

In an accompanying statement, appellant related that she informed Ms. Kayser on February 6, 2008 by telephone that she had overslept and would be late. When she arrived at work she bandaged her injured thumb with special tape. Ms. Kayser asked appellant why she came to work if her thumb was bothering her. In a raised voice she told appellant to stock items. Ms. Kayser took appellant into her office and yelled that she was not doing her job and should not help the customers with their trays and coffee. Appellant related:

“She told me I was too nice and that we didn’t need nice people in this world. I told her that she was crazy and she was jealous of me. I’ve only been there a short time and people like me. She then told me I was crazy and that I just needed to keep my mouth shut. Just stock and cashier and stop being so nice. I asked her to stop yelling at me because I started not feeling well. But she continued. She told me that I never wiped down the counters, clean the coffee pots, this and that. I asked her to stop. She told me to go home, that it was okay, and that I didn’t need to come in tomorrow and for me to think about everything that we talked about not needing nice people in this world (in a hateful tone). She finally opened the door so I could get out.”

After she left Ms. Kayser’s office, appellant experienced difficulty breathing and went to the hospital. She asserted that the incident with Ms. Kayser caused a myocardial infarction.

In a statement received by the Office on April 28, 2008, Ms. Kayser noted that she hired appellant and two other employees in October 2007. She related that appellant did not believe that she needed to help with cleaning or stocking items. When the time came for cleaning or stocking, appellant would tell customers about her family problems. Ms. Kayser stated that on February 6, 2008 appellant called her for the second time in a week to say that she had overslept. When appellant got to work, she wrapped her finger up and then picked up a rag and waited for someone to ring it out. Ms. Kayser told her to ring the rag out herself with gloves on. Appellant replied that she could not get her finger wet. Ms. Kayser asked if she wanted to see a physician but appellant declined. She told appellant not to stack muffins and pastries on top of each other and to remove any extras. Ms. Kayser left to stock items. Appellant became angry and, using profanity, told the other employees and customers that she did not care what Ms. Kayser thought and was not coming to work the following day. Ms. Kayser asked appellant to come in her office and told her that she was supposed to follow instructions. She told appellant that she did not adequately clean the condiment table or the coffee drain. Ms. Kayser related that appellant, in a raised voice, told her that she was jealous because she had a relationship with the customers and employees. She asked if she was joking and told her that she could be polite but to stop telling her personal problems at work. Ms. Kayser stated:

“Then it hit me what [appellant] said about me and I stood up and told her our conversation was over, I then opened the door and looked at [her] and told her she needed to go home and think [whether] she liked her job or wanted her job and to call me later and let me know if she was coming back to work tomorrow. [Appellant] said she needed to get her stuff so she could leave[;] I said okay.”

In an undated statement received April 28, 2008, Mary Anne Drake, a coworker, related that on February 6, 2008 Ms. Kayser opened her office door and told appellant “that the conversation was over and she needed to just go home and think about whether she liked her job and to call and let her know if she was coming to work tomorrow. [Appellant] said she needed to get her things and [Ms. Kayser] said okay.”¹

In another undated statement, Toni Robinson, a coworker, related that on February 6, 2008 appellant came in late and complained that she should not have had to come to work.² Appellant also told her customers about her problems. Ms. Robinson told Ms. Kayser about appellant’s behavior.

In a statement dated May 14, 2008, appellant related that on February 6, 2008 Ms. Kayser yelled that she was not doing her job.³ She went to Ms. Kayser office. Ms. Kayser told appellant not to assist the customers with their trays. She instructed appellant to go home and think about their conversation and informed her that she did not have to come in the following day. Ms. Kayser also said that the world did not need nice people. Appellant related that she experienced shortness of breath and went to the hospital.

Melba Everly, a customer, related that she saw Ms. Kayser yell at appellant and chastise her for being nice to customers. She related that she had “never witnessed a supervisor treating an employee in such an unpleasant manner in front of others before.” On May 6, 2008 Frank Delarmi, another customer, related that appellant’s supervisor “berated her in a demeaning manner” for stating that she would bring him his meal.

By decision dated June 2, 2008, the Office denied appellant’s claim on the grounds that she did not establish an injury as alleged.

On June 20, 2008 appellant requested a telephone hearing held on October 15, 2008. She related that she was doing her job of “taking care of people” when Ms. Kayser yelled at her and assigned her other tasks. Appellant spoke with her in her office about not stacking muffins on top of each other. Ms. Kayser cursed and used profanity during the meeting, including calling appellant a “fu_king idiot.” She told appellant not to carry out trays or coffee for the customers. Ms. Kayser informed appellant that she should take a couple of days to “think about being nice” and told her that the world did not need nice people. She also told appellant to get “the fu_k out” of her office before she opened the door. Appellant related that she may have called her Ms. Kayser a bitch but did not use any other profanity.

