

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JUDY N. MONIA and DEPARTMENT OF HEALTH & HUMAN SERVICES,
SOCIAL SECURITY ADMINISTRATION, Los Angeles, CA

*Docket No. 01-793; Submitted on the Record;
Issued August 27, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant sustained an emotional condition while in the performance of duty causally related to factors of her employment.

On January 21, 1999 appellant, then a 39-year-old claims development clerk, filed an occupational disease claim alleging that she sustained an emotional condition due to a number of employment factors that she described in various written statements and at a hearing.

Appellant alleged employing establishment error and abuse in the handling of administrative and personnel matters. She alleged that supervisors Pat Talamantez and Pat Flores followed her to the restroom and checked on her during her breaks, Ms. Talamantez told her not to go to her car or outside after clocking in and not to make toast in the breakroom until her scheduled break, Ms. Flores told her in a rude and condescending manner to take her breaks on time, Ms. Flores told her that she had established lunch and break periods, she was required to use 15 minutes of leave one day when she came back from her morning break two minutes late, on June 3, 1997 Ms. Flores shook her finger at appellant and accused her of not shipping folders in a timely manner, on June 5, 1997 Ms. Flores verbally harassed her and shook her finger at her because she did not take her break in a timely manner, Ms. Flores attempted to use appellant's personal information number while she was away from her computer, Ms. Flores criticized her for taking the initiative in creating a contact sheet for processing prisoner alerts, on June 26, 1997 Ms. Flores asked appellant to submit medical documentation for sick leave use, she was ordered back to work on March 9, 1999 without her physician's approval, Ms. Flores looked over her shoulders when she was typing, Ms. Flores told her to go to lunch when it was her assigned lunch time, at staff meetings Ms. Talamantez acknowledged everyone either by unit or individually but never mentioned appellant by name, Ms. Flores asked appellant why she was walking around instead of working at her desk, management listened in on employee telephone calls and management did not inform appellant of employing establishment changes (she learned of changes only from claimants during telephone conversations).

Appellant alleged that the employing establishment unfairly disciplined her. She alleged that she was unfairly suspended for 14 days on September 22, 1997 for making a rude and threatening statement on July 3, 1997 regarding Ms. Flores, she was unfairly suspended for 14 days on July 27, 1998 for violating systems security rules (31 unauthorized system inquiries were made from January 8 to March 24, 1998 with appellant's password), she was unfairly suspended for 30 days on December 21, 1998 for failure to follow her supervisor's instructions and for rude and discourteous behavior, she was unfairly disciplined for errors she did not make, and she was unfairly disciplined for minor clerical errors.

Appellant alleged that she was unfairly denied training in service representative functions and was not given the opportunity to learn new tasks to improve her potential for promotion, that she was not provided with "annual training" described in a March 22, 1999 memorandum and that she had missed new system training when she was on leave and had not yet received this training.

Appellant alleged that she was unfairly denied promotions. She alleged that she applied for a legal assistant position along with seven other employees and all were selected but she was later advised that her position had been cancelled because one administrative law judge had been relocated, reducing the available positions from eight to seven and, because appellant was the least qualified of the eight applicants, her selection was rescinded. However, appellant felt Ms. Flores and Ms. Talamantez were responsible for her not getting the position. She applied for a service representative position in July 1997 but two other employees were selected.

Appellant alleged that she was harassed and discriminated against by the employing establishment: that Ms. Flores stood behind her while she was working at her desk, Ms. Flores screamed at her and chastised her in front of the public and other employees and often snapped her fingers at appellant or shook her finger at appellant while screaming, "[d]o you understand me?," Ms. Flores and Ms. Talamantez circled her desk and called her name loudly to startle her, Ms. Talamantez told her she was not going to be promoted or receive a transfer, her supervisors were trying to get her terminated, Ms. Flores talked down to her and put her finger in appellant's face, Ms. Flores and Ms. Talamantez harassed her because she filed complaints against them, Ms. Flores and Ms. Talamantez yelled at her everyday, Ms. Flores and Ms. Talamantez tried to mark excused absences as absent without official leave (AWOL), she was badgered on October 20, 1998, Ms. Flores lied about appellant jabbing a pen in her eyes and disobeying a direct order for which appellant was suspended for 30 days, management assigned some of her work to temporary employees in an effort to destroy her self-esteem, Ms. Flores instructed a security guard to monitor her breaks and telephone activity, coworker Pam Graham told appellant that Ms. Flores stated that no one wanted to work with appellant and told Ms. Graham to watch appellant, Ms. Graham was allowed by management to harass appellant by building a paper and box wall to separate herself from appellant, she was publicly reprimanded when she was away from her desk, while the O.J. Simpson murder trial was being discussed in the office Ms. Flores looked at appellant and agreed with someone's statement that Mr. Simpson was guilty, Ms. Flores harassed appellant for being in the breakroom at 10:09 when she was in leave status until 10:15, she was denied union representation during meetings with supervisors, Ms. Flores held unit meetings and passed out donuts during these meetings but appellant was never invited, she wanted to move to another desk but was told she could not have a computer on that desk because management wanted her to remain in close proximity to Ms. Flores and

