

PIP on August 14, 2002. Appellant's representative claimed that appellant had reported to three supervisory controllers prior to coming under the supervision of Lieutenant (Lt.) Jose M. Pi in 1998. Appellant stated that she had consistently earned outstanding ratings under her prior supervisors; it was only when Lt. Pi became her supervisor that she began to experience problems in her job. Although her initial evaluation from Lt. Pi was good, once she began complaining about alleged gross mismanagement, waste of funds, abuse of authority and improper retaliation for her engaging in whistle blowing,¹ Lt. Pi began engaging in reprisals. His reprisals took the form of increasingly caustic and exaggerated criticism of her work, which culminated in the PIP. Appellant alleged that the proposed removal action was taken in reprisal for her Equal Employment Opportunity (EEO) claims and for whistle-blowing activities. She alleged discrimination based on race, African-American, and disability, a deformed left hand.²

Appellant made the following allegations of improper management conduct which she claimed resulted in her emotional condition:

- (1) She was unduly criticized and over-managed in her work by her supervisors' constant suggestions for improving her work and by the assignment of weekly worksheets to track her work;
- (2) Although she was supposed to be left in charge when Lt. Pi was out of the office, the employing establishment would bypass her by making employees report to others in her unit;
- (3) Management allegedly prevented other employees from going to her for assistance, which undermined her role and authority at the employing establishment;
- (4) Although her position description stated that she was supposed to share her office with only one other employee and have an office free of noise or distraction, the employing establishment failed to provide her with these working conditions;

¹ Appellant specifically charged that Lt. Pi: caused budget overruns; attempted to increase the annual funding authorization by obtaining reimbursable funds from other commands; misrepresented the amount of reimbursable funds; leased a \$6,000.00 copier without budgeting for it; submitted incomplete annual reports to the major command, which appellant had to correct and resubmit; ignored the employing establishment's financial management regulations, which appellant also had to correct; arbitrarily demoted her from the authority structure by taking away her authority to draft appointment letters, placed her in a corner cubicle, distanced from his office and "out of the loop", placed other analysts in charge of duties for which she had formerly been responsible; failed to complete an annual budget report, then blamed appellant for this failure; sent her appellant daily emails criticizing her for her work while simultaneously assigning her additional duties and giving her immediate deadlines for these duties, thereby imposing an intolerable burden on her; tolerated sexual harassment of appellant by her coworker Richard Dugdale; falsely accused appellant of submitting incorrect data at a staff meeting; improperly charged appellant with leave and failing to submit leave requests when he had verbally told her to refrain from working on those dates for which she had not requested leave.

² Appellant had asserted that the employing establishment had erroneously denied her request to obtain a special keyboard, with ergonomic adjustments, which would accommodate her hand disability.

(5) Management retaliated against her whistleblower activities, because she had complained about the employing establishment's alleged gross mismanagement, waste of funds, and abuse of authority;

(6) Although she complained to management about her left hand disability, she was denied a wrist band and other ergonomic equipment and was told that the employing establishment was unable to afford these items;

(7) She alleged that she was subjected to sexual and other types of harassment by Richard Dugdale, a coworker and management failed to properly investigate her allegations, discipline the coworker, and failed to resolve her problems with Mr. Dugdale.

On September 12, 2002 appellant received a notice of removal from her position as budget analyst.

By letter dated November 4, 2002, the Office advised appellant that the evidence she submitted was not sufficient to determine whether she was eligible for compensation benefits and to submit a detailed description of the specific employment-related conditions or incidents she believed contributed to her illness. The Office also asked appellant to submit a comprehensive medical report from her treating physician describing her symptoms and the medical reasons for her conditions and an opinion as to whether factors or incidents, *i.e.*, specific employment factors, contributed to her condition.

