

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

L.Y., Appellant

and

**DEPARTMENT OF AGRICULTURE,
FOREST SERVICE, San Diego, CA, Employer**

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**Docket No. 13-242
Issued: August 20, 2013**

Appearances:
William H. Brawner, Esq. for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 13, 2012 appellant filed a timely appeal from a May 14, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) which denied her claim for an emotional condition. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On October 27, 2011 appellant, then a 58-year-old forest botanist, filed an occupational disease claim alleging an emotional condition as a result of interference and lack of communication by her supervisor and a coworker which prevented her from properly carrying

¹ 5 U.S.C. § 8101 *et seq.*

out her duties. She became aware of her condition and realized that it was causally related to her employment on April 11, 2008. Appellant stopped work on February 1, 2010.

On November 22, 2011 OWCP asked appellant to submit additional factual and medical information, including a detailed description of the employment factors or incidents that she believed contributed to her claimed illness. It asked the employing establishment to provide comments from a knowledgeable supervisor on the accuracy of the statements provided by appellant and address whether she was able to perform the required duties.

In a December 3, 2011 statement, appellant indicated that her professional relationships with coworker Kirsten Winter, a forest biologist, and Gloria Silva, a resource supervisor, interfered with her duties. She alleged that she was harassed, discriminated against and retaliated against. Ms. Winter allegedly submitted anonymous complaints to a hotline on October 12 and November 28, 2007 regarding appellant's falsification of time sheets, destruction of government property, wasting federal funds, posting negative comments about appellant on a public server in 2008, casting appellant in a negative light in a 2005 e-mail to coworkers and excluding appellant from e-mails to other biologists. Appellant was harassed when Lance Criley, a range conservation officer, and Keith Fletcher, a ranger, were rude to her in e-mails and on the telephone while Jeff Wells, a resources officer, refused to send her a requested item and told her to straighten up or ship out and that she was incompetent. She asserted that Ms. Silva improperly denied her reasonable accommodation to work from home and instructed her to provide a complete medical history and records to support her request. Appellant alleged that Ms. Silva improperly suspended her from September 8 to 10, 2010 after being accused of not timely reporting a June 10, 2010 vehicle accident and giving false and inconsistent statements in the resulting investigation. Ms. Silva required her to justify her projects to others during meetings and never supported her in work-related conflicts which made appellant feel insulted and embarrassed. She improperly received a "marginally successful" performance rating for fiscal year 2008 and was erroneously placed on a performance improvement plan (PIP) in May 2009.

Appellant submitted a grievance from May 2009. She asserted that the PIP was improper, she was provided with poorly written performance standards and had disagreements and was harassed by Ms. Winter. A November 20, 2007 hotline complaint alleged misconduct by appellant, wasting federal funds and destroying government property. The anonymous caller stated that appellant misrepresented her qualifications and did not have the skills or abilities required by her position. A December 9, 2009 letter from the Office of the Inspector General addressed a hotline complaint against appellant alleging that she could not perform a measureable portion of her assigned duties as a botanist. Appellant submitted a statement dated April 27, 2010 from Ms. Silva who noted that she could not approve appellant's request to work at home.

A November 12, 2008 performance evaluation asked appellant to pay attention to certain aspects of her performance elements, including managing work assignments, time management, good communication skills and timely attendance and to recognize positive aspects and improvements made in response to direction. Ms. Silva noted that appellant interpreted her inquiries about deadlines as harassment; however she noted monitoring accomplishments was a

supervisory function and a desire to successfully complete projects and meet targets. She further noted that appellant showed a poor attitude in taking direction.

Appellant submitted a November 12, 2008 letter of instruction from Ms. Silva addressing her submittal of incorrect time and attendance reports after written and verbal directions on these matters. Ms. Silva asked appellant to submit her requests for compensatory time and overtime in advance. A June 8, 2010 letter of instruction from Ms. Silva directed appellant to follow instructions and obtain clarification if unclear and demonstrate respect in her communications. Appellant submitted a May 1, 2009 PIP from Ms. Silva noting deficiencies in not delivering completed assignments by deadlines, deficiencies in her knowledge of fuels management and watershed restoration and deficiencies in teamwork and the ability to communicate criticism or disagreement. Ms. Silva instituted the plan to elevate appellant's performance to a successful level which she believed was possible.

