

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

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**D.S., Appellant**

**and**

**DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL  
CENTER, Jackson, MS, Employer**

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**Docket No. 15-0411  
Issued: September 10, 2015**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On December 12, 2014 appellant filed a timely appeal from a September 15, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 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 September 21, 2013 appellant, then a 41-year-old secretary of office automation, filed an occupational disease claim alleging that she worked in a hostile environment. She stated that she had filed three Equal Employment Opportunity (EEO) complaints against her supervisor

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

Robert Wolak for discrimination and was forced to defend herself against employing establishment attorneys. Appellant asserted that she was harassed, bullied and deprived of compensation on several occasions. All of these events caused her stress. Appellant became aware of her condition and its relationship to her employment on February 1, 2012. She did not stop work.

On September 30, 2013 OWCP asked appellant to submit additional evidence that included a detailed description of the work incidents that contributed to her claimed illness. It also requested that the employing establishment to comment on appellant's statements.

In a January 6, 2012 statement, appellant alleged that on April 15, 2010 a network chief information officer visited the employing establishment and advised during a staff meeting that everyone who wanted to be cross trained would be permitted to do so. In a February 11, 2013 statement, she explained that on February 8, 2013 she notified Mr. Wolak that her time card had not been posted for the entire pay period, and that this had occurred several times causing errors in her time card and pay. Appellant stated that Mr. Wolak later responded that "We're working on it; I got your email!" She allegedly requested that her time card should be posted daily and Mr. Wolak responded with what appellant described as a threatening, crazed look in his eyes, pointed at her, and stated "I don't like your insubordination!" Appellant indicated that she had two pending EEO complaints against Mr. Wolak and felt her work environment was hostile, threatening and intimidating. In a November 5, 2013 statement, she alleged that in October 2007 Mr. Wolak yelled at her about an e-mail he had instructed her to send. Appellant claimed that on July 30, 2013 a payroll technician and supervisor improperly placed her in leave without pay status even though she had leave to cover her absence. She noted that she had applied for the leave donor program and was approved, but when she returned in September 2013, she had nevertheless been placed in leave without pay status for 10 days. This greatly affected appellant's finances. Appellant alleged that she asked to work overtime but was denied. She did acknowledge that the payroll error was corrected within two weeks.

Paulette Rimpson, a supply technician, noted in an undated statement, that on June 14, 2011 she had overheard a conversation between appellant and Mr. Wolak over coverage of the office for lunch. She stated that appellant asked Mr. Wolak what he intended to do and he responded "what are you going to do about it?" Appellant replied that it was not her responsibility to tell anyone to cover that desk and she was entitled to a lunch break. Mr. Wolak spoke to another coworker in the vicinity: "She's yelling at me, I want you to write a report of contact." A February 11, 2013 statement from Cynthia Culley, a coworker, alleged that on February 8, 2013 she observed a man from the same office approach appellant's desk and point his finger at her in a threatening manner.

In an e-mail dated September 20, 2013, Melody Link, a nurse manager, requested permission from Mr. Wolak to have appellant do overtime in her department. Mr. Wolak requested that Ms. Link send a formal memorandum requesting the change. He stated that his department was funded separately from Ms. Link's department and he was unaware how funds could be transferred to cover this. Mr. Wolak inquired as to whether there was a part-time position into which appellant could be placed so she could be paid by Ms. Link's department.

In a November 12, 2013 request for reasonable accommodation, appellant stated that for many years she worked in a hostile environment of discrimination, harassment, bullying, unclear

work assignments, and compensation deprivation. She noted that she was unable to perform the duties of her job. Appellant submitted the employing establishment's policy regarding designation of timekeepers. She also submitted the employing establishment's policy on EEO and unlawful discrimination.

Appellant also provided several documents pertaining to an EEO complaint. In an undated EEO document, she stated that in March or April 2011 Mr. Wolak informed her twice that she could not take notes during an unscheduled staff meeting in which others took notes. Appellant asserted that on May 27, 2011 the assistant chief information officer announced that staff could leave 59 minutes early due to the Memorial Day holiday. She alleged that when she tried to confirm early dismissal, Mr. Wolak spoke to her sharply stating "Of course! Why wouldn't it!" Appellant asserted that on June 14, 2011 she informed Mr. Wolak that she was going to lunch and inquired as to who would cover the desk and he replied "What are you going to do about it!" She indicated Mr. Wolak stated "Want to bet!" and later accused appellant of yelling at him. Additionally, on June 16, 2011 appellant learned that Mr. Wolak stated to a male coworker that he should never get a wife like her.

