

federal employment. She attributed her emotional condition to a September 10, 2008 interview with Sergeant (Sgt.) Edward R. Barnes, a supervisor, about her sick leave usage. In an October 3, 2008 statement, appellant indicated that she was off work from September 2 to 8, 2008 due to a burn on her hand. She provided Sgt. Barnes with a doctor's note excusing her from work for the days that she was absent. On September 10, 2008 Sgt. Barnes interviewed appellant regarding her sick leave usage and told her that he saw a pattern in her absences.

On October 7, 2008 Sgt. Barnes related that he interviewed employees with low leave balances or apparent patterns in sick leave usage in accordance with employing establishment policy. On October 9, 2008 he denied telling appellant in a September 10, 2008 interview that she was abusing her sick leave. Sgt. Barnes suggested that appellant come into work if she felt a bit unwell and then request leave. He indicated that appellant was agitated during the interview because she had notes from her physician covering some absences.

In a statement dated November 4, 2008, appellant related that in 2004 Lieutenant (Lt.) Roberto Tijerina, her second-line supervisor, began visiting her post, complimenting her appearance and offering her money to buy her children dinner. In March 2005, she and Lt. Tijerina had a consensual sexual encounter. After that Lt. Tijerina would speak of the encounter when he visited appellant at her post. He also scratched the palm of her hand to indicate that he wanted to engage in intercourse. Lt. Tijerina gave her a massage in 2006. He constantly visited appellant's post and would "continuously talk about [the] sexual encounter and how much he enjoyed it." In 2008 Lt. Tijerina, at the time her immediate supervisor, informed her that he had a copy of her schedule and came to her post. Appellant stated, "He would notice that I would put my attention on the security monitors because he knew it made me uncomfortable when he would talk sexual in nature. He would then apologize and tell me that he cherished the time we spent together." She became anxious after Sgt. Barnes questioned her about her sick leave. On October 22, 2008 appellant told investigators that Lt. Tijerina had sexually harassed her and told her not to tell anyone or they would lose their jobs. She attributed her stress to "being sexually harassed by [her] second-line supervisor, Lt. Tijerina for an extended period of time."

On November 20, 2008 the employing establishment controverted the claim. It maintained that Sgt. Barnes administered the sick leave regulations on a sound and equitable basis and had the right to interview employees regarding their use of leave if there was a good-faith belief that there may be abuse. The employing establishment additionally asserted that appellant's allegations of sexual harassment were unsubstantiated.

By decision dated March 3, 2009, OWCP denied appellant's claim after finding that she did not establish an injury as alleged. It determined that she did not establish any compensable work factors.

On January 25, 2010 appellant requested reconsideration. In support of her request, she submitted an October 8, 2008 report by the employing establishment regarding its investigation into allegations that Lt. Tijerina engaged in conduct unbecoming an officer and had an inappropriate senior/subordinate relationship with appellant. The investigator, Thomas Miles, related that the investigation began after Sgt. Barnes heard Lt. Tijerina tell appellant that she needed a foot massage and also overheard one side of an inappropriate telephone call. In an

October 24, 2008 interview, Lt. Tijerina related that he made comments of a sexual nature to appellant and scratched her palm but believed that it was not inappropriate due to their prior sexual encounter. He also confirmed that he had loaned her money. Mr. Miles stated, “[Lt. Tijerina] related that he was aware that comments he has made up to the summer of 2008 have bothered [appellant], but that he did not feel that he was harassing her.... [He] further related that he should not have made some of the comments, no matter what their previous relationship may have been.” Mr. Miles also interviewed appellant, who related that, on one occasion, Lt. Tijerina placed her hands on his pants which “caused her embarrassment and discomfort.” She told him that she wanted a professional relationship. Lt. Tijerina scratched her palm and appellant “understood it meant that he wanted to have sex with her.” He instructed her not to tell anyone or they would lose their jobs. As a result of the investigation, the employing establishment concluded that Lt. Tijerina had sexually harassed appellant from 2005 through 2008 and engaged in an inappropriate senior/subordinate relationship as he was her second-line supervisor.

By decision dated August 17, 2010, OWCP denied modification of its March 3, 2009 decision. It found that she had provided no evidence corroborating her allegation of sexual harassment.

On appeal appellant argues that the investigative report supports that Lt. Tijerina sexually harassed her. She further maintains that she was removed from her position in retaliation for filing an Equal Employment Opportunity (EEO) complaint.

