United States Department of Labor
Employees' Compensation Appeals Board

R.A., Appellant	)	
and	)	**Docket No. 07-989**
	)	**Issued: August 23, 2007**
DEPARTMENT OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, Guaynabo, PR, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 1, 2007 appellant filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs dated June 30 and October 5, 2006 and February 6, 2007 denying her emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

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

FACTUAL HISTORY

On February 17, 2006 appellant, then a 51-year-old investigator, filed an occupational disease claim alleging that she sustained psychological distress because management denied her request for advanced sick leave. She attributed her need for sick leave to a "recurrence of emotional problems."

In an email message dated February 17, 2006, David R. Heffelfinger, a manager with the employing establishment, denied appellant's request for advanced sick leave because she had other forms of leave available, including annual leave and credit time. He asserted that a manager could, in his discretion, approve advanced sick leave only when an employee had no other leave available.

In a sworn statement dated February 6, 2006, appellant related that on January 26, 2006 her supervisor, Edison Fernandez, accompanied her on a field investigation. She stated:

> "[W]hile in the car [Mr. Fernandez] suddenly and unexpectedly said 'Talking about retirement many people will take advantage of it. There are many people at the office that work just for a check and not for the work itself.' I answered that I like my work and did not work just for the money. My impression afterwards was that he wanted me to retire, [and] even though he did not actually say it he was implying it.
>
> "Th[en] last Thursday, February 2, 2006, I had been back to the [o]ffice after a day of field work. After arrival, [Mr.] Fernandez asked me and my coworker, David Marin, to attend an informal reunion. While we approached him he said 'Talking about the [d]evil and the [d]evil's horns arrived.' Investigator Zulma Caraballo was also present in the conference room. Then I asked him 'What did you say?' and he replied with the same commentary and in addition touched my head."

Appellant straightened her desk on February 3, 2006. On February 6, 2006 Mr. Fernandez stated in front of coworkers that she had packed in order to retire. Appellant requested that he treated her with respect and he replied that he was joking. She stated, "I told him I had a lot of work and I left. He followed me to the exit door and told me that he was my supervisor and ordered me to look into his eyes." Appellant sought treatment at the health unit and a nurse told her that she had high blood pressure.

On March 14, 2006 appellant informed the Office that she had three prior accepted claims for work injuries. She referred to a February 6, 2006 affidavit, in response to its request for a detailed description of the employment factors to which she attributed her condition. Appellant maintained that she liked her job and performed her duties very well. She attributed her stress to management's attitude and her supervisor's micromanagement and efforts to make her retire. Appellant contended that he created a hostile work environment.

In a statement dated May 26, 2006, Mr. Heffelfinger asserted that management supported appellant. He noted that she performed parts of her job very well and that the job "by its very nature does create stress." Mr. Heffelfinger related that appellant could be "overly sensitive to some of management['s] communications," and submitted email messages in support of this statement. He noted that Mr. Fernandez denied touching her head.

By decision dated June 30, 2006, the Office denied appellant's claim on the grounds that the evidence did not establish that she sustained an employment-related emotional condition.

The Office found that she had not established any compensable employment factors. It further noted that appellant's other workers' compensation claims were not for emotional conditions.

On July 27, 2006 appellant requested reconsideration. She submitted a July 18, 2006 email message from Hedda E. Acevedo, a coworker, who described an incident on February 6, 2006 when Mr. Fernandez "commented that [appellant] was ready to retire." Ms. Acevedo told him that he was disrespectful and wanted to be left alone to work. Mr. Fernandez walked behind appellant as she left the area demanding that she speak with him.

In an email message dated August 2, 2006, Victor Rodriguez, a coworker, confirmed that on February 6, 2006 Mr. Fernandez noticed that appellant had cleaned her desk and mentioned that she was ready to retire. Appellant replied that he should respect her and Mr. Fernandez responded that he was joking. She asked him to leave her work area. Mr. Rodriguez stated, "I also heard [Mr. Fernandez] telling you to calm down, that it was a joke and that it would not happen again."

