United States Department of Labor
Employees' Compensation Appeals Board

ISABEL MARRERO, Appellant	)	
and	)	**Docket No. 05-1983**
	)	**Issued: March 15, 2006**
U.S. DEPARTMENT OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, WAGE & HOUR DIVISION, Miami, FL, Employer	)	

Appearances:
Isabel Marrero, 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 September 23, 2005 appellant filed a timely appeal from a June 24, 2005 decision of the Office of Workers' Compensation Programs, affirming prior denial of her emotional condition claim. Pursuant to 20 C.F.R. § 501.2(c) and 501(d)(3), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant has established that she sustained an emotional condition in the performance of duty as alleged.

FACTUAL HISTORY

On March 5, 2004 appellant, then a 32-year-old wage and hour investigator, filed an occupational disease claim alleging that she sustained panic disorder, depression and anxiety due to work incidents from February 1, 1999 to February 20, 2004. She attributed her condition to

being denied Family and Medical Leave Act (FMLA) leave beginning February 20, 2004 by her supervisor, Jorge M. Diez de Oñate. Appellant also alleged a pattern of harassment and retaliation by him for which she filed Equal Employment Opportunity (EEO) grievances.

Mr. Diez de Oñate began supervising appellant in June 1999 following her transfer from the employing establishment's Fort Lauderdale office. She requested the transfer to shorten her commute. On June 15, 2000 appellant requested a promotion from GS-11 to GS-12, asserting that her investigations demonstrated her ability to perform independently at the GS-12 level. The employing establishment later approved the promotion.

In five email messages dated from August 1, 2000 to July 17, 2002, Mr. Diez de Oñate advised appellant that she failed to complete required reports or turn in work as requested. In an October 7, 2003 memorandum, he advised her that her use of sick leave from October 1 to 3, 2003 to take an academic test was irregular and unauthorized. Mr. Diez de Oñate emphasized that appellant was required to comply with leave rules. In a December 1, 2003 email, he advised her that she had no authorization to switch duties with another employee and to have called in sick the day after Thanksgiving. Mr. Diez de Oñate warned that any further such conduct would constitute abuse of leave.

In a December 5, 2003 letter, appellant requested that District Director Jorge I. Rivero assign her to a new supervisor. She alleged that Mr. Diez de Oñate was unprofessional, misused his power, made "derogatory comments" about her, put her in "uncomfortable situations" that crossed "physical boundaries," harassed her and created a dysfunctional work environment.

In a March 2, 2004 letter, Mr. Diez de Oñate explained that on January 15, 2004 he assigned appellant to a "strike force" team interviewing seasonal agricultural workers in Fort Pierce, Florida beginning Monday, February 23, 2004. Appellant would be required to drive an official car from Miami to Fort Pierce on February 23, 2004. On February 10, 2004 appellant met with Mr. Diez de Oñate and Mr. Rivero, asserting that she needed to drive her private car to Fort Pierce due to a planned vacation at Disneyworld. In a telephone call later that day, she offered to drive an official car from Miami to Fort Lauderdale on February 22, 2004 so another employee could drive it to Fort Pierce. Mr. Rivero denied the request as it would entail unnecessary overtime and there was no secure area in which to leave the vehicle. Appellant telephoned on February 23, 2004 requesting two weeks of sick leave for a "mental situation." She refused to participate in the strike force as thinking about driving the official vehicle caused her stress.

In a March 3, 2004 email, appellant advised Mr. Diez de Oñate that she had sought medical treatment for her emotional condition. She submitted a February 24, 2004 slip signed by A.C.M. Jones for Dr. Barnett I. Alpert, holding her off work for 10 to 14 days "due to myalgias, anxiety and depression." In a March 18, 2004 report, Dr. Lydia Kelsner-Silver, an attending licensed clinical psychologist, diagnosed panic disorder and agoraphobia beginning in February 1999. She stated that "[b]etween February 23 and March 12, [2004] [appellant] felt unable to perform [her] job." Dr. Kelsner-Silver opined that appellant was "unable to travel to unfamiliar environments, particularly open spaces."