Appellant submitted a narrative statement, received November 25, 2002 in which she made the following allegations:

(1) While her work as a budget analyst required a high degree of mental dexterity with intense concentration in meeting close deadlines, she had never experienced difficulty meeting those deadlines until Lt. Pi became her supervisor. Appellant alleged that she was subjected to a hostile work environment in which Lt. Pi harassed her on a daily basis, made unfounded, derogatory accusations about her work which were included in false reports to other coworkers and to management, significantly reduced her professional responsibilities, and downgraded her performance review;

(2) She was treated in a discriminatory manner as reflected by Lt. Pi's constant, daily emails in which he made excessive demands of her (especially during a special request for a report from major command, annual and monthly reporting) and ordered her to perform tasks that were unnecessarily repetitive and less significant than those she had been previously assigned. Appellant felt that Lt. Pi was deliberately setting her up to fail and be terminated from employment with the employing establishment;

(3) She was transferred from a single office to a common work area with four other coworkers where the telephone rang continuously and staff came over on a daily basis to pick up their mail, and which was located near the lunch area where staff members prepared and ate their meals;

(4) She was made to feel like an “outcast” with whom none of her coworkers wanted to associate;

(5) She was labeled as a troublemaker because of her EEO activity and other complaints against management.

In a letter dated December 5, 2002, the employing establishment controverted appellant’s claim, noting that appellant had been placed on a PIP due to previous performance issues, documented performance improvement recommendations, and a failing performance appraisal. The employing establishment stated that appellant was given the opportunity to improve her performance, but had failed; therefore, she was subsequently removed from her position. The employing establishment also submitted statements and affidavits from several of appellant’s supervisors and coworkers.

In an affidavit dated September 9, 2002, Richard Dugdale, an accounting technician since July 1992, denied that he had sexually harassed appellant.³ Mr. Dugdale stated that he had worked in the same office with appellant for many years, but was not aware that she had a left hand disability. Once he became aware of the disability, he did not believe that it was a factor in her job performance, noting that she was able to use a computer.⁴

In a September 12, 2002 affidavit, Lupe Salcedo, a management analyst who worked under Lt. Pi, stated that, while she was aware that appellant had a deformed left hand, it was not a problem in the performance of her duties. Ms. Salcedo stated that some internal customers had expressed concern about appellant’s customer service, and had a difficult time approaching her. She opined that Lt. Pi had been fair in applying rules and regulations, including informing appellant of the critical elements in her performance review.

In an August 9, 2002 report, Dr. R.S. Horowitz, a clinical psychologist, stated that when appellant was first seen on July 11, 2002 she indicated that she experienced which included depressed moods, insomnia, agitation, frequent emotionality, and various physical complaints. Dr. Horowitz stated, “She reports that the primary stressor in her life is her employment and what appears to be a systematic effort on the part of her supervisor to discredit her and remove her from her position.” He diagnosed major depression and indicated that it was unlikely that she would “be able to return to being employable before September 12, 2002.”

³ Appellant had alleged in an EEO complaint dated September 5, 2000 that Mr. Dugdale had sexually harassed her by asking her out on dates; by asking whether he could date her daughter if she was not inclined; by “staring at her” in October 1998 and October/December 1999; and by “finding” pictures of women that Mr. Dugdale had downloaded from the Internet. The complaint was dismissed by the employing establishment on January 8, 2001.

⁴ In a statement dated February 21, 2003, Lt. Danilo L. Yu, the administrative officer/comptroller for the Navy Environmental and Preventive Medicine Unit at appellant’s worksite from November 1994 to June 1997, asserted that both appellant and Mr. Dugdale were under his direct supervision during this period and at no time during his tenure did appellant file any formal or informal sexual harassment complaint against Mr. Dugdale. In a statement dated February 28, 2003, Lt. Commander Gary W. Bruton, appellant’s front-line supervisor from February 1997 through May 1999, asserted that he was not aware of any statements, written or verbal, by appellant regarding sexual harassment of any kind.

In an affidavit dated September 13, 2002, Captain John E. Tueller, the commander of the Navy Environmental Health Center and the superior officer to whom Lt. Pi reported, stated that he had been informed by the human resources office that there had been a management inquiry or investigation into allegations of sexual harassment made by appellant in 2000, which were unsubstantiated. Captain Tueller stated that appellant did not come to him directly with her allegations of harassment or provide him with any request for accommodation.

