

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

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D.H., Appellant )  
 )  
and )  
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DEPARTMENT OF VETERANS AFFAIRS, )  
VETERANS ADMINISTRATION )  
OUTPATIENT CLINIC, Columbus, OH, )  
Employer )  
\_\_\_\_\_ )

Docket No. 07-1919  
Issued: January 24, 2008

*Appearances:*  
*Appellant, 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  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On May 23, 2007 appellant filed a timely appeal from the Office of Workers’ Compensation Programs’ June 27, 2006 and April 27, 2007 merit decisions denying her emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

**ISSUE**

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

**FACTUAL HISTORY**

On December 14, 2005 appellant, then a 40-year-old staff assistant, filed a claim alleging that she sustained depression due to being harassed by a supervisor. She stopped work on October 25, 2005.

In several statements, appellant alleged that she was harassed by Dr. Lilian Thome, a supervisor. She claimed that on June 23, 2005 when she was describing a roller coaster ride Dr. Thome stated, "You are lucky that your last ovary did not fall out." Appellant claimed that Dr. Thome made this statement in the presence of coworkers and then laughed. She asserted that on June 24, 2005 she declined to participate in a car wash for employees and Dr. Thome responded in the presence of coworkers, "Who do you think you are Princess Sahara?" Appellant claimed that Dr. Thome visited her in the hospital on October 24, 2005 while she was recovering from an ovarian cyst condition and commented that she was "cheaply made" or "cheaply put together." She alleged that Dr. Thome harassed her by discussing her private medical information, including information about gynecological problems, with other employing establishment officials. Appellant claimed that on November 3, 2005 Dr. Thome discussed her private medical information in front of Dr. Miguel H. Lapuz, a supervisor, despite her request that Dr. Lapuz not be present. She claimed that Dr. Thome would "shun" her whenever she became sick. Appellant claimed that after her work duties changed her coworkers began to whisper about her.

Appellant claimed that on June 27, 2005 she was advised that duties were being removed from her position and that she would receive a reduction in grade. She alleged that, after this meeting, her work duties declined and she had fewer communications with Dr. Thome. Appellant asserted that she no longer had weekly meetings with Dr. Thome, that she was given assignments by a third party and that she was excluded from "executive level activities." She claimed that management unfairly denied her requests to telecommute and did not make adequate attempts to accommodate her physical condition. Appellant asserted that after she returned to work in January 2006 Dr. Thome told her that she no longer needed a staff assistant and advised her that she would be working for someone else. She claimed that she did not receive a proper description of her new position until March 2006. Appellant alleged that management unfairly requested certain medical reports to justify leave requests.

Appellant submitted medical reports from attending physicians, including reports from Dr. Samuel Dixon, an attending clinical psychologist. She also submitted documents from an Equal Employment Opportunity (EEO) claim she filed.

In a May 5, 2006 statement, Dr. Thome denied that she subjected appellant to harassment or discrimination. She asserted that on October 24, 2005 she visited appellant in the health unit and told a story about how her own husband complained of blisters and joked that he was "put together cheap." Dr. Thome claimed that she did not intend to embarrass or belittle appellant and stated, "I was not comparing [appellant's] condition with my husband's and was merely trying to lighten the moment for her." She indicated that appellant laughed at the comment which led her believe that she did not take offense. Dr. Thome indicated that appellant could not telecommute because her job required her to work on site. The record contains an October 26, 2005 email in which Dr. Thome apologized to appellant for talking about how her own husband had foot blisters and was "put together cheap." She stated, "I was trying to make your day less stressful by sort of comparing your situation. Of course, they are not similar."

In a June 27, 2006 decision, the Office denied appellant's claim on the grounds that she did not establish any compensable employment factors. The Office found that appellant was not

subjected to harassment or discrimination and that the employing establishment did not commit error or abuse with respect to administrative matters.

Appellant requested a hearing before an Office hearing representative. At the January 11, 2007 hearing, she provided further details regarding her claimed employment factors. Appellant claimed that after she was told that her job did not exist she did not receive certain information, including information about budget matters. She claimed that she was unfairly terminated in December 2006 for unexcused absences and failure to perform her work.

Appellant submitted additional medical evidence and numerous documents related to her EEO claim including several transcripts conducted by EEO officials. In an August 17, 2006 interview, Dr. Thome again denied that she harassed appellant and repeated her account of the statements she made about her own husband being “cheaply made.” In an August 23, 2006 interview, Debra Shiley, a management official, indicated that she did not have any reason to believe that Dr. Thome inappropriately shared appellant’s private medical information. In another August 23, 2006 interview, Teri Mzozoyana, a management official, stated that Dr. Thome submitted paperwork regarding appellant’s telecommuting request but it was determined that the nature of her work prevented her from working at home. She indicated that appellant’s job changed in January 2006 because a new associate director was hired and there was a shift in the work load.

