

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

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**D.C., Appellant**

**and**

**DEPARTMENT OF THE NAVY, NAVAL AIR  
STATION, San Diego, CA, Employer**

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**Docket No. 09-1087  
Issued: July 13, 2010**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On March 16, 2009 appellant filed a timely appeal from the January 6, 2009 merit decision of the Office of Workers' Compensation Programs that denied her emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the merits of the claim.

**ISSUE**

The issue is whether appellant sustained an emotional condition in the performance of duty.

**FACTUAL HISTORY**

Appellant, a 54-year-old former electronic integrated systems mechanic, filed a May 4, 2007 claim for employment-related depression and anxiety.<sup>1</sup> She identified March 20, 2000 as

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<sup>1</sup> Appellant also noted she had post-traumatic stress disorder (PTSD), which had previously been linked to a sexual assault that occurred during her military service.

the date she first realized her condition was employment related. Appellant alleged a hostile work environment, sexual harassment, derogatory name calling and that coworkers spread rumors about her being a child molester. She also alleged being falsely accused of a crime and abused by the Naval Criminal Investigative Service (NCIS) and improperly charged absence without leave (AWOL).

The employing establishment controverted appellant's claim; rather it attributed her emotional reaction to recent disciplinary actions. Beginning in November 2006, appellant was investigated, charged, suspended and ultimately relieved of her duties for unauthorized use of a government computer system and use of Privacy Act information.<sup>2</sup>

In a July 24, 2007 statement, appellant described numerous events over the previous decade that contributed to her claimed psychiatric condition. She alleged sexual harassment by Jim Page, a former supervisor, and two coworkers, Hunter Cross and Lazar Lopez. In June or July 1996, Mr. Page allegedly asked appellant to go out with him and then threatened her when she refused. He made her sit in his office and would not allow her to work. Appellant alleged that coworkers referred to her as Mr. Page's "sexratory." Mr. Cross also harassed appellant by asking her out and told her that her problems stemmed from her refusal to date Mr. Page. Appellant also alleged that Mr. Cross took pictures of her bending over at work and stuck his hand down the back of her pants while she was bent over working on an airplane.

Appellant reported the misconduct of Mr. Cross and Mr. Page but action was not taken. She alleged that, when she was working a night shift with Mr. Cross on May 3, 2000, he fondled his penis three times while they worked in a cockpit. Appellant described an incident when Mr. Cross reportedly showed her that he was not wearing any underwear beneath his coveralls. She complained to a supervisor about the cockpit fondling incident and she prepared a written statement dated May 9, 2000. Appellant's supervisor continued to schedule her to work with Mr. Cross on the night shift. Mr. Cross eventually retired. The record indicates that Mr. Cross received a verbal warning on May 4, 2000 for misconduct involving appellant. Shop Supervisor Bill Robinette advised Mr. Cross that "he had to stop." Mr. Robinette also told Mr. Cross to be more aware of what he was doing around appellant and advised him to keep his conversations with her on work-related issues.

Appellant alleged that Mr. Lopez began harassing her in 2003 by making sexually-related remarks. Mr. Lazar asked her to go into the hanger with him to look for parts and, when they were alone, he told her to look at his erect penis and grabbed at her. Appellant stated that she hit him, told him to stop and left the hanger. She reported the incident and, when questioned by Jan Burris, the supervisor, Mr. Lopez denied doing anything wrong. According to appellant, Mr. Lazar repeated this behavior on numerous occasions and repeatedly told her that he wanted to have sex with her. She also alleged that in 2004 Brian Mallak allegedly asked her if she had sex with her son. Appellant stated that Mr. Mallak told her he had heard the rumor from a

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<sup>2</sup> Appellant was charged with unauthorized entry into a federal computer system and alteration of documents stored in its database. She gained access to an employee resume database and altered several resumes. While the investigation was still pending, appellant was barred from entering the facility where she worked. She was placed on indefinite suspension effective January 29, 2007 and was removed from federal service effective June 10, 2007.

female coworker, Gabriel Howard. She subsequently confronted Ms. Howard, who denied making the comment.

Appellant reported that she had problems with her resume that took years to fix. The outcome was a letter from the employing establishment explaining that, due to an administrative error, her resume was not put on the certification list for a supervisory position. A copy of a May 17, 2005 letter from the employer's Resume Intake and Employment Information Center was submitted to the record. Due to an administrative oversight, appellant was not considered for a particular position. She was further advised that to correct the problem, her name would be placed on a priority consideration list, which meant she would be referred to the selecting official for consideration before any other promotional candidates. Appellant contended that this was retaliation for having previously filed an Equal Employment Opportunity (EEO) complaint.

