

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

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**K.S., Appellant** )

**and** )

**DEPARTMENT OF VETERANS AFFAIRS,** )  
**HUNTER/HOLMES/McGUIRE VETERANS** )  
**ADMINISTRATION MEDICAL CENTER,** )  
**Richmond, VA, Employer** )

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**Docket No. 10-505**  
**Issued: November 22, 2010**

*Appearances:*  
Charles W. Jackson, for the appellant  
Office of the 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 December 14, 2009 appellant filed a timely appeal from a November 18, 2009 merit decision of the Office of Workers' Compensation Programs denying her emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

**ISSUE**

The issue is whether appellant met her burden of proof to establish that she sustained an emotional condition causally related to factors of her federal employment.

**FACTUAL HISTORY**

On December 30, 2008 appellant, then a 52-year-old nursing assistant, filed an occupational disease claim (Form CA-2) for an emotional injury following an alleged sexual assault on October 10, 2008. She alleged that a coworker started grinding himself against her

while kissing her against her will. Appellant tried to get away, but he would not let her go. She reported the incident to the employing establishment police but contended that no action was taken to protect her from the individual who assaulted her. Appellant also alleged that her employer failed to inform her of her right to file a workers' compensation claim for an exacerbation of her preexisting anxiety and depression. She stopped work on December 9, 2008 and sought medical treatment on December 10, 2008. The employing establishment noted that appellant was last exposed to the alleged work conditions on October 23, 2008 and reported the condition to her supervisor on December 30, 2008.

In a December 30, 2008 statement, appellant reiterated that she reported the assault to management officials on October 22, 2008 and filed a harassment report to a police officer on October 23, 2008. She submitted medical reports from Linda E. Scott, Ph.D., a licensed clinical psychologist, a January 14, 2009 attending physician's report from Dr. Banerje Koduru, a Board-certified psychiatrist, and a January 20, 2009 attending physician's report from Dr. Phillip Y. Shou, an internist. The reports noted a history of the sexual assault on October 10, 2008 and diagnosed post-traumatic stress disorder, depression and anxiety related to the incident.

In a January 28, 2009 statement, the employing establishment controverted the claim.

On February 10, 2009 the Office advised appellant of the deficiencies in her claim. Appellant was requested to provide additional documentation to support that the claimed sexual assault occurred as alleged or that her employer treated her improperly following the incident.

On February 25, 2009 appellant stated that she was assigned to work the 3:30 p.m. to 12 midnight shift on October 10, 2008. She took her break around 11:15 p.m. and at approximately 11:30 p.m., Don Gardner, a coworker, assaulted her by grinding into her and holding her against her will. Appellant stated that he kissed her all over and down her neck. She was shaken and embarrassed and did not know how to handle the situation. Appellant reported the incident to management on October 22, 2008 and filed a report with the employing establishment police on October 23, 2008, but no action was taken. She was told that it would be her word against his. Appellant tried to work but was in constant fear of Mr. Gardner as there were few people available, including police, on the second shift. She provided a copy of an Equal Employment Opportunity (EEO) complaint she filed on January 27, 2009 against the employing establishment and the police chief for sexual harassment and failure to provide a harassment-free work environment. The complaint noted that appellant had been harassed by the accused since 2004 and management failed to provide a harassment-free work environment.

A May 4, 2009 statement cosigned by Sylvia B. Johns, associate chief nurse, and Stephanie Ferguson, nurse manager, advised that appellant was not on duty October 10, 2008 as it was her scheduled day off. When appellant reported the assault to Ms. Ferguson on October 23, 2008, she stated that she had not spoken to Mr. Gardner for almost three years, when he offered to buy her dinner for her birthday. She reported that she was handed a card at approximately 11:30 p.m. asking her to meet in a workout room to receive the second part of her birthday present. Ms. Johns and Ms. Ferguson noted that the area referenced by appellant as a workout room was actually a locked research area which was not open after 5 p.m. Neither appellant nor Mr. Gardner were authorized to access the room, located some 500 feet from appellant's assigned work area. Appellant called Ms. Johns on October 21, 2008 and stated that

she would not be in for the rest of the week. When Ms. Johns inquired, appellant stated that she was upset and would tell her later. Ms. Ferguson granted appellant leave for the rest of the week. Appellant subsequently contacted Ms. Ferguson on October 22, 2008 and reported that she had been sexually assaulted. Mr. Ferguson asked appellant to come to work to file a police report and informed Ms. Johns of appellant's complaint. Ms. Johns contacted Mr. Gardner's supervisor and he was reassigned to work in another area pending investigation. When appellant came in Ms. Ferguson escorted her to the police unit to register her complaint. On December 3, 2008 appellant inquired as to the result of the police investigation. Ms. Johns spoke to an officer, who advised that the investigation did not gather enough evidence to charge Mr. Gardner. Appellant was advised that she could file a formal complaint through the EEO Commission and the employing establishment police, the employee assistance program and to contact the workers' compensation office regarding lost time.

