

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

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**M.M., Appellant**

**and**

**DEPARTMENT OF THE NAVY, HUMAN  
RESOURCE OFFICE, Norfolk, VA, Employer**

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**Docket No. 06-998  
Issued: August 28, 2006**

*Appearances:*  
*M.M., pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On March 22, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated September 2, 2005 and January 19, 2006 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 April 8, 2005 appellant, then a 36-year-old legal assistant, filed an occupational disease claim alleging that she developed headaches, depression and anxiety due to increased stress at work. She became aware of her condition on November 4, 2004. Appellant did not stop work.

By letter dated August 3, 2005, the Office asked appellant to submit evidence, including a detailed description of the employment factors or incidents that she believed contributed to her claimed illness. No additional evidence was received.

In a September 2, 2005 decision, the Office denied appellant's claim finding that the claimed emotional condition did not occur in the performance of duty.

In an April 8, 2005 letter, received September 6, 2005, appellant alleged harassment and reprisals by Lieutenant Colleen M. Shook, her supervisor, after reporting an incident that occurred on September 25, 2004 when a coworker kicked her in the buttocks. Appellant had a pending Equal Employment Opportunity (EEO) complaint alleging that her supervisor harassed her. She alleged that Lieutenant Shook improperly disciplined her and issued a five-day proposed suspension for not following supervisory instructions. Appellant alleged that Lieutenant Shook improperly denied her request for three hours of leave on October 27, 2004. She further alleged that Lieutenant Shook improperly requested that she be addressed by her military rank and be notified before appellant contacted other department heads. Appellant alleged that Lieutenant Shook improperly denied her request for a job transfer. She generally alleged that Lieutenant Shook assigned her more work than she could complete and gave unrealistic deadlines. Appellant also alleged that she was sexually harassed by Petty Officer Michael Lock when he kicked her in the buttocks on September 25, 2004.

On September 22, 2005 appellant requested a review of the written record. She submitted notes from Stephanie C. O'Hara, a counselor, who treated appellant for panic attacks and stress due to a hostile work environment. Appellant came under the care of Dr. Lea Laplace, a Board-certified internist. In a report dated November 29, 2004, Dr. Laplace stated that appellant was treated since November 6, 2004 for migraine headaches, anxiety and depression. Appellant reported that her condition began after she filed a claim against a coworker who assaulted her at work. Dr. Laplace recommended a leave of absence and that appellant work in a separate area from her assailant. In reports dated March 15 to May 17, 2005, she noted that appellant could return to work. In an attending physician's report dated May 12, 2005, Dr. Laplace noted that appellant reported that she was assaulted at work by a coworker who kicked her in the buttocks. Appellant thereafter experienced reprisals from her supervisor which caused her anxiety and stress. Dr. Laplace diagnosed anxiety and depression due to work-related stress and hostile work environment and worsening migraine headaches. She checked a box "yes" that appellant's condition was caused or aggravated by an employment activity and specifically noted that appellant's condition worsened by working in close proximity to the assailant. Also submitted were reports from Kathleen A. Hooper, a social worker, who noted that appellant had depression due to workplace stress.

The employing establishment submitted an October 4, 2004 investigative report noting that, on September 27, 2004, appellant filed a complaint alleging that she was kicked in the buttocks by Petty Officer Lock on September 25, 2004. Lieutenant Shook verified appellant's statements and Petty Officer Lock admitted to kicking her in the buttocks, for which he was reprimanded. In an October 27, 2004 notice of proposed suspension, appellant was advised of a five-day suspension, for failure to follow instructions of a supervisor, inattention to duty and improper use of government database for personal reasons. Electronic mail dated November 1, 2004 from appellant to Lieutenant Shook noted that she was working on post-court tasking;

however, she was unable to complete the “CI’s” assigned the prior week as instructed because she was on sick leave. Appellant requested guidance on prioritizing her tasks and advised that she could not complete her assignments without overtime. Lieutenant Shook responded that she would not approve overtime and requested the work be completed by the next day. Appellant responded that she was not confident that she could complete the assignments. Lieutenant Shook responded, indicating the work that she wanted done. She advised that, if appellant could not complete the duties that were assigned the prior week by the end of the day, an extension would be granted in order to complete the work by the next day. Also submitted was a notice of decision on the proposed suspension dated November 15, 2004 indicating that the suspension was reduced from five days to three days. The deciding official found that appellant engaged in a “deliberate” challenge to her supervisor’s authority and disregard for proper procedures.