Ms. Graham and that when she asked to see her leave slips to check for errors, Ms. Flores lied and told her they had not been kept. Appellant alleged that on August 19, 1999 Patricia Ramos bumped into her and almost knocked her down and sometimes spoke to appellant in a loud, demeaning or intimidating tone.

Appellant also alleged that she was afraid Ms. Flores would accuse her of hitting Ms. Flores in order to get her terminated and possibly sent to jail, that she was reassigned to Ms. Flores' unit in October 1996 and no longer performed any service representative tasks that she performed in her previous unit because of a shortage of service representatives and that she was denied a transfer recommended by her physician.

In reports dated January 26 and February 9, 1999, H. William Winter, Ph.D., a clinical psychologist, stated that Ms. Flores, harassed appellant, screamed at her and was trying to fire her. He related that Ms. Flores' supervisor, Ms. Talamantez, told appellant that she would never be promoted or transferred. Appellant alleged that she was unfairly disciplined for minor errors or errors she did not commit, that Ms. Flores and Ms. Talamantez followed her to the restroom and checked on her location during her breaks and that she was unfairly denied a promotion. Dr. Winter diagnosed an anxiety disorder and indicated that the condition was causally related to her employment. He indicated that appellant could return to work on March 9, 1999. Dr. Winter indicated that appellant's prognosis was excellent if she could obtain a transfer from her present work location. He stated that appellant was clearly angry with her employer and "may have, therefore, presented an overidealized portrayal of her past history in order to place her present superiors in the worst possible light." He suggested that appellant be transferred "so as not to further disrupt the smooth operation of her unit and limit further erosion of [her] mental health." Dr. Winter further stated that appellant should continue with medications and additional counseling might be helpful only if the counselor could avoid being coerced into the role of advocate and appellant assumed some responsibility for her current condition. He stated, "I expect this will be difficult as [appellant] is fixed on retribution and is desperately seeking powerful allies. Therefore, she is unlikely to let go of her anger and associated symptoms until she gets some measure of justice." Dr. Winter indicated that no further visits had been scheduled.

In a report dated February 21, 1999, Dr. Winter provided a history of appellant's condition and diagnosed an anxiety disorder that appellant attributed to problems with Ms. Flores, in particular, an incident on October 20, 1998 that led to appellant being suspended from December 21, 1998 through January 19, 1999.¹

By decision dated February 16, 2000, the Office of Workers' Compensation Programs denied appellant's claim for an emotional condition on the grounds that she had failed to establish that her emotional condition was causally related to any compensable factors of her employment.

By letter dated March 7, 2000, appellant requested a hearing that was held on July 31, 2000.

¹ The record contains a Merit Systems Protection Board decision dated May 18, 1999 in which an administrative judge affirmed the employing establishment's imposition of a 30-day suspension commencing December 21, 1998.

In a report dated April 3, 2000, Dr. Julie Crusor stated that appellant had been harassed at work and had developed an anxiety disorder due to the verbal abuse by her supervisors as well as one incident of battery.

By decision dated and finalized on October 24, 2000, an Office hearing representative affirmed the Office's February 16, 2000 decision.

The Board finds that appellant has failed to establish that she sustained an emotional condition while in the performance of duty causally related to factors of her employment.

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his or her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.² On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or his or her frustration from not being permitted to work in a particular environment or to hold a particular position.³

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which she claims compensation was caused or adversely affected by employment factors.⁴ This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.⁵

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.⁶ If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.⁷

² 5 U.S.C. §§ 8101-8193.