Appellant claimed she was improperly charged 96 hours AWOL in November 2006. She stated that she was on administrative leave beginning November 5, 2006 because of her alleged unauthorized access to the employee resume database.<sup>3</sup> On November 6, 2006 appellant learned that her father was dying and she went to be with him. She alleged that she told Doug Burkett, her immediate supervisor, that she had to leave; however, Dennis Weddle, the department head, placed her on AWOL for not informing anyone of her whereabouts. Appellant contended that Mr. Weddle knew she was visiting her father.

Appellant contended that she was "set-up" regarding her alleged unauthorized access to the employing establishment's computer system. She stated that NCIS personnel detained her for more than eight hours and screamed at her, telling her to confess. Appellant alleged that NCIS refused to allow her to speak with an attorney and forced her to sign a prepared statement. Additionally, her home was searched after 10:00 p.m. and NCIS reportedly grabbed appellant's elderly mother and made her wait outside. Appellant alleged that Mr. Lazar visited her at home and told her that he informed management that she had access to his e-mail account. She alleged that he grabbed and squeezed her breast which was witnessed by her mother.<sup>4</sup>

In a December 1, 2006 note, Dr. Cheng-I Lin, a Board-certified family practitioner, reported that appellant had been treated for "PTSD ... depression and anxiety." He did not provide any treatment records or identify any specific cause for appellant's diagnosed psychiatric condition.

In a November 30, 2007 decision, the Office denied appellant's emotional condition claim. It found that the majority of her allegations were not factually established; however, it accepted three incidents as established: that Mr. Cross fondled himself while working with appellant in an airplane cockpit on May 3, 2000; that appellant was under investigation in 2006 for unauthorized entry into a federal computer system and the alteration of documents stored in the database; and, on a July 24, 2007 visit to appellant's home, Mr. Lopez grabbed her breast. Of these three incidents, only the May 3, 2000 incident involving Mr. Cross was found to

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<sup>3</sup> The employing establishment barred appellant from entering the base effective November 6, 2006.

<sup>4</sup> Appellant's mother provided two signed statements stating that she witnessed Mr. Lopez grab her daughter's breast while the two were seated on a bench outside appellant's home.

constitute a compensable factor of employment. The Office determined that the investigation resulting in appellant's suspension and removal was a disciplinary action for which she failed to establish error or abuse.<sup>5</sup> With respect to the incident with Mr. Lazar while at home, it found that she was not in the performance of duty at the time it occurred. The Office found that the medical evidence from Dr. Lin did not relate her diagnosed condition to the May 3, 2000 incident with Mr. Cross.

Appellant requested an oral hearing that was held on July 8, 2008. In a report dated November 27, 2006, Dr. Linda Maggio, Ph.D., a marriage and family therapist, advised that appellant had been in counseling since April 2005. She obtained a history that appellant was sexually assaulted and harassed while in the military and developed PTSD. Dr. Maggio stated that, when appellant experienced sexual harassment in her workplace, she attempted to resolve these issues but none of the rulings were in appellant's favor. Appellant reported that her issues were denied, dismissed or ignored and she became depressed and felt helpless. She applied for a promotion but received a letter that her application had been inadvertently lost. As a result, appellant could not be considered for promotion. Dr. Maggio also indicated that appellant was assigned duty where she was likely to cross paths with a person she had accused of sexual harassment.

With respect to the unauthorized computer access, Dr. Maggio noted that back in 1997 appellant received paperwork associated with a sexual harassment hearing and, included among those papers, was personal information about various employees. Appellant came across this old paperwork and her brother reminded her of how she had been wronged and overlooked in the past. Dr. Maggio explained that appellant impulsively wanted to make a statement about how "stupid" people had been in dealing with her claims and was able to make ludicrous statements in their online resumes. Dr. Maggio noted that, when confronted, appellant admitted that she had played a prank. She noted that appellant's actions indicated impulsivity, frustration and poor judgment. According to Dr. Maggio, appellant had not intended to hurt any other employee or compromise the system and attributed her actions to "a long trauma history" and the feeling that no one took her claims of sexual harassment seriously.

On July 14, 2008 Dr. Maggio noted that appellant advised her that she had been sexually harassed by a supervisor in 1997 and when she reported the incident there was a delayed investigation and ultimately she lost the claim. She stated that appellant outlined other incidents of harassment and a history of sexual trauma during the military. In 2005, appellant was again assigned to work under a supervisor who had previously sexually harassed her. She began taking anti-anxiety medication and she experienced dread at the thought of going to work. Dr. Maggio stated that appellant was constantly fearful about bad things that might happen and her anxiety regarding work remained elevated without significant improvement.