Appellant submitted a Family Medical Leave Act request prepared by Dr. Sara Epstein, a Board-certified psychiatrist, who noted that appellant was depressed, her emotional condition had deteriorated and she was unable to perform the functions of her position. Dr. Epstein opined that appellant could return to work in October 2011 at a different work site. In a December 12, 2011 report, she diagnosed major depression, acute stress disorder, mixed personality traits and Sjögren's disease. Dr. Epstein opined that appellant's workplace incidents were the source of her depression and stress disorder. Other medical records noted appellant's treatment for physical conditions that included a degenerative right knee condition and for Sjögren's syndrome.

In January 28 and December 9, 2011 statements, appellant reiterated her allegations of harassment, discrimination and retaliation by Ms. Silva, Ms. Winters and other coworkers. She asserted that she was an outsider from New York and did not fit in because of cultural differences and being Jewish. Appellant submitted an Equal Employment Opportunity (EEO) complaint alleging discrimination, failure to accommodate her request to work at home, and being unfairly accused of being insubordinate and not following instructions.

The employing establishment submitted a November 22, 2011 statement from Ms. Silva who noted that on May 1, 2009 appellant was placed on a PIP. On May 14, 2009 appellant grieved the PIP requesting that it be rescinded. On August 14, 2009 the forest supervisor denied the grievance and on December 29, 2009 the employing establishment denied the grievance. Ms. Silva listed adverse personnel actions including a three-day suspension on September 2, 2010 for failure to report a motor vehicle accident involving a government vehicle and a December 15, 2010 a letter of reprimand for submission of inaccurate time and attendance reports. She stated that appellant did not provide details of how work caused or aggravated an emotional condition and she was not aware of any incident or exposure on April 8, 2008 that would cause an emotional condition. On August 31, 2010 appellant noted being depressed and stressed and indicated that her physician had thought she had not worked through the grief process concerning her parents, eldercare and marital problems. Ms. Silva denied appellant's allegation that she refused to compel a coworker with whom she was having a communication issue to join her in an alternate dispute resolution (ADR) process. The ADR process was for improving personal relations not for resolving any EEO-type issue or incident. Ms. Silva stated that there had been improvement in communication and the coworker was opposed, so she did

not mandate ADR participation. She denied that this discriminated or harassed appellant. Ms. Silva noted that the work assigned to appellant was not more stressful than others; rather, there were no other employees who solely performed botany work. She noted that appellant was a permanent full-time employee on a maxiflex schedule with core hours of 10:00 a.m. to 2:00 p.m. with no overtime required.

In an undated statement, Ms. Silva noted that there was no finding of harassment or discrimination in appellant's EEO complaint. On November 12, 2008 she gave appellant a marginal performance rating for the period October 1, 2007 to September 30, 2008. Appellant was not rated as fully successful for the teamwork and partnership element. By mid-fiscal year 2009, her performance was in jeopardy of being not fully successful; so, in accordance with employing establishment policy, she placed appellant on a PIP on May 1, 2009 to improve her performance. Ms. Silva worked with appellant, meeting biweekly to make sure she had opportunity to understand and perform the expected workload. On November 3, 2009 appellant received a performance rating of "fully successful." When appellant requested reasonable accommodation, Ms. Silva did not ask for a complete medical record. Rather she informed appellant that it was up to her to decide which medical documents she should include and that it would be confidential. Regarding appellant's allegation that Ms. Winter posted unsubstantiated negative perceptions about appellant on a public server on July 1, 2008, Ms. Silva stated that Ms. Winter wrote a "protocol for resources work" document. It was of a supervisory nature and Ms. Silva requested that the document be removed and the matter was resolved. As to appellant's allegation that Ms. Winters excluded her from e-mails addressed to other biologists, Ms. Silva stated that, due to the organizational structure and the number of biologists performing botany work, not all work was coordinated with all other biologists. Ms. Silva denied that she ever supported appellant or the botany program. She made recommendations that were in accordance with policy and what was in the best interest of the forest and public. Ms. Silva denied appellant's allegation that from April to May 2010 Ms. Silva had informed District Ranger Joan Friedlander that appellant discussed their differences of opinion with other botanists. She stated that during a fungi study, appellant demonstrated inappropriate conduct in her interaction with Ms. Friedlander and called into question Ms. Friedlander's reputation and judgment. As to the allegation that Ms. Winters submitted two anonymous complaints against appellant in October 2007 and August 2008, Ms. Silva stated that the identity of the complainant was not disclosed by the Office of the Inspector General hotline. She was notified about an anonymous complaint regarding appellant and was directed to investigate the allegation and report her findings. One of the allegations included falsification of timesheets which Ms. Silva had already discovered. Ms. Silva denied any retaliation against appellant due to her EEO complaint. Appellant's 14-day suspension was reduced to 3 days. Ms. Silva indicated that the EEO complaint was investigated and no harassment or discrimination was found. She stated that the employer's process for adverse action allowed a change in the penalty for mitigating factors and appellant's penalty was reduced to three days. Ms. Silva denied ostracizing appellant and was unaware of any harassment or discrimination based on religion, ethnicity or being from New York.

