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

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| **P.T., Appellant** | ) | |
| **and** | ) | **Docket No. 14-2011** |
| | ) | **Issued: February 5, 2015** |
| **DEPARTMENT OF VETERANS AFFAIRS, HOUSTON VETERANS ADMINISTRATION MEDICAL CENTER, Houston, TX, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*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 18, 2014 appellant filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) decision dated August 26, 2014. Pursuant to the Federal Employees' Compensation Act[1] (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 has met her burden of proof to establish an emotional condition in the performance of duty.

### ***FACTUAL HISTORY***

On January 16, 2014 appellant, then a 39-year-old food service worker, filed an occupational disease claim alleging that she developed stress, anxiety, and loss of appetite after a

[1] 5 U.S.C. § 8101 *et seq.*

coworker sexually harassed her, asked her for sexual favors, offered her money for sex, and made inappropriate sexual comments. She became aware of her condition on January 12, 2013 and realized it was causally related to her employment on January 7, 2014. Appellant did not stop work.

On January 28, 2014 OWCP asked appellant to submit additional evidence, including a detailed description of the employment incidents that contributed to her claimed illness.

The employing establishment submitted records, including a position description for a food service worker and appellant's work schedule from November 4, 2012 to January 11, 2014. An SF-50, notification of personnel action, dated August 11, 2013, noted that appellant had a change in work schedule from full-time duty to part-time duty effective August 11, 2013.

The employing establishment submitted a January 24, 2014 letter of controversion. In two undated statements, Willie Turner, a workers' compensation program manager, noted that on January 16, 2014 appellant filed a Form CA-2 asserting that she was sexually harassed by the coworker on January 12, 2013. He noted that the employing establishment did not concur with appellant's claim noting there was no evidence from a psychiatrist or clinical psychologist to support that her alleged occupational disease claim was caused by employment activities or event(s).

In a February 7, 2014 letter to Dr. Carolyn Clansy Miller, a licensed psychologist, Mr. Turner requested a complete medical narrative report of the history of appellant's condition, social and family history, the employees work situation, mental status examination, personality testing, diagnoses, clinical course, and an opinion which identifies which factors of employment caused or aggravated her condition and an assessment of her current condition.

Appellant submitted reports from Dr. Miller dated March 1 and April 3, 2014. Dr. Miller opined that appellant's mental health improved and she was able to work with the general public in a job setting on April 1, 2014. In a work capacity evaluation dated March 5, 2014, she noted that appellant experienced severe anxiety and possible psychotic symptoms, and depression which impaired her ability to perform her job assignment. Dr. Miller noted that appellant was not competent to perform her usual job of interaction with the general public and coworkers, and opined that an appropriate job would be minimal involvement with people, minimal stress, and a job which did not require average to high cognitive capacity.

The employing establishment conducted a fact-finding investigation on February 5, 2014 to determine the circumstances surrounding the sexual harassment allegations from appellant and a coworker. The fact-finding investigation was conducted by three team members, Jeremiah Jackson, supervisory health system specialist, Beena Kurian, supervisory health system specialist, and Sheri Kuhlenschmidt, program support assistant. In a February 7, 2014 memorandum, the employing establishment concluded that it was clear to the investigative team that a consensual relationship existed between the coworker and appellant for a period of time. Based on the statements from the parties involved, it was apparent that sexual harassment did not take place. The investigative team noted that from the recording provided by the accuser it could not be confirmed that the coworker initiated the inappropriate conversation regarding sexual favors in exchange for money. The investigative team recommended that appellant and the

coworker retake a sexual harassment training course and continue working in their assigned areas.

The employing establishment submitted a February 5, 2014 fact-finding questionnaire from appellant in which she indicated that the incident occurred on January 7, 2014 at noon while at work. Appellant noted recording the conversation with the coworker on her cell phone that was in her pocket. She advised that he did not state his name on the recording but she knew it was him. Appellant reported that the incidents with the coworker began in January 2013, two months after she started working at the employing establishment in November 2012, and that the last incident was on January 7, 2014. She indicated that she told him to stop more than twice and informed him that nothing would happen between them. Appellant described the relationship noting that the coworker worked with the robots and she worked in the staging area and he would come to her work area and ask for her. She indicated that she did not tell anyone of the incidents and tried to handle it herself, but was scared. Appellant stated that the last incident took place on January 7, 2014 and she reported it to the union on January 12, 2014.

In a fact-finding interview dated February 5, 2014, the coworker indicated that he knew appellant and that she worked in the kitchen area. He indicated that she had asked him for gas money and he was very giving. The coworker noted being surprised by appellant's allegations and indicated that on many occasions she approached him in the control room complaining about her home life and lack of money for her kids at Christmas. He indicated that on December 20, 2013 he gave her $300.00, which was $50.00 for each of her kids and $100.00 for herself, and told her she did not owe him anything in return. The coworker indicated that appellant came to his office and reported problems with her husband and that she did not have a car. He reported that she requested a $2,000.00 car down payment and he told her she could get a car without a down payment. The coworker noted that he did not know much about appellant but he could not give her $2,000.00 because his money went into his wife's account and he was a "working man." He noted that he never promised her $2,000.00 to get a car and would not pay that amount for sex. The coworker indicated that he was 68 years old and it was sad someone would step on him to get ahead but he did not sexually harass or assault women. He liked his job and hoped to retire the next year.

