United States Department of Labor
Employees' Compensation Appeals Board

S.M., Appellant	)	
and	)	**Docket No. 10-864**
	)	**Issued: March 28, 2011**
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Los Angeles, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 17, 2010 appellant filed a timely appeal from the December 9, 2009 merit decision of the Office of Workers' Compensation Programs. Pursuant to the Federal Employees' Compensation Act[1] and 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 in establishing that she developed an emotional condition in the performance of duty.

FACTUAL HISTORY

On November 1, 2006 appellant, then a 61-year-old personnel management specialist, filed a claim alleging that she developed an emotional condition as a result of being forced to

[1] 5 U.S.C. §§ 8101-8193.

retire and due to discrimination and retaliation. She became aware of her condition and its relation to her work on June 10, 2004. Appellant retired on October 3, 2004.[2]

On November 15, 2006 the Office asked appellant and the employing establishment to provide additional evidence. In an undated statement, appellant alleged that, on April 13, 2004, in a meeting, scheduled with the administrator for resource management, Ventris Gibson, commented on staff diversity and encouraged recruitment of similar individuals. She disagreed with this and commented that Hispanics were underrepresented as most of the staff was African American. Appellant asserted that she was improperly disciplined for her comments. Ms. Gibson declined appellant's request to meet privately. Appellant alleged that several incidents occurred during her settlement negotiations for her Equal Employment Opportunity (EEO) complaint in May and June 2004, specifically that Nina Adams, human resource manager, would not agree to settle unless appellant agreed to retire; Ms. Adams stated that appellant would receive workers' compensation benefits "over her dead body"; Brad Talamon, a manager, made rude and demeaning statements; and Ms. Adams stated that a proposed May 15, 2004 suspension was a stepping stone to her removal. She stated that Tim Kubik told a selection committee not to consider her for vacant jobs in August 2006 because she was a troublemaker. In September 2004, appellant contacted Mr. Talamon to withdraw her retirement but he did not return her calls whereupon she contacted Monroe Balton, regional counsel, who advised her that she could not retract the retirement agreement. She stated that Mr. Balton was loud and dismissive. Appellant generally alleged that Ms. Adams was abusive and harassed her.

In an April 13, 2004 statement, appellant noted attending the staff meeting and commenting that the majority of the employees were of one particular group and that Ms. Adams chose to hire mostly black employees. She stated that the Office of Civil Rights hired only Puerto Ricans. Appellant noted that the majority of the agency was white and the hiring policy was tantamount to incest. She asserted that Ms. Adams reassigned her air traffic duties because she challenged Ms. Adams in court and that Ms. Gibson declined to meet with her.

In an April 13, 2004 report of contact, Mr. Kubik, manager, stated that during a staff meeting that day Ms. Gibson noted her desire for more staff diversity. He stated that appellant interrupted and stated "Yeah, just take a look around this room! I would like to ask what you are doing to increase the number of Hispanics in the FAA? With every new Administrator, I hear how the agency is working to increase those numbers but nothing changes." Mr. Kubik stated that Ms Gibson spoke of increasing Hispanic hires but appellant interrupted stating "What sort of diversity is there, it's all a bunch of white guys and a Civil Rights Officer (ACR-1) at headquarters only hires Puerto Ricans because that's what she is." He noted that appellant sent e-mails to Ms. Gibson about diversity and expressed anger that Ms. Adams withdrew an Air Traffic Labor Relations assignment from her. Ms. Gibson informed appellant that the meeting was not the appropriate forum to discuss management personnel issues and later informed management that appellant's e-mails were rude and threatening and her meeting comments were discriminatory.

[2] Appellant filed previous emotional condition claims that were denied on February 27, 1997 and August 18, 1999.

On April 19, 2004 Mr. Kubik advised appellant during a mid-year performance review that her comments during the April 13, 2004 meeting were inappropriate and that she should cease making rude and belligerent comments at meetings. Appellant asserted that she confronted Ms. Gibson because she thought she was ignored because she was Hispanic.

The employer, by notice dated May 17, 2004, proposed to suspend appellant for 12 days for unprofessional and inappropriate conduct during the April 13, 2004 meeting. On May 25, 2004 appellant asserted that the proposed suspension was based on discrimination and reprisals and that she did not use profanity or denigrate anyone but was concerned that Ms. Adams was not held accountable for discrimination and reprisals.

The employer submitted a statement from Angela Porter, a manager, who attended the April 13, 2004 meeting and noted that appellant made inappropriate comments on agency diversity and noted that Ms. Adams hires mostly blacks. Ms. Porter noted many employees were uncomfortable and shocked by appellant's behavior. The employer submitted statements from employees in attendance at the April 13, 2004 meeting including Stephen M. Soffe, Deone Ambrose, Jacalyn Murray, Loray A. Hunter and Kawana Midgette who noted feeling uncomfortable with appellant's statements that Ms. Adams hired primarily black people to the exclusion of Hispanics and that the hiring practices were tantamount to incest.

