

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

H.C., Appellant)	
)	
and)	Docket No. 12-1836
)	Issued: August 19, 2013
U.S. POSTAL SERVICE, POST OFFICE,)	
Toa Alta, PR, Employer)	
)	

Appearances:
Paul Kalker, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 5, 2012 appellant, through her attorney, filed a timely appeal of an August 6, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether appellant has met her burden of proof to establish an emotional condition due to factors of her federal employment.

On appeal, counsel argued that appellant had established a work-related emotional condition.

FACTUAL HISTORY

On March 29, 2010 appellant, then a 36-year-old sales service associate, filed a traumatic injury claim alleging that on March 4, 2010 as a result of her discovery of compromising text

¹ 5 U.S.C. § 8101 *et seq.*

messages between Awilda Rodriguez, supervisor, and appellant's husband occurring both during and after work hours, she alleged that she had developed continuous anger, depression, nausea, loss of appetite and anxiety. She stated that she had been ridiculed and humiliated by Ms. Rodriguez.

In a letter dated April 1, 2010, OWCP requested additional factual and medical information in support of appellant's claim. Appellant submitted a note from Dr. Carlos J. Alfaro, a Board-certified internist, dated March 31, 2010 diagnosing depressive disorder and finding her totally disabled. On April 9, 2010 Dr. Alfaro stated that she had a work-related emotional condition and could return to work on April 19, 2010. He completed a note on April 6, 2010 written in Spanish.

By decision dated May 3, 2010, OWCP denied appellant's emotional condition claim on the grounds that she had not substantiated a compensable employment factor as causing or contributing to her diagnosed condition.

Appellant requested reconsideration on July 21, 2010. She submitted a note dated March 31, 2010 regarding an initial examination which was written in Spanish. Appellant also submitted a form report completed in Spanish indicating that she was hospitalized from April 5 through 9, 2010. She submitted hospital records written in Spanish. In a note dated April 21, 2010, Dr. Alfaro stated that beginning in February 2010 appellant became suspicious that her husband was having an affair with her immediate supervisor who frequently humiliated and ridiculed her. He noted that on March 4, 2010 she found text messages with a sexual content between her supervisor and her husband. Appellant developed severe depressive and anxiety-related symptoms. She was hospitalized.

Appellant stated that the messages between her husband and Ms. Rodriguez were sexually explicit and discussed the extramarital affair. She stated that at work Ms. Rodriguez had used her authority to ridicule and humiliate her on 20 different occasions. Appellant alleged that Ms. Rodriguez scolded her on an almost daily basis. She stated that, during a service talk, she tried to offer her opinion but Ms. Rodriguez chastised her and stated that she would not enter into an argument with appellant and that she would make sure that appellant "did not go over her head." Appellant claimed that Ms. Rodriguez would take other employees' input at the same meeting without issue.

Appellant noted another occasion where she had been assigned to light duty, seated work in the mark-up area, but left that assignment to greet coworkers. Ms. Rodriguez instructed appellant in a sarcastic manner that she was not to move because she had hurt her "little footie." Appellant alleged that Ms. Rodriguez continuously singled her out, lectured her and raised her voice. She noted that she had filed an Equal Employment Opportunity (EEO) complaint against Ms. Rodriguez.

In a separate statement, appellant alleged that she was the victim of constant and intentional abuse by Ms. Rodriguez including harsh and unusual disciplinary or corrective procedures and intentional ridicule. She stated that she received a letter of warning in July 2009 for absenteeism while other similarly situated employees were not disciplined. Appellant again alleged that in a September 2009 meeting Ms. Rodriguez dismissed her suggestions in a "scornful manner" yet listened to the ideas of other coworkers. She alleged that her coworkers were allowed to violate the uniform standard while she received lectures. Appellant stated that

Ms. Rodriguez was engaged in an extramarital affair with appellant's husband. She also completed a statement dated May 21, 2010 written in Spanish.

Appellant submitted a Step A agreement on November 9, 2006, which provided that Ms. Rodriguez would attend anger management training. She submitted statements from Nelson Garcia, Ricardo Emerson and William Cortes, coworkers, dated July 21, 2010 written in Spanish. Appellant received a letter of warning for failure to be in regular attendance signed by José Colon, a supervisor, on October 13, 2009, but on January 27, 2010 the letter was expunged.