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 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 his regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.² 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 his frustration from not being permitted to work in a particular environment or to hold a particular position.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 FECA.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

² 5 U.S.C. § 8101 *et seq.* *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

³ *Gregorio E. Coned*, 52 ECAB 410 (2001).

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

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

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 FECA, 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 unfair treatment occurred.⁸ The issue is whether the claimant has submitted sufficient evidence under FECA 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 OWCP and the Board.¹⁰

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, OWCP, 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.¹¹ If a claimant does implicate a factor of employment, OWCP 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, OWCP must base its decision on an analysis of the medical evidence.¹²

ANALYSIS

Appellant has not alleged that she developed an emotional condition due to the performance of her regular or specially assigned duties or out of a specific requirement imposed by his employment. Instead, she maintained that she experienced stress caused in part by Sgt. Barnes interviewing her on September 10, 2008 about her sick leave usage. Although matters involving leave are generally related to the employment, they are administrative

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

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

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

¹² *Id.*

functions of the employer rather than duties of the employee.¹³ Administrative or personnel matters will be considered to be employment factors only where the evidence discloses error or abuse on the part of the employing establishment.¹⁴ Sgt. Barnes related that he interviewed appellant because she had a low leave balance and a possible pattern in her sick leave usage. On November 20, 2008 the employing establishment maintained that his interview conformed with its regulations. Appellant has not submitted any evidence showing error or abuse by Sgt. Barnes in interviewing her regarding her use of sick leave and thus has not established a compensable work factor.

Appellant primarily attributed her anxiety and depressive disorder to sexual harassment by her second-line supervisor, Lt. Tijerina, from 2005 through 2008. Harassment by supervisors and coworkers, if established as occurring and arising from the performance of work duties, can constitute a compensable work factor.¹⁵ The allegations of harassment must be substantiated with probative and reliable evidence.¹⁶ In a November 4, 2008 statement, appellant related that from 2004 until 2008 Lt. Tijerina came to her post while she was working and discussed her attractiveness. Following a consensual sexual encounter in March 2005, she told him that she wanted to keep their relationship professional but he regularly came to her post, scratched the palm of her hand to indicate that he wanted a sexual relationship and repeatedly discussed their sexual encounter. In October 2008, for reasons apparently unrelated to appellant, the employing establishment initiated an investigation of Lt. Tijerina for conduct unbecoming an officer and for engaging in an inappropriate senior/subordinate relationship. In an interview conducted as part of that investigation Lt. Tijerina admitted that he made comments to appellant that he should not have made, scratched her on the palm and essentially confirmed the bulk of appellant's November 4, 2008 statement. In the October 8, 2008 investigative report, the employing establishment concluded that Lt. Tijerina had sexually harassed appellant from 2005 through 2008. This report was dismissed by the hearing representative's decision as irrelevant. While OWCP found that appellant had not submitted any evidence corroborating her allegation of sexual harassment, the October 8, 2008 investigative report clearly establishes that Lt. Tijerina sexually harassed her from 2005 through 2008. Consequently, appellant has established a compensable factor of employment.

As appellant has established sexual harassment by Lt. Tijerina from 2005 through 2008 as a compensable work factor, the issue is now whether the medical evidence supports that she sustained an emotional condition resulted from the compensable employment factor. As OWCP found there were no compensable employment factors, it did not analyze or develop the medical evidence. The case will be remanded to OWCP for this purpose.¹⁷ After such further development as deemed necessary, it shall issue a *de novo* decision.

¹³ *Lori A. Facey*, 55 ECAB 217 (2004).

¹⁴ *See M.D.*, 59 ECAB 211 (2007); *Jeral R. Gray*, 57 ECAB 611 (2006).

¹⁵ *T.G.*, 58 ECAB 189 (2006); *Doretha M. Belnavis*, 57 ECAB 311 (2006).

¹⁶ *C.W.*, 58 ECAB 137 (2006); *Robert Breeden*, 57 ECAB 622 (2006).

¹⁷ *See Robert Bartlett*, 51 ECAB 664 (2000).

CONCLUSION

The Board finds that appellant has established a factor of employment and that OWCP must evaluate the medical evidence to determine whether she has a medical condition causally connected to her employment.

ORDER

IT IS HEREBY ORDERED THAT the August 17, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: April 6, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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