During an April 5, 2013 EEO hearing, Vivian Brandon, a coworker, testified that she was present at a meeting in which Mr. Wolak asked appellant not to take notes. She noted that there were several incidents in which Mr. Wolak yelled at appellant or made negative comments about her. Ms. Brandon indicated that it was a common occurrence, but she could not recall the content of the statements or when they occurred. She noted being present in a meeting with Dale Nelson, Mr. Wolak's supervisor, where he indicated that all employees would be able to cross train. Ms. Brandon noted appellant questioning Mr. Wolak about her job assignments on several occasions but she did not remember if Mr. Wolak responded. She witnessed Mr. Wolak respond to appellant in an abrupt manner when she asked questions in 2011. Ms. Brandon noted that she did not cross train and she was not aware of any technology specialists who cross trained. She noted that the staff meetings were recorded. Ms. Brandon further noted that she observed appellant yelling at her coworker including Ms. Stokes. She found that a lot of yelling went on at work and was more than she experienced in other jobs.

During an April 4, 2013 EEO hearing, El Marco McNair, a coworker, testified that he recalled an incident where Mr. Wolak got upset, his tone and facial expression changed, when appellant informed him of work that needed to be done with time cards. He indicated that the environment was tense. Mr. McNair noted experiencing tense moments with Mr. Wolak and witnessing tense moments with Mr. Wolak and Tim Langford. He noted Mr. Wolak made a comment about appellant "something about I wouldn't marry her or something like that. I don't know the specifics of how he said it..." Mr. McNair recalled attending meetings in which appellant asked questions about the chain of command and Mr. Wolak "blew up" but he was not sure if it was directed at appellant or the whole group and he could not say it was hostile. When that happened, Mr. Wolak would tell appellant not to record that portion of the meeting. Mr. McNair indicated that he never heard Mr. Wolak make racially derogatory statements.

Appellant also provided medical evidence. In a November 19, 2012 report, Dr. Courtney Bagge, a psychologist, noted seeing appellant on March 1 and 13, 2012 for work stress and anxiety. She diagnosed major depressive disorder, recurrent, moderate.

In a December 4, 2013 decision, OWCP denied appellant's claim for an emotional condition as the evidence did not support that appellant had established any compensable factors of employment.

On July 21, 2014 appellant requested reconsideration.<sup>2</sup> She submitted a statement from Keith Moncure, a coworker, who confirmed that Mr. Wolak raised his voice in a staff meeting but he could not remember the content of the statement or when it occurred. Mr. Moncure contended that he worked in a hostile work environment, but could not address whether appellant had a threatening or tense relationship with Mr. Wolak. Mr. Moncure indicated that in a staff meeting management advised that staff could be cross trained and appellant inquired as to whether she could cross train. Management's response was yes, but in what area was unclear. He indicated that Mr. Wolak had asked that certain information not be retained from the minutes. Mr. Moncure stated that he filed his first EEO complaint against Mr. Wolak in 2007, and that he had filed two EEO complaints relating to Mr. Wolak's preselection of job candidates.

Appellant submitted e-mails dated December 12, 2007 to Catherine Lutz regarding a final determination in an EEO complaint filed against Mr. Wolak. She submitted e-mails dated August 12 to December 10, 2013, detailing her leave issues. A November 18, 2013 e-mail to Mr. Wolak inquired as to why she was not paid for three hours when she had donated leave. In response, Mr. Wolak promised that he would look into the leave matter with the acting chief but that in his opinion the agency had used everything that had been donated to appellant. He further noted that he did not have authority to approve certain types of absences.

By report dated March 20, 2014, Dr. Clyde Glenn, a Board-certified psychiatrist, noted that appellant should be moved to another work environment as the current environment was the source of her stress, anxiety, and depression.