Appellant filed a grievance against Ms. Rodriguez on March 31, 2010 alleging that since October 13, 2009, she had been subjected to a hostile work environment, through unjust discipline, warnings, requests for a uniform and monitoring her job assignments.

In a statement dated May 11, 2010, appellant alleged that she had been harassed by Ms. Rodriguez since July 2009. She noted that in September 2009 while working general delivery she requested assistance from Ms. Rodriguez in finding a parcel. According to appellant, Ms. Rodriguez was hostile and instructed her that it was her job to look for the parcel not the job of the supervisor. She stated that Ms. Rodriguez subjected her to disciplinary action in July 2009 due to an absence of five days when her child was ill. Appellant stated that in September 2009, Ms. Rodriguez chose two employees to leave because there was not enough work, but did not ask her. She stated that the following day during a service talk she informed Ms. Rodriguez that there had been a need for more employees the previous day, because she had to cover the areas that were left behind. Appellant reported that Ms. Rodriguez replied in a hostile manner that she would not discuss the issue with appellant and that appellant would not "go over me." She later requested a change in schedule in October 2009 from Jorge Colon and followed his instructions to fax the change of schedule to the union. Appellant did not receive the form back from the union in time and Ms. Rodriguez required her to report to work. She stated that she normally requested leave and change of schedules through José Colon. Ms. Rodriguez allegedly instructed appellant in a hostile manner that the changes of schedule had to stop. Appellant believed that the October 2009 letter of warning was instigated by Ms. Rodriguez. She stated that she received two service talks about uniforms in November 2009, while other employees received only one.

Appellant further alleged that, in November 2009, Ms. Rodriguez screamed at her and a coworker while they were on break and that appellant later realized that Ms. Rodriguez had an inappropriate relationship with her husband. Ms. Rodriguez continued to scream at appellant and instructed her to report to work. In a service talk shortly thereafter, she acknowledged that she was friends with appellant's husband. In December 2009, Ms. Rodriguez reprimanded appellant because she did not have a complete uniform, as she was not allowed to wear black pants. Appellant later conferred with José Colon and it was determined that appellant could wear black pants. The next day a coworker wore jeans and Ms. Rodriguez did not reprimand her.

Ms. Rodriguez also allegedly was disrespectful to appellant when she denied appellant's request for leave in December 2009 as she put her hands on her sides and swayed her hips. Appellant stated that Ms. Rodriguez in a hostile manner instructed appellant to call the employing establishment notification system; and was instructed to aid a private mailer at 4:30 p.m. despite having to leave at 5:30 p.m. Ms. Rodriguez attempted to force appellant to stay, but she left. When appellant returned Ms. Rodriguez accused her of disrespectful behavior.

In January 2010, appellant broke her toe and requested seated work. Ms. Rodriguez told her not to move from her seat or walk around so as not to hurt her “little footie.” On February 26 2010 appellant confronted her husband about the affair with Ms. Rodriguez and on March 4, 2010 requested all text messages from her husband.

Appellant filed a notice of occupational disease on July 28, 2010 alleging that she developed back pain, headaches and stress due to Ms. Rodriguez.

Appellant submitted a report from Dr. Alfaro dated July 14, 2010 written in Spanish. The record contains four paragraphs which have been translated from Spanish on November 1, 2010. These paragraphs include the statements from Mr. Cortes, Mr. Emerson and Mr. Garcia. Mr. Cortes described a meeting in which Ms. Rodriguez informed appellant that she would not talk to her and that appellant would not go above her. He stated that other colleagues were allowed to disagree with Ms. Rodriguez without being chastised. Mr. Emerson’s statement included that in response to a question from appellant Ms. Rodriguez replied, “I [a]m not going to argue with you and you [a]re not going to go over me.” He noted that other colleagues questioned and disagreed with Ms. Rodriguez without a similar response. Mr. Garcia completed a statement that during appellant’s break Ms. Rodriguez instructed her to “come here now.”

