

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**M.J., Appellant**

**and**

**DEPARTMENT OF THE AIR FORCE, MARCH  
AIR RESERVES BASE, CA, Employer**

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**Docket No. 12-1600  
Issued: April 15, 2013**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 20, 2012 appellant filed a timely appeal from a February 17, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her emotional condition claim. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant established that she sustained an emotional condition in the performance of duty.

On appeal, appellant contends that she established workplace harassment that caused her medical issues.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On August 19, 2011 appellant, then a 41-year-old photographer, filed an occupational disease claim alleging an upset stomach, severe jaw pain, headaches and sleep problems the morning after a feedback session. She stated that “leadership is targeting me, and stopped work that day.” The employing establishment responded by noting that appellant had not returned to work, that her work assignment had not changed and that she reported her condition after civilian progress feedback.

In an August 12, 2011 response, appellant detailed her allegations with regard to employment factors. She generally alleged workplace harassment in bullying by Major Karen Davis with the help of Kirby Love, which resulted in an offensive and intimidating atmosphere at her employment. Major Davis used public humiliation, accusations of a lack of effort and sarcasm. Appellant stated that Major Davis and Mr. Love had more than once “accidentally” forgotten to keep her in the information loop which set her up for failure. She alleged that on July 9 and 10, 2011, a video flight commander asked her if she had any information about an air drop assignment. Appellant had no idea what he was referring to. She brought this up at a meeting and Mr. Love apologized and stated that he thought she knew about this. Appellant also alleged that Mr. Love failed to provide a copy of a form that her union representative suggested she obtain. She alleged that she had been falsely accused of making mistakes, which she denied.

Appellant stated that Major Davis had discounted her opinions or input during staff meetings, gave her the “silent treatment” and exhibited uncontrollable mood swings in front of her coworkers. She alleged that Major Davis held her to higher standards than her counterparts and had yelled at her while pointing a finger at her. On June 30, 2011 Major Davis stated in a meeting that she read on appellant’s facebook page that she wanted to sleep in. She stated that appellant did not know what it was like to be tired since she had not been deployed. Appellant argued that this was a personal attack and that her private life should not be brought up at an office meeting. On that day, Major Davis disregarded everything she proposed in a meeting with regard to tasking and the vetting process. On June 17, 2011 she told appellant to contact 2CTCS to coordinate tasking and appellant told Major Davis that she should get Mr. Love involved. Major Davis asked others to leave her office and then told appellant in an intimidating manner that it was appellant’s job to gather the information on the jobs involving the video, that this was her bread and butter, and that purchasing stuff was not her job and that contacting the customer should be. Appellant did not believe this to be true and contended that purchasing items was one of her duties. During the same encounter, she told Major Davis that she did not mind helping, but research was not her primary responsibility. Major Davis had asked her to do something that was not in her position description and appellant felt overwhelmed with the list of tasks she needed to perform. Appellant noted that in performing her assignment, she called a POC at the 2CTCS and Major Davis subsequently reprimanded her and instructed her not to contact the commander. She also accused Major Davis of micromanaging and excessive monitoring of her work. On July 1, 2011 when appellant stated that she was required to find a back-up for an assignment to Australia and that Major Davis suggested that appellant should go. She stated that she declined as she had too much work and that the perception with the troops would be unfavorable since so many of them wanted that assignment. Appellant indicated that Major Davis exhibited a superficial charm which can easily turn off and on and that this breeds insecurity and fear of never knowing what type of mood she will be in or how quickly the mood

could change. She stated that Major Davis coerced her into telling her about her sexuality, and in doing so, had broken the military rules "Don't Ask Don't Tell (DADT)." Specifically, appellant noted that on June 23, 2011 Major Davis asked her if she was a lesbian. She indicated that this made her very uncomfortable as she had asked her point blank and that she did not know what the repercussion would be since the repeal of DADT had not taken affect. Appellant also believed that Major Davis had broken the rule by asking her the question. She stated that, ever since this incident, she believed that there was a change in the way certain people treated her. Appellant noted that on August 9 and 10, 2011, Major Davis came by and said good morning to others but ignored appellant and that she did so intentionally to be spiteful and isolate her. She also discussed alleged behavior surrounding her evaluation. Appellant alleged that around 8:00 a.m. on August 9, 2011 Mr. Love approached her and stated that he wanted to meet with her at 1400 hours to discuss her performance review; appellant asked if they could do it right then but Mr. Love answered no because he had a meeting to attend. She stated that because studies show that people usually get fired at the end of a workday, she questioned Mr. Love as to whether he was going to fire her, that he gave her a blank stare and a long pause and stated that he would meet with her at 2:00 pm. Appellant stated that she was worried all day. She noted that, at the meeting, Mr. Love presented a mid-term feedback with all the markings on the unsatisfactory side. Appellant disputed the negative evaluation and noted that her two prior evaluations had been stellar. She contended that her bad evaluation was because Major Davis had been bullying her, discriminating against her and asked the commander to back her up. Appellant also alleged that later that day, as she was going through lock up duty, Mr. Love came to her office with her timecard and scrutinized her credit time because she had come in almost every day half an hour early and that other employees do the same and he did not question them, and that he told her not to come in early. She alleged that, as a result of these collective incidents, she was having stress that was affecting her health. Appellant noted that she was experiencing jaw pain which the doctor had diagnosed as temporomandibular joint (TMJ) disorder and that she had anxiety before coming to work because of the unpredictable behavior of Major Davis. She alleged that she suffered from emotional exhaustion and stated that she cried several times at work due to the aggressive behavior of Major Davis.

