# United States Department of Labor
# Employees' Compensation Appeals Board

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| **YOUNG JA KAHN, Appellant** | ) | |
| | ) | **Docket No. 05-1520** |
| **and** | ) | **Issued December 19, 2005** |
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| **DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Denver, CO, Employer** | ) | |

*Appearances:*
*Young Ja Kahn, pro se*
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

### ***JURISDICTION***

On July 12, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated February 10 and April 13, 2005 which denied her claim for an emotional condition. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

### ***ISSUE***

The issue is whether appellant met her burden of proof in establishing that she sustained an emotional condition in the performance of duty.

### ***FACTUAL HISTORY***

On September 25, 2003 appellant, then a 59-year-old information security officer, filed an occupational disease claim alleging that she developed physical symptoms due to increased

stress at work. She became aware of her condition on July 15, 2003. Appellant stopped work on September 23, 2003 and did not return.

By letter dated October 2, 2003, the Office asked appellant to submit evidence, including a detailed description of the employment factors or incidents that she believed contributed to her illness. The Office also requested that the employing establishment to submit information addressing her work environment.

Appellant submitted an October 15, 2003 statement noting that her stress commenced upon filing an Equal Employment Opportunity (EEO) complaint on August 20, 2002. She alleged that her supervisor, Jon Heikka, Chief of Police for the employing establishment, harassed and retaliated against her after filing the EEO complaint. Appellant referred to an accompanying EEO complaint for specific instances of harassment. She was required to meet daily deadlines but was able to perform her assigned duties without any problem. Appellant advised that she did not bring work home to complete her assignments.

In her EEO complaint, appellant alleged a hostile work environment and stated that Mr. Heikka harassed and discriminated against her because she was Korean and because she was older. She alleged as harassment, that he was rude to her on February 3, 2003 with regard to a narcotic inspection. On March 7, 2003 he threatened to set a fact-finding meeting[1] to determine whether a suspension was appropriate for her unreasonable delay and failure to provide guidance to the clinical executive board concerning controlled dangerous substances. Mr. Heikka also alleged that appellant submitted inaccurate information to the medical center director for signature and failed to monitor and follow up on controlled substance inspections. On March 11, 2003 he set the fact-finding meeting without her knowledge. On April 4, 2003 Mr. Heikka issued a proposed suspension without conducting a fact-finding meeting; and on April 7, 2003 he informed appellant that he would not reschedule a fact-finding meeting. Appellant alleged that on June 5, 2003 he informed her that she did not produce quality work. On June 5, 2003 she requested clarification of assignment priorities from her supervisor but he was not responsive. On November 12, 2002 Mr. Heikka threatened her and improperly issued a written admonishment for not timely completing a work assignment. Appellant alleged that on November 12, 2002 she was verbally abused by Mr. Heikka, who yelled at her "you know what's coming after this." On April 11, 2003 she was wrongfully placed on absence without leave (AWOL) from 6:00 a.m. to 3:30 p.m. Appellant also alleged that she was improperly disciplined on May 12, 2003 and was wrongfully suspended from November 17 to 21, 2003. She alleged that she was improperly denied a promotion in 2001 and September 2003 while other coworkers were promoted. Appellant alleged that she was generally overworked and understaffed. She advised that, when she was hired, she was responsible for the territory of eastern Virginia health care system and in July 2002, Mr. Heikka expanded her territory to include Pueblo Colorado, Fort Lyons and 20 other facilities. Appellant indicated that she found it difficult to supervise the inspection of facilities in her region because they were not located in proximity to where she worked and there was a high turnover rate of inspectors.

[1] The record interchangeably refers to a "fact-finding board" or a "fact-finding meeting" but there is no description of the composition of this board or the employing establishment personnel who may have participated in any such meeting. Apparently, such a board convened prior to disciplinary action.

Appellant sought treatment from Dr. Kathryn Hobbs, a Board-certified internist, who noted on July 15 and September 29, 2003 that she was treated for fibromyalgia which was aggravated by increased stress at work by her supervisor. Treatment notes from Dr. Warren P. Jaeger, a Board-certified internist, advised that she had physical symptoms due to interactions with her supervisor. Dr. Marg Dickson, Board-certified in occupational medicine, opined on November 7, 2003 that appellant's interaction with her supervisor caused a preexisting condition to deteriorate. On December 9, 2003 she requested temporary duty until resolution of her workers' compensation claim.