¹ The record also contains a statement from Wendy Goldacker, Ms. Kayser’s daughter. Ms. Goldacker related that she heard appellant yelling during the February 6, 2008 meeting.

² Ms. Robinson indicated that she was describing an incident occurring on January 6, 2008; however, this appears to be a typographical error.

³ In a report dated March 6, 2008, Dr. Robert L. Barrett opined that work stress “may have triggered the myocardial infarction that she had.”

In a dated November 13, 2008 affidavit, Ms. Kayser asserted that appellant spoke to coworkers and customers about personal problems.⁴ She told her not to stack muffins on top of each other and she protested loudly. Ms. Kayser “let it go” and went back to work. Ms. Robinson heard appellant stating that she was “not coming to work tomorrow because she is sick and tired of Ms. Kayser’s sh_t.” Ms. Kayser talked to appellant in her office about their differences. She stated:

“I told [appellant] that I had several concerns to include her talking to other employees and customers and telling them her personal business and not concentrating on accomplishing her work because she spent too much time talking to other employees and customers. I also told her that as her supervisor I expected her to do her job without questioning everything I say and complaining to other employees.

“[Appellant] then started to raise her voice stating she did a good job and she knew what the problem was. [She] stated I was jealous of her relationship with the customers and I could not stand that everyone liked her because she was nice. I told her it was ok to be nice and polite but, she needed to focus and do her job as well and stop telling everyone about her personal problems.”

Ms. Kayser related that appellant began yelling at her in an aggressive manner. She stated that she “told [appellant] this discussion was over and she was relieved of duty. I told her she needed to go home and decide if this job was important to her and to call me later that day to let me know if she would be at work tomorrow.”

On October 28, 2008 Gary R. Allison, a manager, maintained that appellant often spoke of personal problems to others including customers. He indicated that he had never witnessed Ms. Kayser swearing or yelling.

On October 30, 2008 the employing establishment controverted appellant’s claim, noting that what she stated at the hearing differed from her initial statement. On November 20, 2008 appellant’s attorney argued that she was in the performance of duty when she sustained her injury.

By decision dated January 6, 2009, the hearing representative affirmed the June 2, 2008 as modified. She noted that appellant did not maintain that Ms. Kayser cursed at her until the hearing. The hearing representative found that she had not established a compensable work factor.

On appeal, appellant’s attorney contends that the Office did not properly develop the issue of whether Ms. Kayser used profanity or yelled at appellant. He noted that the employing establishment did not specifically ask Ms. Kayser whether she called her a “fu_king idiot” or whether she told her to go home and consider whether she wanted to remain in her job. The

⁴ The record contains a statement from a coworker who indicated that she had not witnessed Ms. Kayser yelling or swearing at other employees or customers.

attorney also argues that discussing appellant's work performance constitutes a compensable employment factor.

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 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 frustration from not being permitted to work in a particular environment or to hold a particular position.⁶

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under the Act.⁷ 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.⁸ 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.⁹

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.¹⁰ 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.¹¹ 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.¹² The primary reason for

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

⁶ *Gregorio E. Conde*, 52 ECAB 410 (2001).

⁷ See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990); *reaff'd on recon.*, 42 ECAB 556 (1991).

⁸ See *William H. Fortner*, 49 ECAB 324 (1998).

⁹ *Ruth S. Johnson*, 46 ECAB 237 (1994).

¹⁰ See *Michael Ewanichak*, 48 ECAB 364 (1997).

¹¹ See *Charles D. Edwards*, 55 ECAB 258 (2004); *Parley A. Clement*, 48 ECAB 302 (1997).

¹² See *James E. Norris*, 52 ECAB 93 (2000).

requiring factual evidence from the claimant in 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.¹³

The Board has recognized the compensability of physical threats or verbal abuse in certain circumstances. This does not imply, however, that every statement uttered in the workplace will be covered under the Act.¹⁴ A raised voice in the course of a conversation does not, in and of itself, warrant a finding of verbal abuse.¹⁵

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.¹⁶ 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.¹⁷

ANALYSIS

Appellant alleged that she sustained an emotional condition as a result of a number of employment incidents and conditions. 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 and conditions of employment are covered employment factors under the terms of the Act.