In a decision dated September 15, 2014, OWCP denied modification of the prior decision. It found that appellant had failed to establish any compensable work factors as the cause of her claimed condition.

### **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.<sup>3</sup>

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,<sup>4</sup> the Board

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<sup>2</sup> Appellant stated that no final decision had been made on her EEO claim but she also indicated that the judge found no evidence of discrimination. She did not provide copies of any final decisions or rulings in the matter. Appellant did submit copies of the employing establishment's absence and leave policy.

<sup>3</sup> *George H. Clark*, 56 ECAB 162 (2004).

<sup>4</sup> 28 ECAB 125 (1976).

explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under FECA. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under FECA.<sup>5</sup> 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.<sup>6</sup> Allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.<sup>7</sup> Where the claimant alleges compensable factors of employment, she must substantiate such allegations with probative and reliable evidence.<sup>8</sup> Personal perceptions alone are insufficient to establish an employment-related emotional condition.<sup>9</sup> 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.<sup>10</sup>

### ANALYSIS

Appellant alleged that she sustained an emotional condition as a result of a number of incidents and conditions at work. OWCP denied her emotional condition claim because she had failed to establish any compensable employment factors. The Board must review whether these alleged incidents and conditions of employment are covered employment factors under the terms of FECA.

The Board notes that appellant's allegations do not pertain to her regular or specially assigned duties under *Cutler*.<sup>11</sup> Rather, she has alleged that she was exposed to a hostile work environment by her supervisor.

Appellant made several allegations related to administrative and personnel actions. In *Thomas D. McEuen*,<sup>12</sup> the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under FECA as such matters pertain to procedures and requirements of the employing establishment 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

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<sup>5</sup> See *Robert W. Johns*, 51 ECAB 137 (1999).

<sup>6</sup> *Supra* note 4.

<sup>7</sup> *J.F.*, 59 ECAB 331 (2008).

<sup>8</sup> *M.D.*, 59 ECAB 211 (2007).

<sup>9</sup> *Roger Williams*, 52 ECAB 468 (2001).

<sup>10</sup> See *supra* note 4.

<sup>11</sup> See *supra* note 4.

<sup>12</sup> See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

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.<sup>13</sup>

Appellant alleged that on April 15, 2010 a network chief offered other employees an opportunity to cross train but that she had never been given the same opportunity. The Board has held that an employing establishment's refusal to give an employee training as requested is an administrative matter, which is not covered under FECA unless the refusal constitutes error or abuse.<sup>14</sup> Ms. Brandon, appellant's coworker, testified that she was present at the meeting with Mr. Nelson who indicated that all employees would be able to cross train. She noted that she did not cross train and she was not aware of any technology specialists who cross trained. The Board finds that appellant has not offered sufficient evidence to establish error or abuse regarding training opportunities. The evidence does not establish that there was an established cross training program nor that the employing establishment acted unreasonably.

Appellant contends that on several occasions her time card had not been posted for an entire pay period which caused errors in her pay, that on July 30, 2013 the payroll department improperly placed her in leave without pay status even though she had leave to cover the absence, and in November 2013 she was not paid for three hours of leave when leave had been donated to her. The Board notes that the handling of leave requests and attendance matters are generally related to the employment, they are administrative functions of the employing establishment and not duties of the employee.<sup>15</sup> The Board finds that the employing establishment acted reasonably in this administrative matter. As noted, after appellant informed Mr. Wolak of the time card errors and that her time card should be posted daily, Mr. Wolak did work to resolve the issue. Appellant acknowledged that the payroll errors were corrected within two weeks. With regard to the donated leave, Mr. Wolak promised that he would look into the leave matter with the acting chief but informed her that the employing establishment believed that all the donated leave had been used. Appellant presented no corroborating evidence to support that the employing establishment erred in this matter.

Appellant alleged that in March or April 2011 Mr. Wolak informed her that she could not take notes during an unscheduled staff meeting while others were taking notes. She indicated that on May 27, 2011 Ms. Stokes announced that staff could leave 59 minutes early due to the Memorial Day holiday and when appellant attempted to confirm that she was permitted to depart early Mr. Wolak spoke to her sharply stating "Of course! Why wouldn't it!" Similarly, on June 14, 2011 appellant attempted to take a lunch break and inquired of Mr. Wolak as to who would cover the desk and he replied "What are you going to do about it!" The Board has found that an employee's complaints concerning the manner in which a supervisor performs his duties as a supervisor or the manner in which a supervisor exercises his supervisory discretion fall, as a rule, outside the scope of coverage provided by FECA. This principle recognizes that a

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<sup>13</sup> See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

<sup>14</sup> *Lorraine E. Schroeder*, 44 ECAB 323, 330 (1992).

