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

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| **S.R., Appellant** | ) | |
| **and** | ) | **Docket No. 07-932** |
| | ) | **Issued: April 21, 2008** |
| **U.S. POSTAL SERVICE, POST OFFICE, Coppell, TX, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*No appearance,* for the Director

Oral Argument February 12, 2008

## DECISION AND ORDER

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

### ***JURISDICTION***

On February 21, 2007 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decisions dated April 6 and June 8, 2006 finding that she had not established an emotional condition due to her federal employment. She also requested review of nonmerit decisions dated August 28 and December 6, 2006. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit issues of this case.

### ***ISSUES***

The issues are: (1) whether appellant has met her burden of proof in establishing that she developed an emotional condition due to factors of her federal employment; and (2) whether the Office, on August 28 and December 6, 2006, properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

### ***FACTUAL HISTORY***

On September 10, 2005 appellant, then a 42-year-old secretary, filed an occupational disease claim alleging that she developed job-related stress due to her federal employment duties.

She stated that she first noticed her condition on August 18, 2005 and first related her condition to her employment on that date. Appellant stated, "I was made to feel denigrated and my managers made a difference between myself and the other employees."

By letter dated October 20, 2005, the Office requested additional factual and medical evidence in support of appellant's claim. The Office allowed 30 days for a response. Appellant submitted a narrative statement alleging that on March 14, 2005 her managers indicated that her detail would end in two weeks. She presented documentation supporting that her detail should continue to December 31, 2005. Following appellant's resistance to the end of her detail, she began to notice that she was treated differently from her coworkers. She stated that the delegation of workload changed and that her supervisors, Sheila Jennings and Alford Martinez, specifically designated the other secretaries to "work the mail" which excluded her from employing establishment operations. Appellant alleged that Mr. Martinez did not include her in a lunch order, noting that one coworker was on annual leave and that she would be answering the telephones rather than attending the meeting. She alleged that, in the past, all the secretaries were provided lunch. Appellant raised these issues with her supervisors.

Appellant filed an Equal Employment Opportunity (EEO) complaint on August 16, 2005 alleging discrimination based on her race and sex. She stated that the employing establishment ended her detail on August 11, 2005 and replaced her with a white female who she trained, Noma White. Appellant contended that she was better qualified than the employee who replaced her. She stated that the supervisors delegated work to either Ms. White or Judy Allumbaugh, a white female, rather than to her. Appellant stated that she was excluded from the department through instructions to her coworkers to work the mail and the failure to include her when ordering lunch.

Mr. Martinez completed a statement on October 11, 2005 and denied any changes or disparity in workload assignments. He stated that Ms. Allumbaugh was provided with lunch when she attended a meeting on his behalf. Mr. Martinez noted that appellant informed him in the last week of July 2005 that she felt underutilized and he assured her that more of her skills would be utilized in the future as a coworker was going to be detailed beginning in August 2005. Appellant informed Mr. Martinez on August 8, 2005 that she was unhappy and needed a change. Mr. Martinez requested that appellant continue in her position for the remainder of the week and she did so.

Appellant responded to the Office's request for factual information on November 17, 2005 alleging that the employing establishment ended her detail on August 11, 2005 and placed Ms. White in her position while she was undergoing surgery in May 2004. She stated that following her return from medical leave she noticed that her workload was decreased. Appellant stated that Ms. Jennings and Mr. Martinez began designating assignments rather than placing the assignments in a general inbox. She reiterated that assignments were made to Ms. White and Ms. Allumbaugh rather than to her. Appellant stated that she no longer received training. She discussed the situation with Ms. Allumbaugh. Appellant attributed her emotional condition to: "[B]eing replaced by the person I trained, watching the person I trained being trained in depth on jobs that I haven't even been trained on, keeping up with all of my time and not even keeping a record … on annual leave for [Ms.] White." She reiterated that she was not included on the lunch order for a meeting on July 26, 2005, that she felt her job assignments were eliminated,

and that she was not included in work discussions, but informed later by Ms. White rather than the prior practice of a group meeting. Appellant discussed this situation with Mr. Martinez on July 28, 2005. On August 8, 2005 she stated that she was informed of a mistake by a supervisor and referred to as a "girl." Appellant stated that this was an inference that the other secretaries did not make mistakes. She reported her concerns to her supervisor as well as to Carl January, the district manager, who called a "Round Table" discussion on August 11, 2005 which excluded Nat Harris, an African-American male and Marilyn McLendon, an African-American female. Following this meeting, Mr. January instructed appellant to return to the work floor and Mr. Martinez contacted the plant manager, Eric Martinez, and informed him that appellant's detail ended on August 11, 2005.

