

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

C.W., Appellant

and

DEPARTMENT OF DEFENSE, DEFENSE
GENERAL SUPPLY CENTER, Employer

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**Docket No. 09-916
Issued: June 16, 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
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 25, 2009 appellant filed a timely appeal from Office of Workers' Compensation Programs' merit decisions dated November 19, 2008 and January 30, 2009. Under 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 failed to meet her burden of proof to establish that she sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

Appellant, a 53-year-old packing specialist, filed a Form CA-1 claim for benefits on August 28, 2008. She alleged that, on February 17, 2006, her division chief, Edward West, approached her from behind as she was sitting at her desk and grabbed her breasts. Appellant stated on the form that she reported the incident to her supervisor but did not file a claim. She also filed a Form CA-2 claim for benefits based on a stress-related condition on August 28, 2008, alleging that she developed post-traumatic stress disorder (PTSD) due to being sexually assaulted

on February 17, 2006. Appellant asserted on the form that her supervisor failed to report the incident and that she was unaware she needed to file a report.

By letter dated September 23, 2008, the Office advised appellant that she needed to submit additional factual and medical information in support of her claim. It asked appellant to describe in detail the employment-related conditions or incidents which she believed contributed to her emotional condition, and to provide specific descriptions of all practices, incidents, etc., which she believed affected her condition. The Office also asked appellant to submit a comprehensive medical report from her treating physician describing her symptoms and the medical reasons for her stress-related condition, and an opinion as to whether her claimed emotional condition was causally related to her federal employment.

In a letter to her congressional representative dated September 2, 2008, received by the Office on September 15, 2008, appellant asserted that she was not able to file her claim in a timely manner due to the incompetence and neglect of her supervisor, Lee Watkins. She stated that management ignored the merits of her claim because she had accused her division chief of sexual misconduct. Appellant requested an explanation of the delay from Mr. Watkins and from management's deputy director, Sallee Justis, regarding why they failed to file a Form CA-16 at the time appellant informed them of the alleged assault or inform her that she was required to provide timely written notice of her allegations.

Appellant submitted a 197-page packet of documents which, she asserted, supported her contention that she was sexually assaulted by her division chief on February 17, 2006 and that she sustained an emotional condition caused by employment factors. These documents were received by the Office on November 3, 2008.

By decision dated November 19, 2008, the Office denied appellant's claim on the basis that she failed to establish any compensable factor of employment and thus fact of injury was not established.

By letter dated November 21, 2008, received by the Office on November 26, 2008, appellant requested reconsideration. Appellant noted that the Office had not reviewed the 196-page packet of supporting documents which she submitted prior to the November 19, 2008 Office decision. She stated that she was resubmitting this packet with her request.

In a letter to appellant dated September 13, 2006, Captain S.P. Abramowicz, the Director of Aviation Supplier Operations, apprised appellant of the measures management had taken with regard to her sexual harassment allegation. He stated that, when Ms. Justis was informed of appellant's allegation on July 26, 2006, she initiated a command investigation on July 31, 2006. On the basis of this investigation, the employing establishment concluded on August 24, 2006 that the alleged February 17, 2006 sexual harassment incident did not occur. Captain Abramowicz stated that management took the following actions during its investigation: On July 31, 2006 Mr. West was detailed to nonsupervisory duties and physically required to sit in a different building. Upon the conclusion of the investigation, Mr. West returned to the division chief position on September 11, 2006. During the week of July 31, 2006, Ms. Justis had several conversations with appellant during which she informed her that Mr. West would be reassigned from his current position for the duration of the investigation. Appellant responded

that she considered it too stressful to return to her former job, even with Mr. West physically relocated to another building. Management also offered her a lateral reassignment to another work area, which she declined.¹

Captain Abramowicz determined based on the investigation's results that it was in the best interest of all parties to reassign appellant to a new position, quality assurance specialist; he indicated that it would require approximately one year for her to meet the job's qualification requirements. He stated that Mr. Watkins would assist her with all the necessary paperwork so that her transition could proceed with minimal disruption. The employing establishment also referred appellant to management's employee assistance program coordinator to further ease the transition. Captain Abramowicz stated management's regret for any unpleasantness appellant had experienced at the workplace and expressed its hope that its resolution to her issues was satisfactory.

In a form report dated March 12, 2007, Adelaide Simpson, Ph.D in psychology, stated that appellant had PTSD which was caused by an incident at work in which she was sexually molested. She also asserted that management engaged in reprisals against her for filing a claim regarding the incident and created a hostile work environment; this worsened her condition and caused anxiety, stress and loss of sleep. Dr. Simpson advised that appellant no longer felt safe at work, where she believed she was not being protected from attacks by her division chief.

In a statement dated April 20, 2007, received by the Office on November 3, 2008, appellant stated:

“My disease is classified as Post Traumatic Stress Disorder.

