

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CORINNE DOELL and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, TAXPAYER SERVICE DIVISION,
Fort Myers, FL

*Docket No. 02-2329; Submitted on the Record;
Issued April 2, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant has established that she sustained an emotional condition in the performance of duty as alleged; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's May 28, 2002 request for a merit review.

On November 3, 2000 appellant, then a 48-year-old customer service representative, filed a notice alleging that she sustained major depression in the performance of duty such that she was too depressed to leave her home. She attributed her condition to an alleged pattern of harassment by her supervisor, Joseph DeMeo, from October 1996 to June 2000. Appellant stopped work on June 26, 2000 and did not return.¹

Appellant alleged that Mr. DeMeo committed the following incidents of harassment: in October 1996, Mr. DeMeo told Pat Hagen, appellant's previous manager, that "he was going to straighten [appellant] out"; in 1997, he stated that appellant, who was from the Bronx, spoke with a loud, offensive New York accent; in October 1997, Mr. DeMeo accused appellant of not being dependable and taking excessive sick leave, even though she had a hospital stay and two other surgeries with documentation; he accused appellant of not wanting to work as she enjoyed attending Diversity Day celebrations; he told appellant he received anonymous complaint calls from customers who would not name the employee, but attributed these complaints to being against appellant; Mr. DeMeo used anonymous taxpayer complaints against appellant in a March 1998 performance evaluation; on various dates and in particular on December 11, 1998, he demanded that appellant keep the office open beyond normal business hours and required her to work with no pay; in October 1998, he wrote her up for keeping a taxpayer waiting more than 15 minutes although she was assisting another taxpayer at the time; in March 1999, Mr. DeMeo complained that appellant was away from the service counter although her assigned duties

¹ In November 28, 2000 letters, the Office advised appellant of the type of factual and medical evidence needed to establish her claim and requested information from the employing establishment regarding appellant's allegations.

required her to be away from the counter on occasion; throughout 1999 and in particular on July 28, 1999, Mr. DeMeo accused appellant of receiving excessive personal telephone calls, but did not receive more than her coworkers; in February 2000, he told a coworker that appellant ran when she saw taxpayers coming; in March 2000, Mr. DeMeo tried to issue appellant an admonishment for making a personal telephone call to a bookstore on March 2, 2000 from a public area during a five-minute break; in March 2000, he told a coworker that appellant had talked about her behind her back; in March 2000, a coworker told appellant that “Joe told him that I was trying to get Janice Davies old job;” in May 2000, Mr. DeMeo told a coworker that appellant had a facelift, whereas she had a brow lift and it was an inappropriate matter for discussion.²

In November 8 and December 26, 2000 letters, Mr. DeMeo generally refuted appellant’s allegations. He explained that she had a habit of making personal calls in the customer service area and thus forbade her from making such calls, but that appellant would leave her duty station without authorization to make personal calls. Mr. DeMeo thus initiated disciplinary action. Upper management instructed Mr. DeMeo to handle this in the evaluation process rather than as a disciplinary matter. When appellant filed a grievance regarding her performance rating, the matter was resolved by giving appellant a higher performance rating. Mr. DeMeo asserted that appellant failed to take responsibility for her own misconduct. He noted that she also had significant personal financial stresses and stress from a difficult facial surgery. Mr. DeMeo noted that, from 1996 to 1999, appellant’s performance was good and that he placed many positive comments in her performance file. He also questioned if appellant was too depressed to leave her home, as she had taken several trips and cruises since April 2000 to Alaska, St. Lucia and New York City.

Appellant submitted factual evidence, which she asserted, corroborated her account of the December 11, 1998, July 28, 1999 and March 4, 2000 incidents.

In a December 14, 1998 memorandum of counseling, Mr. DeMeo summarized a December 11, 1998 incident in which appellant hurried two taxpayers who had come in close to closing time, refused with rude language to give a customer an envelope and stated that she could not earn credit time and did not work for free. Mr. DeMeo counseled appellant not to be rude to members of the public.³

In a July 28, 1999 memorandum of counseling, Mr. DeMeo summarized the incident that day in which he observed appellant making a personal call, but told him that she was on business. She later admitted to Mr. DeMeo that she had lied to him. He noted that appellant did not follow his directive one year previously to make all personal calls from a conference room after obtaining authorization to leave her duty station.⁴ In a second July 28, 1999 memorandum, Mr. DeMeo explained that everyone was to follow the policy of obtaining prior permission to

² Appellant submitted an exhaustive diary of more than 150 pages, describing these incidents.