By letter dated October 31, 2003, Judy Schriver, an employing establishment compensation specialist, noted that appellant's job was not generally considered stressful. She noted that there were no requirements for overtime, quotas, travel or intense assignments. Ms. Schriver advised that there were instances when deadlines were imposed but appellant did not meet those deadlines although adequate time was provided. She advised that she failed to properly schedule her time and, as a result, disciplinary action was taken to correct her work deficiencies. Ms. Schriver noted that, before September 2003, appellant provided doctors notes for sick leave which were related to a motor vehicle accident and an adverse reaction to cortisone. She advised that management was in the process of assigning her to another supervisor and providing her a permanent work space.

In a March 25, 2004 decision, the Office denied appellant's claim, finding that the claimed emotional condition did not arise in the performance of duty.

Appellant requested an oral hearing which was held on November 23, 2004. She submitted an employing establishment memorandum dated September 16, 2002 which described a reorganization. Appellant responded to the proposed suspension of April 4, 2003[2] and noted that she did not delay or fail to document or account for controlled substances, but indicated that the date of the meeting was outside her work hours, that she had a doctor's appointment and that she offered to send a replacement. She denied submitting false or inaccurate statements to the director but noted that the estimate figures she provided were rejected by management as inaccurate. Regarding the claim that appellant failed to monitor or follow up on controlled substance inspections, she stated that she struggled to recruit inspectors because they either resigned or found other jobs.

Appellant submitted an investigative summary and analysis of her EEO complaint prepared by the employing establishment office of resolution management. She reiterated her allegations set forth above. In an undated statement, Mr. Heikka denied promising appellant a promotion but recalled that they had discussed promotions and that he had told her that he would consider her for future promotions. He advised that she was selected for an information security officer position at a GS-11 grade and he believed this was appropriate as human resources requested the position be set at a GS-7. Mr. Heikka denied appellant's allegations of

[2] The alleged infractions involved an unreasonable delay and failure to provide guidance to the clinical executive board concerning the documentation and accountability of controlled dangerous substances, for submitting false and inaccurate information to the medical center director for his signature and for failure to monitor and follow up on controlled substance inspections pursuant to employing establishment policy.

discrimination. He advised that she was issued a written admonishment on November 12, 2002 because she failed to complete a survey although she was provided with adequate time. Mr. Heikka denied threatening appellant or speaking in a derogatory manner; but acknowledged raising his voice when employees interrupted him. He advised that appellant raised her voice with him and became argumentative on a number of occasions. Mr. Heikka advised that on March 7, 2003 he conducted a fact-finding meeting before enacting disciplinary measures on April 4, 2003 and allowed her until the end of the day to arrange representation. He confirmed that he would not reschedule the meeting while appellant was on sick leave and advised her that she could respond when she returned to work. Mr. Heikka denied that on March 7, 2003 he told appellant "you know what is coming after this." With regard to charging her with AWOL on March 11, 2003 he noted that she failed to call in and advise management that she would be absent. The AWOL charge was removed when he received a doctor's note. Mr. Heikka noted that in June 2003 he did not tell appellant that she failed to produce quality work but did discuss the need for improvement. He advised that she reacted in a hostile manner and was accusatory. Mr. Heikka denied any reprisals against appellant because she filed an EEO complaint, but contended that she was not performing her job and chose not to follow instructions. Regarding her allegation that she was given additional territories to manage, Mr. Heikka noted that the Southern Colorado and Denver Medical Centers functioned together and were in a slow process of integration. He advised that appellant was aware of this and participated in a meeting discussing the reorganization in December 2001 and raised no objection.

In a December 9, 2004 statement, Ms. Schriver, a registered nurse, advised that promotions were based on performance and could not be promised. She noted that appellant incurred three disciplinary actions due to performance issues that affected her potential promotions. Ms. Schriver advised that she was admonished on November 3, 2002 and was suspended for three days on May 7, 2003. She advised that Mr. Heikka confronted appellant about discrepancies in her reports before disciplining her and appellant was unable to provide documentation to resolve the discrepancies. Ms. Schriver noted that in September 2003 appellant was issued a proposed suspension and that Mr. Heikka issued this in an attempt to improve her performance and not to terminate appellant. With regard to her allegation of difficulty in managing the narcotic inspections, Ms. Schriver reported that Mr. Heikka provided instructions to appellant but that she still provided inaccurate, incomplete documentation. She noted that Mr. Heikka was concerned with appellant's ability to communicate clearly in reports and emails and requested that he be allowed to review all reports and emails prior to submission for the purposes of editing and grammar. Ms. Schriver advised that appellant was transferred to another supervisor.