“It has been exactly 14 months since I have been struggling with the Depression, Stress, Anger, Fear, and Disappointment for being the victim of a physical Sexual Harassment. The trauma from my February 16, 2006 assault has caused me undue stress and flashbacks from my dark childhood molestation. Further, DSCR has been treating me as if I was responsible for my supervisor not taking corrective actions In Accordance With the Agency's policy on Sexual Harassment. It wasn't until I reminded him of it 5 months later via e-mail on July 21, 2006 that he took action (5 months later). Even the EEOC has refused to protect me due to the exhausted time frame in which I filed my on [sic] Sexual Harassment claim against DSCR's Upper Manager. Further, on Sunday, April 8, 2007, at approximately 4:30 p.m., I went to DSCR's Security gate in request of an escort to accompany me to my desk to retrieve my personal belongings. I was asked to leave the area and call the Police Chief the next day to arrange an appointment to be escorted; shortage of security staff. I called, however, did not receive a reply to schedule such appointment. I fear the worst should I enter the area alone. My attacker's desk is located across from where my desk is located. These continued obstacles increase my anxiety and anger and the fear of 'what if.'

¹ Captain Abramowicz also stated that management was also taking other actions to address other findings raised during the investigation which he was not at liberty to discuss due to privacy concerns.

“I constantly experience anxiety, nervousness, paranoia, and trembling in my hand. I depend on medication to help me stay calm. I depend on medication to help me sleep. I immediately told my supervisor that I had been attacked in February. He never mentioned a word to me about the incident again, nor did my attacker.

“I was automatically assigned to a new job series as a Product Specialist for Blowing the Whistle on my Sexual Attacker. I have been very nervous and has developed a tremble in my hand since I have been fighting this problem. I have depended on medical professionals and medicines with my illness. I can not move on with my career due to the reprisals from my Supervisors, Work Leader, and Upper Management. Due to a lack of support from my agency has contributed to my illness. To the best of my knowledge, my attacker remains in his same position, at the same location. I never want to work around him or people like him again. His behavior has caused me to retire from a place where I once enjoyed working and looked forward to growth in my career....”

In a form report dated April 20, 2007, received by the Office on November 3, 2008, Dr. Brian Bradshaw, Board-certified in psychiatry and neurology, diagnosed depression and anxiety related to a harassment incident at work. He noted that he first examined appellant on September 5, 2006 and placed her off work on July 5, 2006.

Appellant submitted a January 31, 2008 decision of the Office of Personnel Management (OPM) which initially denied her request for a disability retirement. The decision indicated that the employing establishment had investigated appellant’s contention and concluded that the evidence failed to establish that she was disabled and that her medical condition warranted her absence from the workplace. The report indicated that a review of her case file failed to reveal any evidence of psychotherapy treatment notes pertaining to her claim of sexual harassment by her supervisor. It stated that management’s offer to reassign her was based solely on her subjective complaint as there is no evidence that the alleged sexual harassment had occurred. The report further noted that David L. Bassler, human resources specialist, sent her a February 26, 2007 letter which advised her that no one at the employing establishment had any record of her claimed injury and that medical evidence on file did not refer to the alleged February 16, 2006 incident.²

In a September 25, 2007 statement to appellant’s treating physicians, Drs. Bradshaw and Simpson, appellant indicated that the employing establishment’s response to her allegations was inadequate and aggravated her emotional condition. She stated that she had received OPM’s denial of her request for disability retirement based on PTSD and that this denial was partially based on incomplete medical documentation for her condition. Appellant asserted that, although management sent her a letter postmarked August 24, 2007 authorizing her return to work by August 30, 2007, she did not receive this letter until September 24, 2007. She stated that this

² In a September 11, 2007 report, Dr. James Vorosmarti, Board-certified in preventive medicine, stated that none of the medical documentation appellant submitted mentioned that she had been diagnosed with PTSD, as she had asserted. He also stated that she was not diagnosed with acute situational stress, depression or anxiety until August 2007.

letter indicated that she would be working for the same supervisor who failed to report the sexual attack against her and engaged in numerous hostile reprisals toward her. Appellant stated that although Mr. West was reassigned to a different office she believed she would still come into contact with him on a daily basis while at work.

Appellant asserted that she feared returning to work at the employing establishment due to the hostile and negative work environment. She stated that she feared the worst could happen to her from a mental and emotional standpoint given Mr. Watkins's past negative actions toward her. Appellant advised that she had been abused physically and mentally and that her level of anxiety, together with the intensity of the abuse, would aggravate her PTSD condition if she returned to work. She believed that she was being forced out of her livelihood by a habitual sex offender Mr. West which the employing establishment was protecting.

On August 28, 2008 in response to a Merit Systems Protection Board review of appellant's disability claim, OPM approved appellant's request for a disability retirement.

