



## **FACTUAL HISTORY**

On August 28, 2009 appellant, a 61-year-old attorney advisor, filed an occupational disease claim alleging that she sustained an aggravation of her preexisting fibromyalgia condition on May 27, 2008 when she was verbally assaulted by a parking attendant who worked in the employing establishment parking garage where she had an assigned disability parking permit. She stated that the parking attendant kept screaming at her on the telephone and would not allow her to tell him that the guards had her keys. Appellant contended that the May 27, 2008 incident was part of a longstanding retaliation against her for the filing of Equal Employment Opportunity (EEO) complaints related to nonenforcement of disabled parking rules at the employing establishment.

Appellant stated that she had a permanent disabled parking permit, which allowed her to park in handicapped accessible parking. Based upon her belief that the union had obtained permission for her to do so, she routinely double parked on level B, which did not require the use of stairs, and delivered the car keys to one of the guards, who made them available to the parking attendant when necessary. On the date in question, appellant's husband gave the keys to one of the guards after double-parking on level B. Appellant alleged that at 10:30 a.m. the parking attendant telephoned her in her office and began screaming at her because her car was double parked. The parking attendant would not allow her to tell him that her keys were with the guards. Appellant stated that, Maureen Willoughby, a coworker, was sitting in her office and heard her side of the conversation and the parking attendant screaming.

In a letter dated September 14, 2009, OWCP informed appellant that the evidence submitted was insufficient to establish her emotional condition claim. She was advised to submit additional evidence, including a description of the claimed May 27, 2008 incident in detail, explaining what occurred, when it occurred and whether it occurred on federal property. OWCP also asked appellant to explain her allegations relating to claimed retaliation and to describe in detail any other employment-related conditions or incidents which she believed contributed to her illness and to submit witness statements or other documentation supporting each of her allegations.

Appellant submitted copies of numerous documents relating to previously-filed EEO complaints. In e-mail exchanges and letters, she complained of other drivers' violation of disabled parking regulations, nonenforcement of disabled parking regulations and retaliation against her for the filing of her EEO complaints. Appellant also submitted copies of parking policies for disabled drivers, medical reports and various other documents related to her application and approval for a disabled parking space.

In an October 6, 2009 statement, appellant noted that her claim was not about the employing establishment for which she worked as an attorney, noting that her supervisor worked consistently with her to provide a flexible work schedule under a flexiplace program. Rather, the claim was about handicapped accessible parking. Appellant alleged that she was subjected to harassment and retaliation for the filing of EEO complaints and that the parking facility had been reconfigured to allow for nondisabled individuals to park wherever they wanted. She was reportedly told in 2008 by an attendant that she could no longer double park on level B of the

garage unless she had verified that there were no disabled parking spots on the lower levels, but that this restriction was not based on a written policy.

Detailing the alleged incident of May 27, 2008, appellant stated that she was in her office at the employing establishment with Ms. Willoughby when the phone rang around 10:30 a.m. When she answered the telephone, she heard a “screaming voice with unintelligible ranting.” When she heard the word “keys,” she reportedly attempted to tell him that the guards had her keys. The parking attendant kept ranting and told her he would have her car towed if she did not go to the garage immediately. Appellant stated that she immediately went with a coworker to level B of the North garage and walked up the stairs to the guards’ booth. The guard gave her the car keys and she “politely” handed them to the parking attendant, who allegedly sneered at her and told her that she knew she was supposed to give him the keys. Appellant informed the parking attendant that no one had ever told her that before. She stated:

“He kept screaming at me and that was when I told him that I was tired of him thinking that he could treat me any way he wanted because I am a middle disabled white woman. I told him that I never saw him treat African-American employees that way, he was always pleasant and courteous to them. He, of course, denied that.”

In a decision dated February 10, 2010, OWCP denied appellant’s claim on the grounds that she had not established a compensable factor of employment. It accepted that an incident occurred in the parking garage on May 27, 2008 and that words of a contentious nature were exchanged between appellant and the parking attendant. The claims examiner found, however, that appellant’s act of double parking rather than parking on a lower level, as instructed, constituted willful misconduct. Therefore, any injury arising from that act is not compensable. OWCP also found that there was no evidence of harassment, retaliation or discrimination.

On February 23, 2010 appellant requested an oral hearing before the Branch of Hearings and Review, which was held on May 21, 2010. At the hearing, she testified regarding the incident of May 27, 2008, reiterating her allegations of abuse by the parking attendant. Appellant presented her husband and Ms. Willoughby as witnesses on her behalf.