Appellant submitted medical evidence diagnosing major depressive disorder and generalized anxiety disorder. She included a work-hour transfer which provided that her detail to secretary of post office operations would begin on December 11, 2004 and end on December 31, 2005. Appellant submitted statements from her husband, a friend and her mother. She also submitted an e-mail from Alford Martinez stating, "Per our conversation [appellant's] last day in [p]ost [o]ffice operations is today. She has requested annual leave for Friday, August 12, 2005."

Ms. Jennings submitted a statement, received on November 23, 2005, that she never witnessed appellant being treated differently than the other secretaries. She stated that she occasionally assigned Ms. White or Ms. Allumbaugh a task because one or the other was involved in the work at an earlier stage. Ms. Jennings noted that on the holidays she bought all the secretaries the same gifts.

By decision dated December 19, 2005, the Office denied appellant's claim for an emotional condition finding that she failed to substantiate a compensable factor of employment.

Appellant requested reconsideration on March 16, 2006. In support of her request, she submitted additional medical evidence. By decision dated April 6, 2006, the Office reviewed appellant's claim on the merits and denied modification of its prior decision.

Appellant requested reconsideration on April 26, 2006. She alleged that she experienced racial discrimination, that her supervisors ended her detail so as to replace her with Ms. White, and that she did not request an end to her detail. Appellant disagreed with the Office's finding of facts regarding actions of her husband and the statement that she needed a change and therefore requested an end to her detail. By decision dated June 8, 2006, the Office considered the merits of appellant's claim and made additional factual findings. The Office determined that appellant had not substantiated any compensable factors of employment and denied her claim for an emotional condition arising out of factors of her federal employment.

Appellant requested reconsideration on August 7, 2006 disagreeing with the Office's factual findings. She stated that she requested one day of annual leave for August 12, 2005 and reported to work on August 15, 2005 as directed. Appellant submitted an "Investigative Summary" in which she alleged discrimination based on the ending of her detail on August 12, 2005 and her replacement by Ms. White. She asserted that she did not request to end her detail and was not given any explanation as to why she was replaced by Ms. White. Appellant noted

that Ms. White was also on detail to the Postal Operations office. She discussed the failure of Eric Martinez to order lunch for her while Ms. Allumbaugh received a catered lunch. Appellant submitted a series of e-mails addressing how many managers planned to attend the meeting. The e-mails specifically noted that it was not necessary to include appellant and Ms. White as Ms. White was utilizing leave and appellant would be covering the office.

On December 2, 2005 Ms. Jennings denied that appellant's race was a causative factor in the decision to end her detail. She stated that, if she assigned work to Ms. White or Ms. Allumbaugh, it was not to discriminate against appellant but to lighten her own workload. Ms. Jennings noted that Ms. White and Ms. Allumbaugh asked for work and were sometimes already involved in work making it easier to have them continue the job rather than offer more extensive explanations necessary to bring appellant up to speed. She asked appellant to report to her office prior to the August 11, 2005 meeting to discuss an error appellant made in scheduling interviews. Ms. Jennings alleged that appellant became angry before the conversation began and that appellant informed her that she had something to tell her as well. She stated, "I told her that I depended on the "girls" to ensure things were done correctly." Ms. Jennings alleged that appellant became belligerent and asserted that she was not a girl. She stated, "I had not called her a 'girl.' 'Girls' is a term I use in referring to the secretaries. I have even included myself in that term." Ms. Jennings asserted that she then asked what appellant wanted to tell her and that appellant stated that she was leaving.