By decision dated February 10, 2005, the hearing representative affirmed the March 25, 2004 decision.

In a letter dated March 12, 2005, appellant requested reconsideration and submitted additional medical evidence, indicating that job stress caused situational anxiety and abdominal pains.

In a decision dated April 13, 2005, the Office denied modification of the February 10, 2005 decision on the grounds that the evidence submitted was insufficient to establish that appellant sustained an emotional condition in the performance of duty.

## ***LEGAL PRECEDENT***

To establish her claim that she sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her emotional condition.[3]

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,[4] the Board explained that there are distinctions to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees' Compensation Act.[5] 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 under the Act.[6] When an employee experiences emotional stress in carrying out his or her employment duties and the medical evidence establishes that the disability resulted from his emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from his or her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of his work.[7] 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 under the Act. Where the disability results from an employee's emotional reaction to his regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act. 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.[8]

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

[3] *Donna Faye Cardwell*, 41 ECAB 730 (1990).

[4] 28 ECAB 125 (1976).

[5] 5 U.S.C. §§ 8101-8193.

[6] *See Anthony A. Zarcone*, 44 ECAB 751, 754-55 (1993).

[7] *Lillian Cutler*, *supra* note 4.

[8] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, *supra* note 6.

providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.[9] 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.[10]

## ***ANALYSIS***

Appellant alleged that her supervisor, Mr. Heikka, generally harassed and discriminated against her based on her ethnic background and age. To the extent that incidents alleged as constituting harassment by a supervisor are established as occurring and arising from her performance of her regular duties, these could constitute employment factors.[11] However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.[12]

The factual evidence fails to establish the alleged instances of harassment. In an investigative summary interview, Mr. Heikka denied appellant's allegations. He advised that she was issued a written admonishment on November 12, 2002 because she failed to complete a survey. Mr. Heikka noted that appellant was given from July 11 to August 10, 2002 to complete her assignment and failed to timely do so. He denied threatening her or speaking in a derogatory manner; however, Mr. Heikka acknowledged raising his voice with employees who interrupted him and noted that appellant would raise her voice and became as argumentative. On March 7, 2003 Mr. Heikka conducted a fact-finding meeting and provided appellant until the end of the day to arrange for a representative and she failed to do so. He denied telling her on March 7, 2003 "you know what is coming" or advising her that she did not produce quality work, but advised appellant that her work needed improvement. Additionally, Ms. Schriver noted in a statement dated October 31, 2003, that appellant had poor performance and conduct issues since November 2002. The factual evidence fails to support appellant's claim that she was harassed. She did not submit sufficient evidence supporting her allegations.

To the extent that appellant alleged verbal abuse and threats by her supervisor. The Board has recognized the compensability of threats or verbal abuse in certain circumstances. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Act.[13] The Board finds that the evidence submitted to the record does not establish that appellant's superiors made any threats or verbally abused her. Mr. Heikka denied that he threatened, harassed or spoke to her in a derogatory manner and there is no corroborating evidence to support that he erred or acted abusively. Appellant has not otherwise shown how

[9] *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[10] *Id.*

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

[12] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[13] *Charles D. Edwards*, 55 ECAB ___ (Docket No. 02-1956, issued January 15, 2004).

supervisory comments or actions rose to the level of verbal abuse or otherwise fell within coverage of the Act.[14]

Other allegations by appellant relate to administrative or personnel actions. In *Thomas D. McEuen*,[15] the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under the Act, as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. The Board noted, however, that coverage under the Act would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment's superiors in dealing with the claimant. Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[16]

Regarding appellant's allegation that on April 11, 2003 she was wrongfully placed on AWOL from 6:00 a.m. to 3:30 p.m., the Board notes that the handling of leave requests and attendance matters are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[17] The Board finds that the employing establishment acted reasonably in this administrative matter. Mr. Heikka noted that appellant was placed in an AWOL status because initially she failed to inform management that she would be absent. He advised that the AWOL charge was subsequently removed upon receipt of a doctor's note. Appellant has presented no corroborating evidence to support that the employing establishment erred or acted abusively with regard to this matter. Instead, the employing establishment acted reasonably in its administrative capacity and, when she presented a doctor's note, the leave status was changed expeditiously.