In an April 27, 2007 decision, the Office hearing representative affirmed the Office’s June 27, 2007 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.<sup>1</sup> 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>2</sup>

Appellant 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.<sup>3</sup> This burden includes the submission of a detailed

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff’d on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>3</sup> *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.<sup>4</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 factors of employment and may not be considered.<sup>5</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>6</sup>

### ANALYSIS

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

Appellant alleged that she was subjected to harassment and discrimination by Dr. Thome, a supervisor. She claimed that Dr. Thome made a comment about her ovary falling out and called her "Princess Sahara" after she declined to participate in a car wash for employees. Appellant asserted that Dr. Thome visited her in the hospital on October 24, 2005 while she was recovering from an ovarian cyst condition and commented that she was "cheaply made" or "cheaply put together." She alleged that Dr. Thome harassed her by discussing her private medical information, including information about gynecological problems, with other employing establishment officials. Appellant claimed that Dr. Thome would "shun" her whenever she became sick. She claimed that after her work duties changed her coworkers began to whisper about her.

To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.<sup>7</sup> However, for harassment or discrimination to give rise to a compensable disability under the Act,

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<sup>4</sup> *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

<sup>5</sup> *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

<sup>6</sup> *Id.*

<sup>7</sup> *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.<sup>8</sup>

In the present case, the employing establishment denied that appellant was subjected to harassment or discrimination and she has not submitted sufficient evidence to establish that she was harassed or discriminated against by her supervisors or coworkers.<sup>9</sup> Appellant alleged that supervisors and coworkers made statements and engaged in actions which she believed constituted harassment and discrimination, but she provided no corroborating evidence, such as witness statements, to establish that the statements actually were made or that the actions actually occurred.<sup>10</sup> In particular, there is no evidence that Dr. Thome improperly shared private medical information, made the comments about her ovary falling out or called her “Princess Sahara.” Appellant filed an EEO complaint about some of these matters but the record does not contain a final decision concerning this complaint which shows that the employing establishment committed harassment or discrimination.

With respect to appellant’s allegations that Dr. Thome stated that she was “cheaply made” or “cheaply put together,” there is no evidence that Dr. Thome made such comments about appellant. Dr. Thome testified that she actually stated that her own husband was “put together cheap” as a means of lightening the situation for appellant. She asserted that she had no intent to embarrass or belittle appellant and that appellant actually laughed at the comment. 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.<sup>11</sup> Appellant has not shown how such an isolated and seemingly innocent comment would rise to the level of verbal abuse or otherwise fall within the coverage of the Act. Thus, she has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

Appellant claimed that on June 27, 2005 she was advised that duties were being removed from her position and that she would receive a reduction in grade. She alleged that after this meeting her work duties declined and she had fewer communications with Dr. Thome, that she was given assignments by a third party and that she was no longer privy to certain information. She claimed that management unfairly denied her requests to telecommute and did not make adequate attempts to accommodate her physical condition. Appellant asserted that after she returned to work in January 2006 Dr. Thome told her that she no longer needed a staff assistant and advised her that she would be working for someone else. She alleged that management unfairly requested certain medical reports to justify leave requests and issued her unfair disciplinary actions.

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<sup>8</sup> *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

<sup>9</sup> *See Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

<sup>10</sup> *See William P. George*, 43 ECAB 1159, 1167 (1992).

<sup>11</sup> *Harriet J. Landry*, 47 ECAB 543, 547 (1996).

Regarding appellant's allegations that the employing establishment improperly assigned work duties, incorrectly handled job transfers and accommodation requests, engaged in improper disciplinary actions and wrongly denied leave, 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>12</sup> Although the handling of such matters are generally related to the employment, they are administrative functions of the employer and not duties of the employee.<sup>13</sup> However, the Board has also found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.<sup>14</sup>

The Board finds that appellant did not submit sufficient evidence to establish that the employing establishment committed error or abuse with respect to these matters. Moreover, employing establishment officials explained that proper procedures were followed with respect to such matters as work assignments, job transfers, leave usage and telecommuting requests. For example, a management official stated that Dr. Thome submitted paperwork regarding appellant's telecommuting request but it was determined that the nature of her work prevented her from working at home. The same official noted that appellant's job changed in January 2006 because a new associate director was hired and there was a shift in the work load. Thus, appellant has not established a compensable employment factor under the Act with respect to administrative matters.

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.<sup>15</sup>

### CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained an emotional condition in the performance of duty.

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<sup>12</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>13</sup> *Id.*

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

<sup>15</sup> 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).

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' April 27, 2007 and June 27, 2006 decisions are affirmed.

Issued: January 24, 2008  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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