By decision dated August 28, 2006, the Office declined to reopen appellant's claim for review of the merits on the grounds that she had not raised substantive legal questions nor included new and relevant evidence.

Appellant requested reconsideration on October 12, 2006 and submitted medical evidence. She resubmitted statements from her mother and husband and her EEO complaint. By decision dated December 6, 2006, the Office refused to reopen appellant's claim for consideration of the merits on the grounds that the evidence she submitted was not relevant and pertinent new evidence requiring a merit review.

## ***LEGAL PRECEDENT -- ISSUE 1***

Workers' compensation law does not apply to each and every injury or illness that is somehow related 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.[1] 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.[2]

[1] 5 U.S.C. §§ 8101-8193.

[2] *See Thomas D. McEuen*, 41 ECAB 387, 390-91 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125, 129 (1976).

Generally, actions of the employing establishment in administrative or personnel matters unrelated to the employee's regular or specially assigned work duties, do not fall within the coverage of the Act.[3] While an administrative or personnel matter will be considered an employment factor where the evidence discloses error or abuse on the part of the employing establishment, mere perceptions are insufficient. In determining whether the employing establishment erred or acted abusively, the Board determines whether the employing establishment acted reasonably.[4] Although the handling of leave requests and attendance matters are generally related to employment, they are administrative functions of the employer and not duties of the employee. As a general rule, a claimant's reaction to administrative or personnel matters falls outside the scope of the Act. However, to the extent that the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.[5]

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.[6]

For harassment or discrimination to give rise to a compensable disability, there must be evidence which establishes that the acts alleged or implicated by the employee did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act.[7] A claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.[8] A claimant must establish a factual basis for his or her allegations of harassment or discrimination with probative and reliable evidence.[9] Grievances and Equal Employment Opportunity (EEO) complaints by themselves do not establish that workplace harassment or discrimination occurred. The issue is whether the claimant has submitted sufficient evidence under the Act to establish a factual basis for the claim by supporting her allegations with probative and reliable evidence. The primary reason for requiring factual evidence from the claimant in support of 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]

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[3] *James E. Norris*, 52 ECAB 93, 100 (2000).

[4] *Bonnie Goodman*, 50 ECAB 139, 143-44 (1998).

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

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

[7] *Reco Roncoglione*, 52 ECAB 454, 456 (2001).

[8] *Penelope C. Owens*, 54 ECAB 684, 686 (2003).

[9] *Beverly R. Jones*, 55 ECAB 411, 417 (2004).

[10] *David C. Lindsey, Jr.*, 56 ECAB 263, 268 (2005).

## ***ANALYSIS -- ISSUE 1***

Appellant attributed her emotional condition to alleged changes in her work environment on and after March 2005. She contended that the distribution of work by Alford Martinez and Ms. Jennings changed. Both Alford Martinez and Ms. Jennings denied this allegation, but noted that occasionally a specific secretary was designated to perform a specific task. Appellant alleged that Ms. White was not required to compute her leave as she was. The Board has held that the assignment of work duties and leave requests relates to administrative or personnel matters, unrelated to regular or specially assigned work duties and do not fall within the coverage of the Act. Appellant further alleged that Ms. White was provided with training which she felt that she should receive. The Board has also held that administrative and personnel matters include matters involving training of employees.[11] Although these activities are generally related to the employment they are administrative functions of the employer and not duties of the employee.[12] Appellant has not established error or abuse on the part of her supervisors in the assignment of work duties and training or in the processing of leave requests.

Appellant attributed her emotional condition to a supervisor's statement on August 18, 2005 referring to her as a "girl." 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.[13] Appellant has not submitted sufficient factual evidence to establish that she was a "girl," as alleged. Therefore she has not established verbal abuse as a compensable factor of employment.

Appellant attributed her emotional condition to her supervisors attempt to end her detail in March 2005 and then end her detail in August 2005. The Board has held that any emotional condition resulting from a change in assignments such as the end of a detail is the result of frustration in not holding a particular position or being permitted to work in a particular environment which is not compensable under the Act.[14] Appellant also attributed her emotional condition to the failure of Alford Martinez to provide her with lunch when a meeting was under way. She alleged that in the past all the secretaries were provided with lunch. These allegations do not relate to her regular or specially assigned duties. Appellant's frustration from not beginning permitted to work in a particular environment where all employees are provided with lunch whether or not the employee attends a scheduled meeting is not compensable.[15]

To the extent that incidents alleged as constituting discrimination by supervisors are established as occurring and arising from appellant's performance of her regular duties, these

[11] *Phillip L. Barnes*, 55 ECAB 426 (2004).