In a deposition dated November 13, 2002, Captain Tueller stated that he approved appellant's termination based on the evidence of record indicating that she had an unacceptable performance rating. Appellant made errors in the financial and accounting process which led him to that conclusion. Appellant was the only civilian employee for whom he had recommended termination since he commenced command in September 1999. Captain Tueller noted that appellant had complained about Mr. Dugdale. He investigated her complaints, but concluded that there was not sufficient evidence to establish them. Mr. Dugdale had "issues" with other employees which pertained to his tendency to engage in "practical jokes," such as taking and doctoring photographs of employees; and sending emails which certain employees found offensive. Mr. Dugdale was given a letter of reprimand. Mr. Dugdale was also given a suspension, held in abeyance, because of an "inability to work together" with a coworker.

In a statement dated February 27, 2003, Lt. Pi rebutted appellant's allegations. He stated:

- (1) Appellant was not singled out in any way or discriminated against regarding the management of her work. Rather, appellant required closer supervision due to performance-related problems. The position she occupied as budget analyst was a stand-alone position critical to the mission of the agency and claimant's poor performance could not be overlooked;
- (2) Appellant often refused to accept responsibility for her marginal work performance and would blame others or other factors for improper or missing reports. Generally, appellant would become defensive whenever a defective or missing work product was brought to her attention;
- (3) Appellant was not expected by the chain of command to assume charge of Lt. Pi's office during his absence, contrary to her assertion. She was, however, expected to handle and answer all financially related questions and issues in his absence as set forth in her position description;
- (4) Some of the staff members were apprehensive in approaching appellant for reasons explained by Ms. Salcedo in her affidavit;
- (5) Appellant had a private cubical with five and one half feet tall partitions that provided a quiet workspace away from normal office distraction. In fact, contrary to her allegations, her office space is distanced from general traffic;
- (6) Appellant's assertions of "gross mismanagement," "waste of funds" and "abuse of authority" lack credibility because she did not raise them until after she received the PIP. Her claim that management acted against her in retaliation for

whistle blowing activities is also without foundation, since there was no evidence to support her claim of whistleblowing activity;

(7) Appellant never complained regarding her alleged left hand disability, nor did she ever request special accommodations for such disability. Lt. Pi asserted that he was not aware of, nor had he ever observed, any difficulty on the part appellant in operating the computer or any other device in connection with her work. Her cubicle was equipped with an adjustable keyboard tray with gel wrist rest, ergonomic, fully adjustable chair, foot rest, lower back cushion, oversized 19-inch screen, space heater, roller ball mouse, speakers, sound card, and a laser jet printer. Lt. Pi denied that appellant requested a special wrist band or other ergonomic equipment that she claimed was necessary to perform her duties.

By decision dated June 9, 2003, the Office denied appellant's claim finding that she did not submit sufficient evidence to establish a compensable employment factor. The Office noted that credible testimony from employing establishment officials outweighed appellant's allegations.

By letter dated August 15, 2003, appellant requested reconsideration. She submitted numerous emails from Lt. Pi which allegedly documented his harassment and abuse and subjecting her to a hostile work environment.⁵ Appellant also submitted emails from Mr. Dugdale which, she asserted, established harassment and abuse, which was tolerated by management.⁶ Appellant submitted an October 28, 1999 email from Ms. Salcedo which stated that her position description stated that she "acted on the financial side" in the absence of Lt. Pi. Appellant also submitted depositions of Lt. Pi dated November 13 and December 16, 2002, Captain Tueller, and Ms. Salcedo from a Merit Systems Protection Board (MSPB) hearing, which pertained to her termination.