In March 19, 2004 letters, the Office requested that the employing establishment submit information about appellant's job requirements. The Office also requested that she submit a detailed statement of the work factors that caused or contributed to her condition, as well as a report from her attending physician explaining how and why those factors would cause the claimed condition.

On March 26, 2004 the employing establishment granted appellant's request for FMLA leave from February 23, 2004 to approximately March 14, 2004 and withdrew an absent without leave (AWOL) determination for that period.

In an April 15, 2004 letter, Mr. Diez de Oñate asserted that appellant's request for FMLA leave was suspect as she was attempting to avoid the Fort Pierce assignment. However, he later approved her request. Mr. Diez de Oñate acknowledged that her position was "difficult and at times [might] be confrontational."[1] He noted that, at a December 12, 2003 meeting, appellant withdrew her complaints of sexual harassment. Mr. Diez de Oñate stated that she had a "conduct problem" as she was late to meetings and made improper leave requests.

In a May 10, 2004 letter, Mr. Diez de Oñate noted that appellant's duties required annual investigations during the winter agricultural season.[2] Wage and hour investigators were updated and retrained each year. Appellant conducted five on-site investigations in the second quarter of 2000 and was the lead investigator on one. She did not mention any anxiety. Mr. Diez de Oñate stated that, during a February 9, 2004 meeting, Mr. Rivero, appellant and himself discussed the need for, her to participate in the strike force but did not mention transportation. Appellant contended that it was "not safe to go out in the fields." On February 20, 2004 she told Mr. Rivero and Assistant District Director Juan Coria that she needed to drive her personal car to Fort Pierce as she "had already made plans to drive to Disneyworld in her private car during the weekend and had no plans to return to Miami on that weekend."[3] Appellant asked that another employee drive the car or that she be allowed to drive the car to a pick-up point on Sunday. Mr. Rivero declined as working Sunday would constitute overtime and the car could not be left in an unsecured location. Later that day, appellant stated that "she would not be able to attend the Fort Pierce task force since asking her to drive the [official] car was causing her a lot of stress. Mr. Diez de Oñate found a February 24, 2004 medical certificate to be inadequate and placed appellant on AWOL. After she provided medical evidence on March 19, 2004, he approved the FMLA leave and removed the AWOL status. Mr. Diez de Oñate denied appellant's allegations of harassment and sexual harassment, noting that she, on numerous

[1] In April 2 and 5, 2004 emails, one of appellant's coworkers alleged that, during the Fort Pierce detail, some of the investigators felt in danger as their marked official vehicles created agitation in a labor camp. There is no evidence of record corroborating these allegations.

[2] A June 1992 position description showed that appellant's duties included "interviewing employers and employees," touring employer facilities, field assignments and special investigations or projects.

[3] In a February 25, 2004 memorandum, Mr. Coria summarized two telephone conversations with appellant on February 20, 2004. Appellant explained that there was a problem with driving the official vehicle to Fort Pierce as this interfered with "arrangements to visit Disneyworld during the weekend and planned to travel from … Fort Pierce to Orlando." When Mr. Coria called her back later in the day, appellant informed him "that she was not going to participate in the taskforce."

occasions, "contacted [him] backwards asking who is the taller of the two." He asserted that his assignment of a Fort Lauderdale area case to her in March or April 2004 was in accordance with normal work assignment procedures, not a retaliatory action. He noted that, while appellant alleged that the Fort Lauderdale assignment was not in her commuting area, she requested assignments to Key West, 150 miles away. "Her request was denied in view of her claim of 'panic attacks created by open fields' since the trip to Key West is full of open fields, including the Seven Mile Bridge."

In a May 10, 2004 letter, Mr. Rivero stated that he was appellant's direct supervisor from December 1997 to June 1999 in the employing establishment's Miami office. He asserted that she requested the transfer to Fort Lauderdale to reduce her commuting time from 45 to 20 minutes, not due to any interpersonal conflicts or workplace issues.