By decision dated November 1, 2010, OWCP reviewed the merits of appellant’s claim. It found that the events regarding her discovery of the affair between her husband and Ms. Rodriguez were not related to her employment duties. OWCP found that appellant had “verified” two factors of employment: a September 2009 service talk where Ms. Rodriguez spoke in a hostile manner and informed appellant that she would not talk to her and that she was not to go above her and the removal of the October 12, 2009 letter of warning. It further found that the medical evidence supported that her emotional condition was the result of the affair and the actions of Ms. Rodriguez. However, OWCP found that the record established that Ms. Rodriguez harassed appellant as a result of the ongoing affair with appellant’s husband. It noted that the harassment was the result of animosity from appellant’s domestic life and imported into the workplace. OWCP concluded that Ms. Rodriguez’ actions did not arise out of her employment.

Appellant requested reconsideration on November 18, 2010. She submitted a report dated November 23, 2010 from Dr. Alfaro, who stated that her mental condition had begun in July 2009 due to the continuous harassment, humiliations, hostile environment and treatment by Ms. Rodriguez. Dr. Alfaro opined that appellant’s depression was later aggravated by the discovery that Ms. Rodriguez was having an affair with her husband.

In a statement dated November 23, 2010, Radmes Sierra, union steward, stated that Ms. Rodriguez continuously harassed appellant and issued unjustified discipline. In a statement dated July 27, 2010, Janet Velazquez, a coworker, stated that, in a service talk, Ms. Rodriguez raised her voice and told appellant that she was not to go above her authority. She stated that Ms. Rodriguez had a special relationship with appellant’s husband as he was her right hand man. Ms. Velazquez stated that Ms. Rodriguez had screamed at both appellant and her and had embarrassed appellant. She stated that Ms. Rodriguez monitored appellant incessantly and treated her different from other employees. Ms. Velazquez noted that Ms. Rodriguez gave other employees more time to purchase the correct uniform.

By decision dated May 24, 2011, OWCP denied appellant's claim finding that the accepted factors of employment occurred as a result of animosity from her domestic and private life that was imported into the workplace.

Appellant requested reconsideration on September 9, 2011. She submitted an EEO decision dated August 17, 2011 reinstating her complaint. By decision dated October 5, 2011, OWCP declined to reopen appellant's claim for consideration of the merits.

Appellant again requested reconsideration on May 1, 2012. Counsel argued that her relationship with Ms. Rodriguez was not imported into the workplace as these parties did not have a relationship outside of work.

By decision dated August 6, 2012, OWCP again denied appellant's claim finding that she had not established an injury arising in the performance of duty.

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*,² the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under FECA.³ There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under FECA.⁴ When an employee experiences emotional stress in carrying out his or 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.⁵ 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.⁶

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.⁷ Where the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its

² 28 ECAB 125 (1976).

³ 5 U.S.C. §§ 8101-8193.

⁴ See *Robert W. Johns*, 51 ECAB 136 (1999).

⁵ *Cutler*, *supra* note 2.

⁶ *Id.*

⁷ *Charles D. Edwards*, 55 ECAB 258 (2004).

administrative or personnel responsibilities, such action will be considered a compensable employment factor.⁸ A claimant must support his or her allegations with probative and reliable evidence. Personal perceptions alone are insufficient to establish an employment-related emotional condition.⁹

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.¹⁰

ANALYSIS

Appellant has not alleged that her emotional condition is due to her regular or specially assigned work duties and, thus, has not alleged or established any factors under *Lillian Cutler*.¹¹ She has alleged that she developed an emotional condition as the result of actions of her supervisor, Ms. Rodriguez. Appellant attributed her emotional condition in part to the affair between Ms. Rodriguez and appellant's husband. While this alleged affair has some relationship to her work, as both Ms. Rodriguez and her husband are coemployees of the employing establishment, an extramarital affair between other parties does not have sufficient relationship to appellant's regular or specially assigned duties to render it a compensable factor of employment.

The Board notes that, contrary to OWCP's analysis, this situation is not similar to a situation where disputes are imported into the workplace and the resulting actions are found not to be in the performance of duty.¹² Appellant has not alleged an assault, she is not the party responsible for the private relationship and Ms. Rodriguez was her direct supervisor.