In a May 12, 2009 statement, Toney R. Hill, chief of the police service, summarized the offense report and investigation. On October 23, 2008 appellant reported an alleged assault that took place 13 days prior on October 10, 2008. The agency officer assigned to the case conducted an investigation and interviewed appellant, the suspect and work peers but found no evidence to support appellant's allegations. He reported his findings to the United States Attorneys office, which deferred prosecution for insufficient evidence. The officer was instructed to advise appellant that she was free to pursue charges with the local city magistrate. Appellant subsequently sought an arrest warrant for the incident, but the city magistrate declined the warrant based on the lack of evidence. A local city police detective was then contacted, who conducted an independent investigation and further prosecution was declined due to insufficient evidence.

By decision dated July 22, 2009, the Office denied appellant's claim. It found that there was insufficient evidence to establish the October 10, 2008 sexual assault, as alleged, or that appellant was otherwise sexually harassed in the workplace. The Office further found that appellant did not establish any failure on the part of her employer in advising her as to workers' compensation benefits or in any actions taken.

On August 12, 2009 appellant requested a review of the written record. In an August 18, 2009 statement, she stated that Mr. Gardner pretended to be her friend and was aware of her stress issues and how she felt ostracized by her coworkers. Appellant stated that he was a well-respected 70-year-old man who knew she was not interested in him and took advantage of her. She alleged four years prior, Mr. Gardner asked her about what she did when she was not at work and would make comments such as, "Hey foxy you are the baddest women in the hospital. If you weren't married, you could have any man in this hospital. All the guys want you." Appellant thought he was just being nosey but, since the assault, she felt he was trying to get with her. She alleged Mr. Gardner had not spoken to her for almost two years and did not give any reason for the silent treatment. Appellant found this bothersome and told one of her coworkers about his changed behavior. One day, Mr. Gardner apologized to her, told her he was not trying to avoid her and indicated that he would not revert to past behavior. Appellant stated that he hugged her and stated she was alright. Two weeks later, Mr. Gardner offered to buy her lunch and then sexually assaulted her. Appellant alleged that the coworker, to whom she had confided, told her that Mr. Gardner talked about her every evening. After the October 10, 2008 incident, she was unable to concentrate or follow through on things. Appellant noted that, while

management had moved her assailant to another area, he continued to park in the same parking lot and she was afraid that she would run into him, which made it difficult to work. The employing establishment responded that her allegations were not supported by the evidence.

In a November 18, 2009 decision, an Office hearing representative affirmed the denial of appellant's emotional condition claim.

### **LEGAL PRECEDENT**

Workers' compensation 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 (RIF) or her frustration from not being permitted to work in a particular environment or to hold a particular position.<sup>2</sup>

It is well established that administrative or personnel matters, although generally related to employment, are primarily administrative functions of the employer and not duties of the employee.<sup>3</sup> Investigations are considered to be an administrative function of the employer unrelated to the employee's day-to-day duties or specially-assigned job requirements.<sup>4</sup>

For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that the incidents alleged or implicated by the employee did, in fact, occur.<sup>5</sup> Grievances or EEO complaints by themselves are not determinative of whether harassment or discrimination took place.<sup>6</sup> Where a claimant alleges harassment, the issue is whether he or she has submitted sufficient evidence to establish a factual basis for the claim by the submission of probative and reliable evidence to support such allegations.<sup>7</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

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<sup>1</sup> 5 U.S.C. §§ 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>2</sup> *Gregorio E. Conde*, 52 ECAB 410 (2001).

<sup>3</sup> See *Pamela D. Casey*, 57 ECAB 260 (2005); *Thomas D. McEuen*, 41 ECAB 387 (1990); *reaff'd on recon.*, 42 ECAB 566 (1991).

<sup>4</sup> See *Jeral R. Gray*, 57 ECAB 611 (2006).

<sup>5</sup> *T.G.*, 58 ECAB 189 (2006).

<sup>6</sup> *C.S.*, 58 ECAB 137 (2006).

<sup>7</sup> *Id.* See *Robert Breeden*, 57 ECAB 622 (2006).

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>8</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>9</sup>

A claimant has the burden of establishing by the weight of the reliable, probative and substantial evidence that an emotional condition was caused or adversely affected by her employment.<sup>10</sup> Neither the fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish a causal relationship.<sup>11</sup>

### ANALYSIS

Appellant initially alleged a sexual assault by a coworker on October 10, 2008. She subsequently alleged sexual harassment by this same individual since 2004 and alleged error on the part of her employer in investigating the matter and in failing to properly advise her as to pursuing her claim. The Board notes that appellant did not attribute her emotional condition to her regular or specially-assigned job duties as a nursing assistant under *Cutler*.