³ Appellant submitted a December 28, 1998 letter controverting Mr. DeMeo’s account of the December 11, 1998 incident, asserting that she was not rude to anyone and did not try to rush the taxpayers out of the office.

⁴ In response, appellant submitted a July 28, 1999 letter, alleging that Mr. DeMeo singled her out for disciplinary measures while her coworkers also made personal calls from their duty stations.

make personal calls and only from a conference room, so all customer service positions would be covered.

In a July 29, 1999 letter, appellant admitted misleading Mr. DeMeo and agreed to follow his instructions regarding making personal telephone calls.

In a March 4, 2000 memorandum, Mr. DeMeo noted that in a meeting that day with appellant and a union representative, she admitted ignoring Mr. DeMeo's instructions on March 2, 2000 "not to leave her workstation for the purpose of making personal telephone calls without asking [him] to provide coverage for the counter," as she felt "singled out" and felt the policy was "discrimination."

On March 29, 2000 appellant filed an EEO (Equal Employment Opportunity) grievance regarding her performance rating for the period ending February 28, 2000. She alleged that the 3.7/5 rating was unfair and requested she be given a rating of 4.67.

In a March 29, 2000 memorandum, Mr. DeMeo explained his supervisory reasoning for instituting the personal telephone call policy. He asserted that in 1997, he had to remove two of the three telephones in the walk-in area due to appellant's excessive personal calls. She was advised to make personal calls only with prior authorization to ensure coverage and only speak from a private conference room. "Over the next two years [appellant] never followed these directions." Mr. DeMeo reminded appellant of the procedure for making personal calls in November 1998 after she was "observed in the collection area making personal call(s)," issued a written reminder to appellant in December 1998 due to taxpayer complaints about her "rudeness" and an admonishment in July 1999, when appellant lied to cover up making a personal call. Mr. DeMeo also alleged that on March 2, 2000 appellant made a personal call from the audit section to order nonwork-related books, making a customer wait. Appellant allegedly stated that she felt singled out and would, therefore, not obey Mr. DeMeo's instructions. Mr. DeMeo noted that, while other employees did not have to ask permission to use the telephone, other employees did not abuse "the personal telephone call guidelines." Regarding her appraisals, Mr. DeMeo noted that appellant had been rated at 4.2 from 1996 through 1998 and qualified for awards. However, for the period beginning March 1, 1999, her expertise in tax law did not meet the description for an outstanding rating in her upgraded position, resulting in a rating of 3.7.⁵

In an August 3, 2000 memorandum, Bonnie Daigle, a coworker of appellant's, generally corroborated her accounts of harassment by Mr. DeMeo.⁶

⁵ Mr. DeMeo reiterated these statements in a June 30, 2000 memorandum, refuting appellant's allegations of harassment and providing additional details of her misconduct regarding the personal telephone call policy.

⁶ A July 11, 2000 EEO investigative memorandum contains July 2000 interviews with Gloria Wells, Karen Garner, two of appellants' coworkers, who did not offer any specific information regarding appellant's allegations or the alleged incidents. Both Ms. Wells and Ms. Garner noted that Mr. DeMeo could be critical of subordinates' work, fostered a hostile working environment with interpersonal conflicts and often issued disciplinary write-ups. In a July 13, 2000 memorandum, Mr. DeMeo noted that, on May 3, 1999, appellant signed a statement agreeing that she did not have and was unaware of any difficulties with "EEO or sexual harassment problems," a position also affirmed by appellant's coworkers in November 1998 and November 1999. He asserted that these forms controverted appellant's allegations of a hostile work environment.

In an August 11, 2000 settlement agreement, appellant agreed to withdraw the March 29, 2000 grievance regarding her performance rating and Mr. DeMeo agreed to raise the rating for the critical element of customer interaction from a three to a four. There was no “admission of fault or wrongdoing” of any kind by either party.⁷ On September 6, 2000 Mr. DeMeo issued the revised appraisal.

Appellant filed a second EEO complaint in November 2000, alleging that she was subjected to a hostile work environment due to her female sex from February 29 to April 4, 2000. She alleged that on February 29, 2000 Mr. DeMeo told a coworker that she would run when she saw taxpayers coming and questioned her on March 2, 2000 regarding a telephone call to a bookstore she made while on break. Appellant also alleged that on March 3, 2000 Mr. DeMeo gave her a negative walk-in review, “attempted to intimidate her by mentioning the name of an employee ... [he] allegedly ran off,” inferred that she should find a different job if she did not like his rules and “accused her of sneaking off to make personal calls.” Appellant also alleged that on March 4, 2000 Mr. DeMeo spoke negatively about her to her coworkers, told a coworker on March 7, 2000 that he was going “to straighten [appellant] out,” divulged her personal information to a union representative on March 13, 2000, discussed appellant’s transfer request with another coworker on March 17, 2000, stated that she had personality problems and was not qualified to be a revenue officer, discussed her job evaluation on March 19, 2000 with a revenue officer and on April 14, 2000 questioned her about leaving “15 minutes before her schedule sick leave.”