In response to appellant’s questions to her husband, the record reflects:

Q. “Now, the -- there’s been a lot made of an incident that occurred between me and the parking attendant, okay, ..., okay in May of 2008. Do you remember anything about that....

A. “It [i]s almost two years ago, so I wanted to make sure we [are] talking about the same thing. Yes. The actual confrontation I was not privy to. I only learned about it later in the morning from you and therefore, I have no direct knowledge.

Q. “Okay. Well, let’s be clear for the record. When you’re talking about confrontation, you’re talking about a phone call that I would have received in my office that day from [the parking attendant]. Is that correct?

A. "That is correct."

\* \* \*

"Q ...Now would you disagree with [the parking attendant] sworn affidavit?

"A. Yes.

"Q. Okay. And what is the basis of that disagreement?

"A. I cannot to my memory recall you ever driving to work alone. As far as I remember what happened that particular day, we drove together. I did the driving. I did [not] see [the parking attendant] when we came in or when we parked. He may have been there, but I did [not] see him and I certainly did [not] speak to him and have him instruct me about going down to a different level. What I did do was what I had been doing for months and months, was parking on the B level in the -- in a -- in the driving lane adjacent to the parked vehicles because there were no handicapped parking spaces available and proceeding to the guard's office to drop off.

"Q. We actually have a picture because this thing is a lot scrunchier than...

"A. ...the keys.

"Q. Yeah, okay.

"A. So in that case they had to move the vehicle to let someone else out that I might be blocking, they could do so. I've done this numerous times in the -- over the past few years prior to the date in question.

"Q. Okay. Now, you walked up the parking ramp that day to give the keys to the guard -- to put in the guard's booth, correct?

"A. Up the ramp or up...

"Q. Yeah.

"A. ...the stairs...

"Q. Yeah.

"A. ...one of the stairwells, yes.

"Q. Is one of the reasons that I because of not only the fibromyalgia, but the nerve damage in my recent injury from the car accident in 2007 to my right foot, that I tried to minimize my walking in the morning?

"A. Would you say that again, please?

“Q. When -- sorry. When you walk up -- when I asked you...

“A. Yes.

“Q. ... to walk up, is one of the reasons because -- in the morning in particular, I have problems with my balance. I have problems with my -- okay.

“A. Well, that plus the fact that there -- you could get a head start getting to your office...

“Q. Sure.

“A. ...because sometimes...

“Q. Sure.

“A. ...we park...

“Q. Sure.

“A. ...close to 9:30 [a.m.]...

“Q. Sure.

“A. ...which is the sign in time...

“Q. Sure.

“A. ...when you're late.

“Q. Sure.

“A. And you...

“Q. Sure.

“A. You know, I took care of it.

“Q. Sure.

“A. There might have been one or two times when you actually did that. I don't know, but on that particular day...

“Q. Okay.

“A. ...I don't know...

“Q. Now...

“A. ...I probably did it again...

“Q. Okay.

“A. ...and that’s the reason...

“Q. Okay.

“A. ...so you could get...

“Q. Sure.

“A. ...moving and...

“Q. Sure.

“A. ...not waste time.

“Q. Okay. So let me ask you this. On that particular day when [the parking attendant] says that he spoke to me, did you see him speak to me?

“A. As I said, I did not see him that day ... but you told me that was not the case, that he wasn’t around when we arrived and you left, so I can only take...

“Q. Okay.

“A. ...what you said to me.”

Ms. Willoughby testified initially as to certain efforts by the local union following reorganization of the parking facility and use of handicapped parking spaces on lower levels as a potential safety hazard. As to the incident alleged in this case, the testimony was as follows:

“Q. Correct. Okay. Let’s get to the day, okay. Now, do you recall being in my office?

“A. Yes.

“Q. Okay. And do you recall what time it would have been?

“A. I want to say about 10 in the morning.

“Q. Yeah, okay.

“A. I had checked in with my e-mail and I kind of popped in to say hello and you had your chair at the desk and then the only other chair was way across the room and I sat down in it and within about a minute of sitting down, the phone rang and I could hear...

“Q. Well, before we get to that...

“A. Okay.

“Q. ...okay, if there had been a message on my phone, would you have seen the red light?

“A. Yes, from where I sat, yes.

“Q. Okay. Were there any messages on my phone?

