

FACTUAL HISTORY

On June 5, 2008 appellant, then a 45-year-old psychiatric nursing assistant, filed a claim (Form CA-2) for employment-related stress, depression, anxiety attacks and insomnia, which reportedly arose on or about April 16, 2008. She claimed she did not have issues with panic/anxiety attacks before working on Ward 7, which she characterized as a hostile work environment. Appellant stopped work on June 5, 2008.³

In a May 5, 2008 statement, appellant alleged that on April 25, 2008 around 3:30 p.m., Christopher Chavez, a coworker, became visibly angry with her because she had let the charge nurse, Gene Chapa, know that she wanted to go to lunch at 7:00 p.m. Mr. Chavez reportedly told her that he was “sick of [her] shit!” Appellant alleged that he loomed over her, postured aggressively and pointed his finger in her face. She felt very threatened and was afraid to continue working with Mr. Chavez. Appellant notified Jessica R. Harman, Ward 7 nurse manager, about her concerns, but Ms. Harman “basically blew me off.” As Ms. Harman was leaving for the day, appellant asked her if she could contact the employing establishment police. Ms. Harman replied “No,” and advised appellant to contact the off-tour supervisor if anything else happened. Appellant stated that she no longer felt safe working on a locked unit with Mr. Chavez. Several individuals reportedly witnessed the April 25, 2008 incident with Mr. Chavez. Appellant stated that she had been advised that she and Mr. Chavez should “stay away from each other.”

On May 23, 2008 Ms. Harman conducted a fact-finding meeting regarding the alleged April 25, 2008 incident between appellant and Mr. Chavez. Appellant indicated that, prior to the incident, Mr. Chavez agreed to cover one or more of her shifts, but later changed his mind.⁴ She was not upset with his decision not to cover her shift and claimed to have treated him professionally afterwards. Regarding the April 25, 2008 incident, Mr. Chavez reportedly overheard appellant tell the charge nurse that she wanted to go to lunch at 7:00 p.m. He then turned around and reportedly stated, “I’m tired of this shit.” Appellant reiterated that Mr. Chavez hovered over her and pointed at her. Mr. Chavez also reportedly asked her if she wanted to go in the back, he then left and did not say anything. Appellant described her interactions with him since the incident as “professional” and appropriate for patient care. She stated that she did not feel safe working with Mr. Chavez after how he treated her. Appellant alleged that he was “throwing dirty looks at [her].” Ms. Harman asked appellant whether she had been acting like Mr. Chavez’s boss when they worked together. Appellant claimed she had not and said she treated Mr. Chavez like a team member. She acknowledged that she had told him to watch out for a particular patient who reportedly would eat out of the trash. Appellant explained that they had been monitoring this particular patient’s food and fluid intake, and she thought her advice to Mr. Chavez was just helping him out, not acting like his boss.

³ The June 5, 2008 Form CA-2 indicated appellant’s regular work schedule was Sunday, Tuesday and Thursday from 3:30 p.m. until midnight.

⁴ Appellant sought to change shifts with Mr. Chavez for a variety of personal reasons, including a trip to the spa with her mother, her daughter’s baptism and her father’s surgery.

Appellant questioned Ms. Harman's decision not to transfer her to a different area and her instructions to call the off-tour supervisor if anything additional occurred, rather than the employing establishment police. After the incident with Mr. Chavez, she was given the option of staying or leaving. Appellant chose to go home on emergency annual leave. Ms. Harman suggested that appellant was attempting to capitalize on the situation so that she could call out for the weekend; the same days she had asked to take off. Appellant denied that was her intention. She denied instigating the incident with Mr. Chavez.

Ms. Harman also questioned appellant about another incident where she walked her attorney and another gentleman through the medical center unit. She asked whether it was done in an effort to intimidate staff. Appellant denied that was her motive. Ms. Harman advised appellant that bringing these individuals through the unit was a violation of patient confidentiality.

Appellant accused Ms. Harman of discriminating against her. She alleged that Ms. Harman told Mr. Chavez to keep an eye on her and report back any problems. Appellant believed Ms. Harman saw Mr. Chavez as the victim and herself the instigator.