In a statement dated September 13, 2011, Mr. Love responded to appellant's allegations. He noted that he was her first line supervisor and disputed her contention that management was targeting her. Mr. Love noted that appellant worked in a military environment, and that she was currently competent at approximately 60 percent. He noted that it takes time to master all these skills, but that she appeared to have stalled and that, if she continued to be unwilling to master her position, this would raise the question of whether this was the correct job for her. Mr. Love noted some issues with appellant's timeliness of getting tasks done, quality of task performance, effort and attention to detail.

In a September 15, 2011 statement, Sylvia E. Frausto, Director of Logistics for the employing establishment, stated that she believed that appellant's feedback form was undeserved. She noted that she was not appellant's supervisor but that she did observe appellant and that her performance was not deteriorating. Ms. Frausto stated that she believed appellant received retaliation with regard to her leave requests because she had not gone to the requested training. She also opined that Major Davis inquired as to appellant's whereabouts but rarely inquired with regard to other employees and appeared to be "singling [appellant] out for some unknown reason."

In a September 15, 2011 report, Melinda Miller, who worked in Human Resources for the employing establishment, indicated that appellant filed a grievance for harassment, that her supervisor also began to take disciplinary action, but that it was decided that no disciplinary action would be taken against appellant and that appellant agreed not to pursue her grievance with the union. Mr. Love agreed to allow appellant more time to learn her position and to limit contact between appellant and Major Davis.

In a statement dated September 26, 2011, a Sarah Corrice stated that appellant spoke to her about her concerns regarding staffing and that most “ARTS” seldom go on regular temporary duty in order to give these valuable opportunities to younger airmen who need the experience, that appellant told her that Major Davis was upset that she sent a certain person and e-mail, that appellant told her of facebook issues with Major Davis and that she had seen similar incidents first hand. She indicated that she observed that appellant was physically stressed.

In a September 26, 2011 statement, Senior Airman Jonathan Garcia stated that on June 17, 2011 appellant burst into tears and stated that the stress of dealing with Major Davis was more than she could take.

By decision dated February 17, 2012, OWCP denied appellant’s claim as it found that she had not established a compensable employment factor. It further noted that, even if there were events that were determined to have occurred in the performance of duty, the medical evidence would be deficient to establish causal relationship.

### **LEGAL PRECEDENT**

To establish a claim that she sustained an emotional condition in the performance of duty, an employee 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 his or her condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his or her emotional condition.

Workers’ compensation law does not apply to each and every injury or illness that is somehow related to an employee’s employment.<sup>2</sup> 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.<sup>3</sup> Where the disability results from an employee’s emotional reaction to his or her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.<sup>4</sup> On the other hand, the disability is not covered where it results from such factors as an employee’s fear of a reduction-

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<sup>2</sup> *L.D.*, 58 ECAB 344 (2007).

<sup>3</sup> *A.K.*, 58 ECAB 119 (2006).

<sup>4</sup> 5 U.S.C. §§ 8101-8193. *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

in-force or his or her frustration from 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> 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.<sup>7</sup> 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.<sup>8</sup>

The Board has held that the manner in which a supervisor exercises his or her discretion falls outside the coverage of FECA. Mere disagreement with or dislike of actions taken by a supervisor or manager will not be compensable absent evidence establishing error or abuse.<sup>9</sup> Although the handling of leave requests and attendance matters are generally related to employment, they are administrative matters and not a duty of the employee.<sup>10</sup>

For harassment or discrimination to give rise to a compensable disability, there must be evidence which establishes that the facts alleged or implicated by the employee did, in fact, occur.<sup>11</sup> Mere perceptions of harassment or discrimination are not compensable under FECA.<sup>12</sup> A claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence.<sup>13</sup> Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.<sup>14</sup> A claimant must establish a factual basis for his or her allegations of harassment or discrimination with probative and reliable evidence.<sup>15</sup>

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<sup>5</sup> *J.F.*, 59 ECAB 331(2008); *Gregorio E. Conde*, 52 ECAB 410 (2001).