By decision dated April 18, 2001, the Office denied appellant’s claim on the grounds that she has not established a compensable factor of employment. The Office found that she had not established any of her allegations of harassment. The Office further found that the office telephone policy, disciplinary letters and warnings by Mr. DeMeo were administrative matters not in the performance of duty and that there was no error or abuse shown with regard to those matters which would bring them under coverage of the Federal Employees’ Compensation Act.

Appellant disagreed with this decision and in an April 21, 2001 letter, requested a hearing before a representative of the Office’s Branch of Hearings and Review. A telephonic hearing was held on December 18, 2001.

At the hearing, appellant reiterated her previous allegations. She noted that the March 2, 2000 incident in which she took a break in order to call a bookstore on personal business exacerbated her ongoing conflict with Mr. DeMeo. Appellant asserted that Mr. DeMeo required her to seek prior permission to use a telephone at any time while at work, even when on break, overly scrutinized her work, gave her frequent written reprimands. She attributed her June 2000 “breakdown” to harassment by Mr. DeMeo, disciplinary letters and the stress of filing her EEO grievances. Following the hearing, appellant submitted additional evidence.

In a February 2002 responses to EEO interrogatories, appellant reiterated her allegations that Mr. DeMeo singled her out for telephone restrictions while other employees made and

⁷ In a June 30, 2000 memorandum, Mr. DeMeo advised appellant that he would raise her customer interaction rating from a three to a four, but that no further action was warranted due to her extensive violations of the office telephone policy and disregard of Mr. DeMeo’s directives.

received far more telephone calls than she did, that Mr. DeMeo made personal calls about golf and photography while on duty and that he gossiped about her. She rebutted statements made by Mr. DeMeo and her coworkers during the EEO investigation. Appellant also alleged that she was called away from her duty station due to assigned duties on many occasions, but was falsely accused by Mr. DeMeo of taking unauthorized breaks.

Appellant also newly alleged a March 7, 1996 incident, in which she was not adequately trained to answer an estate tax question, attempted to assist a customer and was later criticized by management. She also alleged that on November 10, 1999 and another unspecified date, Mr. DeMeo criticized the advice she gave to taxpayers, although he did not know the area of tax law involved.

In an undated letter, Renate Strufe, a coworker of appellant's, stated: "Filing time has come and gone and we gave it our all.... If you could only be a fly on the wall and observe what [i]s going on. Joe has found another victim, wonder how this is going to work out. Nobody is happy and almost all want to go back to where they came from."⁸

By decision dated and finalized March 19, 2002, the Office hearing representative affirmed the Office's April 18, 2001 decision. The hearing representative found that appellant submitted sufficient evidence to corroborate the telephone policy, disciplinary actions and performance rating as factual. However, the hearing representative also found that appellant submitted insufficient evidence to substantiate the alleged pattern of harassment. The hearing representative noted that the undated letter stating that Mr. DeMeo had found a "victim" did not establish any of the alleged incidents of harassment. The hearing representative also found that appellant had not established that the employing establishment committed error or abuse regarding restrictions on using the telephone at work for personal tasks, alleging that appellant used excessive sick leave, issuing the performance appraisal or in amending the performance appraisal to a higher rating. The hearing representative also found that appellant failed to substantiate that Mr. DeMeo talked to her coworkers about her or criticized her accent or manner of speaking.

Appellant disagreed with this decision and in a May 28, 2002 letter, requested reconsideration. She requested that the Office obtain testimony from eight of her former coworkers and managers. Appellant also asserted that she was not allowed to divulge documents relating to her EEO claims to the Office or any other party. She did not submit any new evidence.

By decision dated June 17, 2002, the Office denied reconsideration on the grounds that appellant had submitted no new, relevant evidence in support of her request.

Appellant filed her appeal with the Board on September 23, 2002.

The Board finds that appellant has not established that she sustained an emotional condition in the performance of duty as alleged.