³ *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

⁴ See *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁵ See *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

⁶ See *Margaret S. Krzycki*, 43 ECAB 496, 502 (1992); *Norma L. Blank*, 43 ECAB 384, 389 (1992).

⁷ *Id.*

In the present case, appellant alleged that she sustained an emotional condition as a result of a number of employment incidents and conditions. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant alleged that supervisors Ms. Talamantez and Ms. Flores followed her to the restroom and checked on her during her breaks, Ms. Talamantez told her not to go to her car or outside after clocking in and not to make toast in the breakroom until her scheduled break, Ms. Flores told her in a rude and condescending manner to take her breaks on time, Ms. Flores told her that she had established lunch and break periods,⁸ she was required to use 15 minutes of leave one day when she came back from her morning break two minutes late, on June 3, 1997 Ms. Flores shook her finger at appellant and accused her of not shipping folders in a timely manner, on June 5, 1997 Ms. Flores verbally harassed her and shook her finger at her because she did not take her break in a timely manner, Ms. Flores attempted to use appellant's personal information number while she was away from her computer, Ms. Flores criticized her for taking the initiative in creating a contact sheet for processing prisoner alerts, on June 26, 1997 Ms. Flores asked appellant to submit medical documentation for sick leave use, she was ordered back to work on March 9, 1999 without her physician's approval, Ms. Flores looked over appellant's shoulders when she was typing, Ms. Flores told her to go to lunch when it was her assigned lunch time, at staff meetings Ms. Talamantez acknowledged everyone either by unit or individually but never mentions appellant by name, Ms. Flores asked appellant why she was walking around instead of working at her desk, management listened in on employee telephone calls and management did not inform her of employing establishment changes (she learned of changes only from claimants during telephone conversations).

Appellant alleged that the employing establishment unfairly disciplined her: that she was unfairly suspended for 14 days on September 22, 1997 for making a rude and threatening statement on July 3, 1997 regarding Ms. Flores, she was unfairly suspended for 14 days on July 27, 1998 for violating systems security rules (31 unauthorized system inquiries were made from January 8 to March 24, 1998 with appellant's password), she was unfairly suspended for 30 days on December 21, 1998 for failure to follow her supervisor's instruction and for rude and discourteous behavior, she was unfairly disciplined for errors she did not make and she was unfairly disciplined for minor clerical errors.

Appellant alleged that she was unfairly denied training training in service representative functions and was not given the opportunity to learn new tasks to improve her potential for promotion, that she was not provided with "annual training" described in a March 22, 1999 memorandum and that she had missed new system training one day when she was on leave and had not yet received this training.

The Board finds that these allegations relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the

⁸ In a statement dated March 16, 2000, Casey Kim, the employing establishment timekeeper indicated that appellant did not follow proper procedures for requesting leave and sometimes left work without permission. She indicated that everyone was held to the same procedures and appellant was not singled out in these matters.

coverage of the Act.⁹ Although such matters are generally related to the employment, they are administrative functions of the employer and not duties of the employee.¹⁰ However, the Board has also found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹¹

In a statement dated March 9, 1999, Ms. Flores denied that she ever stood behind appellant and watched her or circled her desk and screamed out her name in order to startle her. She stated that she did approach appellant's desk to ask her, in a normal tone of voice, about her current task. Ms. Flores noted that appellant was sometimes balancing her checkbook, engaged in personal telephone calls or engaged in other nonwork-related matters when she approached. She stated that records revealed that appellant had accessed the records of private citizens for nonbusiness reasons. Ms. Flores stated that appellant needed constant supervision because of her behavior and she became agitated, hostile and aggressive when told to do her work. She stated that on October 21, 1998 she asked appellant why she had not completed sorting the afternoon mail before she left the previous day and appellant stood up and said in a loud and threatening voice, “[I]ok, I do [not] come to work to get harassed, why are you harassing me? I know my job, you do [not] have to tell me how to do my job!” Appellant walked away and Ms. Flores asked her twice to return but she ignored the request. When appellant returned to her desk, Ms. Flores told her to complete the previous day’s mail but appellant stood up with a pen in her hand, screamed “[n]o” and jabbed the pen in Ms. Flores’ face. Appellant was given a proposal for a 30-day suspension but requested sick leave and then filed her compensation claim.