By decision dated October 5, 2006, the Office denied modification of its June 30, 2006 decision.

Appellant again requested reconsideration on November 21, 2006. She related her condition to her prior accepted claims. Appellant described the reference by Mr. Fernandez on February 6, 2006 to her retirement. She told him to leave her work area but he refused. Mr. Fernandez blocked the exit and told her to look him in the eyes because he was her supervisor. He let appellant leave the office after she looked at him and he had finished talking.[1]

In a decision dated February 6, 2007, the Office denied modification of its October 5, 2006 decision.

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 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.[2] 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.[3]

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially

[1] Appellant also submitted a medical report dated March 14, 2006.

[2] 5 U.S.C. § 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

[3] *Gregorio E. Conde*, 52 ECAB 410 (2001).

assigned work duties of the employee and are not covered under the Act.[4] However, the Board has held that where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.[5] In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.[6]

For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.[7] A claimant must establish a factual basis for his or her allegations with probative and reliable evidence. Grievances and Equal Employment Opportunity complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.[8] The issue is whether the claimant has submitted sufficient evidence under the Act to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[9] The primary reason for requiring factual evidence from the claimant is support of his or her allegations of stress in the workplace is to establish a basis in fact for the contentions made, as opposed to mere perceptions of the claimant, which in turn may be fully examined and evaluated by the Office and the Board.[10]

Verbal altercations and difficult relationships with supervisors, when sufficiently detailed by the claimant and supported by the record, may constitute factors of employment. 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.[11]

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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[4] *See Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990); *reaff'd on recon.*, 42 ECAB 556 (1991).

[5] *See William H. Fortner*, 49 ECAB 324 (1998).

[6] *Ruth S. Johnson*, 46 ECAB 237 (1994).

[7] *See Michael Ewanichak*, 48 ECAB 364 (1997).

[8] *See Charles D. Edwards*, 55 ECAB 248 (2004); *Parley A. Clement*, 48 ECAB 302 (1997).

[9] *See James E. Norris*, 52 ECAB 93 (2000).

[10] *Beverly R. Jones*, 55 ECAB 411 (2004).

[11] *Marguerite J. Toland*, 52 ECAB 294 (2001).

factors of employment and may not be considered.[12] 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.[13]

ANALYSIS

Appellant alleged that she sustained an emotional condition as a result of a number of employment incidents. The Office denied her emotional condition claim on the grounds that she did not establish any compensable employment factors. The Board must, therefore, initially review whether these alleged incidents are covered employment factors under the Act.

Appellant did not attribute her emotional condition to the performance of her regular or specially assigned duties or out of a specific requirement imposed by her employment. She noted that she enjoyed her job and excelled in her position. Appellant associated her psychological distress primarily to management's denial of her request for advanced sick leave and comments made about retirement by Mr. Fernandez.

Regarding Mr. Heffelfinger's denial of appellant's request for advanced sick leave, the Board has held that actions of the employing establishment in matters involving the use of leave are generally not considered compensable factors of employment as they are administrative functions of the employer and not duties of the employee.[14] Approving or denying a leave request is an administrative function of a supervisor.[15] Mr. Heffelfinger denied her request for advanced sick leave because she had other types of leave available for her to use, including annual leave and credit time. He asserted that it was within the discretion of a manager to approve advanced sick leave requests only when the employee had no other forms of leave available. Appellant has not submitted any evidence showing error or abuse by management in denying her request for advanced sick leave and thus has failed to establish a compensable employment factor.

Appellant additionally alleged that Mr. Fernandez treated her disrespectfully by implying that she should retire. If disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from the employee's performance of her regular duties, these could constitute employment factors.[16] The evidence, however, must establish that the incidents of harassment or discrimination occurred as alleged to give rise to a compensable disability under the Act.[17] Additionally, verbal altercations

[12] *Dennis J. Balogh*, 52 ECAB 232 (2001).

[13] *Id.*

[14] *Judy L. Kahn*, 53 ECAB 321 (2002).

[15] *Beverly R. Jones*, *supra* note 10.