In an undated statement, Ms. Winters noted that she authorized notes regarding who should review biological evaluations and assessments. These were personal notes in a password protected file; however, the file became corrupted and was visible to other employing establishment staff. As soon as Ms. Silva advised her of appellant's concern regarding the

document, Ms. Winters removed it from the computer. She was responsible for overseeing the forest wildlife, fish and botany programs and appellant was the primary contact and lead for botany issues. Ms. Winters stated that much of her correspondence related to wildlife issues, so appellant was not included on those e-mails. She was unaware of any cultural or religious issues with appellant.

In an employing establishment decision dated December 29, 2009, appellant's grievance was denied. Her request that the PIP be rescinded was also denied as she did not prove she was subjected to harassment. In an EEOC decision, appellant's claims of harassment and discrimination were denied.

In a decision dated May 14, 2012, OWCP denied appellant's claim, finding that her emotional condition did not arise in the performance of duty. It found that she did not establish any compensable work factors.

LEGAL PRECEDENT

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

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*,³ 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.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 Allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.⁶ Where the claimant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.⁷ Personal perceptions alone are insufficient to establish an

² *George H. Clark*, 56 ECAB 162 (2004).

³ 28 ECAB 125 (1976).

⁴ *See Robert W. Johns*, 51 ECAB 137 (1999).

⁵ *Supra* note 3.

⁶ *J.F.*, 59 ECAB 331 (2008).

⁷ *M.D.*, 59 ECAB 211 (2007).

employment-related emotional condition.⁸ 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 or her frustration from not being permitted to work in a particular environment or to hold a particular position.⁹

ANALYSIS

Appellant alleged harassment and discrimination by Ms. Winter and Ms. Silva. She noted the denial of reasonable work accommodation, suspension, justification of projects, a marginal performance rating, being placed on a PIP and Ms. Silva's failure to support her in work-related disagreements. Appellant alleged harassment by Ms. Winter, Mr. Criley, Mr. Fletcher and Mr. Wells. The Board must initially review whether the alleged incidents and conditions of employment are established as compensable employment factors under the terms of FECA. Appellant has not attributed her emotional condition to the regular or specially assigned duties of her position as a forest botanist. Therefore, she has not alleged a compensable factor under *Cutler*.¹⁰

Appellant's allegations relate to administrative and personnel actions. In *Thomas D. McEuen*,¹¹ the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by is not covered under FECA as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. The Board noted, however, that coverage under FECA would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant. Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹²

Appellant asserted that Ms. Silva, a supervisor, improperly denied her request to work from home and instructed her to provide complete medical records in support of her request. The Board has found that an employee's complaints concerning the manner in which a supervisor performs her duties as a supervisor or the manner in which a supervisor exercises her supervisory discretion fall, as a rule, outside the scope of coverage provided by FECA. This principle recognizes that a supervisor or manager in general must be allowed to perform her duties, that employees will at times dislike the actions taken, but that mere disagreement or dislike of a supervisory or management action will not be actionable, absent evidence of error or

⁸ *Roger Williams*, 52 ECAB 468 (2001).

⁹ *See supra* note 3.

¹⁰ *Supra* note 3.