OWCP had accepted as a compensable factor of employment the removal of a letter of warning for failure to be in regular attendance signed by José Colon on October 13, 2009. The handling of disciplinary actions is generally related to the employment, but is considered an administrative function of the employer and not duties of the employee.¹³ Reactions to actions taken in an administrative capacity are not compensable unless it is shown that the employing establishment erred or acted abusively in its administrative capacity.¹⁴ The Board finds that appellant did not submit sufficient evidence to establish that the employing establishment

⁸ *Kim Nguyen*, 53 ECAB 127 (2001). See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

⁹ *Roger Williams*, 52 ECAB 468 (2001).

¹⁰ *Alice M. Washington*, 46 ECAB 382 (1994).

¹¹ *Supra* note 2.

¹² *M.B.*, Docket No. 08-292 (issued December 18, 2008).

¹³ *C.S.*, 58 ECAB 137 (2006).

¹⁴ *T.G.*, 58 ECAB 189 (2006).

committed error or abuse with respect to this letter. Appellant submitted no evidence to suggest error or abuse associated with the issuance of the letter. There was no evidence that it had been issued improperly. The mere fact that the actions of the employing establishment were later removed or modified does not, in and of itself, establish error or abuse by management in its administrative duties.¹⁵ The Board reverses this finding of a compensable factor.

OWCP also accepted as a compensable factor that in a September 2009 service talk Ms. Rodriguez had spoken to appellant in a hostile manner and informed appellant that she would not talk to her and that appellant was not to go above her. This incident involved a situation where Ms. Rodriguez allegedly treated appellant in a disrespectful manner by refusing to consider her input at a meeting in which other employees were allowed to express their opinions freely. Appellant submitted statements from three coworkers, Mr. Cortes, Mr. Emerson and Ms. Velasquez, which purportedly established this allegation. The Board finds that appellant and her witnesses have not provided the requisite detail to establish that the events occurred as alleged. The statements do not provide a specific date, time or place of the alleged inappropriate statements. Furthermore, the statements do not provide the names of other employees who were allowed to disagree with Ms. Rodriguez. The Board finds that these general allegations and general supporting statements are not sufficient to find a specific factor of abuse by management regarding administrative matters. Due to the deficiencies and discrepancies in these factual statements, the Board finds, contrary to OWCP, that appellant has not submitted sufficient evidence to establish a compensable factor of employment in this regard.

Appellant stated that, in November 2009, Ms. Rodriguez screamed at her and a coworker while they were on break and that at that time she also realized that Ms. Rodriguez was having an inappropriate relationship with her husband. Ms. Rodriguez continued to scream at appellant and instructed her to report to work. Mr. Garcia noted in his statement that during one of appellant's breaks Ms. Rodriguez instructed her to "come here now." Ms. Velazquez noted that Ms. Rodriguez had screamed at both appellant and her and had embarrassed appellant. She stated that Ms. Rodriguez monitored appellant incessantly and treated her differently than other employees. The Board finds that these statements are not sufficiently detailed to establish error or abuse on the part of Ms. Rodriguez. There are no specific dates noted and the details are general and are inconsistent. Due to the deficiencies and discrepancies in the factual statements, the Board finds that appellant has not submitted sufficient evidence to establish a compensable factor of employment in this regard.

Appellant further alleged harassment and discrimination by Ms. Rodriguez through unjust discipline, warnings, requests for a uniform and monitoring her job assignments. If disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from the employee's performance of her regular duties, these could constitute employment factors.¹⁶ The evidence, however, must establish that the incidents of harassment or discrimination occurred as alleged to give rise to a compensable disability under FECA. Appellant did not submit any factual evidence in support of the remainder of her allegations and thus has not established a compensable work factor.

¹⁵ R.S., Docket No. 08-2095 (issued June 4, 2009).

¹⁶ A.R., Docket No. 11-1949 (issued April 16, 2012).

The Board finds that appellant has not submitted the necessary detailed and comprehensive corroborating evidence to substantiate a compensable factor of employment. Where a claimant has not established any compensable employment factors, the Board need not consider the medical evidence of record.¹⁷

CONCLUSION

The Board finds that appellant has not established a compensable factor of employment and, therefore, OWCP properly denied her claim.¹⁸

ORDER

IT IS HEREBY ORDERED THAT the August 6, 2012 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: August 19, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

¹⁷ A.K., 58 ECAB 119 (2006).

¹⁸ As the Board has found no compensable employment factors, the medical evidence has not been reviewed.