In a November 15, 2004 employing establishment investigation report of the EEO allegations by appellant, the Commanding Officer, T. Keeley, found that appellant’s allegations of sexual harassment and reprisals were unsubstantiated. Commander Keeley noted that he concurred with the investigator’s finding that Petty Officer Lock did not sexually harass appellant although his behavior was inappropriate. The record reflects that Petty Officer Lock was formally counseled orally and in writing for his inappropriate behavior. Commander Keeley further found that Lieutenant Shook’s October 27, 2004 notice of proposed suspension was issued for a valid and documented basis. Lieutenant Shook’s disapproval of appellant’s request for three hours of leave for October 27, 2004 was within the supervisor’s discretion. Commander Keeley advised that Lieutenant Shook properly annotated the reason for her disapproval of the leave request citing work requirements that needed to be met. He indicated that Lieutenant Shook’s request to be addressed by her military rank was a valid and reasonable request by a military officer to a civilian subordinate and unrelated to the assault charge. Lieutenant Shook’s request for notification prior to appellant contacting other department heads arose after appellant contacted the security officer and requested one of his subordinates contact her and referenced her current assault investigation. Commander Keeley advised that it was highly inappropriate for appellant to contact a department head regarding a case in which she was an alleged victim. Lieutenant Shook was appropriate to request that a chain of command be notified. With regard to appellant’s allegation that Lieutenant Shook assigned more work than appellant could complete in deadlines, the investigation revealed that Lieutenant Shook’s deadlines were reasonable and had not changed since the letter of requirement was issued in March 2004. Commander Keeley noted that Lieutenant Shook requested appellant to provide status reports on deadlines not met and an estimated time of completion which was found to be a reasonable request for a supervisor managing a subordinate’s work.

The employing establishment submitted an undated statement from Petty Officer Lock indicating that, on September 24, 2004, he jokingly gently tapped his shoe against appellant’s buttocks in response to a remark made by her. Petty Officer Lock indicated that he had been friendly with appellant since early 2004 and they would frequently joke between themselves.

By decision dated January 19, 2006, the hearing representative affirmed the September 2, 2005 decision, as modified. The Office found that appellant established a compensable factor of employment with respect to being kicked by Petty Officer Lock on September 24, 2004; however, she failed to submit rationalized medical evidence in which to establish a causal

relationship between the compensable employment factor and the diagnosed emotional condition.

### **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.<sup>1</sup>

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*,<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> When an employee experiences emotional stress in carrying out her employment duties, and the medical evidence establishes that the disability resulted from her emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of an in the course of employment. This is true when the employee's disability results from her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of her work.<sup>5</sup> 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 her 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 her frustration from not being permitted to work in a particular environment or to hold a particular position.<sup>6</sup>

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

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<sup>1</sup> *Donna Faye Cardwell*, 41 ECAB 730 (1990).

<sup>2</sup> 28 ECAB 125 (1976).

<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> See *Anthony A. Zarcone*, 44 ECAB 751, 754-55 (1993).

<sup>5</sup> *Lillian Cutler*, *supra* note 2.

<sup>6</sup> See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, *supra* note 2.

factors of employment and may not be considered.<sup>7</sup> 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.<sup>8</sup>

### ANALYSIS

Appellant alleged that she experienced harassment and reprisals by her supervisor, Lieutenant Shook, after reporting that on September 25, 2004 a coworker kicked her in the buttocks. She listed several instances of alleged disparate treatment. To the extent that incidents alleged as constituting harassment by a supervisor are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.<sup>9</sup> 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.<sup>10</sup>

The factual evidence fails to support appellant's claim of harassment. In an investigative summary it was noted that Lieutenant Shook's October 27, 2004 proposed suspension was issued for a valid and documented basis, specifically appellant's failure to follow instructions, inattention to duty and improper use of a government database. The investigation further noted that Lieutenant Shook's request to be addressed by her military rank to be a valid and reasonable request by a military officer to a civilian subordinate. Lieutenant Shook's request that appellant follow the chain of command and provide her with notification prior to appellant contacting other department heads was appropriate. Appellant did not submit evidence or witness statements in support of her allegation and her supervisor denied harassing appellant. Although she alleged that her supervisor engaged in actions which she believed constituted harassment, she provided insufficient evidence to establish her allegations.<sup>11</sup> Appellant has not established a compensable employment factor under the Act with respect to the claimed harassment.