¹¹ *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

¹² *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

abuse.¹³ The Board notes that the assignment of work is an administrative function.¹⁴ The manner in which a supervisor exercises his or her discretion falls outside the ambit of FECA. Absent evidence of error or abuse, appellant's mere disagreement or dislike of a managerial action is not compensable.¹⁵ The Board finds that appellant has not offered sufficient evidence to establish error or abuse regarding denying her request to work at home. Appellant presented no corroborating evidence to support that the employer acted unreasonably. In an April 27, 2010 statement, Ms. Silva indicated that she could not approve appellant for work at home as there was a process that must be implemented for approval. She further indicated that, when appellant made her request, she informed appellant that it was up to her to decide which medical documentation she should include to support her request. Appellant has not established administrative error or abuse in this matter.

Appellant alleged that Ms. Silva improperly disciplined her including a suspension from September 8 to 10, 2010 for not timely reporting a June 10, 2010 vehicle accident and giving false and inconsistent statements in the resulting investigation. The evidence does not support that the employer or Ms. Silva acted unreasonably in response to appellant's failure to report a motor vehicle accident involving a government-owned vehicle. Appellant also contended that a December 15, 2010 letter of reprimand for inaccurate time and attendance reports was improper. Allegations that the employing establishment engaged in improper disciplinary actions, relate to administrative or personnel matters, unrelated to her regular or specially assigned work duties.¹⁶ Although the handling of disciplinary actions and evaluations are generally related to the employment, they are administrative functions of the employer, and not duties of the employee.¹⁷ The record reveals that, prior to being issued the letter of reprimand for submission of inaccurate time and attendance reports, Ms. Silva issued a November 12, 2008 letter of instruction addressing appellant's continued submittal of incorrect time and attendance reports following written and verbal directions. The evidence does not support that Ms. Silva acted unreasonably issuing a letter of reprimand for submission of inaccurate time and attendance reports.¹⁸ Appellant presented no corroborating evidence that the employing establishment acted unreasonably in this matter and her unsupported assertion that Ms. Silva was disciplining her as a way to harass her is insufficient to meet appellant's burden of proof. Thus she has not established administrative error or abuse in the performance of these actions and therefore they are not compensable under FECA.

¹³ See *Marguerite J. Toland*, 52 ECAB 294 (2001).

¹⁴ *Donney T. Drennon-Gala*, 56 ECAB 469 (2005).

¹⁵ See *Barbara J. Latham*, 53 ECAB 316 (2002); see also *Peter D. Butt Jr.*, 56 ECAB 117 (2004) (allegations such as improperly assigned work duties, which relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties do not fall within the coverage of FECA).

¹⁶ See *Janet I. Jones*, 47 ECAB 345, 347 (1996); *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

¹⁷ *Id.*

¹⁸ Although Ms. Silva indicated that the original 14-day suspension was reduced to 3 days for mitigating factors, this does not establish that the suspension was in error. See *C.T.*, Docket No. 08-2160 (issued May 7, 2009) (the mere fact that a personnel action is later modified or rescinded does not, in and of itself, establish error or abuse).

Appellant asserted that Ms. Silva required appellant to justify her projects to others during meetings and never supported her in any work-related conflicts or disagreements. As noted, an employee's complaints concerning the manner in which a supervisor performs her duties as a supervisor or the manner in which a supervisor exercises her supervisory discretion generally fall outside the scope of coverage provided by FECA and that, absent evidence of error or abuse, mere disagreement or dislike of a managerial action is not compensable.¹⁹ The Board finds that appellant has not offered sufficient evidence to establish error or abuse. Ms. Silva noted that it was not true that she never supported appellant or the botany program. She indicated that she made recommendations that were in accordance with policy and what was in the best interest of the forest and public. Ms. Silva acknowledged that she disagreed with appellant at times but contended that she would not say anything embarrassing or insulting about appellant's opinion. Appellant presented no corroborating evidence to support that Ms. Silva or the employer acted unreasonably in this regard.