Appellant alleged that Mr. Dugdale socialized on the job to the detriment of his job duties. She asserted that Mr. Dugdale asked her out on dates, complimented her outfits, moved into her personal space to ask nonessential questions, asked for her opinion regarding his own personal appearance, and volunteered personal comments about his ex-wife. She stated that, after her informal complaints to Lt. Pi, Captain Tueller and Ms. Salcedo about Mr. Dugdale went unheeded, she filed a formal EEO charge which was dismissed as untimely.⁷ Appellant alleged that the employing establishment failed to adequately investigate and remedy harassment by Mr. Dugdale. She claimed that Lt. Pi refused her request to remove Mr. Dugdale from her office

⁵ Lt. Pi stated in an email to appellant and Mr. Dugdale, "You have seem [sic] to skipped your department head in your routing of issues. This issue you have with work is a personal one and I do not want to see this happen again. You are part of the Unit's team and you are expected to cover where your coworker cannot, as described within the context of your position. Leave your issues for discussion with me for my return and remember the team concept -- you and [appellant] must work together not against each other, this is a requirement of your position."

⁶ Appellant also submitted a letter of warning to Mr. Dugdale which admonished him and refrain from complaining about petty issues, and instructed him to behave in a more mature and professional fashion.

⁷ Appellant made reference to the depositions of Captain Tueller, pages 44-45, Lt. Pi, November 13, 2002 deposition, pages 19-26, and December 12, 2002 deposition, pages 48-51, and Mr. Dugdale, pages 14-16, 27.

space at work.⁸ Appellant alleged that Mr. Dugdale commenced a campaign of retaliatory conduct against her which consisted of muttering derogatory comments under his breath, yelling at her in front of a captain, pointing his finger at her face, and calling her a liar. Appellant claimed that she was forced to resign as his supervisor due to management's failure to take disciplinary action against Mr. Dugdale.⁹ She alleged harassment of other African-Americans at the worksite by telling improper jokes, using his government computer to download pictures of African-Americans from the internet, and superimposing these photographs over the torsos of African-Americans at the worksite, then emailing them to the entire unit as a "joke."¹⁰ Appellant claimed that management unfairly charged her with recording leave that she requested.¹¹

By decision dated September 22, 2003, the Office affirmed its June 3, 2003 decision. It found that appellant had not submitted sufficient evidence to establish any compensable employment factors.

LEGAL PRECEDENT

To establish that an emotional condition was sustained in the performance of duty there must be factual evidence identifying and corroborating employment factors or incidents alleged to have caused or contributed to the condition, medical evidence establishing that the employee has an emotional condition, and rationalized medical opinion establishing that compensable employment factors are causally related to the claimed emotional condition.¹² There must be evidence that implicated acts of harassment or discrimination did, in fact, occur supported by specific, substantive, reliable and probative evidence.¹³

The first issue to be addressed is whether appellant has cited factors of employment that contributed to her alleged emotional condition or disability. Where the disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within the coverage of the Act.¹⁴ On the other hand, disability is not covered where it results from an employee's fear of a reduction-in-force, frustration from not being permitted to work in a particular environment or to hold a particular position, or to

⁸ Appellant made reference to the depositions of Captain Tueller, pages 25-28, Lt Pi, November 13, 2002 deposition, pages 50-51, and December 16, 2002 deposition, page 53, and Mr. Dugdale, page 38-41.

⁹ Appellant noted that Mr. Dugdale had previously been disciplined by the employing establishment for using his government computer to send sexual harassing emails to another female employee. See depositions of Captain Tueller, pages 73-78, Lt Pi, November 13, 2002 deposition, pages 21-26 and December 16, 2002 deposition, page 53, and Mr. Dugdale, pages 8-12.

¹⁰ Appellant made reference to the depositions of Captain Tueller, pages 74-78, Lt Pi, November 13, 2002 deposition, 21-23, 27, and Mr. Dugdale, pages 12-13.

¹¹ Appellant submitted an email pertaining to the leave issue. She made reference to Lt. Pi's December 16, 2002 deposition, in which Lt. Pi alleged that she submitted an unreadable time card.

¹² See *Debbie J. Hobbs*, 43 ECAB 135 (1991).

¹³ See *Ruth C. Borden*, 43 ECAB 146 (1991).