“A. No.

“Q. While you were with me, if there is a -- and this first was at the phone call and I -- excuse me, I've got it. If there is an affidavit from a [ph] in the parking office known as CC where she relates that she called me and we had this extensive conversation about how I needed to move my car, would you agree with that statement?

“A. Would I agree that that did [not] happen?

“Q. Yes.

“A. Well, no, it did [not] happen because I was right across the hall and I would have heard you have a conversation like that.

“Q. Okay. So you had -- okay. Let's get to the phone call.

“A. Okay.

“Q. Okay. There was a phone call.

“A. Um-hum.

“Q. Okay.

“A. And I could hear somebody screaming and I didn't know whether it was, you know, a grandchild or something. I just -- did [not] know. I just...

“Q. Just a little -- you mean like just being...

“A. A little, but all I knew -- well, yeah, you know, happy birthday, Grandma, I do [not] know. It wasn't your birthday, but it just -- it was unintelligible, but it was really loud and...

“Q. Okay.

“A. ...I was kind of startled and I -- but I did [not] know at that point whether it was angry or hysterical or -- I mean I used to work with somebody whose daughter got completely hysterical if she saw a cricket, so you know, you never know what's behind something going on, so...

“Q. Okay. Now -- I did find it, okay. Now, what was my demeanor when I picked up the phone and got that phone call?

“A. You were I think trying to cheer me up....

“Q. Did the phone call change my mood?

“A. Well, yeah, you -- well, what really concerned me is that you really -- it [is] not like you trembled. You know, it's not like a tremor. You shook all over and I [have] known you to fall down and lose your balance and that [is] part of the fibromyalgia since you [have] had that. I know you [have] had a lot of, you know, issues with injuries and stuff, so -- you said, I have to go down, they said they [are] going to tow my car from the garage. And I thought, I can [not] let her go down alone. She [is] just too apt to either pass out or fall over or something. And then at first, you were kind of pink and by the time we got down to the elevators, which is a long walk down the corridor from our office, you were frighteningly pale. You got white and I -- after my surgeries, I could [not] use my left arm and my right arm was a problem too and I was afraid that if you fell over, I was [not] going to be able to hold you up, so I was just kind of, you know, trying to figure out how I was going to take care of this and wondering if there was somebody I should all, but we just went down to the --- went directly down to the garage, so...

“Q. Okay. Now do you recall whether I yelled at the parting attendant during the phone call?

“A. No, you said goodbye, but that -- you did [not] make any intelligible sound until he had -- you said, do [not] you dare tow my car, but he had already hung up at that point, so...

“Q. So from what you heard, I was trying to convey to him that my keys were in the guard's booth?

“A. Yes. You may have said keys, the keys a couple of times, but it was just kind of he was -- he never stopped. He never took a breath I do [not] think.”

\* \* \*

“Q. Okay. Now, when we reached the -- and I don't know if you're familiar with the north garage, but when we reached level B...

“A. Uh-hum.

“Q. ... of the north garage, what did we see?

“A. Your car was in front of a handicapped space and you went -- walked by the car that was -- your car was blocking and you apologized and said the keys had been here all the time to the lady. The lady who had the car was a very attractive



black woman, very lovely, driving a white Mercedes and I looked at her and she did [not] have any kind of identification as an employee so I looked at her state tag and then I went around to the front of the car and she had no parking permit, so...

“Q. And do you recall what kind of a parking space she was parked in?”

“A. It was a handicapped space.

Q. Okay. So when I came in the morning, the space that she was illegally parked in would have been unavailable for me to legally park in. Is that correct?

“A. Correct.

“Q. Okay. Now do you recall what happened next?”

“A. You went up to the kiosk and [the parking attendant] came over to you and he as -- at that point, he was kind of snarling. He was [not] real loud, but he was going, you know, you can [not] do this, you can [not] double park, you have to park somewhere else. And I was kind of taken aback and you just handed him the keys and did [not] say anything at that point. And then after he moved your car and the other woman moved, I think he put your car in that handicapped space, but I [am] not sure about that. He then came back up to the kiosk where the guards were and turned the keys back in to the guards and he walked maybe three or four car spaces down and you [stated] -- started talking to him and you [stated], I want you to know I really resent the way you treat me, that you treat me differently because I [am] older and because I [am] white and because I have a disability, you think you should be rude to me and you [are] never anything but rude, you [are] always disrespectful. And you [stated], I know you do [not] treat African-American people that way and I really resent it. And I was looking at him and I thought at that point, I do [not] think I was even sure that -- I do [not] think I was -- knew for certain that there was a parking attendant because although I park in the building, my -- somebody else got my ticket for me and I did [not], you know, have to deal with him and I always, you know, dealt with the guards. I did [not] really realize there was such a thing as a parking attendant in the building, so...

