

FACTUAL HISTORY

On June 29, 2009 appellant, then a 51-year-old human resource technician, filed an occupational disease claim alleging that she sustained an emotional condition due to various incidents and conditions at work. She alleged that she sustained post-traumatic stress syndrome, depression, stress-related migraines, anxiety, sleeplessness and constant fear of reprisal. Appellant alleged that she was subjected to constant hostility because she filed a complaint with the EEO Commission, disclosed unlawful activity and filed a police report due to harassment. She filed two complaints of discrimination which in one case, resulted in reprisal. Appellant generally alleged that she had been exposed to pervasive bullying, a hostile and toxic environment and disparate treatment.

By letters dated July 2, 2009, the Office asked that appellant and the employing establishment submit further information as to the incidents she attributed to her emotional condition.

In a letter dated July 15, 2009, appellant responded that she had attached documentation to support her claim and provided numerous examples of incidents and discriminatory practices that she believed contributed to her condition. She filed a complaint with regard to the employer's reprisal, unprofessional conduct, disparate treatment, harassment and threats based on the EEO process. Appellant alleged that this conduct unreasonably interfered with her work environment and created an intimidating, hostile and offensive work environment. She stated that she had been subjected to pervasive, humiliating, demeaning treatment for almost three years.

Appellant attached copies of letters and complaints she wrote to various persons and agencies, which included her EEO complaints. She alleged in these documents that her supervisors, management and coworkers harassed and bullied her with the intent to cause her to resign her position. Appellant alleged that management solicited negative statements from her coworkers who had a vested interest in having her removed from her position. She was treated in a disparate manner in that there were excessive layers of supervision. Appellant alleged a lack of feedback on her performance and also complained that she was subjected to an increased level of criticism. She was assigned menial tasks or assigned tasks above her level without receiving additional compensation. Appellant noted that management would not respond to her leave requests until the last minute. She alleged that her employer ran a "plantation" and that white management officials were allowed to treat her, a 51-year-old black female, as if she were property and did not afford her the same rights and privileges as other workers. Appellant alleged reprisal after reporting a racial slur in 2006 by her supervisor's predecessor and for having filed two EEO complaints. She alleged that the employing establishment was deliberately avoiding her allegations by delaying the issuance of a decision on her EEO complaint.

Appellant also alleged specific incidents of mistreatment. On April 6, 2009 she asked Janet Wankowski, her supervisor, to provide clarification on a work issue and Ms. Wankowski scolded her in a vicious and debasing tone, told her to read the information and figure it out for herself. On April 22, 2009 Ms. Wankowski called appellant into her office and began to harass her over an e-mail response that appellant wrote to Col. William Mott. Because she treated her

in a threatening manner, appellant left the meeting and filed a police report alleging that Ms. Wankowski posed a physical threat to her. On April 24, 2009 Ms. Wankowski subjected her to additional reprisal by presenting a complaint and notice of proposed seven-day suspension in response to filing the police report. Appellant contended that she was held against her will by Darryl B. Lee while he taunted and humiliated her when he presented her with a temporary suspension letter. She was suspended for three days for being discourteous to her supervisor but that deductions were made to her pay for 44 hours instead of 27 hours. Appellant alleged that on June 10, 2009 she was spoken to in loud and threatening tones by Giles Sanchez and that he slammed his door very loud.

The employing establishment, in a July 29, 2009 memoranda, controverted appellant's claim. The employer generally denied that appellant experienced a hostile work environment and noted that she had stressors that were not related to her employment. Appellant responded, reiterating her allegations of reprisal and discrimination.

The record contains letters and memoranda from employing establishment personnel written with regard to appellant's stated concerns and with regard to her behavior. This included a February 17, 2009 "counseling;" a written response concerning assignment of duties; and a May 14, 2009 memorandum from Captain Lee suspending appellant for three calendar days due to serious incidents of misconduct and noting the procedure for filing a grievance. The employer also submitted a June 2, 2009 decision which rejected appellant's claims of discrimination with regard to her pay, letter of counseling and evaluation. The decision acknowledged, however, that the employing establishment had improperly retaliated against appellant with regard to her assignment on detail. Appellant was inappropriately kept on temporary detail until her EEO complaint was concluded and that a preponderance of evidence established that her detail was motivated, at least in part, by her protected activity.