¹⁴ *Lillian Cutler*, 28 ECAB 125 (1976).

secure a promotion. Disabling conditions resulting from an employee's feeling of job insecurity or the desire for a different job do not constitute a personal injury sustained while in the performance of duty within the meaning of the Act.¹⁵

ANALYSIS

The Board finds that appellant has failed to submit sufficient evidence to establish her allegations that her supervisor engaged in a pattern of harassment or discrimination. These included appellant's allegations that her supervisor, Lt. Pi, harassed her because she discovered budget shortfalls and engaged in whistle-blowing activities which embarrassed him.¹⁶ Appellant has alleged, in general terms, that Lt. Pi harassed her, but has not provided the evidence to support her allegations that she was harassed, mistreated, or treated in a discriminatory manner by management.¹⁷ Lt. Pi and Captain Tueller stated in affidavits and deposition testimony that appellant had been disciplined with a PIP and subsequently terminated due to poor performance which was documented over a period of months.¹⁸ Appellant's allegations constitute mere perceptions or generally stated assertions of dissatisfaction with a certain superior at work which do not support her claim for an emotional disability.¹⁹ For this reason, the Office properly determined that these claimed incidents constituted mere perceptions of appellant and were not factually established.

Appellant has submitted no evidence to corroborate her assertion that management tolerated sexual or other types of harassment on the part of Mr. Dugdale. While appellant did file a sexual harassment claim against Mr. Dugdale, these charges were not proven because the claim was untimely filed. The record indicates that the harassment charges were investigated by the employing establishment and that Lt. Pi, Captain Tueller and Ms. Salcedo all believed that there was not sufficient evidence to support appellant's allegations. Appellant has failed to provide support for her allegations that Mr. Dugdale initiated inappropriate discussions about her personal life, that he harassed her by pressuring her to go out on dates with him, or that he made derogatory remarks about her to other employees. To that end, she failed to establish that Mr. Dugdale threatened, sexually harassed or verbally abused her or otherwise ridiculed her as alleged.

The records of emails sent by various parties and the deposition testimony of Lt. Pi, Captain Tueller, and Ms. Salcedo indicate that there was tension between appellant and

¹⁵ *Id.*

¹⁶ The record contains several emails which suggest that appellant did in fact discover some accounting errors which she reported to Lt. Pi. However, appellant has submitted no evidence that Lt. Pi undertook to punish her in retaliation for "embarrassing" him with these revelations.

¹⁷ See *Joel Parker, Sr.*, 43 ECAB 220 (1991) (holding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

¹⁸ Although appellant's termination was subsequently overturned pursuant to an agreement, the mere fact that personnel actions were later modified or rescinded, does not in and of itself, establish error or abuse. *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

¹⁹ See *Curtis Hall*, 45 ECAB 316 (1994).

Mr. Dugdale. However, although the Board has recognized the compensability of verbal abuse in certain circumstances, this does not imply that every statement uttered in the workplace will give rise to coverage under the Act.²⁰ The record is vague with respect to the specific nature of the relationship between appellant and Mr. Dugdale and she has not shown that Mr. Dugdale's interaction with her would rise to the level of abuse or otherwise fall within the coverage of the Act.²¹

The Board finds that the administrative and personnel actions taken by management do not constitute error or abuse, and are therefore not considered factors of employment. An employee's emotional reaction to an administrative or personnel matter is not covered under the Act, unless there is evidence that the employing establishment acted unreasonably.²² Regarding appellant's allegation that her supervisors ignored her left hand disability and forced her to exceed her physical restrictions, the Board has held that being required to work beyond one's physical limitations could constitute a compensable employment factor if such activity is substantiated by the record.²³ However, appellant has failed to substantiate or provide corroboration for these allegations, nor show that Lt. Pi prevented her from assuming certain duties, which she felt were part of her job description, when he was not present in the office. Appellant has provided no factual evidence to corroborate her allegation that the employing establishment committed error or abuse by transferring her to a work area where she was forced to work in a small, noisy, crowded office adjacent to Mr. Dugdale, contrary to her work standards. The Board finds that this amounts to frustration at not being permitted to work in a particular environment and is not a compensable factor under the circumstances of this case.