Appellant attributed her myocardial infarction to harassment, verbal abuse and criticism of her job performance by Ms. Kayser on February 6, 2008. In the statement accompanying her claim, she related that Ms. Kayser yelled at her to stock items instead of doing her job as a cashier. Ms. Kayser took appellant into her office and, in a raised voice, told her that she should not assist customers with their trays and coffee. She maintained that appellant did not perform her work duties like wiping the counters and cleaning coffee pots and complained that she was too nice. Ms. Kayser told appellant to go home and that she needed to think about what they talked about, including the fact that the world did not need nice people. At the telephone

¹³ *Beverly R. Jones*, 55 ECAB 411 (2004).

¹⁴ *Id.*; *Cyndia R. Harrill*, 55 ECAB 522 (2004).

¹⁵ *Karen K. Levene*, 54 ECAB 671 (2003).

¹⁶ *Dennis J. Balogh*, 52 ECAB 232 (2001).

¹⁷ *Id.*

hearing, appellant asserted that Ms. Kayser called her a “fu_king idiot” and to get the “fu_k out” of her office. She stated that she may have called her Ms. Kayser a “bitch.”

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.¹⁸ 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.¹⁹ Additionally, verbal altercations 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.²⁰ In a statement received April 28, 2008, Ms. Kayser related that appellant believed that she only had to work the cash register and not stock items. Appellant also told customers about her family problems. On February 6, 2008 she became angry after Ms. Kayser told her not to stack muffins and pastries on top of each other. Using profanity, Ms. Kayser informed appellant’s coworkers and customers that she did not care what her supervisor thought and was not coming to work the next day. She took appellant to her office and told her to follow instructions. In a raised voice appellant accused Ms. Kayser of being jealous of her relationship with the other employees and customers. Ms. Kayser responded that appellant should stop telling everyone her personal problems and to go home and think about whether she wanted to return to work the next day. In a statement dated November 13, 2008, she related that appellant yelled in an aggressive manner during the meeting.

Appellant has not shown how Ms. Kayser’s instructing her to stock items or calling her into her office for a discussion about job performance constituted harassment. Further, she has not submitted any evidence corroborating her contention that Ms. Kayser yelled and swore at her during the February 6, 2008 meeting. Appellant submitted statements from two customers who related that on an unspecified date Ms. Kayser yelled and berated her because she helped customers. The issue, however, is whether Ms. Kayser verbally abused her on February 6, 2008. Appellant has not factually established her allegations of verbal abuse by Ms. Kayser on February 6, 2008 and thus has not established a compensable work factor.²¹

On appeal, appellant’s attorney contends that the Office erred in failing to further develop whether Ms. Kayser yelled or used profanity in the February 6, 2008 meeting. He notes that Ms. Kayser did not specifically deny that she called appellant a “fu_king idiot.” A raised voice in the course of a conversation, however, does not, in and of itself, warrant a finding of verbal abuse.²² Additionally, even if it were established that Ms. Kayser used an isolated vulgar comment in the February 6, 2008 meeting, the record shows that appellant used profanity during

¹⁸ *Janice I. Moore*, 53 ECAB 777 (2002).

¹⁹ *Id.*

²⁰ *Marguerite J. Toland*, 52 ECAB 294 (2001).

²¹ *David S. Lee*, 56 ECAB 602 (2005).

²² *Karen K. Levene*, *supra* note 15.

the exchange by calling her supervisor a “bitch.” Under such circumstances, the mere utterance of an epithet which may engender offensive feelings in an employee does not sufficiently affect the conditions of employment to constitute a compensable factor.²³

Regarding Ms. Kayser’s criticism of appellant’s work during the February 6, 2008 meeting, the Board has characterized supervisory discussions of job performance and reprimands as administrative or personnel matters of the employing establishment, which are covered only when a showing of error or abuse is made.²⁴ Appellant has not submitted evidence establishing error or abuse by her supervisor in discussing her work performance on February 6, 2008. Consequently, she has not shown a compensable work factor.

On appeal, appellant’s attorney contends that a discussion of work performance constitutes a compensable work factor. Administrative or personnel matters, however, while generally related to the employee’s employment are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under the Act absent error or abuse.²⁵

CONCLUSION

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

²³ *Denis M. Dupor*, 51 ECAB 482 (2000).

²⁴ *David C. Lindsey, Jr.*, 56 ECAB 263 (2005).

²⁵ *C.T.*, 60 ECAB ____ (Docket No. 08-2160, issued May 7, 2009).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 6, 2009 is affirmed.

Issued: February 25, 2010
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