By decision dated January 30, 2009, the Office denied appellant's claim on the basis that she failed to establish any compensable factor of employment and thus fact of injury was not established. It noted that the employing establishment had undertaken a formal investigation of appellant's allegation that she was sexually attacked by Mr. West while sitting at her desk on February 17, 2006, but had determined there was no substantiation that this incident had occurred. The Office also found that appellant failed to support her allegations that management had been treating her if she was responsible for her supervisor not taking corrective action in accordance with the policy on sexual harassment, and noted that management had acted to reassign Mr. West during the course of the investigation.

The Office found that, with regard to all of the incidents described above, the employing establishment had acted reasonably, in its administrative capacity and had not erred or committed abuse. Therefore, it found that none of the aforementioned incidents were compensable.

LEGAL PRECEDENT

To establish that an emotional condition was sustained in the performance of duty there must be factual evidence identifying and corroborating employment factors or incidents alleged to have caused or contributed to the condition, medical evidence establishing that the employee has an emotional condition, and rationalized medical opinion establishing that compensable employment factors are causally related to the claimed emotional condition.³ There must be evidence that implicated acts of harassment or discrimination did, in fact, occur supported by specific, substantive, reliable and probative evidence.⁴

The first issue to be addressed is whether appellant has cited factors of employment that contributed to her alleged emotional condition or disability. Where the disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the

³ See *Debbie J. Hobbs*, 43 ECAB 135 (1991).

⁴ See *Ruth C. Borden*, 43 ECAB 146 (1991).

employment, the disability comes within the coverage of the Act.⁵ On the other hand, disability is not covered where it results from an employee's fear of a reduction-in-force, frustration from not being permitted to work in a particular environment or to hold a particular position, or to secure a promotion. Disabling conditions resulting from an employee's feeling of job insecurity or the desire for a different job do not constitute a personal injury sustained while in the performance of duty within the meaning of the Act.⁶

ANALYSIS

The Board finds that appellant has failed to submit sufficient evidence to establish her allegations that management engaged in harassment, intimidation or discrimination. Mere perceptions of harassment or discrimination are not compensable; a claimant must establish a basis in fact for the claim by supporting her allegations with probative and reliable evidence.⁷ The Office found that appellant failed to submit any corroboration to substantiate her allegations of harassment. Appellant has failed to substantiate her allegation that her division chief Mr. West approached her desk from behind and sexually harassed her by grabbing her breast on February 17, 2006. The employing establishment investigated appellant's claim of sexual misconduct on the part of her superior but concluded that there was no corroboration to support her assertion.

The Office properly found that appellant's allegation that she was sexually harassed by her superior Mr. West on February 17, 2006 was not established as factual by the weight of evidence of record. It reviewed her specific allegation of harassment by Mr. West and found that it did not accept as factual that such harassment had occurred as she described. In addition, appellant has failed to provide support for her allegations that Mr. Watkins and other management personnel engaged in reprisal actions against her for filing a claim against Mr. West or that they condoned his alleged sexual misconduct. Appellant alleged that the employing establishment harassed her and tried to get her to quit but did not provide sufficient evidence or a description of specific incidents she believes constituted harassment or discrimination in this manner.⁸ She stated that the employing establishment created a hostile work environment, but has submitted no corroborating evidence, such as witness statements, to establish the truth of these allegations.⁹

In his September 13, 2006 statement, Captain Abramowicz indicated that in response to appellant's charges management had Mr. West removed from his supervisory duties and reassigned him to a different worksite during the course of its investigation. He noted that the

⁵ *Lillian Cutler*, 28 ECAB 125 (1976).

⁶ *Id.*

⁷ *Curtis Hall*, 45 ECAB 316 (1994); *Margaret S. Krzycki*, 43 ECAB 496 (1992).

⁸ *See Joel Parker, Sr.*, 43 ECAB 220 (1991) (The Board held that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence.)

⁹ *See Larry J. Thomas*, 44 ECAB 291, 300 (1992).

employing establishment had offered to transfer appellant to another position and indicated that Mr. Watkins and other management personnel would assist her with her transition.

The Board finds that the episodes of managerial harassment cited by appellant are not established as factual as she failed to provide any corroborating evidence for her allegations. As such, they constitute mere perceptions or generally stated assertions of dissatisfaction with a certain superior at work which do not support her claim for an emotional disability.¹⁰ Appellant has not submitted evidence sufficient to establish that management engaged in a pattern of harassment and intimidation toward her or created a hostile workplace environment.

The Board finds that the evidence of record does not establish that the administrative and personnel actions taken by management in this case were in error and are therefore not considered factors of employment. An employee's emotional reaction to an administrative or personnel matter is not covered under the Act, unless there is evidence that the employing establishment acted unreasonably.¹¹ Appellant has not presented sufficient evidence that the employing establishment acted unreasonably or committed error with regard to the incidents of alleged unreasonable actions involving personnel matters on the part of the employing establishment.