“Q. Do you now know that...

A. But while you were talking to him and say that, you know, basically that you felt that he was being disrespectful, he was sort of -- it looked like he was mumbling to himself and I could [not] understand and it took me awhile and he turned his head and I could see he had a blue tooth phone in his ear, so apparently he was on the phone and talking to somebody else while you were talking to him...”

In an August 30, 2010 decision, OWCP's hearing representative found that OWCP had properly carried out its adjudicatory function in making findings of fact regarding which alleged actions were unsubstantiated and those which occurred but were not compensable. He found that appellant's allegations did not relate to her regular employment duties and there was no formal finding of agency error or abuse. Accordingly, the hearing representative affirmed the February 10, 2010 decision finding that appellant had failed to establish a compensable factor of employment.

### **LEGAL PRECEDENT**

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,<sup>2</sup> the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under FECA. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under FECA.<sup>3</sup> When an employee experiences emotional stress in carrying out her employment duties and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from his or her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work.<sup>4</sup> In contrast, a disabling condition resulting from an employee's feelings of job insecurity *per se* is not sufficient to constitute a personal injury sustained in the performance of duty within the meaning of FECA. Thus disability is not covered when it results from an employee's fear of a reduction-in-force, nor is disability covered when it results from such factors as an employee's frustration in not being permitted to work in a particular environment or to hold a particular position.<sup>5</sup>

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.<sup>6</sup> Where the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.<sup>7</sup> A claimant must support his or her allegations with probative and reliable

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<sup>2</sup> 28 ECAB 125 (1976).

<sup>3</sup> See *Robert W. Johns*, 51 ECAB 136 (1999).

<sup>4</sup> *Cutler*, *supra* note 2.

<sup>5</sup> *Id.*

<sup>6</sup> *Charles D. Edwards*, 55 ECAB 258 (2004).

<sup>7</sup> *Kim Nguyen*, 53 ECAB 127 (2001). See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

evidence. Personal perceptions alone are insufficient to establish an employment-related emotional condition.<sup>8</sup>

For harassment or discrimination to give rise to a compensable disability under FECA, there must be evidence that harassment or discrimination did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under FECA. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.<sup>9</sup>

### ANALYSIS

Appellant's primary allegation pertains to verbal abuse and threats by a parking attendant on May 27, 2008. This allegation is not directed at her immediate employer. Appellant has not attributed her emotional condition to the performance of her regular or specially assigned job duties under *Cutler*.<sup>10</sup> Indeed, she has in no way implicated as causative her work responsibilities as an attorney advisor with the employing appellate Board. Similarly, appellant has not raised any allegation of error or abuse by any of the judges or her supervisors at the Benefits Review Board. This eliminates *McEuen* from consideration of the evidence on appeal.<sup>11</sup> As made clear under the *Cutler* standard, workers' compensation law is not applicable to each and every illness or injury that is somehow incidental to an employee's federal employment. Under *Cutler*, emotional conditions arising from general feelings of job insecurity, the frustration of an employee in not receiving a promotion or to work in a particular position or job environment are not compensable factors. An emotional condition arising from such factors is generally considered as being self-generated.<sup>12</sup>

Appellant maintains that the record shows that she "endured loud, persistent verbal abuse, a threat to tow her car and was forced into an unnecessary face-to-face confrontation with her assailant."<sup>13</sup> To establish the nature of the confrontation that day between herself and the parking attendant, she relied extensively on the testimony of her husband and a coworker at the oral hearing before the Branch of Hearings and Review. The Board finds, however, that the hearing transcript is not one that establishes the events of that day as appellant alleged.

The Board has addressed the difficulty in determining whether interactions between employees will give rise to coverage under FECA where harassment or discrimination are alleged through "verbal altercations" or "difficult relationships" between employees.<sup>14</sup> As a

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<sup>8</sup> *Roger Williams*, 52 ECAB 468 (2001).

<sup>9</sup> *G.M.*, Docket No. 11-1429 (issued January 6, 2012); *Alice M. Washington*, 46 ECAB 382 (1994).