Appellant filed an EEO claim for harassment and discrimination. However, the Board notes that grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.<sup>12</sup> The employing establishment submitted two investigative reports which summarized appellant's pending EEO complaint for sexual harassment and retaliation and determined that her allegations were unsubstantiated. None of the

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<sup>7</sup> See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

<sup>8</sup> *Id.*

<sup>9</sup> See *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

<sup>10</sup> *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

<sup>11</sup> See *William P. George*, 43 ECAB 1159, 1167 (1992) (claimed employment incidents not established where appellant did not submit evidence substantiating that such incidents actually occurred).

<sup>12</sup> *James E. Norris*, 52 ECAB 93 (2000).

information submitted establishes improper action by the employing establishment personnel. Thus, the evidence regarding the EEO matter does not establish a compensable employment factor under the Act.

Other allegations by appellant relate to administrative or personnel actions. In *Thomas D. McEuen*,<sup>13</sup> 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 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.<sup>14</sup>

Appellant alleged that Lieutenant Shook improperly disciplined her and issued a five-day proposed suspension for failure to follow a supervisors instructions. The Board finds that the supervisor did not act unreasonably in this administrative matter. 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.<sup>15</sup> Appellant alleged that she was improperly disciplined on October 27, 2004 for failure to follow instructions of a supervisor, inattention to duty and improper use of government database for personal reasons. Lieutenant Shook indicated that the notice of proposal to suspend was issued for a valid and documented basis for disciplinary action. The record does not establish that she acted unreasonably when she disciplined appellant for documented poor performance. Although the proposal to suspend appellant was reduced to a three-day suspension this does not establish error or abuse.<sup>16</sup> The deciding official did not note any error but instead emphasized that appellant engaged in a "deliberate" attempt to challenge her supervisor's authority. Appellant has presented insufficient evidence to establish that Lieutenant Shook erred or acted abusively with regard to these allegations. She has not established administrative error or abuse in these actions and therefore they are not compensable under the Act.

Appellant alleged that Lieutenant Shook improperly denied a request for three hours of leave on October 27, 2004. 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.<sup>17</sup> The Board finds that the supervisor acted reasonably

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<sup>13</sup> See *Thomas D. McEuen*, *supra* note 6.

<sup>14</sup> See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

<sup>15</sup> 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).

<sup>16</sup> See *Linda K. Mitchell*, 54 ECAB 748 (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).

<sup>17</sup> See *Judy Kahn*, 53 ECAB 321 (2002).

in this administrative matter. Lieutenant Shook noted that she disapproved of the leave request citing work requirements that needed to be met. Appellant has presented no evidence to support that Lieutenant Shook erred or acted abusively with regard to this matter.

Regarding appellant's allegations that the employing establishment refused to transfer her to another position, 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 coverage of the Act.<sup>18</sup> 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.<sup>19</sup> The employing establishment has either denied these allegations or contended that it acted reasonably in these administrative matters. Appellant has presented no evidence to support that employing establishment personnel erred or acted abusively with regard to these allegations. Thus she has not established administrative error or abuse in the performance of these actions and therefore they are not compensable under the Act.

Appellant also alleged that Lieutenant Shook improperly requested notification before appellant contacted other department heads and that she be addressed by her military rank. 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.<sup>20</sup> Appellant has not presented evidence to support that her supervisor acted unreasonably in exercising her supervisor authority.

Appellant generally alleged that Lieutenant Shook assigned her more work than she could complete and was subject to unrealistic deadlines.<sup>21</sup> However, the record fails to support this allegation. Appellant's allegations generally seem to relate at her frustration with the assigning of her work instead of frustration in performing her actual duties. An investigative summary revealed that Lieutenant Shook's deadlines were reasonable and have not changed since the letter of requirement was issued in March 2004. Lieutenant Shook requested that appellant provide status reports on deadlines not met and an estimated time of completion which was found to be a reasonable request for a supervisor managing a subordinate's tasks. Contrary to appellant's allegations, the record reveals that Lieutenant Shook granted extensions for appellant to complete her assignments. One such occasion was documented in an email dated November 1, 2004, in which appellant was unable to complete her task which was assigned the prior week, and Lieutenant Shook granted appellant an extension to the next day. There is no evidence that the employing establishment acted unreasonably regarding this. Rather, the record reflects that Lieutenant Shook provided appellant extensions to complete her assignments and sought to accommodate appellant's absences.