In a letter dated September 6, 2000, Ms. Talamantez stated that there were numerous inaccuracies in appellant’s testimony at the hearing. She stated that appellant was insubordinate to management on several occasions, had experienced difficulties with seven supervisors, did not get along with other employees (16 out of 20 employees had filed complaints against appellant), was terminated on April 7, 2000 for rude and discourteous conduct and for making a threatening remark. Ms. Talamantez stated that appellant was very defensive and rarely took responsibility for her actions, had been suspended three times before her termination and had filed two grievances and one Merit Systems Protection Board appeal with the result that management’s decisions were upheld. She denied appellant’s allegations that Ms. Flores was transferred due to complaints about her, that there was a rule that union representatives could never be promoted to a supervisory position, that appellant was ever subject to disparate treatment or retaliation or that Ms. Ramos ever walked into appellant and almost knocked her down.

For the foregoing reasons, appellant has not established a compensable employment factor under the Act in regard to the employing establishment’s handling of administrative and personnel matters.

⁹ See *Dinna M. Ramirez*, 48 ECAB 308, 313 (1997); *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

¹⁰ See *Anne L. Livermore*, 46 ECAB 425, 431-32 (1995); *Richard J. Dube*, 42 ECAB 916, 920 (1991).

¹¹ See *Richard J. Dube*, *supra* note 10.

Appellant alleged that she was unfairly denied promotions. She alleged that she applied for a legal assistant position along with seven other employees and all were selected but she was later advised that her position had been cancelled because one administrative law judge had been relocated, reducing the available positions from eight to seven and, because appellant was the least qualified of the eight applicants, her selection was rescinded. However, appellant felt Ms. Flores and Ms. Talamantez were responsible for the rescission of her selection. Appellant applied for a service representative position in July 1997 but two other employees were selected.

The Board has held that denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment under the Act, as they do not involve appellant's ability to perform her regular or specially assigned work duties, but rather constitute appellant's desire to work in a different position.¹² As there is insufficient evidence of error or abuse in the employing establishment's handling of the selection of employees for these positions, appellant has not established a compensable employment factor under the Act in this respect.

Appellant has also alleged that harassment and discrimination on the part of her supervisors and coworkers contributed to her claimed stress-related condition. She alleged that she was harassed and discriminated against by the employing establishment: that Ms. Flores stood behind her while she was working at her desk, Ms. Flores screamed at her and chastised her in front of the public and other employees and often snapped her fingers at appellant or shook her finger at appellant while screaming, [d]o you understand me?," Ms. Flores and Ms. Talamantez circled her desk and called her name loudly to startle her, Ms. Talamantez told her she was not going to be promoted or receive a transfer, her supervisors were trying to get her terminated, Ms. Flores talked down to her and put her finger in appellant's face, Ms. Flores and Ms. Talamantez harassed her because she filed complaints against them, Ms. Flores and Ms. Talamantez yelled at her everyday, Ms. Flores and Ms. Talamantez tried to mark excused absences as AWOL, she was badgered on October 20, 1998, Ms. Flores lied about appellant jabbing a pen in her eyes and disobeying a direct order for which appellant was suspended for 30 days, management assigned some of her work to temporary employees in an effort to destroy her self-esteem, Ms. Flores instructed a security guard to monitor her breaks and telephone activity, coworker Ms. Graham told appellant that Ms. Flores stated that no one wanted to work with appellant and told Ms. Graham to watch appellant, Ms. Graham was allowed by management to harass appellant by building a paper and box wall to separate herself from appellant, she was publicly reprimanded when she was away from her desk, while the O.J. Simpson murder trial was being discussed in the office Ms. Flores looked at appellant and agreed with someone's statement that Mr. Simpson was guilty, Ms. Flores harassed appellant for being in the breakroom at 10:09 when she was in leave status until 10:15, she was denied union representation during meetings with supervisors, Ms. Flores held unit meetings and passed out donuts during these meetings but appellant was never invited, she wanted to move to another desk but was told she could not have a computer on that desk because management wanted her to remain in close proximity to Ms. Flores and Ms. Graham and that when she asked to see her leave slips to check for errors, Ms. Flores lied and told her they had not been kept. Appellant alleged that on

¹² See Donald W. Bottles, 40 ECAB 349, 353 (1988).

August 19, 1999 Ms. Ramos bumped into her and almost knocked her down and sometimes spoke to appellant in a loud, demeaning or intimidating tone.