In a July 14, 2008 report, Dr. Kristin S. Beizai, a Board-certified psychiatrist associated with the San Diego Department of Veterans Affairs Medical Center, stated that appellant had been seen in the outpatient mental health clinic and was diagnosed with a recurrent major depressive disorder. Appellant's treatment included pharmacotherapy and psychotherapy.

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<sup>5</sup> Appellant had been suspended without pay effective January 29, 2007 and she was removed from federal service effective June 10, 2007.

In a January 6, 2009 decision, an Office hearing representative affirmed the November 30, 2007 decision.

### **LEGAL PRECEDENT**

To establish that she sustained an emotional condition causally related to factors of her federal employment, appellant must submit: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to her condition; (2) rationalized medical evidence establishing that she has an emotional condition or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that her emotional condition is causally related to the identified compensable employment factors.<sup>6</sup>

Workers' compensation law does not apply to each and every injury or illness that is somehow related to one's employment. There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within the purview of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is deemed compensable.<sup>7</sup> Disability is not compensable, however, when it results from factors such as an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or hold a particular position.<sup>8</sup> Perceptions and feelings alone are not compensable. To establish entitlement to benefits, a claimant must establish a basis in fact for the claim by supporting her allegations with probative and reliable evidence.<sup>9</sup> When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter, the Office must base its decision on an analysis of the medical evidence.<sup>10</sup>

As a general rule, an employee's emotional reaction to an administrative or personnel matter is not covered under the Federal Employees' Compensation Act.<sup>11</sup> Such matters, while related to the employment, are functions of the employer rather than duties of the employee.<sup>12</sup> Investigations and discipline are administrative functions which, absent evidence of error or abuse, are not generally compensable.<sup>13</sup>

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<sup>6</sup> See *Kathleen D. Walker*, 42 ECAB 603 (1991).

<sup>7</sup> *Pamela D. Casey*, 57 ECAB 260, 263 (2005).

<sup>8</sup> *Lillian Cutler*, 28 ECAB 125, 129 (1976).

<sup>9</sup> *Kathleen D. Walker*, *supra* note 6.

<sup>10</sup> See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

<sup>11</sup> See *Ana D. Pizarro*, 54 ECAB 430 (2003).

<sup>12</sup> See *Karen K. Levene*, 54 ECAB 671 (2003).

<sup>13</sup> See *Deborah L. Hanna*, 54 ECAB 548 (2003); *Judy L. Kahn*, 53 ECAB 321 (2002); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

## ANALYSIS

Initially, the Board notes that appellant has not alleged any compensable factor relating to the performance of her regular or specially assigned work duties under *Cutler*. Appellant's allegations have pertained to the investigation and disciplinary action taken by her employer and to incidents of alleged sexual harassment by former coworkers. The record reveals that she was investigated for unauthorized entry into a federal computer system and the alteration of documents in the database. Appellant was placed on indefinite suspension on January 29, 2007 and removed from federal service as of June 10, 2007. On May 4, 2007 she filed a claim alleging an emotional condition due to various incidents in the workplace that she characterized as sexual harassment and a hostile work environment. The Office accepted as a compensable factor that on May 3, 2000 Mr. Cross had fondled himself while working in a cockpit with appellant. It denied her claim, finding that the medical evidence was not sufficient to establish that her diagnosed condition or disability was caused or contributed to by this accepted factor.

Appellant claimed that a former supervisor, Mr. Page, began sexually harassing her in 1996. Verbal altercations and difficult relationships with supervisors when sufficiently detailed and supported by the record may constitute compensable factors of employment.<sup>14</sup> Appellant did not substantiate her allegations pertaining to Mr. Page with probative and reliable evidence.<sup>15</sup> She did not substantiate her allegations that he had asked her to go out with him or threatened her when she refused. Appellant did not submit evidence from any witness to the comments or actions she attributed to her former supervisor.

Appellant alleged that Mr. Cross sexually harassed her on numerous occasions, including sticking his hand down the back of her pants, taking photographs of her while bent over, and fondling himself in her presence. As noted, the Office accepted the May 3, 2000 incident in which he fondled himself while working with appellant in a cockpit. The record establishes that the employer issued a verbal warning to Mr. Cross on May 4, 2000 for misconduct and admonished him to be more aware of what he was doing around her. The remaining allegations involving Mr. Cross are not supported by any contemporaneous witness statements or documents from the employer of appellant making such complaints. The Office properly accepted the May 3, 2000 incident based on contemporaneous statements and other documentary evidence indicating that Mr. Cross received a verbal warning for his misconduct.