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<sup>18</sup> See *Janet I. Jones*, *supra* note 15.

<sup>19</sup> *Donald W. Bottles*, 40 ECAB 349, 353 (1988).

<sup>20</sup> See *Michael A. Deas*, 53 ECAB 208 (2001).

<sup>21</sup> See *Donney T. Drennon-Gala*, 56 ECAB \_\_\_\_ (Docket No. 04-2190, issued April 26, 2005) (assignment of work is an administrative function of the employing establishment).

The Office found that appellant established a compensable factor of employment with respect to the September 25, 2004 incident in which Petty Officer Lock kicked her in the buttocks. Petty Officer Lock admitted to kicking appellant in the buttocks and the incident was corroborated by Lieutenant Shook. The record reflects that he was counseled orally and in writing for his inappropriate behavior. The Board noted that horseplay among coworkers which results in physical contact may be compensable under the Act.<sup>22</sup> Therefore, it is accepted as a factor of employment that on September 25, 2004 appellant was kicked in the buttocks by a coworker.

However, appellant's burden of proof is not discharged by the fact that she has established an employment factor which may give rise to a compensable disability under the Act. To establish her occupational disease claim, appellant must also submit rationalized medical evidence establishing that her claimed conditions are causally related to the accepted compensable employment factor.<sup>23</sup> While it is not disputed that appellant has an emotional condition, the medical evidence does not explain how or why the accepted employment factors caused or contributed to the emotional condition.

Appellant submitted various medical records from the social workers, counselors and Dr. Laplace. None of these reports, however, are sufficient to establish that the September 25, 2004 kicking incident contributed to an emotional condition or a physical condition.

Appellant submitted reports from Ms. Hooper, a social worker, and from Ms. O'Hara, a counselor. However, these reports are insufficient to establish the claim as they were not signed by a physician and thus are not competent medical evidence.<sup>24</sup>

In a report dated November 29, 2004, Dr. Laplace noted that appellant was treated since November 6, 2004 for migraine headaches, anxiety and depression. Appellant reported that her condition began when she filed a claim against a coworker who assaulted her at work. Dr. Laplace recommended a leave of absence and recommended appellant work in a separate area from her assailant. In reports dated March 15 to May 17, 2005, Dr. Laplace noted that appellant recovered sufficiently from her condition to return to work but requested that appellant work in an area separate from her assailant. However, none of the treatment notes provide a rationalized medical opinion establishing that appellant has an emotional or physical condition causally related to the accepted compensable employment factor.<sup>25</sup> Specifically, the treatment notes fail to reference the accepted employment factor or explain how such factor caused or contributed to appellant's claimed condition. Additionally, Dr. Laplace appears merely to be

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<sup>22</sup> *Barry Himmelstein*, 42 ECAB 423 (1991).

<sup>23</sup> *See William P. George*, *supra* note 11.

<sup>24</sup> *See* 5 U.S.C. § 8101(2) (this subsection defines a "physician" as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. *See also Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board has held that a medical opinion, in general, can only be given by a qualified physician).

<sup>25</sup> *Id.*; *see also Jimmie H. Duckett*, 52 ECAB 332 (2001); *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).



repeating the history of injury as reported by appellant without providing his own opinion regarding whether appellant's emotional condition was caused by the accepted employment factor.

In an attending physician's report dated May 12, 2005, Dr. Laplace noted that appellant reported that she was assaulted at work by a coworker who kicked her in the buttocks and thereafter experienced reprisals from her supervisor which caused her anxiety and stress. Dr. Laplace checked a box "yes" that appellant's condition was caused or aggravated by an employment activity and specifically noted that appellant's condition worsened by working in close proximity to the assailant and working under undue hostility from her supervisor. The Board has held that an opinion on causal relationship which consists only of a physician checking "yes" to a medical form report question on whether the claimant's condition was related to the history given is of little probative value. Without any explanation or rationale for the conclusion reached, such report is insufficient to establish causal relationship.<sup>26</sup>

The Board finds that appellant has not submitted rationalized medical evidence establishing that her claimed conditions are causally related to the accepted compensable employment factor.

### **CONCLUSION**

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

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<sup>26</sup> *Lucrecia M. Nielson*, 41 ECAB 583, 594 (1991).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 19, 2006 and September 2, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 28, 2006  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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