By decision dated July 9, 2004, the Office denied appellant's claim on the grounds that she failed to establish any compensable factors of employment. The Office found the following incidents to be factual but noncompensable: the December 1, 2003 letter from Mr. Diez de Oñate regarding appellant's noncompliance with time and attendance procedures; her assignment to the Fort Pierce strike force; appellant's dissatisfaction with her assignment to the Fort Pierce strike force and its interference with her personal travel plans; February 20, 2004 telephone conversations regarding driving an official vehicle; and an EEO grievance with no final determination of record. The Office further found that appellant had not established as factual that she sustained a panic attack on February 20, 2004 or that Mr. Diez created a hostile working environment, made derogatory comments or harassed her.

Appellant requested an oral hearing which was held March 22, 2005. She asserted that she sustained her first panic attack on February 1, 1999 due to inadequate supervision and guidance at the Miami office and that the attacks continued due to anxiety from a lack of training. Appellant expressed anxiety over being assigned to chase migrant workers through open fields in Fort Pierce. She asserted that being required to drive an official vehicle to Fort Pierce constituted harassment. Appellant denied that her refusal was due to plans to visit Disneyworld. She also described general anxiety over "struggling to please [her] supervisor" and experiencing stress in December 2003 due to her grandfather's death. Appellant accused Mr. Diez de Oñate of twice putting "his pen up [her] skirt" while she was on the telephone on unspecified dates. She also alleged that he would walk around the office with his keys in his hand, telling employees how bad it was going to get. Appellant submitted additional evidence.[4]

In a supplemental statement, appellant denied withdrawing her complaints of sexual harassment. She contended that Mr. Diez de Oñate unfairly denied her leave requests and retaliated by issuing disciplinary memorandums. She attributed her first panic attack in February 1999 as due to a nonoccupational car accident.

[4] Appellant also submitted documents regarding a July 8, 2004 "nervous breakdown" she attributed to Mr. Diez de Oñate denying her request for leave without pay from late July to mid November 2004 to enable her to attend law school. In the June 24, 2005 decision, the Office hearing representative noted that appellant should file a new traumatic injury claim for the July 8, 2004 episode as this was "a new incident that resulted in a new period of disability."

In April 26 and 27, 2005 letters, the employing establishment asserted that from February 20 through October 2004, appellant failed to follow established leave use and record keeping procedures. The employing establishment, therefore, revoked her flexi-place agreement, an action that was later sustained in the grievance process. The employing establishment also asserted that appellant had adequate training to perform her duties as she charged 400 hours to training from October 1, 2000 to February 20, 2004, with an additional six weeks of classroom "basic" training.

In July 9 and August 5, 2004 emails, Armando Bran, one of appellant's coworkers, asserted that Mr. Diez de Oñate created an intolerable work environment and had a vendetta against appellant. Appellant submitted an undated form and a September 1, 2004 petition signed by several coworkers asserting that Mr. Diez de Oñate was "retaliatory" and that her emotional condition was caused or worsened by the work environment. In a December 8, 2004 email, Mr. Bran alleged that Mr. Diez de Oñate assigned cases based on personal preference and used work assignments as a form of retaliation. In an April 17, 2005 letter, Maria A. Lopez, one of appellant's friends, but not a coworker, commented on appellant's mental state and reiterated her account of workplace events.

Appellant also submitted an October 2003 performance appraisal, as well as 1995 and 1996 appraisals from jobs prior to work at the employing establishment. She asserted that these prior appraisals showed that Mr. Diez de Oñate gave her an unfairly low rating.

Appellant also submitted July 2004 EEO grievance documents regarding unspecified March and May 2004 events. In September 2004 grievance documents, Mr. Diez de Oñate noted that he ultimately approved her request for FMLA leave beginning in February 2004. He generally denied appellant's allegations of harassment and retaliation.

Appellant submitted additional reports dated March 18, 2004 to February 26, 2005 from Dr. Kelsner-Silver, diagnosing panic and anxiety.

By decision dated and finalized June 24, 2005, the Office hearing representative affirmed the July 9, 2004 decision, finding that appellant had not established any compensable factors of employment. The hearing representative found that there was insufficient factual evidence to establish her allegations of harassment or discrimination. She also found that appellant had not established any error or abuse regarding the administrative leave and work assignment matters. The hearing representative found that there was no medical evidence prior to the February 2004 assignment that appellant could not drive an official vehicle or be in open spaces. She stated that appellant's testimony regarding why she wanted to drive her own car to Fort Pierce was not credible.