In a June 10, 2004 EEO settlement, the employer agreed to retroactively promote appellant to a Grade 14 with back pay, pay medication and medical services, credit appellant 100 hours of sick and annual leave and rescind the notice of proposed suspension issued May 17, 2004 in return for her voluntary retirement on October 3, 2004. The agreement did not admit discrimination against appellant. Appellant submitted an August 12, 2004, amendment to the June 10, 2004 settlement agreement where she was requesting that back pay be retroactive to November 1996 with interest.

In a June 22, 2004 EEO complaint, appellant alleged that Ms. Adams denied her work at her grade level and improperly issued a notice of proposed suspension causing her depression to worsen.

A January 22, 2007 statement from Mr. Balton noted that Mr. Talamon was on extended leave for health reasons but spoke to Mr. Balton about appellant's allegations and submitted a September 3, 2004 statement from Mr. Talamon who noted that the settlement agreement was achieved through several sessions with an EEO mediator and that appellant, represented by Glen Rotella, voluntarily signed the agreement. Mr. Talamon told appellant that she alienated everyone in the command structure due to repeated acts of insubordination directed toward Ms. Adams and her actions warranted substantial discipline which would be instituted if the settlement negotiations had not been successful. He reported that the mediator encouraged the parties to be candid. Mr. Talamon denied being rude or demeaning to appellant. Mr. Balton further noted that he did not recall a telephone conversation with appellant about her settlement but advised Mr. Talamon that if the agreement was withdrawn the proposed disciplinary proceedings would be reinstated.

In Mr. Kubik's January 31, 2007 statement, he again noted the April 13, 2004 events and advised that appellant's proposed suspension was due to numerous unprofessional incidents and

inappropriate conduct dating to 2001 which continued despite counseling. He noted that appellant's name appeared on the certificate of well-qualified applicants to be considered for vacant positions and he never discussed appellant with the hiring team which reviewed all applications and then made a recommendation.

In a January 31, 2007 statement, Ms. Gibson noted having an aggressive schedule and visiting 11 human resource offices in 2004 throughout the nation and indicated that she could not accommodate appellant's request for a meeting on April 13, 2004. She indicated that appellant expressed concern about the hiring practices and she advised her that the agency always followed hiring rules and did not engage in prohibited personnel practices. Ms. Gibson noted that appellant's conduct during the staff meeting was unprofessional and inappropriate and disciplinary action was initiated. She noted that appellant filed several EEO complaints for discrimination and reprisals which were settled with no finding of discrimination or retaliation. Ms. Gibson stated that she did not disrespect, publicly humiliate or embarrass appellant during the town hall meeting but allowed her the opportunity to voice her concerns.

Appellant submitted medical evidence that included a May 19, 2004 report from Dr. David Borman, a psychiatrist, who treated her for depression. Reports from Dr. Stephen Shuchter, a psychiatrist, from October 26, 2006 to January 9, 2007, diagnosed recurrent chronic depression related to a divorce in 2003, psychiatric problems with her daughters and workplace issues.

In a decision dated April 27, 2007, the Office denied appellant's claim finding that she had failed to establish any factors of employment responsible for her alleged emotional condition.

A telephone hearing was held on October 29, 2007. Appellant submitted various documents from 1996 to 2003 relating to events that predated her claim. She submitted a November 30, 2007 statement from Mr. Rotella who noted that in 1998 appellant had work differences with the air traffic director who did not want appellant to service that agency and also with Ms. Adams who reduced appellant's assignments. Mr. Rotella noted being assigned to the committee that reviewed job applications and being informed by another employee that Mr. Kubik told the selection committee not to consider appellant for a vacancy on August 24, 2006 because she was a trouble maker and not a team player. Medical reports from Dr. Shuchter dated January 9 to November 29, 2007 noted that certain work events exacerbated appellant's condition.

The employing establishment submitted a November 28, 2007 statement from Julie Berko, a manager, who assisted Mr. Kubik in determining discipline after the April 13, 2004 meeting and noted that appellant had been previously counseled. In a December 4, 2007 declaration, Mr. Kubik noted appellant was technically competent but unable to effectively communicate. He noted counseling her on multiple occasions on raising valid concerns in an acceptable manner. Mr. Kubik noted that the proposed suspension was rescinded as part of the settlement but there was no admission of discrimination or retaliation by the agency. Appellant submitted December 11 and 18, 2007 statements reiterating her allegations.