In an undated employing establishment statement received on April 21, 2014, Mr. Turner noted that the employing establishment did not concur with appellant's claim and noted that there was no factual or medical evidence to support the employees alleged occupational disease claim was caused by employment activities. He noted that appellant had not submitted any evidence to establish the alleged incidents as factual. Mr. Turner indicated that an employing establishment fact-finding investigation was conducted on February 5 and 7, 2014 the resulting memorandum concluded that a consensual relationship existed between the coworker and appellant for a period of time based on the statements of the parties and that sexual harassment did not take place. The investigative team recommended that appellant and the coworker retake a sexual harassment training course.

In an August 26, 2014 decision, OWCP denied appellant's claim for an emotional condition as the evidence did not support that the events occurred as alleged.

## ***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 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 alleges that she developed stress, anxiety, and loss of appetite after the coworker sexually harassed her, asked her for sexual favors, offered her money for sex, and made inappropriate sexual comments to her. The Board must thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of FECA. Appellant has not attributed her emotional condition to performing her regular or

[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).

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

[9] *See supra* note 3.

specially assigned duties of her position as a food service worker. Instead, as noted below, she has characterized the incident as harassment. Therefore, appellant has not alleged a compensable factor under *Cutler*.[10]

Appellant asserted that the incidents of sexual harassment with the coworker began in January 2013, two months after she began working at the employing establishment in November 2012. The last incident was on January 7, 2014 which she reported to the union on January 12, 2014. Appellant noted recording the conversation with the coworker on her cell phone. She advised that he did not state his name on the recording, but she knew it was him. Appellant indicated that she told the coworker to stop more than twice and informed him that nothing would happen between them. She described the relationship noting that he worked with the robots and she worked in the staging area and he would come to her area and ask for her. Appellant indicated that she did not tell anyone of the sexual harassment incidents and tried to handle it herself but was scared. To the extent that incidents alleged as constituting harassment or a hostile environment by the coworker are established as occurring and arising from her performance of her regular duties, these could constitute employment factors.[11] However, for harassment to give rise to a compensable disability under FECA, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under FECA.[12]

The factual evidence fails to support appellant's claim for harassment as a cause for her emotional condition. The record does not support her allegation that she was sexually harassed. In a February 7, 2014 memorandum, the employing establishment noted conducting a fact-finding investigation by a team of three members to determine the circumstances surrounding the sexual harassment allegations from appellant about the coworker. The investigative team concluded that it was clear that a consensual relationship existed between the coworker and appellant for a period of time. Based on the statements gathered from the investigator involved, it was apparent that sexual harassment did not take place. The investigative team noted that from the recording provided by appellant it could not be confirmed that the coworker initiated an inappropriate conversation regarding sexual favors in exchange for money. The investigative team recommended that appellant and the coworker retake a sexual harassment training course and continue working in their assigned areas.

Additionally, in a fact-finding interview dated February 5, 2014, the coworker denied sexually harassing appellant. He knew she worked in the kitchen and indicated that she had asked for gas money and he had given her the money. The coworker indicated that appellant would complain about her home life, problems with her husband, and about not having money for her kids for Christmas. He indicated that on December 20, 2013 he gave her $300.00, which was $50.00 for each of her kids and $100.00 for herself and told her she did not owe him anything in return. The coworker alleged that appellant wanted information about a car and

[10] *See id.*

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

[12] *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).

requested a $2,000.00 car down payment which he declined and asserted that he never promised her $2,000.00 to get a car and would not pay for sex.

The Board notes that there is no evidence of record corroborating appellant's charges that the coworker was harassing her. Thus, appellant has not established a compensable employment factor under FECA with respect to the claimed harassment.

To the extent that appellant alleged that from November 2012 to January 2014 her coworker verbally abused her, the Board has recognized the compensability of verbal abuse in certain circumstances. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under FECA.[13] The Board finds that the facts of the case do not support any specific incidents of verbal abuse. Appellant provided no corroborating evidence, or witness statements to establish her allegations.[14] There is no corroborating evidence of record to support that any verbal interaction with appellant and her coworker rises to the level of a compensable employment factor.[15]

Consequently, appellant has failed to establish her claim for an emotional condition as she has not attributed her claimed condition to any compensable employment factors.[16] She 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.

[13] *Charles D. Edwards*, 55 ECAB 258 (2004).

[14] *See William P. George*, 43 ECAB 1159, 1167 (1992) (claimed employment incidents not established where appellant did not submit evidence substantiating that such incidents actually occurred).

[15] *See Judy L. Kahn*, 53 ECAB 321 (2002) (the fact that a supervisor was angry and raised her voice does not, by itself, support a finding of verbal abuse).

[16] 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).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the August 26, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 5, 2015
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