⁸ Appellant also submitted seven customer compliment letters from September 1977 through 1999 and two administrative letters of commendation

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. When an employee experiences an emotional reaction to his or her regular or specially assigned work duties or to a requirement imposed by the employment or has fear and anxiety regarding his or her ability to carry out his or her duties and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment and comes within the scope of coverage of the Act. On the other hand, where the disability results from an employee's emotional reaction to employment matters but such matters are not related to the employee's regular or specially assigned work duties or requirements of the employment, the disability is generally regarded as not arising out of and in the course of employment and does not fall within the scope of coverage of the Act.⁹

When working conditions are alleged as factors in causing 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.¹⁰ When a claimant fails to implicate a compensable factor of employment, the Office should make a specific finding in that regard. Perceptions and feelings alone are not compensable. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.¹¹ In this case, the Office made findings of fact regarding appellant's allegations of harassment and discrimination.

Appellant alleged a pattern of harassment by her supervisor, Mr. DeMeo from 1996 through June 2000. She asserted in particular that he made a number of harassing remarks; in October 1996, telling Ms. Hagen that he was going to straighten appellant out; in October 1997 criticizing her for an "offensive" Bronx accent; accusing appellant of not liking to work as she attended Diversity Day events; telling her that he received customer complaints about an unnamed employee and assumed it was appellant; in March 1999, complaining that she was away from her counter without permission, on November 10, 1999; criticizing advice appellant gave to a taxpayer on February 29, 2000; told her coworkers that she would run when she saw taxpayers coming in March 2000; telling a coworker that appellant wanted another employee's job, on March 13, 2000; discussing her transfer request with another coworker on March 17, 2000; criticized appellant to coworkers; divulged confidential evaluation information to a coworker on March 19, 2000; accused appellant of leaving early on April 14, 2000; in May 2000, gossiping about her cosmetic surgery.

In order to establish compensability under the Act, however, there must be evidence that harassment did in fact occur. To establish harassment based upon a comment made by a supervisor, a claimant must establish that the comment was actually made and that the comment,

⁹ *Lillian Cutler*, 28 ECAB 125 (1976).

¹⁰ *See Barbara Bush*, 38 ECAB 710 (1987).

¹¹ *Ruthie M. Evans*, 41 ECAB 416 (1990).

or any other action by the employing establishment, was a form of harassment.¹² The Board notes that unfounded perceptions of harassment do not constitute an employment factor and that mere perceptions are not compensable under the Act.¹³ In this case, appellant did not submit evidence corroborating any of the above incidents. She did not submit witness statements affirming that Mr. DeMeo made any of the alleged remarks. Additionally, Mr. DeMeo submitted detailed November 8 and 26, 2000 letters refuting appellant's allegations. As appellant has not submitted sufficient evidence to corroborate her account of harassing remarks, particularly in view of Mr. DeMeo's detailed rebuttal, the Board finds that she has not established the alleged pattern of harassing remarks.

Appellant also alleged harassment by Mr. DeMeo due to four disciplinary matters; an October 15, 1998 note asserting that she made a customer wait for 15 minutes; a December 11, 1998 letter of admonishment regarding appellant's rude remarks that day to a customer; a July 28, 1999 memorandum of counseling regarding appellant's violation of the telephone policy and her attempt to deceive Mr. DeMeo into thinking that she was on a business call and a March 4, 2000 memorandum regarding a March 2, 2000 personal call causing appellant to leave her counter made in violation of office policy.

Regarding the disciplinary letters, memoranda of counseling and discussions about the telephone policy, the Office found that disciplinary actions are not considered to be in the performance of duty.¹⁴ The Board has held that these disciplinary actions relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.¹⁵ Although the handling of disciplinary actions, evaluations and other similar actions are generally related to the employment, they are administrative functions of the employer and not the duties of the employee.¹⁶ 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.¹⁷

In this case, there is sufficient evidence of record to establish that Mr. DeMeo's disciplinary actions were justified. Appellant admitted that a customer did have to wait 15 minutes on October 15, 1998 and that on December 11, 1998 she expressed her dissatisfaction with Mr. DeMeo's instructions to assist taxpayers close to office closing time. In a July 29, 1999 letter, regarding the July 28, 1999 telephone incident, appellant admitted lying to Mr. DeMeo in an attempt to deceive him into thinking she was on an official call. In a March 4, 2000 memorandum, Mr. DeMeo noted that appellant refused to obey the personal call policy as she

¹² *Ernest J. Malagrida*, 51 ECAB 287 (2000).

¹³ *Kathleen D. Walker*, 42 ECAB 603 (1991).

¹⁴ *See Larry D. Passalacqua*, 32 ECAB 1859 (1981).

¹⁵ *See Jimmy Gilbreath*, 44 ECAB 555 (1993).

¹⁶ *See Jimmy Gilbreath*, 44 ECAB 555 (1993).