Appellant also alleged that the employing establishment improperly disciplined her. The Board finds that the employing establishment did not act unreasonably in this administrative matter.[18] Although the handling of disciplinary actions and evaluations are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[19] Appellant alleged that she was improperly disciplined on November 12, 2002 when she was issued a written admonishment, on April 4, 2003 she was issued a proposed suspension on May 12, 2003 she was issued a three-day suspension and was suspended from November 17 to 21, 2003. Mr. Heikka, as noted above, explained appellant's deficiency in each instance

[14] *See Judy L. Kahn*, 53 ECAB 321 (2002) (the fact that a supervisor was angry and raised his voice does not, by itself, support a finding of verbal abuse).

[15] *See Thomas D. McEuen*, *supra* note 8.

[16] *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

[17] *See Judy Kahn*, 53 ECAB 321 (2002).

[18] *See Janet I. Jones*, 47 ECAB 345, 347 (1996), *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

[19] *Id.*

which prompted disciplinary actions. Ms. Schriver also submitted statements supporting that the disciplinary actions were warranted. The record establishes that her supervisors acted reasonably with regards to her performance issues. Although the proposal to remove appellant was reduced to a 30-day suspension this does not establish error or abuse.[20] The evidence indicates that the employing establishment acted reasonably in response to performance issues as they arose. She presented no corroborating evidence to support that the employing establishment erred or acted abusively with regard to these allegations.

Appellant alleged that she was improperly denied promotions in 2001 and September 2003. 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 as they do not involve the employee's ability to perform his or her regular or specially assigned work duties, but rather, constitute his or her desire to work in a different position.[21] Mr. Heikka denied ever promising appellant a promotion, but recalled discussing promotions with her and indicated that he would consider her for future promotions. He explained the reasons for his decisions on promotions and explained the reasons why he believed she was not presently entitled to a promotion. Ms. Schriver also explained that promotions were based on performance and could not be promised. She noted that appellant had three disciplinary actions due to performance issues which affected her promotion potential. The Board recognizes that a supervisor or manager must be allowed to perform his or her duties and that, in performing such duties, employees will at times dislike actions taken.[22] Appellant did not submit evidence supporting her claims that the employing establishment committed error or abuse in this matter. She has presented no corroborating evidence to support that the employing establishment erred or acted abusively with regard to these allegations and, thus, has not established administrative error or abuse.

Appellant generally alleged that she was overworked and understaffed. She specifically indicated that, when she was hired, she was responsible for the territory of Eastern Virginia Health Care System and in July 2002 Mr. Heikka expanded her territory to include Pueblo Colorado, Fort Lyons and 20 other facilities. She alleged that she did not have proper supervisory authority, the facilities were not conveniently located making inspections difficult and noted that it was difficult to maintain inspectors. However, the record fails to support this allegation. Mr. Heikka noted that the Southern Colorado and Denver Medical Centers functioned together and indicated that these facilities were in the process of reorganization. He explained that appellant was aware of this since December 2001 and raised no previous objection. Ms. Schriver noted that appellant's job was not generally considered stressful and there were no requirements for overtime, quotas, travel or intense assignments. Moreover,

[20] *See Linda K. Mitchell*, 54 ECAB ___ (Docket No. 03-1281, issued August 12, 2003) (the mere fact that the employing establishment lessened a disciplinary action did not establish that the employing establishment erred or acted in an abusive manner).

[21] *Donald W. Bottles*, 40 ECAB 349, 353 (1988).

[22] *See Michael A. Deas*, 53 ECAB 208 (2001).

appellant submitted a statement dated October 15, 2003 and noted that she was required to meet daily deadlines but was able to perform her assigned duties with no problem and did not bring work home. This supports that she did not attribute her stress to her actual duties. To the extent that appellant alleged overwork, this is not established by the evidence.[23] Consequently, she has not established any compensable factors of her employment.[24]

## ***CONCLUSION***

The Board finds that the evidence fails to establish that appellant sustained an emotional condition in the performance of duty.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the April 13 and February 10, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 19, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

[23] The Board has held that overwork, as substantiated by sufficient factual information to support the claimant's account of events, may be a compensable factor of employment. *Bobbie D. Daly*, 53 ECAB 691 (2002).

[24] As appellant has failed to establish a compensable employment factor, the Board need not address the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496 (1992).