Appellant alleged that management caused her stress by tolerating sexual misconduct on the part of Mr. West and by failing to file a claim or submit a report until July 2006, five months after she informed management that the alleged harassment had occurred. She has failed to provide substantiation or corroboration for these assertions. Management denied that it protected Mr. West or condoned his alleged conduct. As stated above, it initiated a command investigation to determine the veracity of appellant's allegations, temporarily reassigned Mr. West and removed him from his supervisory position, and offered to place appellant in a similar job in a different worksite.¹² Appellant has failed to show that these actions demonstrated error or abuse.

Regarding appellant's allegations that the employing establishment mishandled and delayed her compensation claim, wrongly denied her disability compensation stemming from the alleged incident of sexual misconduct and caused her to forfeit her eligibility to file an Equal Employment Opportunity claim, the Board notes that the development of any condition related to such matters would not arise in the performance of duty as the processing of compensation claims bears no relation to appellant's day-to-day or specially assigned duties.¹³ As to appellant's allegation that she developed stress due to the uncertainty of her job duties and her insecurity about maintaining her position, the Board has previously held that a claimant's job

¹⁰ See *Debbie J. Hobbs*, *supra* note 3.

¹¹ See *Alfred Arts*, 45 ECAB 530, 543-44 (1994).

¹² The Board notes that the August 24, 2007 letter from management authorizing her to return to work by August 30, 2007, which she referenced in her September 25, 2007 statement to her treating physicians, is not contained in the instant record. Appellant asserted that this letter indicated she would again be working under Mr. Watkins in her new position as quality assurance specialist. There is no indication in the record, however, to support this assertion.

¹³ See *George A. Ross*, 43 ECAB 346, 353 (1991); *Virgil M. Hilton*, 37 ECAB 806, 811 (1986).

insecurity is not a compensable factor of employment under the Act.¹⁴ Accordingly, she has presented no evidence that the employing establishment acted unreasonably or committed error with regard to these incidents of administrative managerial functions. A reaction to such factors did not constitute an injury arising within the performance of duty; such personnel matters were not compensable factors of employment in the absence of agency error or abuse.

The Board has held that investigations, which are an administrative function of the employing establishment, that do not involve an employee's regularly or specially assigned employment duties are not considered to be employment factors.¹⁵ 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. Appellant has alleged that the employing establishment erred and acted abusively in conducting its investigation of Mr. West, treating her as if she was responsible for her supervisor's failure to take corrective actions in accordance with its policy regarding sexual harassment. Appellant has provided insufficient evidence to support her contentions. A review of the evidence indicates that appellant has not shown that the employing establishment's actions in connection with its investigation were unreasonable. Appellant has not established a compensable employment factor under the Act in this respect.

Finally, appellant asserted that she sustained stress and anxiety because management offered to relocate her at a job in which she believed she would engage in daily contact with Mr. West. The Board has held that denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment as they do not involve the employee's ability to perform his or her regular or specially assigned work duties but rather constitute his or her desire to work in a different position.¹⁶ An employee's dissatisfaction with perceived poor management constitutes frustration from not being permitted to work in a particular environment or to hold a particular position and is not compensable under the Act.¹⁷ The employing establishment stated that the job it offered appellant was in a different building than the one in which Mr. West was stationed; her contact with him in this position would therefore be minimal. Accordingly, appellant has presented no evidence that the employing establishment acted unreasonably or committed error with regard to these incidents of administrative managerial functions.¹⁸

¹⁴ See *Artice Dotson*, 42 ECAB 754, 758 (1990); *Allen C. Godfrey*, 37 ECAB 334, 337-38 (1986).

¹⁵ *Jimmy B. Copeland*, 43 ECAB 339, 345 (1991).

¹⁶ *Donna J. DiBernardo*, 47 ECAB 700, 703 (1996).

¹⁷ See *Cyndia R. Harrill*, 55 ECAB 522 (2004).

¹⁸ The Board notes that OPM approved appellant's request for disability retirement on August 28, 2008 based on the Merit Systems Protection Board's review. OPM had denied her initial request on the grounds that the alleged February 17, 2006 sexual harassment incident had never occurred and that therefore her claimed disability was not work related. However, the mere fact that personnel actions were later modified or rescinded, does not in and of itself, establish error or abuse. *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

The Board notes that, since appellant has not established a compensable work factor, the medical evidence will not be considered.¹⁹

CONCLUSION

The Board finds that the Office of Workers' Compensation Programs properly found that appellant failed to meet her burden of proof to establish that she sustained an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the January 30, 2009 and November 19, 2008 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: June 16, 2010
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

¹⁹ See *Margaret S. Krzycki*, 43 ECAB 496 (1992).