Appellant submitted a May 9, 2009 form report by Dr. Carla Lee, a Board-certified family practitioner, who noted "acute reaction to stress" and referred appellant for follow up with James A. Beller, M.A. In an attending physician's report dated July 13, 2009, Mr. Beller diagnosed major depression, single episode, severe and noted psychotic features. He indicated that appellant's condition was caused or aggravated by her employment because she was transferred to a job out of her field as reprisal by her supervisor. In a July 19, 2009 report, Mr. Beller indicated that appellant exhibited labile and pent up emotion, tearfulness, hyperventilation and mental exhaustion. He stated that in his opinion, appellant was significantly vulnerable to stress and unable to function at the work site. Mr. Beller referred her to a psychiatrist for treatment.

By decision dated August 25, 2009, the Office denied appellant's claim. It found that appellant had established a compensable work factor in that she was "temporarily detailed to the position of recreation specialist and that said detail was not to exceed February (sic) 30, 2008, however, [appellant] did not return to [her] previous position until June 30, 2008." The Office found that this constituted reprisal by her managers. It denied appellant's remaining allegations as she did not establish any other compensable factors of employment. The Office then determined that the medical evidence in the file was not sufficient to establish the claim because there were no medical reports from a psychiatrist or clinical psychologist.

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 illness has some connection with the employment but nevertheless does not come within the coverage of workers' compensation. These injuries occur in the course of the employment and have some kind of causal connection with it but nevertheless are not covered because they are found not to have arisen out of the employment. However, when disability results from an employee's emotional reaction to her regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.¹

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 factors of her federal employment.² This burden includes the submission of detailed descriptions of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.³

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.⁴ 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.⁵ 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.⁶

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.⁷ A claimant must establish a factual basis for his or her allegations with probative and reliable evidence. Grievances and EEO complaints, by themselves, do not establish that workplace harassment or

¹ *Lillian Cutler*, 28 ECAB 125 (1976).

² *Pamela R. Rice*, 38 ECAB 838 (1987).

³ *Roger Williams*, 52 ECAB 468 (2001); *Anna C. Leanza*, 48 ECAB 115 (1996).

⁴ See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990); *reaff'd on recon.*, 42 ECAB 556 (1991).

⁵ See *William H. Fortner*, 49 ECAB 324 (1998).

⁶ *Ruth S. Johnson*, 46 ECAB 237 (1994).

⁷ See *Michael Ewanichak*, 48 ECAB 364 (1997).

unfair treatment occurred.⁸ 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.⁹ The primary reason for 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.¹⁰ With regard to emotional claims arising under the Act, the term discrimination or harassment as applied by the Board is not the equivalent of that as defined or implemented by other agencies, such as the EEO Commission, which is charged with statutory authority to investigate and evaluate such matters in the workplace. Rather, in evaluating claims for workers compensation under the Act, the term harassment is synonymous, as generally defined, with a persistent disturbance, torment or persecution, *i.e.*, mistreatment by co-employees or workers.¹¹

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.¹² If a claimant does implicate a factor of employment, it 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.¹³

ANALYSIS

Appellant alleged that she sustained an emotional condition as a result of a number of employment incidents and conditions. The Board must first review these incidents and conditions and see if they constitute compensable employment factors under the Act.

Appellant did not attribute her emotional condition to the performance of her regularly assigned duties as a human resources technician or other requirement of her employment under *Cutler*. She alleged that, while employed at the employing establishment, she was harassed and was the victim of discriminatory practices, unprofessional conduct, disparate treatment and threats. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors are established as occurring and arising from appellant's

⁸ See *Charles D. Edwards*, 55 ECAB 258 (2004); *Parley A. Clement*, 48 ECAB 302 (1997).

⁹ See *James E. Norris*, 52 ECAB 93 (2000).

¹⁰ *Beverly R. Jones*, 55 ECAB 411 (2004).

¹¹ *G.S.*, 61 ECAB (Docket No. 09-764, issued December 18, 2009).

¹² *Dennis J. Balogh*, 52 ECAB 232 (2001).