In a June 4, 2008 letter, counsel noted appellant's intention to file an equal employment opportunity (EEO) complaint for discrimination based on gender and retaliation. He contended that she was being subjected to a hostile, intimidating work environment based on frivolous complaints made against her by Mr. Chavez, who alleged that she was harassing him and trying to provoke him. Counsel also contended that Ms. Harman was hostile towards appellant and appeared intent on imposing discipline and/or looking for something to terminate her for. He further noted that appellant had requested a transfer two to three different times, to no avail.

Appellant provided a supplemental statement of June 18, 2008. She claimed problems with stress and anxiety attacks over the past 2½ months due to a hostile work environment, being mandated to work doubles back-to-back, and because of management's discrimination and retaliation. Appellant's migraines had increased two fold and that she had to go to the emergency room during work hours because of chest pain. She reiterated the April 25, 2008 "verbal attack" by Mr. Chavez and that she was not transferred off the ward. Appellant had difficulty sleeping, a loss of appetite and she experienced shortness of breath and tightness in her chest whenever driving to work. She was under the care of William J. Wahlert, a physician assistant, who twice recommended that she be moved to another part of the hospital for health reasons. Appellant stated that he excused her from work through July 21, 2008 due to stress-related employment issues. She noted that she also saw a psychiatrist, Dr. George M. Baca. Appellant filed an EEO complaint and a fact-finding meeting was held on May 23, 2008. She was awaiting a final decision on her EEO complaint. Appellant noted that working on an in-patient psychiatric ward was challenging and that she should not have to deal with verbal or physical abuse from any other staff members. Due to poor management, staffing was horrible which required she work overtime and on some occasions, she had to work 16 hours straight.⁵

⁵ A nursing assistant "Mandation Log" for Ward 7 indicated that appellant was required to work eight hours overtime on February 10 and 17, March 2, 8, 16 and 28, 2008 and four hours overtime on April 5, 2008.

The Office received a February 27, 2008 work release from Hands on Health Care, P.C. excusing appellant from February 15 to 26, 2008 due to migraine headaches. Department of Veterans Affairs' medical records reflect that appellant was seen in the emergency room on April 11, 2008 and excused from work through April 21, 2008. Appellant was also seen at ABQ Health Partners on April 23, 2008 and was excused from work from April 26 to 29, 2008 due to work-related stress. A June 5, 2008 letter from Mr. Wahlert recommended that she be granted indefinite leave for work-related stress.

In a September 25, 2008 decision, the Office denied appellant's emotional condition claim.

Appellant timely requested a hearing, which was held on February 13, 2009. By decision dated October 29, 2009, the Branch of Hearings and Review affirmed the September 25, 2008 decision. The hearing representative found that appellant had not established a compensable employment factor.

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.⁶

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.⁷ 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.⁸

An employee's emotional reaction to administrative or personnel matters generally falls outside the scope of the Act.⁹ Although generally related to the employment, administrative and personnel matters are functions of the employer rather than the regular or specially assigned duties of the employee.¹⁰ However, to the extent the evidence demonstrates that the employing

⁶ See *Kathleen D. Walker*, 42 ECAB 603 (1991).

⁷ *Pamela D. Casey*, 57 ECAB 260, 263 (2005).

⁸ *Lillian Cutler*, 28 ECAB 125, 129 (1976).

⁹ *Andrew J. Sheppard*, 53 ECAB 170, 171 (2001); *Matilda R. Wyatt*, 52 ECAB 421, 423 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

¹⁰ *David C. Lindsey, Jr.*, 56 ECAB 263, 268 (2005).

establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.¹¹

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.¹² 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.¹³

ANALYSIS

Appellant alleged that her coworker, Mr. Chavez, was verbally abusive on April 25, 2008, and she felt threatened by what she described as his aggressive posturing and finger pointing. She also took exception to Ms. Harman's handling of the situation and her refusal to authorize a transfer out of Ward 7. Appellant noted that she was required to work overtime and alleged discrimination, harassment, retaliation and a hostile work environment. She did not attribute her emotional condition to any regular or specially assigned job requirement or duty arising as a nursing assistant under *Cutler*. Apart from her claim of harassment and a hostile work environment, the remainder of appellant's allegations pertained to administrative or personnel matters. Absent evidence of error or abuse on the part of the employer, an employee's emotional reaction to administrative and personnel matters is not compensable.¹⁴