<sup>6</sup> See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990); *reaff'd on recon.*, 42 ECAB 556 (1991).

<sup>7</sup> See *William H. Fortner*, 49 ECAB 324 (1998).

<sup>8</sup> *Ruth S. Johnson*, 46 ECAB 237 (1994).

<sup>9</sup> See *William H. Fortner*, *supra* note 7; see also *H.C.*, Docket No 12-457 (issued October 19, 2012).

<sup>10</sup> *C.T.*, Docket No. 08-2160 (issued May 7, 2009).

<sup>11</sup> *K.W.*, 59 ECAB 271 (2007).

<sup>12</sup> *M.D.*, 59 ECAB 211 (2007); *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>13</sup> *J.F.*, 59 ECAB 331 (2008).

<sup>14</sup> *G.S.*, Docket No. 09-764 (issued December 18, 2009); *Ronald K. Jablanski*, 56 ECAB 616 (2005).

<sup>15</sup> *Robert Breeden*, 57 ECAB 622 (2006).

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.<sup>16</sup> If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor.<sup>17</sup> When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, it must base its decision on an analysis of the medical evidence.<sup>18</sup>

### ANALYSIS

Appellant alleged that she sustained an emotional condition as a result of a number of employment incidents and conditions. OWCP denied her emotional condition claim on the grounds that she did not establish any compensable employment factors. The Board must initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of FECA.

With regard to appellant's allegations that management at the employing establishment questioned her coming in early to accrue credit time and gave her an unfair evaluation, the Board finds that these allegations are related to administrative or personnel matters unrelated to the employee's regular or specially assigned work duties and do not fall within coverage of FECA absent evidence showing error or abuse on the part of the employing establishment.<sup>19</sup> Although appellant has alleged error by management, she did not submit any probative evidence establishing error or abuse on the above-noted administrative matters. Her supervisor had discretion to make decisions as to whether she could arrive at work early to gain credit time; appellant offered no proof that she was treated improperly in this matter. Furthermore, the fact that appellant's evaluation was scheduled at 2:00 p.m. or the fact that appellant was unhappy with her evaluation is not a compensable factor of employment. Neither is the alleged incident wherein Major Davis reprimanded appellant for contacting an improper party in an e-mail. The Board has recognized the principle that a supervisor or manager in general must be allowed to perform his duties and that employees will at times dislike the actions taken, but the mere disagreement or dislike of a supervisory or management action will not be actionable, absent evidence of error or abuse.<sup>20</sup> There is no evidence of abuse; rather, it appears that the supervisor

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<sup>16</sup> *D.L. 58 ECAB 217* (2006).

<sup>17</sup> *K.W.*, *supra* note 11; *Matilda R. Wyatt*, *supra* note 6.

<sup>18</sup> *Robert Breeden*, 57 ECAB 622 (2006).

<sup>19</sup> *Jeral R. Gray*, 57 ECAB 611 (2006) (disciplinary actions are administrative functions of the employer and not duties of the employee and, unless the evidence discloses error or abuse on the part of the employing establishment, are not compensable employment factors); *Judy L. Kahn*, 53 ECAB 321 (2002) (matters involving the use of leave are generally not considered compensable factors of employment as they are administrative functions of the employer and not duties of the employee).

<sup>20</sup> *See Marguerite J. Toland*, 52 ECAB 294 (2001).

simply gave appellant an evaluation that she did not think was fair and that she disliked the fact that the evaluation was held late in the day. Appellant did submit a statement from Ms. Frausto wherein Ms. Frausto indicated that she did not believe that appellant's performance was deteriorating and that she believed that appellant was the victim of retaliation. However, Ms. Frausto was not appellant's supervisor and her opinion as to appellant's job performance is irrelevant.