<sup>10</sup> *Supra* note 4.

<sup>11</sup> *Thomas D. McEuen*, *supra* note 7.

<sup>12</sup> *Supra* note 4.

<sup>13</sup> Page 5, Appellant's brief in support of notice of appeal.

<sup>14</sup> *Paul Trotman-Hall*, 45 ECAB 229 (1993).

legal standard, the difficulty in such claims is the subjective nature of a claimant's perceptions to his or her work environment. The Board has underscored the necessity for the claimant to submit adequate factual evidence to support his or her allegations of stress due to such factors:

“The claimant for compensation must specifically delineate those factors or incidents to which the emotional condition is attributed and submit supporting factual evidence verifying that the implicated work situations or incidents occurred as alleged. Vague or general allegations of perceived ‘harassment,’ abuse or difficulty arising in the employment are not sufficient to give rise to compensability under FECA. Based on the evidence submitted by the claimant and the employing establishment, OWCP is then required to make factual findings which are reviewable by the Board. 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, which in turn may be fully examined and evaluated by OWCP and the Board.”<sup>15</sup>

In the present case, the Board finds that the evidence submitted by appellant is not sufficient to establish her allegations of verbal abuse, threatening behavior or that she was assailed by a parking garage attendant on May 27, 2008, as alleged. The testimony of appellant's husband does not establish conclusively that he left the keys to their car at the guard's booth after he had double parked on level B. Further, the testimony of her coworker is not sufficient to establish either the identity of the individual who telephoned appellant that day or what was stated on the telephone. After their arrival at the parking garage, the record establishes that the parking attendant was not loud or threatening in behavior and simply moved the motor vehicle after securing the keys from appellant. There is no evidence that the parking attendant engaged in any confrontation with appellant. Rather, after placing the keys at the guard's booth, it was appellant who then accused him of having treated her differently based on age, race and disability. The Board finds that appellant's emotional reaction was largely self-generated and based on her perception of events that day.

Appellant has also alleged that the employing establishment improperly handled her disabled parking requests, EEO complaints and hearing requests. 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.<sup>16</sup> Where the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.<sup>17</sup> The Board finds that appellant has failed to establish error or abuse with regards to these administrative matters. The Board notes that it has no jurisdiction over the assignment of parking spots.

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<sup>15</sup> *Id.* at 236.

<sup>16</sup> *Charles D. Edwards, supra* note 6.

<sup>17</sup> *Supra* note 7.

Appellant also alleged a general pattern of harassment, discrimination and retaliation against her by the parking attendant and the Director of Customer Service for the filing of EEO complaints. The Board has held that a claimant must establish a factual basis for her allegations with probative and reliable evidence.<sup>18</sup> Appellant has submitted insufficient evidence to establish her allegations. She alleged that nondisabled friends of the Director of Customer Service and African Americans received preferential treatment. Appellant did not, however, provide any evidence to support her allegations. As noted, in order to establish harassment there must be evidence that the acts alleged or implicated by the employee did in fact occur.<sup>19</sup> Appellant submitted numerous documents relating to various EEOC claims. Although not dispositive, the Board notes that the record does not contain a final decision relating to any of her claims. The evidence of record is not sufficient to establish a compensable factor of employment regarding appellant's allegations of harassment and discrimination.

On appeal, appellant contends that the evidence of record establishes that her emotional condition occurred in the performance of duty and that OWCP's hearing representative's August 30, 2010 decision contained reversible errors. For reasons stated herein, the Board finds that she has failed to establish a compensable factor of employment. Therefore, appellant has failed to meet her burden of proof to establish that she developed an emotional condition in the performance of duty due to factors of her federal employment.<sup>20</sup>

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that appellant has failed to meet her burden of proof to establishing an emotional condition arising from her federal employment.

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<sup>18</sup> *T.G.*, 58 ECAB 189 (2006).

<sup>19</sup> *C.S.*, 58 ECAB 137 (2006).

<sup>20</sup> OWCP's hearing representative's August 30, 2010 decision was based, in part, on his findings that there had been no formal findings of error or abuse; the May 27, 2008 incident had nothing to do with her job assignment; and OWCP's earlier finding that appellant's act of double-parking constituted misconduct that precluded coverage under FECA. The Board does not adopt his conclusions but bases its decision on the rationale contained herein.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 30, 2010 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: March 22, 2012  
Washington, DC

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

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

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