Appellant alleges that she improperly received a "marginally successful" performance rating for 2008 and was erroneously placed on a PIP in May 2009. Although the handling of evaluations, the assignment of work duties, and the monitoring of activities at work are generally related to the employment, they are administrative functions of the employer, and not duties of the employee.²⁰ The evidence is insufficient to establish that the employing establishment erred or acted abusively in this matter. Ms. Silva indicated that on November 12, 2008 she gave appellant a performance evaluation of marginal for the period October 1, 2007 and September 30, 2008 noting appellant's teamwork and partnership element was not fully successful. She noted that by mid-fiscal year 2009 it was apparent that appellant's performance was in jeopardy of being not fully successful and, in accordance with employing establishment policy, she placed appellant on a PIP to improve her performance by the end of the rating period. Ms. Silva worked with appellant meeting biweekly and, by the end of the rating period, appellant merited a fully successful rating. The Board finds that Ms. Silva acted reasonably in these administrative matters. Ms. Silva provided a reasonable explanation for her actions and appellant has not provided evidence to substantiate such actions were in error, abusive or unreasonable in nature. Appellant has not established administrative error or abuse in the performance of these actions and therefore they are not compensable under FECA.

Appellant also alleges that she was harassed, discriminated against and retaliated against by Ms. Silva, Ms. Winter and others such as Mr. Criley, Mr. Fletcher and Mr. Wells. To the extent that incidents alleged as constituting harassment or a hostile environment by a supervisor are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.²¹ However, for harassment to give rise to a compensable disability under FECA, there must be evidence that harassment did in fact occur. Mere

¹⁹ See *supra* note 13.

²⁰ See *supra* note 16.

²¹ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

perceptions of harassment are not compensable under FECA.²² The evidence does not support the claim for harassment.

The record does not support appellant's allegation that she was harassed or subject to retaliation. Ms. Silva denied ostracizing appellant and she was unaware of any harassment or discrimination of appellant based on religion, ethnicity or being from New York. With regard to appellant's allegation that Ms. Silva retaliated against her, Ms. Silva denied any retaliation for filing an EEO complaint and appellant has not submitted sufficient evidence to corroborate her assertions. She also noted that there was a finding of no harassment or discrimination in the EEO matter. Regarding appellant's request to work at home, as noted, Ms. Silva provided a reasonable explanation for her course of action on this matter. Likewise, in regard to the disciplinary matters such as appellant's suspension and letter of reprimand, the evidence does not establish that Ms. Silva or the employer acted unreasonably and appellant has not otherwise submitted sufficient evidence to establish that these matters constituted harassment. Ms. Silva also denied appellant's allegation that she failed to support appellant. She indicated that she supported appellant and the botany program but further advised that she made recommendations that were in accordance with policy and what is in the best interest of the employing establishment and the public. Appellant has not established allegations of harassment regarding Ms. Silva.

With regard to appellant's allegations that Ms. Winter discriminated and retaliated against her by submitting anonymous complaints on a hotline on October 12 and November 28, 2007, appellant provided no evidence to establish that Ms. Winter filed these complaints or that the complaints were improper. The record reveals that two complaints were filed in 2007 but the complainant was listed as "confidential." Regarding appellant's allegation that Ms. Winter posted negative comments about her on a public server in 2008, Ms. Winters noted that she wrote up personal notes regarding reviewing biological evaluations and biological assessments in a password protected file but the file became corrupted and was visible by other employing establishment staff. She indicated that as soon as she was advised of appellant's concern, she removed it from the computer. Ms. Winter further noted that she did not disparately exclude appellant from e-mails to other biologists but explained that, while appellant was the primary contact and lead for botany issues, much of Ms. Winter's correspondence pertained to wildlife issues such that appellant was not included on e-mails regarding wildlife. She further indicated that she was unaware of any issues related to alleged cultural or religious differences with appellant. The evidence is insufficient to show that appellant was singled out or treated disparately with regard to her claim of harassment by Ms. Winter. Appellant has not established a compensable factor of employment in this regard.

Consequently, appellant has not established her claim for an emotional condition as she has not attributed her claimed condition to any compensable employment factors.²³

²² *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).

²³ As appellant has failed to establish a compensable employment factor, the Board need not address the medical evidence of record; see *Margaret S. Krzycki*, 43 ECAB 496 (1992).

On appeal, appellant's counsel submitted a brief reiterating appellant's allegations, asserting that she has established error or abuse on the part of the employing establishment. The Board has reviewed the entire case record and all the documents appellant submitted in support of her claim for an emotional condition as well as the employer's response. As explained above, the Board finds that appellant has not established her claim for an emotional condition as she has not attributed her claimed condition to any compensable employment factors.

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

ORDER

IT IS HEREBY ORDERED THAT the May 14, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 20, 2013
Washington, DC

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

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

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