To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.¹³ However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.¹⁴ In the present case, the employing establishment denied that appellant was subjected to harassment or discrimination and appellant has not submitted sufficient evidence to establish that she was harassed or discriminated against by her supervisors or coworkers.¹⁵

In a statement dated June 29, 1999, Ms. Flores stated that she had not told appellant that she would never get a promotion or transfer. She noted that appellant had been suspended three times for rude and discourteous behavior, failure to follow instructions and misuse of employing establishment records.

In a statement dated June 29, 1999, Ms. Talamantez denied that she or Ms. Flores had harassed appellant. She stated that appellant was a difficult employee to supervise because she did not get along with other employees, frequently ate at her desk, made numerous personal telephone calls, used her computer for personal business and treated her coworkers disrespectfully. Ms. Talamantez stated that appellant was very defensive when management spoke to her about her behavior and blamed others rather than taking responsibility for her actions. She tried to help appellant by giving her additional training, being liberal with her leave requests and encouraging other employees to give her assignments, but other employees complained about appellant's demeanor or appellant alleged that she had been wronged in some way. Ms. Talamantez denied that she ever screamed at appellant or tried to startle her at her desk or stated that she would never get a promotion or transfer.

In an affidavit dated March 22, 2000, Ms. Ramos told an Equal Employment Opportunity Commission investigator that she did not have any physical contact with appellant at any time and, specifically, that she did not assault appellant on August 19, 1999 as alleged. She stated that she and appellant passed each other closely in the hall but did not touch. Ms. Ramos stated that appellant's allegation that she bumped into her and almost knocked her down was not true. She also denied ever speaking to appellant in a loud, demeaning or intimidating tone.

In an undated statement, Pauline Moss stated that she had seen Ms. Flores yell and talk down to appellant on many occasions and it was her opinion that Ms. Flores treated appellant poorly. She stated that Ms. Flores harassed appellant by standing behind her to monitor her work. However, she provided insufficient details regarding Ms. Flores actions such as dates and what

¹³ See *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

¹⁴ See *Donna J. DiBernardo*, 47 ECAB 700, 703 (1996); *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹⁵ See *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

was said to appellant and the context of the incidents. Therefore, her statement is of diminished probative value and is not sufficient to establish that Ms. Flores acted abusively towards appellant. Additionally, monitoring an employee's work is an administrative function and there is insufficient evidence of error or abuse in Ms. Flores handling of this administrative matter.

Thus, appellant has not established any compensable employment factors in her allegations of harassment and discrimination by the employing establishment.

Appellant also alleged that she was afraid Ms. Flores would accuse her of hitting Ms. Flores in order to get her terminated and possibly sent to jail. However, an employee's perception or fear that someone will perform some act in the future cannot be a compensable employment factor and there is no evidence of record to establish that appellant had reason to believe that Ms. Flores would tell a lie about appellant. Thus, appellant has not established a compensable factor in this regard.

Appellant alleged that that she was reassigned to Ms. Flores' unit in October 1996 and, as a clerk, she no longer performed the service representative tasks that she had performed in her previous unit because of a shortage of service representatives. However, as noted above, disability is not covered where it results from such factors as an employee's frustration from not being permitted to work in a particular environment or to hold a particular position.¹⁶ Thus, appellant has not established a compensable factor in this respect.

Appellant alleged that she was denied a transfer recommended by her physician. In his January 26, 1999 report, Dr. Winter suggested that appellant be transferred "so as not to further disrupt the smooth operation of her unit and limit further erosion of [her] mental health." However, Dr. Winter appeared to indicate, in his report, that stated that appellant's need for a transfer was primarily due to her self-generated anger against the employing establishment and he stressed the need for appellant to assume some responsibility for her current condition. As Dr. Winter attributed appellant's condition and need for a transfer more to her attitude toward the employing establishment rather than the employing establishment's actions, this report does not establish that the employing establishment erred or acted abusively in denying appellant a transfer. Thus, appellant has not established a compensable factor in this regard.

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met her burden of proof in establishing that she sustained an emotional condition in the performance of duty.¹⁷

¹⁶ See also *Eileen P. Corigliano*, 45 ECAB 581, 583-84 (1994).

¹⁷ As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record. See *Garry M. Carlo*, 47 ECAB 299, 305 (1996).

The decision of the Office of Workers' Compensation Programs dated October 24, 2000 is affirmed.

Dated, Washington, DC
August 27, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member