LEGAL PRECEDENT

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his or her regular or specially assigned duties or to a requirement imposed

by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[5] 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.[6]

A claimant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which she claims compensation was caused or adversely affected by employment factors.[7] This burden includes the submission of a detailed description of the employment factors or conditions which the employee believes caused or adversely affected the condition or conditions for which compensation is claimed.[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 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

In the present case, appellant alleged that she sustained panic disorder, depression and anxiety as a result of a number of employment incidents and conditions which the Office found to be noncompensable. Therefore, the Board must review whether these alleged incidents and conditions are covered employment factors under the terms of the Act.

Appellant attributed her emotional condition to an alleged pattern of harassment, sexual harassment and hostility by Mr. Diez de Oñate, her supervisor. She submitted EEO and other grievance documents regarding these allegations. Incidents of harassment by supervisors and coworkers, if established as occurring and arising from the employee's performance of his or her regular duties, could constitute employment factors.[11] However, the issue is not whether the

[5] 5 U.S.C. §§ 8101-8193.

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

[7] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[8] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

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

[10] *Id.*

[11] *Janice I. Moore*, 53 ECAB 777 (2002).

claimant has established harassment or discrimination under standards applied by the EEO Commission. Rather, the issue is whether the claimant, under the Act, has submitted evidence sufficient to establish an injury arising in the performance of duty.[12] For harassment to give rise to a compensable disability under the Act, there must be probative and reliable evidence that harassment or discrimination did in fact occur.[13] Mere perceptions of harassment are not compensable under the Act.[14]

In support of her allegations of harassment, appellant provided several statements from her coworkers and two petitions asserting that Mr. Diez de Oñate was hostile and retaliatory. However, the Board finds that these documents are too vague to establish harassment, as alleged. Also, Mr. Diez de Oñate denied appellant's allegations of harassment, noting that she withdrew her complaints of sexual harassment. There are no final determinations of record regarding appellant's EEO grievances. The absence of such documentation diminishes the validity of appellant's contentions in this case, where there is no evidence to document that she was harassed. The April 17, 2005 letter from Ms. Lopez, appellant's friend, is of no value in establishing the alleged harassment as she did not witness any of the alleged events. Appellant has not established a compensable employment factor under the Act with respect to the claimed harassment.

Appellant alleged that Mr. Diez de Oñate retaliated against her by assigning her certain cases and assigning her to drive to Fort Lauderdale. She also disliked the way he performed his supervisory duties. However, an employee's dissatisfaction with the way a supervisor performs duties or exercises discretion in assigning work is not compensable absent error or abuse.[15] Mr. Diez de Oñate submitted a May 10, 2004 letter asserting that the Fort Lauderdale case and other work were assigned on a rotational basis. The Board finds that, under the circumstances of this case, his explanation as to how he assigned appellant work is reasonable. Therefore, appellant has not established a compensable employment factor with regard to Mr. Diez de Oñate's supervisory and administrative actions or established the alleged retaliation as factual.

Appellant also attributed her condition to being denied FMLA leave in February 2004. Leave use is a noncompensable administrative matter unless error or abuse is shown.[16] Although the employing establishment later granted appellant's leave request this modification, in and of itself, does not establish administrative error or abuse.[17] Mr. Diez de Oñate submitted an April 15, 2004 letter explaining that he initially denied appellant's leave request as he believed she was trying to avoid the assignment to Fort Pierce and appellant did not submit sufficient

[12] *See Martha L. Cook*, 47 ECAB 226 (1995).

[13] *Marlon Vera*, 54 ECAB 834 (2003).

[14] *Kim Nguyen*, 53 ECAB 127 (2001).

[15] *Donney T. Drennon-Gala*, 56 ECAB ___ (Docket No. 04-2190, issued April 26, 2005); *Linda J. Edward-Delgado*, 55 ECAB ___ (Docket No. 03-823, issued March 25, 2004).