In an April 3, 2008 decision, the hearing representative affirmed the April 27, 2007 decision. The hearing representative noted that her decision considered matters beginning with the April 13, 2004 meeting that led to the filing of appellant's claim.[3]

In a decision dated December 9, 2009, the Office hearing representative affirmed the Office's April 27, 2007 decision.

LEGAL PRECEDENT

To establish an emotional condition in the performance of duty, a claimant must submit the following: (1) medical evidence establishing that he or she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to the emotional condition.[4]

Workers' compensation law does not apply to each and every 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 concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to her regular or specifically assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act. 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 or her frustration from not being permitted to work in a particular environment or to hold a particular position.[5]

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 the physician when providing an opinion on causal relationship and, which working conditions are not deemed factors of employment and may not be considered.[6] 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 the matter establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[7]

[3] On July 7, 2008 appellant appealed to the Board. In a June 1, 2009 order, the Board remanded the case to the Office to consolidate claim numbers xxxxxx835 and xxxxxx981. Docket No. 08-1966 (issued June 1, 2009).

[4] *George H. Clark*, 56 ECAB 162 (2004).

[5] *See Lillian Cutler*, 28 ECAB 126 (1976).

[6] *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[7] *Id.*

ANALYSIS

Appellant alleged that she was harassed, discriminated against and the victim of reprisals by management commencing in 2004 which caused her emotional condition. The Board must thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act. Appellant has not attributed her emotional condition to the regular or specially assigned duties of her position as a personnel management specialist. Therefore, she has not alleged a compensable factor under *Cutler*.[8]

Appellant made several allegations related to administrative and personnel actions. In *Thomas D. McEwen*,[9] the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under the Act as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. The Board noted, however, that coverage under the Act would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant. Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[10]

Appellant alleged that she was improperly disciplined for comments she made to Ms. Gibson on April 13, 2004, during a staff meeting when she disagreed with the diversity of the staff. Allegations that the employing establishment engaged in improper disciplinary actions, relate to administrative or personnel matters, unrelated to her regular or specially-assigned work duties.[11] Although the handling of disciplinary actions and evaluations are generally related to the employment, they are administrative functions of the employer, and not duties of the employee.[12] The Board finds that the employing establishment did not act unreasonably in this administrative matter.

In a January 31, 2007 statement, Ms. Gibson explained that appellant's conduct during the meeting was unprofessional and inappropriate and that discipline was initiated. She denied disrespecting or embarrassing appellant during the meeting but noted allowing her an opportunity to voice her concerns. On April 13, 2004 Mr. Kubik confirmed that appellant interrupted the meeting and made inappropriate comments about hiring practices, including that the hiring practices were tantamount to incest. In a January 31, 2007 statement, he noted that appellant's proposed suspension was based on numerous incidents of unprofessional and

[8] *See supra* note 5.

[9] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

[10] *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

[11] *See 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).

[12] *Id.*

inappropriate conduct since 2001. Mr. Kubik explained that she had been counseled but that her behavior was increasingly disrespectful. Other employees at the meeting noted feeling uncomfortable with appellant's statements. The Board finds that the employer acted reasonably in initiating discipline due to inappropriate conduct at the April 13, 2004 meeting. Although the proposal to suspend appellant was rescinded in a June 10, 2004 EEO settlement agreement, this does not establish error or abuse.[13] The settlement agreement noted that there was no admission of discrimination against the complainant by the agency. Appellant has presented no corroborating evidence to support that the employing establishment erred or acted abusively with regard to these allegations and the employing establishment denied acting improperly. She has not established error or abuse in these actions and therefore, as administrative matters, they are not compensable under the Act.

Appellant alleged that, on April 13, 2004, she requested a meeting with Ms. Gibson to discuss the hiring practices of the agency and Ms. Gibson declined. In a January 31, 2007 statement, Ms. Gibson indicated that she had an aggressive schedule in 2004 and she was not able to accommodate appellant's request. The Board has found that an employee's complaints concerning the manner in which a supervisor performs duties as a supervisor or the manner in which a supervisor exercises his supervisory discretion fall, as a rule, outside the scope of coverage provided by the Act. This principle recognizes that a supervisor or manager in general must be allowed to perform his duties, that employees will at times dislike the actions taken, but that mere disagreement or dislike of a supervisory or management action will not be actionable, absent evidence of error or abuse.[14] Ms. Gibson provided a reasonable explanation for her inability to meet with appellant at that time.