[12] *Peter D. Butt, Jr.*, 56 ECAB 117, 123-24 (2004).

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

[14] *Katherine A. Berg*, 54 ECAB 262, 265 (2002).

[15] *Id.*

could constitute employment factors. As noted above, for discrimination to give rise to a compensable disability under the Act, there must be evidence that discrimination did in fact occur.[16] Mere perceptions of discrimination are not compensable under the Act.[17] In the present case, appellant has not submitted sufficient evidence to establish her claim. She alleged that she was denigrated and discriminated against through the above-described actions of her supervisors, but failed to submit any evidence that the alleged discrimination actually occurred.

The record establishes that appellant filed an EEO complaint. Grievances and EEO complaints, by themselves, do not establish that workplace discrimination or unfair treatment occurred. Where an employee alleges discrimination and cites specific incidents, the Office or other appropriate fact finder must determine the truth of the allegations. The issue is not whether the claimant has established harassment or discrimination under EEO Commission standards. Rather the issue is whether the claimant, under the Act, has submitted sufficient evidence to establish a factual basis for the claim by supporting her allegations with probative and reliable evidence. Appellant has failed to do so in this case.

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.[18]

## ***LEGAL PRECEDENT -- ISSUE 2***

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[19] the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[20] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[21]

## ***ANALYSIS -- ISSUE 2***

Appellant requested reconsideration of the Office's June 8, 2006 merit decision on August 7, 2006. In support of her request, she again disagreed with the Office's finding of fact. Appellant submitted a series of e-mails addressing the lunch order for the meeting. She also submitted a statement from Ms. Jennings dated December 2, 2005 denying discrimination in the

[16] *V.W.*, 58 ECAB ___ (Docket No. 07-234, issued March 22, 2007).

[17] *Id.*

[18] 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, 502-03 (1992).

[19] 5 U.S.C. §§ 8101-8193, § 8128(a).

[20] 20 C.F.R. § 10.606(b)(2).

[21] 20 C.F.R. § 10.608(b).

ending of appellant's detail. Ms. Jennings also addressed the allegation that she referred to appellant as a "girl."

The Board finds that appellant has submitted relevant and pertinent new evidence not previously considered by the Office. The Office had not reviewed any statement by Ms. Jennings regarding appellant's allegation that she was referred to as a "girl." The requirements for reopening a claim for merit review do not include the requirement that a claimant submit all evidence which may be necessary to discharge his or her burden of proof. The requirements pertaining to the submission of evidence in support of reconsideration only specify that the evidence be relevant and pertinent and not previously considered by the Office.[22] This evidence is relevant and pertinent to appellant's allegations of verbal abuse and discrimination. The Office has not previously considered this evidence in a merit decision. This evidence is sufficient to require the Office to reopen appellant's claim for further consideration of the merits. On remand, the Office should review the new evidence submitted in support of her August 7, 2006 reconsideration request and issue an appropriate decision.[23]

## ***CONCLUSION***

The Board finds that appellant has not submitted the necessary factual evidence to substantiate a compensable factor of employment as causing or contributing to her emotional condition. The Board further finds that the Office improperly declined to reopen appellant's claim for consideration of the merits on August 28, 2006 and remands the case for further development consistent with this decision of the Board.

[22] *Donald T. Pippin*, 54 ECAB 631 (2003).

[23] Due to the disposition of this issue, it is not necessary for the Board to address whether the Office properly declined to reopen appellant's claim for consideration of the merits on December 6, 2006.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the June 8 and April 6, 2006 decisions of the Office of Workers' Compensation Programs are affirmed. The December 6 and August 28, 2006 decisions are set aside and the case is remanded for further development consistent with this decision of the Board.

Issued: April 21, 2008
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