[16] *James P. Guinan*, 51 ECAB 604, 607 (2000).

[17] *Michael Thomas Plante*, 44 ECAB 510 (1993).

medical documentation until March 19, 2004. The Board finds that it was reasonable for Mr. Diez de Oñate to have denied appellant's FMLA request until she submitted the required medical documentation. Thus, she has failed to establish a compensable factor of employment with regard to these leave matters.

Appellant asserted that she experienced stress upon being asked to drive an official vehicle to Fort Pierce. However, she did not in fact drive this vehicle. The Board has held that fear of future injury is not compensable.[18] Appellant expressed anxiety or dislike of interviewing migrant workers and inspecting sanitary facilities. However, the Board has held that such a reaction is a self-generated frustration from not being permitted to work in a particular environment and is not compensable under the Act.[19] Therefore, appellant's reaction to the prospective assignment and its transportation arrangements are not compensable.

Appellant also attributed her condition, in part, to disciplinary memoranda from Mr. Diez de Oñate regarding leave use, attendance and recordkeeping. However, disciplinary actions including oral remands, discussions or letters of warning for conduct pertain are noncompensable, administrative actions unless the employee shows management acted unreasonably.[20] Mr. Diez de Oñate's July 17, 2002, October 7 and December 1, 2003 memoranda, as well as his May 10, 204 letter, clearly explain appellant's failures to abide by workplace procedures. Also, she did not allege that Mr. Diez de Oñate's characterizations of her conduct were inaccurate. The Board finds that these memorandums were reasonable under the circumstances of the case and do not evince administrative error or abuse. Thus, appellant has failed to establish a compensable factor of employment with regard to the disciplinary memoranda.

Appellant also asserted a general anxiety about being unable to perform the requirements of her position. The pressure of attempting to fulfill her job requirements may be a compensable factor of employment.[21] However, appellant stated, in her June 15, 2000 request for promotion, that she was able to fulfill not only her GS-11 duties, but capably performed GS-12 assignments as well. Also, the employing establishment stated that she did not express any anxiety over not being able to fulfill her duties, including while conducting five field investigations similar to the prospective assignment in Fort Pierce. Thus, appellant has failed to establish a compensable factor of employment pertaining to her regular or specially assigned duties.

Appellant also asserted that she did not receive adequate training to perform her assigned duties. The provision of training is an administrative function of the employer and is not compensable unless error or abuse is shown.[22] Although appellant alleged that she sustained

[18] *Brenda L. Dubuque*, 55 ECAB ___ Docket No. 03-2246 (issued January 6, 2004).

[19] *Peter D. Butt Jr.*, 56 ECAB ___ Docket No. 04-1255 (issued October 13, 2004).

[20] *Janice I. Moore*, 53 ECAB 777 (2002).

[21] *Ernest St. Pierre*, 51 ECAB 623 (2000).

[22] *Brian H. Derrick*, 51 ECAB 417 (2000).

stress due to inadequate training, the employing establishment stated that she logged 400 hours of periodic training in addition to 6 weeks of classroom training during the period October 1, 2000 to February 20, 2004. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably. Appellant did not submit sufficient evidence to show that the employing establishment committed error or abuse with respect to her training or that necessary training was not provided. Thus, appellant has not established a compensable employment factor under the Act with regard to these administrative matters.[23]

Appellant also submitted an October 2003 performance appraisal, asserting that Mr. Diez de Oñate gave her an unfairly low rating. However, performance appraisals are administrative and are not compensable unless error or abuse is shown.[24] The Board finds that under the circumstances of this case, the performance appraisal does not establish any administrative error or abuse, particularly due to appellant's multiple conduct problems.

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met her burden of proof in establishing that she sustained an emotional condition in the performance of duty.[25]

CONCLUSION

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

[23] *Brian H. Derrick*, *supra* note 22.

[24] *Beverly A. Spencer*, 55 ECAB ___ (Docket No. 03-2033, issued May 3, 2004)

[25] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496, 503-03 (1992).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 24, 2005 is affirmed.

Issued: March 15, 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