Regarding appellant's claim of having to work overtime, there is evidence that she was required to work additional hours on at least seven days between February 10 and April 5, 2008. As noted she did not attribute her claimed emotional condition to any particular incident arising on the dates in question or to performing her nursing assistant duties. Appellant merely noted that, because of poor management, staffing was horrible and occasionally she was required to work as many as 16 hours in a given day. Monitoring and assigning work are administrative functions of a supervisor.¹⁵ The manner in which a supervisor exercises her discretion falls outside the coverage of the Act. This principle recognizes that supervisors must be allowed to perform their duties and at times employees will disagree with their supervisor's actions. Mere dislike or disagreement with certain supervisory actions will not be compensable absent proof of error or abuse on the part of the supervisor.¹⁶ Appellant has not demonstrated error or abuse on the part of the employing establishment in assigning overtime.

¹¹ *Id.*

¹² *Kathleen D. Walker, supra* note 6.

¹³ *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992). Unless a claimant establishes a compensable factor of employment, it is unnecessary to address the medical evidence of record. *Garry M. Carlo*, 47 ECAB 299, 305 (1996).

¹⁴ *David C. Lindsey, Jr., supra* note 10.

¹⁵ *Donney T. Drennon-Gala*, 56 ECAB 469, 475 (2005); *Beverly R. Jones*, 55 ECAB 411, 416 (2004); *Charles D. Edwards*, 55 ECAB 258, 270 (2004).

¹⁶ *Linda J. Edwards-Delgado*, 55 ECAB 401, 405 (2004).

Ms. Harman's handling of the April 25, 2008 incident between appellant and Mr. Chavez is similarly noncompensable. Appellant wanted to be reassigned to a different area of the hospital and her requests for transfer were denied. As noted, work assignments are administrative in nature.¹⁷ Appellant has not demonstrated error or abuse. Furthermore, her frustration from not being permitted to work in a particular environment or hold a particular position is not compensable.¹⁸

As to the incident involving appellant and Mr. Chavez on April 25, 2008, the full extent of their exchange is not appropriately documented. Several employees, including the charge nurse, were reportedly present at the time, but no witness statements were submitted. Noticeably absent from the record is any statement from Mr. Chavez, the accused. Verbal abuse or threats of physical violence in the workplace are compensable under certain circumstances.¹⁹ This does not imply, however, that every ostensibly abusive or threatening statement uttered in the workplace will give rise to coverage under the Act.²⁰ Mr. Chavez reportedly told appellant he was "sick of [her] shit!" While his use of a vulgarity could be considered unprofessional, the statement attributed to him does not by itself rise to the level of compensable verbal abuse. The Board further notes that appellant's claim that Mr. Chavez postured aggressively and pointed his finger in her face is not adequately substantiated by the record. Consequently, appellant failed to establish that Mr. Chavez was either verbally abusive or physically threatening on April 25, 2008.

For harassment to give rise to a compensable employment injury there must be evidence that harassment occurred.²¹ The mere perception of harassment is not compensable.²² Allegations of harassment must be substantiated by reliable and probative evidence.²³ Appellant has not submitted any evidence to substantiate her allegations of harassment, retaliation, discrimination or a hostile work environment. She claimed to have filed an EEO complaint. However, the mere fact that an employee filed an EEO complaint does not establish error or abuse on the part of her employer.²⁴

¹⁷ *Peter D. Butt, Jr.*, 56 ECAB 117, 123-24 (2004).

¹⁸ *Id.* at 125; *Lillian Cutler*, *supra* note 8.

¹⁹ *Fred Faber*, 52 ECAB 107, 109 (2000).

²⁰ *Id.*

²¹ *Donna J. DiBernardo*, 47 ECAB 700, 703 (1996).

²² *Id.*

²³ *Joel Parker Sr.*, 43 ECAB 220, 225 (1991).

²⁴ Grievances and EEO complaints do not establish that workplace harassment or unfair treatment occurred. *Charles D. Edwards*, *supra* note 15. Furthermore, absent an admission of fault, a settlement agreement does not establish error or abuse on the part of the employing establishment. *Kim Nguyen*, 53 ECAB 127, 128 (2001).

Because appellant failed to establish a compensable factor of employment, the Office properly denied her claim.²⁵

CONCLUSION

Appellant failed to establish that she sustained an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the October 29, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 18, 2011
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

²⁵ *Garry M. Carlo, supra* note 13.