Appellant alleged that Major Davis suggested that she take an assignment in Australia, and that appellant believed that, if she took this assignment, the perception with the troops would be unfavorable since so many of them wanted the assignment. She also alleged that her suggestions she made at a meeting with regard to taskings and the vetting process were disregarded. Appellant further contended that Major Davis gave her assignments that she did not believe were part of her job duties. The assignment of work is an administrative function of the employing establishment and not a duty of the employee.<sup>21</sup> Appellant has not submitted sufficient evidence to support that her supervisor acted unreasonably in assigning work. She has also not submitted proof that the employing establishment acted unreasonably when it did not adopt her suggestions. The Board had held that an employee's dissatisfaction with perceived poor management constitutes frustration from not being permitted to work in a particular environment or to hold a particular position and is not compensable under FECA.<sup>22</sup>

Appellant's main contentions concern her allegation that Major Davis and Mr. Love engaged in repeated harassment of her. To the extent that disputes and incidents alleged as constituting harassment by supervisors and coworkers are established as occurring and arising from her performance of her regular duties, these could constitute a compensable employment factor.<sup>23</sup> However, for harassment and discrimination to give rise to 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.<sup>24</sup> 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>25</sup> There is no evidence supporting most of appellant's allegations of harassment. Many of the allegations are of an extreme general nature, for example her allegation that Major Davis had uncontrollable mood swings, targeted appellant, or held appellant to a higher standard than her colleagues, nor do most of these allegations arise to the level of compensable harassment. Appellant's allegations that Major Davis yelled at her and pointed her finger at appellant are unsubstantiated. Furthermore, although the Board has recognized the compensability of verbal altercation or abuse in certain circumstances, this does not imply that every statement uttered in the workplace will give rise to

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<sup>21</sup> See *Lori A. Facey*, 55 ECAB 217 (2004).

<sup>22</sup> *M.B.*, Docket No. 12-371 (issued September 12, 2012); see also *Michael J. Plante*, 44 ECAB 510, 515 (1993).

<sup>23</sup> *Charles D. Edwards*, 55 ECAB 258 (2004); see also *C.Y.*, Docket No. 12-741 (issued December 12, 2012).

<sup>24</sup> *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).

<sup>25</sup> See *Frank A. McDowell*, 44 ECAB 522 (1993); *Ruthie M. Evans*, 41 ECAB 416 (1990).

coverage under FECA.<sup>26</sup> Appellant alleged that Major Davis and Mr. Love have more than once forgotten to keep her in the loop of information which set her up for failure. She noted a specific incident of July 9 and 10, 2011 when she was not given information with regard to an air drop assignment. Appellant has not submitted corroborating evidence of this incident. However, mistakes happen in an office situation and this isolated incident would not amount to harassment, nor is the fact that appellant was instructed to go through appropriate channels to obtain a form evidence of harassment. There is no corroborating evidence that appellant was accused falsely of making mistakes or that Major Davis ignored her when she said good morning. Furthermore, absent evidence of error or abuse, any reaction to these matters must be considered self-generated and not employment related.<sup>27</sup> Appellant alleged that several comments were made during meetings that she believed constituted harassment. Specifically, she alleged that Major Davis made inappropriate comments about her facebook page at a meeting. Yet, despite the fact that these comments were allegedly made in front of other people, appellant submitted no eyewitness statement with regard to this alleged incident. A more serious allegation involves appellant's contention that on June 23, 2011 Major Davis violated the DADT statute when she forced appellant to reveal her sexual orientation and then relayed that information to others. June 23, 2011 was prior to the repeal of DADT and the question, if asked, was clearly improper.<sup>28</sup> However, appellant has not provided any corroborating evidence establishing that this incident took place, and accordingly, the Board does not find it to be a compensable factor of employment.

Appellant submitted various other statements in support of her claim. The statement of Ms. Miller from human resources merely confirms that appellant's supervisor had begun disciplinary action and that appellant had filed a grievance, and that both had dropped these actions in order to allow appellant more time to learn her position and that it was agreed that appellant was to have limited contact with Major Davis. This does not add any support to appellant's allegations. Ms. Cornice's statement is largely based on statements appellant made to her and not on first-hand observation of treatment of appellant by Major Davis or Mr. Love. Mr. Garcia's statement basically relays that he saw appellant in an agitated state on June 27, 2011; he does not discuss any compensable factors of employment. Accordingly, these statements do not provide corroborating evidence of any compensable factor of employment.

Because appellant failed to establish a compensable work factor, the Board finds that it is unnecessary to address the medical evidence of record.<sup>29</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.

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<sup>26</sup> *I.D.*, Docket No. 11-296 (issued September 19, 2011).

<sup>27</sup> *L.J.*, Docket No. 12-558 (issued October 4, 2012).

<sup>28</sup> DADT was the official policy on homosexuals serving in the military from December 21, 1993 to September 20, 2011 and was codified at 10 U.S.C. § 654.

<sup>29</sup> See *John Polito*, 50 ECAB 347 (1999).



**CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish that she sustained an emotional condition in the performance of duty.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated February 17, 2012 is affirmed.

Issued: April 15, 2013  
Washington, DC

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

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

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