Appellant alleged that on October 10, 2008 she was sexually assaulted by a coworker. Physical contact by a coworker or supervisor may give rise to a compensable work factor, if the incident occurred as alleged.<sup>12</sup> Appellant did not report the claimed assault to her employer or police for almost two weeks. Ms. Johns and Ms. Ferguson, her up line supervisors, noted that she was not on duty on October 10, 2008, as it was her scheduled day off. Ms. Ferguson noted that she was first contacted about a sexual assault on October 22, 2008 and appellant was asked to come to work to make a report. The record reflects that appellant reported the assault to the agency police service on October 23, 2008, which investigated the matter and found insufficient evidence to support her allegations. The Board finds that appellant has not submitted sufficient evidence to the record to establish that she was sexually assaulted by a male coworker at the time, place or in the manner alleged. She failed to submit corroborating evidence, such as witness statements, to establish that the incident occurred, as alleged.<sup>13</sup> As appellant presented no evidence to substantiate her claim of a sexual assault occurring on October 10, 2008, she failed to establish a compensable employment factor.

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<sup>8</sup> *Dennis J. Balogh*, 52 ECAB 232 (2001).

<sup>9</sup> *Id.*

<sup>10</sup> *See Charles D. Edwards*, 55 ECAB 258 (2004).

<sup>11</sup> *See Ronald K. Jablanski*, 56 ECAB 616 (2005); *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

<sup>12</sup> *Denise Y. McCollum*, 53 ECAB 647 (2002).

<sup>13</sup> *See Larry J. Thomas*, 44 ECAB 291, 300 (1992).

To the extent that incidents alleged as constituting harassment are established as factual, these could constitute employment factors.<sup>14</sup> However, for harassment to give rise to a compensable disability under the Act there must be evidence that the harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.<sup>15</sup> Appellant failed to submit sufficient evidence to establish that she was harassed by her coworker at any time prior to the alleged sexual assault. She described the harassment since 2004 as her coworker pretending to be a friend, making statements to her of a sexual nature, and of not speaking to her for an extended period of several years. As noted, appellant provided no evidence from any coworkers who witnessed any of the incidents alleged.<sup>16</sup> While she stated that she confided with another coworker, there is no statement of record from that individual to support any of appellant's allegations. The factual evidence fails to support harassment of appellant by Mr. Gardner, as alleged.<sup>17</sup> Appellant has not established a compensable employment factor with respect to these allegations.

Appellant alleged that the employing establishment provided no assistance or protection following her complaint of a sexual assault. As noted, investigations are administrative functions of the employer and not related to an employee's day-to-day or specially-assigned duties.<sup>18</sup> The evidence reflects and appellant acknowledged that, following her complaint, the employing establishment removed Mr. Gardner from her work area pending the outcome of the investigation. The evidence reflects that, upon notice of the October 10, 2008 assault, her supervisors requested that she come to the worksite to make a report. On October 23, 2008 appellant made a report to the agency police unit, which investigated the matter and concluded that there was insufficient evidence to support her allegations. Her employer advised her of her right to pursue her complaints at the local city level, which were also unsuccessful. Further, the record documents that appellant filed a grievance and EEO complaint for sexual harassment. The administrative actions by the employing establishment appear reasonable under the circumstances. Appellant failed to establish that her employer failed to provide proper assistance or take protective action following her complaint. The record does not support that the employing establishment erred or acted abusively in the investigation of this matter or in the manner by which her supervisors responded to her complaints or offered assistance.<sup>19</sup> The Board finds that the employer acted reasonably and appellant failed to establish a compensable factor of

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<sup>14</sup> *Kathleen D. Walker*, 42 ECAB 603 (1991).

<sup>15</sup> *Jack Hopkins, Jr.*, 42 ECAB 818 (1991).

<sup>16</sup> A statement from appellant's husband noted only that the coworker came into the same convenience store as him on one occasion.

<sup>17</sup> *See Michael A. Deas*, 53 ECAB 208 (2001).

<sup>18</sup> *G.S.*, 61 ECAB \_\_\_\_ (Docket No. 09-764, issued December 18, 2009). Administrative or personnel matters are generally unrelated to an employee's regular or specially assigned work duties and do not fall within coverage of the Act absent evidence showing error or abuse on the part of the employing establishment. *C.T.*, 60 ECAB \_\_\_\_ (Docket No. 08-2160, issued May 7, 2009).

<sup>19</sup> *See Richard J. Dube*, 42 ECAB 916 (1991).

employment with respect to these allegations. For these reasons, appellant did not establish that her emotional condition arose in the performance of duty.<sup>20</sup>

On appeal, appellant noted that the alleged assault took place on October 9, 2008, not October 10, 2008, and that her coworker acknowledged being with her and of kissing her. The Board notes that its review of the record is limited to the evidence before the Office at the time of its final decision.<sup>21</sup> Based on the evidence of record, appellant did not establish that the October 10, 2008 incident occurred as alleged.

**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.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 18, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 22, 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>20</sup> As appellant has failed to establish a compensable employment factor, the Board need not address the medical evidence of record. *Marlon Vera*, 54 ECAB 834 (2003).

<sup>21</sup> 20 C.F.R. § 501.2(c).