To the extent that the employing establishment was aware of incidents arising between appellant and Mr. Dugdale, the record indicates that Lt. Pi did take action to intervene and mediate their disputes. One of the emails appellant submitted indicated that Lt. Pi copied an email to appellant and to Mr. Dugdale in which he admonished both of them to work as a team

²⁰ *Harriet J. Landry*, 47 ECAB 543, 547 (1996). The record suggests that Dr. Dugdale sent emails which some employees of the employing establishment considered offensive. However, the record does not contain any further details regarding these emails or show that they were directed towards appellant.

²¹ See, e.g., *Alfred Arts*, 45 ECAB 530, 543-44 (1994) and cases cited therein (finding that the employee's reaction to coworkers' comments such as "you might be able to do something useful" and "here he comes" was self-generated and stemmed from general job dissatisfaction). Compare *Abe E. Scott*, 45 ECAB 164, 173 (1993) and cases cited therein (finding that a supervisor's calling an employee by the epithet "ape" was a compensable employment factor).

²² See *Alfred Arts*, *supra* note 21 at 543-44.

²³ *Diane C. Bernard*, 45 ECAB 223, 227 (1993).

and reminded them that they were part of the same unit.²⁴ The record does not reveal that the employing establishment committed error or abuse in carrying out the administrative function of managing the relationship between appellant and Mr. Dugdale.

Appellant failed to demonstrate that Lt. Pi was doing anything more than discharging his supervisory duties by monitoring her work or that he otherwise engaged in improper conduct which exceeded his administrative responsibilities. With regard to the disciplinary actions taken by the employing establishment due to appellant's perceived diminished performance and in her difficulty interacting with her coworkers, there is no evidence that the employing establishment committed error or abuse in connection with these matters.²⁵ With regard to her being denied permission for leave by the employing establishment, appellant also did not show the existence of error or abuse.²⁶ Thus, appellant failed to show that any of the claimed administrative or personnel actions constituted a compensable employment factor.

The Board has held that emotional reactions to situations in which an employee is trying to meet her position requirements are compensable.²⁷ However, appellant has not submitted evidence indicating that the employing establishment imposed an unusually heavy workload and unreasonable deadlines.²⁸ Regarding appellant's allegation that she developed stress due to the uncertainty of her job duties and her insecurity about maintaining her position, the Board has previously held that a claimant's job insecurity is not a compensable factor of employment under the Act.²⁹ The Board has held that an employee's dissatisfaction with perceived poor management constitutes frustration from not being permitted to work in a particular environment or to hold a particular position and is not compensable under the Act.³⁰

Appellant has not established a compensable work factor and, the Board will not consider the medical evidence.³¹

²⁴ Lt. Pi also stated in his November 13, 2002 deposition that, at one point, the ongoing, intermittent dispute between appellant and Mr. Dugdale had caused disruption in their work area to the extent that the matter was submitted to for alternative dispute resolution, and that they had resolved their differences. See Lt. Pi's November 13, 2002 deposition, page 24.

²⁵ *Drew A. Weismuller*, 43 ECAB 745 (1992); *Kathi A. Scarnato*, 43 ECAB 220 (1991).

²⁶ *Weismuller*, *supra* note 25; *Kathi A. Scarnato*, *supra* note 25.

²⁷ See *Georgia F. Kennedy*, 35 ECAB 1151, 1155 (1984); *Joseph A. Antal*, 34 ECAB 608, 612 (1983).

²⁸ Compare *Kennedy*, *supra* note 27. The employing establishment indicated that appellant was not restricted to a rigid schedule or timetable and was given sufficient time to complete her work assignments.

²⁹ See *Artice Dotson*, 42 ECAB 754, 758 (1990); *Allen C. Godfrey*, 37 ECAB 334, 337-38 (1986).

³⁰ See *Michael Thomas Plante*, *supra* note 18.

³¹ See *Margaret S. Krzycki*, 43 ECAB 496 (1992).

CONCLUSION

The Board finds that the Office properly found that appellant failed to meet her burden of proof to establish that she sustained an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the September 22 and June 9, 2003 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: October 4, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member