Appellant alleged that on or about July 1, 2007 Mr. Lopez visited her home during work hours and grabbed her breast. The Office properly determined that that this incident was not a compensable factor as appellant was not at working when it occurred. Appellant had been on indefinite suspension without pay since January 29, 2007, and apparently removed from federal service when this occurred. Although she claimed other instances of harassment involving Mr. Lopez, such as showing her his erection in an airplane hanger, she did not substantiate the allegations with contemporaneous witness statements or evidence that she had raised the matter with her employer.

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<sup>14</sup> *Marguerite J. Toland*, 52 ECAB 294, 298 (2001).

<sup>15</sup> See *Kathleen D. Walker*, *supra* note 6.

Appellant also claimed that coworkers allegedly referred to her as Mr. Page's "sexratory" and rumors were spread about her. As noted, for harassment to give rise to a compensable disability there must be evidence that the claimed incident occurred as alleged.<sup>16</sup> Appellant's perception of harassment is not compensable.<sup>17</sup>

The record reflects that appellant was investigated for unauthorized computer access and barred from entering the base as of November 6, 2006. Appellant explained that she was on administrative leave and went to be with her father, who was ill at the time. She was charged with 96 hours of AWOL for not informing her employer as to her whereabouts. Although time and attendance issues are generally related to the employment, they are administrative functions of the employer and not a duty of the employee.<sup>18</sup> As a general rule, an employee's reaction to administrative or personnel matters falls outside the scope of the Federal Employees' Compensation Act.<sup>19</sup> Appellant has not presented evidence sufficient to establish error or abuse on the part of her managers or employer with respect to the investigation and discipline she received for her unauthorized computer access or in being AWOL. She argued that she had been set up, but this is not supported by sufficient evidence. Appellant's complaints about the interrogation and alleged mistreatment of herself and her mother are similarly not supported by probative evidence. There is also nothing to substantiate her allegation that she informed the employing establishment of her whereabouts while she was on administrative leave and visiting her father. Accordingly, appellant's emotional reaction to being charged AWOL in November 2006 is not a compensable factor.

Appellant also claimed that her employer retaliated against her for filing an EEO complaint by intentionally misplacing her application for a supervisory position. The record does not establish this allegation. By letter dated May 17, 2005, the employer advised appellant that due to an administrative oversight she had not been considered for a particular position. In an effort to rectify the problem, appellant was placed on priority consideration list for consideration before any other promotional candidates. Her frustration from not being promoted to supervisor or holding that particular position is not a compensable factor.<sup>20</sup>

As appellant established the May 3, 2000 incident involving Mr. Cross, the Office considered the medical evidence in her claim.

Dr. Lin's December 1, 2006 report did not attribute appellant's PTSD condition, depression or anxiety to the May 3, 2000 incident or her civilian employment in general. Similarly, Dr. Beizai did not attribute appellant's recurrent major depressive disorder to her federal employment or the accepted incident. The reports of Dr. Maggio discussed certain of appellant's allegations pertaining to sexual harassment while in the military and as a mechanic in

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<sup>16</sup> *Donna J. DiBernardo*, 47 ECAB 700, 703 (1996).

<sup>17</sup> *Id.*

<sup>18</sup> *Joe M. Hagewood*, 56 ECAB 479, 488 (2005).

<sup>19</sup> *Andrew J. Sheppard*, 53 ECAB 170, 173 (2001).

<sup>20</sup> *Lillian Cutler*, *supra* note 8.

her civilian employment. The Board notes, however, that Dr. Maggio is not a physician as defined under the Act. The record indicates that she holds a Ph.D. as a family and marriage therapist and not as a clinical psychologist.<sup>21</sup> For this reason, the reports from Dr. Maggio are not probative as medical opinion evidence on the cause of appellant's emotional condition. The Office properly found that the medical evidence of record was not sufficient to establish appellant's claim.

### **CONCLUSION**

The Board finds that appellant did not establish that she sustained an emotional condition causally related to her federal employment.

### **ORDER**

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

Issued: July 13, 2010  
Washington, DC

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

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

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

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<sup>21</sup> Section 8101(2) provides that the term "physician" includes clinical psychologists within the scope of their practice as denied by state law. *See Jacqueline E. Brown*, 54 ECAB 583 (2003). A family therapist or marriage counselor is not a physician under the Act. *See Joe L. Wilkerson*, 47 ECAB 604 (1996). *See also Nancy A. Johnson-Charpentier*, Docket No. 04-1599 (issued July 25, 2005).