¹⁷ *See Richard Dube*, 42 ECAB 916 (1991).

felt it was discrimination. Therefore, appellant herself has submitted evidence indicating that the disciplinary measures were reasonable, appropriate responses to her behaviors. Thus, appellant has not established a compensable employment factor under the Act in this respect.¹⁸

Regarding appellant's allegation that, in October 1997, Mr. DeMeo unfairly criticized her for taking what he viewed as excessive sick leave, she has not established this incident as factual. Arguendo, denials or reprimands concerning use of sick or annual leave are not compensable work factors where appellant offered no independent evidence that the employing establishment erred or acted abusively in these matters.¹⁹ In this case, appellant has not offered evidence corroborating her account of Mr. DeMeo's actions regarding her use of leave.

Appellant also attributed her emotional condition to receiving a negative "walk-in" review on March 3, 2000 and an unfavorable performance rating for the period ending February 28, 2000. These evaluations are administrative functions of the employer and not the duty of appellant. Lacking evidence of error or abuse on the part of the employer, such functions did not constitute factors of employment. The Board has held that reactions to assessments of performance are not covered by the Act.²⁰ The Board notes that although Mr. DeMeo later revised the appraisal from 3.7 to 4.3 in September 2000, in settlement of a grievance, that is not evidence that any error or abuse was committed. The settlement agreement states on its face that the increased rating was not an "admission of fault or wrongdoing ... by either party." Remedial action does not establish that the employing establishment acted in an erroneous or abusive manner.²¹ Thus, appellant has not established a compensable factor of employment in this respect.

Appellant submitted two coworkers statements, which she alleged, corroborated her account of events. In an August 3, 2000 investigative interview, pursuant to appellant's March 2000 EEO grievance, Bonnie Daigle indicated her agreement with appellant's allegations, but did not offer corroboration of any of the alleged incidents. Similarly, an undated letter to appellant from coworker Renate Strufe stated that "Joe" had "found another victim." However, this letter did not corroborate any of the alleged incidents or indicate that Mr. DeMeo had behaved in any particular manner toward appellant. Therefore, these accounts are of little or no probative value in establishing appellant's account of events.

¹⁸ See *Frederick D. Richardson*, 45 ECAB 454 (1994).

¹⁹ *Michael Thomas Plante*, 44 ECAB 510 (1993).

²⁰ *Effie O. Morris*, 44 ECAB 470 (1993).

²¹ See *Gary M. Carlo*, 47 ECAB 299 (1996).

Consequently, appellant has failed to establish that she sustained an emotional condition in the performance of duty as she did not establish any compensable factor of employment.²²

The Board further finds that the Office did not abuse its discretion in denying her May 28, 2002 request for a merit review.

The Board finds that the Office in its June 17, 2002 decision, properly denied appellant's request for reconsideration on its merits under 5 U.S.C. § 8128(a), on the basis that her request for reconsideration did not meet the requirements set forth under section 8128.²³

Under section 8128(a) of the Federal Employees' Compensation Act,²⁴ the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,²⁵ which provides that a claimant may obtain review of the merits if his written application for reconsideration, including all supporting documents, set forth arguments and contain evidence that:

“(i) Shows that [the Office] erroneously applied or interpreted a point of law; or

“(ii) Advances a relevant legal argument not previously considered by the Office;
or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by the [Office].”²⁶

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.²⁷

Appellant submitted no new evidence in support of her request other than the May 28, 2002 letter requesting reconsideration. This letter does not contain new, relevant legal arguments or new, relevant evidence. This letter merely repeats appellant's allegations

²² Appellant also submitted medical evidence, including a October 25, 1994 report from Dr. Frederick W. Schaefer, an attending Board-certified psychiatrist and neurologist, diagnosing depression and terminal insomnia. Referred appellant for psychotherapy, chart notes from October 1994 to December 1996 notes, November 2000 and February 12, 2001 reports from Dr. Tom Baker, an attending clinical psychologist, and chart notes dated November 2, 2000 to January 10, 2001 notes from a nurse practitioner. As appellant has not established a compensable factor of employment, the medical record need not be addressed.

²³ See 20 C.F.R. § 10.606(b)(2)(i-iii).

²⁴ 5 U.S.C. § 8128(a).

²⁵ 20 C.F.R. § 10.606(b) (1999).

²⁶ 20 C.F.R. § 10.606(b).

²⁷ 20 C.F.R. § 10.608(b).

previously of record. Therefore, the Office's June 17, 2002 decision denying appellant's request for a merit review was proper under the law and the facts of this case.

The decisions of the Office of Workers' Compensation Programs dated June 17, 2002 and dated and finalized March 19, 2002 are hereby affirmed.

Dated, Washington, DC
April 2, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member