¹³ *Id.*

performance of her regular duties, these could constitute employment factors.¹⁴ However, for harassment to give rise to a compensable disability under the Act there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.¹⁵ In the present case, appellant has not submitted sufficient evidence to establish that she was harassed by her supervisors.¹⁶ She alleged that supervisors made statements and engaged in actions, which she believed constituted harassment. Appellant alleged specific incidents of harassment including being scolded and treated in a threatening manner on April 6 and 22, 2009 by her supervisor, being held against her will on April 24, 2009 by Captain Lee and being spoken to in a threatening tone on June 10, 2009 by Mr. Sanchez.

Appellant did not provide any corroborating evidence, such as witness statements, to establish that her allegations were factual or the actions occurred.¹⁷ While certain statements of her supervisors may have engendered offensive feelings, they did not sufficiently affect the conditions of her employment to constitute a compensable factor.¹⁸ The Board finds that appellant's emotional reaction to the actions of her supervisors is considered self-generated.¹⁹ Consequently, appellant has not established a compensable factor with respect to claimed harassment and discrimination.

Appellant alleged a lack of feedback on her performance yet also alleged that she was subjected to an increased level of criticism. She alleged that she was assigned menial tasks given tasks above her grade level without additional compensation. Appellant alleged that she was subjected to an excessive layer of oversight. She alleged that her leave requests were not granted until the last minute. Appellant alleged discrimination with regard to her suspensions from work. The Board finds that the employing establishment's suspension of appellant and letters or meetings of reprimand for her behavior are not compensable factors. These matters pertain to administrative and personnel matters unrelated to her work duties, and do not fall within the coverage of the Act.²⁰ The assignment of appellant's work and the level of oversight or criticism by her supervisor are not compensable factors. Although the handling of disciplinary actions and leave requests, the assignment of work duties and the monitoring of work activities are generally related to the employment, they are administrative functions of the employer and not duties required of the employee.²¹ The Board has found that an administrative or personnel matter will

¹⁴ *Robert Breeden*, 57 ECAB 622 (2006).

¹⁵ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹⁶ *See Joel Parker, Sr.*, 43 ECAB 220, 225 (1992) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

¹⁷ *See William P. George*, 43 ECAB 1159, 1167 (1992).

¹⁸ *See Denis M. Dupor*, 51 ECAB 482, 486 (2000).

¹⁹ *See David S. Lee*, 56 ECAB 602 (2005).

²⁰ *See Lori A. Facey*, 55 ECAB 217 (2004). *See also 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).

²¹ *Id.*

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 acted abusively, the Board has examined whether the employing establishment acted reasonably.²² In this case, appellant has not submitted sufficient evidence to establish that her superiors committed error or abuse with respect to this matter. On the contrary, the evidence presented establishes that the managers acted reasonably under most of the circumstances.

However, the EEO Commission found that appellant has established retaliation with regard to assignment on a detail. Although the Board has held that findings made by the EEO Commission are not determinative under the Act, these findings may constitute substantial evidence to the claim to be considered by the Office and Board in reviewing a claim for compensation.²³ The Office properly considered the EEO decision and found that appellant had established a compensable work factor under *McEuen*. However, appellant must also submit rationalized medical opinion evidence establishing that her claimed emotional condition is causally related to the compensable employment factor.²⁴

The Office found that appellant had established one compensable factor of employment, *i.e.*, retaliation with regard to her assignment on detail. However, Dr. Beller is not a physician under the Act. A psychotherapist is not a physician or a clinical psychologist as defined under the Act²⁵ His opinion regarding an injury is of no probative medical value. The Board further notes that Dr. Lee is a family practitioner and not a psychiatrist. Dr. Lee did not provide a rationalized opinion relating appellant's emotional condition to the compensable factor found in this case. Accordingly, appellant has not provided medical evidence establishing that her emotional condition is causally related to accepted compensable factors of employment.

CONCLUSION

The Board finds that appellant failed to meet her burden of proof to establish that she sustained an emotional condition in the performance of duty.

²² See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

²³ *G.S.*, *supra* note 11.

²⁴ *C.F.*, 60 ECAB ___ (Docket No. 08-1102, issued October 10, 2008); *Charles D. Gregory*, 57 ECAB 322, 328 (2006).

²⁵ 5 U.S.C. § 8101(2).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 25, 2009 is affirmed.

Issued: September 1, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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