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

[17] *Id*.

and difficult relationships with supervisors, when sufficiently detailed by the claimant and supported by the record, may constitute factors of employment. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Act.[18] Appellant related that Mr. Fernandez spoke to her about retirement on January 26, 2006 when he accompanied her on a field investigation. He told her that "many people at the office that work just for a check and not for the work itself." Mr. Fernandez' comments to appellant about retirement on January 26, 2006 were general in nature rather than specific to her and thus do not show evidence of harassment or verbal abuse. On February 6, 2006 he noticed that appellant had straightened her desk and stated in front of coworkers that she had packed for retirement. Mr. Fernandez noted that he was joking when she asked him to treat her with respect. He followed appellant as she left the area and told her that he was her supervisor and told her to look into his eyes. Ms. Acevedo corroborated that Mr. Fernandez told her that she was about to retire and walked behind her demanding that she speak with him. Mr. Rodriguez also heard Mr. Fernandez tell appellant that she was ready to retire after noticing that she had cleaned her desk. She told him to treat her with respect and he maintained that he was joking. Mr. Fernandez requested that she calm down and told her that "it would not happen again." While the evidence supports that Mr. Fernandez mentioned that appellant was about to retire after seeing her clean desk, it further shows that he commented that he was joking. The witness statements do not provide evidence that the comment of Mr. Fernandez constituted verbal harassment under the circumstances.[19] Further, appellant has not shown how his comments about retirement would rise to the level of verbal abuse.[20] Consequently, she has not established a compensable employment factor.

Appellant further maintained that Mr. Fernandez referred to her as the "devil's horns" and touched her head. As discussed, the Board has recognized the compensability of physical threats or verbal abuse in certain circumstances.[21] Additionally, physical contact by a coworker or supervisor may give rise to a compensable work factor, if the incident occurred as alleged.[22] Mr. Heffelfinger asserted in his May 26, 2006 statement that Mr. Fernandez denied touching appellant's head and none of the witness statements corroborated her allegation that Mr. Fernandez referred to her as the "devil's horns" or touched her head. Even if substantiated, she has not shown how such a comment would rise to the level of verbal abuse or otherwise fall within coverage of the Act.[23]

Regarding appellant's allegation that Mr. Fernandez micromanaged her work, the Board has held that an employee's complaints concerning the manner in which a supervisor performs his duties as a supervisor or the manner in which a supervisor exercises his supervisory

[18] *Marguerite J. Toland*, *supra* note 11.

[19] *See Cyndia R. Harrill*, 55 ECAB 522 (2004).

[20] *Charles D. Edwards*, *supra* note 8.

[21] *Id*.

[22] *Denise Y. McCollum*, 53 ECAB 647 (2002).

[23] *Id*.

discretion fall, as a rule, outside the scope of coverage provided by the Act.[24] This principle recognizes that a supervisor or manager must be allowed to perform their duties and that employees will at times dislike the actions taken; however, mere disagreement or dislike of a supervisory or management action will not be actionable, absent evidence of error or abuse.[25] Appellant has not provided any specific examples of micromanagement or provided any evidence that her supervisor acted unreasonably and thus has not established a compensable employment factor.

Appellant generally related her emotional condition to her prior work injuries. The Board notes that an emotional condition related to pain and other limitations resulting from an employment injury is covered under the Act.[26] Appellant, however, has not alleged that she had pain and limitations due to a previous work injury or otherwise explained her contention. Thus, she has not established a compensable employment factor.

On appeal appellant argues that she submitted sufficient evidence to establish a *prima facie* case. As discussed above, however, as she failed to establish any compensable factors of employment, the Office properly denied her claim.[27]

CONCLUSION

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

[24] *See Judy L. Kahn*, *supra* note 14.

[25] *Id*.

[26] *Arnold A. Alley*, 44 ECAB 912 (1993).

[27] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Hasty P. Foreman*, 54 ECAB 427 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 6, 2007 and October 5 and June 30, 2006 are affirmed.

Issued: August 23, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board