Appellant further alleged that she contacted Mr. Talamon in September 2004 to withdraw her retirement and EEO settlement agreement but her call was not returned. She stated that she later contacted Mr. Balton in September 2004 about this but he stated that she had signed the agreement and it could not be retracted. The Board notes that matters relating to an EEO settlement do not relate to appellant's regular or specially-assigned duties. The Board has also held that stress or frustration resulting from failure to obtain appropriate redress or corrective actions from other administrative agencies before which complaints are filed against the employing establishment are not covered by the Act.[15] In a September 3, 2004 statement, Mr. Talamon explained how the settlement was reached, noted that appellant was represented and confirmed that she signed the agreement voluntarily without coercion. Appellant presented no corroborating evidence to support that the employer acted unreasonably in this matter and she has not established error or abuse in this regard.

Appellant alleged that Mr. Kubik instructed the selection committee not to consider her for vacancies on August 24, 2006 because she was a troublemaker. The Board notes that the granting or denial of a request for a transfer and the assignment to a different position are

[13] *See Linda K. Mitchell*, 54 ECAB 748 (2003) (the mere fact that the employing establishment lessened a disciplinary action did not establish that the employing establishment erred or acted in an abusive manner).

[14] *See Marguerite J. Toland*, 52 ECAB 294 (2001).

[15] *Bernard Snowden*, 49 ECAB 144 (1997).

administrative functions that are not compensable factors of employment under the Act, absent error or abuse, as they do not involve appellant's ability to perform her regular or specially-assigned work duties but rather constitute her desire to work in a different position.[16] On January 31, 2007 Mr. Kubik noted the hiring process and stated that he did not discuss appellant with the hiring team before they reviewed the list of applicants. In a November 30, 2007 statement, Mr. Rotella noted being told by a coworker that Mr. Kubik did not want the selection committee to consider appellant for a vacancy because she was a troublemaker. The Board notes that Mr. Kubik denied making such a statement and appellant did not provide proof of his hearsay evidence from the coworker who allegedly heard the statement. This evidence is insufficient to support that the employing establishment acted unreasonably with regard to appellant's application for vacant positions.

Appellant generally alleged that she was harassed and discriminated against because she is Hispanic. She alleged several incidents in May and June 2004, specifically that Ms. Adams would not agree to a settlement unless she retired; that Ms. Adams stated that appellant would receive workers' compensation benefits "over her dead body" and that the proposed suspension of May 15, 2004 was a stepping stone to appellant's removal. To the extent that incidents alleged as constituting harassment by a supervisor are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.[17] 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.[18] The factual evidence does not support the harassment assertions. Appellant presented no corroborating evidence or witness statements to support that Ms. Adams made these statements and she denied making them. The matters underlying these assertions also generally pertain to processing an EEO claim and a workers' compensation claim which bear no relation to appellant's regular or specially-assigned duties.[19] As noted, the evidence does not show that the employer acted unreasonably in the settlement matter. The evidence is insufficient to show that appellant was singled out or treated disparately with regard to her claim of harassment.

To the extent that appellant is alleging that she was verbally abused by Ms. Adams, Mr. Talamon and Mr. Balton, the Board has generally held that being spoken to in a raised or harsh voice does not of itself constitute verbal abuse or harassment.[20] She did not identify what statements of Mr. Talamon were "rude and demeaning" or how Mr. Balton's statements were "dismissive." As noted, appellant presented no corroborating evidence to support that Ms. Adams made the "dead body" statements. Mr. Balton and Mr. Talamon denied treating appellant inappropriately. The Board finds that appellant's unsupported allegations are

[16] *Id.*; *see also Peter D. Butt Jr.*, 56 ECAB 117 (2004).

[17] *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

[18] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991). *See Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

[19] *See Snowden, supra* note 15; *George A. Ross*, 43 ECAB 346 (1991) (processing compensation claim bears no relation to a claimant's day-to-day or specially assigned duties).

[20] *T.G.*, 58 ECAB 189 (2006).

insufficient to rise to the level of compensable verbal abuse. Appellant did not show how a statement regarding why she was being disciplined would rise to the level of verbal abuse or otherwise fall within the coverage of the Act.[21] She has not established a compensable factor in this regard.

Consequently, appellant has not established her claim for an emotional condition as she has not attributed her claimed condition to any compensable employment factors.[22]

CONCLUSION

The Board finds that the evidence fails to establish that appellant sustained an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the December 9, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 28, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[21] *Peter D. Butt Jr., supra* note 16. *See David C. Lindsey, Jr.,* 56 ECAB 263 (2005) (the mere fact that a supervisor raised his voice during a conversation was insufficient to warrant a finding of verbal abuse).

[22] As appellant has failed to establish a compensable employment factor, the Board need not address the medical evidence of record; *see Margaret S. Krzycki,* 43 ECAB 496 (1992).