<sup>15</sup> See *Judy Kahn*, 53 ECAB 321 (2002).

supervisor or manager in general must be allowed to perform his 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 abuse.<sup>16</sup> The Board finds that appellant has not offered specific evidence to establish error or abuse. She presented no specific corroborating evidence, specific to date and time, to show that Mr. Wolak or the employing establishment acted unreasonably in these matters.

Appellant asserted that on September 20, 2013 Ms. Link, a supervisor in another department, requested permission to have appellant work overtime in her department and Mr. Wolak would not permit it. The Board has held that denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment as they do not involve the employee's ability to perform her regular or specially assigned work duties but rather constitute her desire to work in a different position.<sup>17</sup> The employing establishment has either denied these allegations or explained how it acted reasonably in these administrative matters. The record indicates that Mr. Wolak explained that his department was funded separately from Ms. Link's department and he was unaware of how funds could be transferred to fund the overtime. He also inquired if Ms. Link could hire appellant in a part-time position so appellant could be paid by Ms. Link's department. Appellant presented no corroborating evidence to establish that Mr. Wolak erred or acted abusively with regard to these allegations. She has not established administrative error or abuse in the performance of these actions and therefore they are not compensable under FECA.

Appellant alleged that she worked in a hostile environment and was harassed. She noted filing three EEO complaints against Mr. Wolak asserting that he retaliated and discriminated against her. To the extent that incidents alleged as constituting harassment or a hostile environment by a manager are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.<sup>18</sup> 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.<sup>19</sup>

The factual evidence fails to support appellant's claim for harassment as a cause for her emotional condition. In the hearing transcript dated April 4, 2013, Mr. McNair recalled an incident where Mr. Wolak got upset when appellant informed him of a time card issue and when appellant asked a question about the chain of command. However, Mr. McNair was not sure if Mr. Wolak was directing his anger at appellant or the whole group and he could not say that the situation was hostile. Mr. McNair noted that he never heard Mr. Wolak make derogatory statements based on race. He indicated that he could not address whether appellant had a threatening or tense relationship with Mr. Wolak. Other witness statements are also not specific

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<sup>16</sup> See *Marguerite J. Toland*, 52 ECAB 294 (2001).

<sup>17</sup> *Donald W. Bottles*, 40 ECAB 349, 353 (1988). See *Robert Breeden*, 57 ECAB 622 (2006) (an employee's dissatisfaction with being transferred constitutes frustration from not being permitted to work in a particular environment or to hold a particular position and is not compensable).

<sup>18</sup> *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

<sup>19</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).

as to the time or place of any claimed harassing incidents or lack sufficient context to establish disparate treatment. The Board notes that there is insufficient evidence corroborating appellant's charges that Mr. Wolak harassed 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 Mr. Wolak threatened, yelled and verbally abused her, the Board has recognized the compensability of verbal abuse and threats in certain circumstances. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under FECA.<sup>20</sup> The Board finds that the facts of this case do not support any specific incidents of verbal abuse. Appellant claimed that in October 2007 Mr. Wolak yelled at her regarding an e-mail he instructed her to send but there is no evidence confirming that a specific incident occurred at a particular time and place. Appellant submitted a witness statement from Ms. Culley who claimed that on February 8, 2013 she witnessed a man approach appellant's desk and pointed his finger at her in a threatening manner. However, Ms. Culley did not identify the individual speaking to appellant. Similarly, Ms. Brandon noted several incidents in which Mr. Wolak yelled at appellant and made negative comments but she could not recall the content of the statements or when they occurred. Ms. Brandon further noted that she also observed appellant yelling at coworkers, including Ms. Stokes. She indicated that there was a lot of yelling in the workplace.<sup>21</sup> Appellant alleged that Mr. Wolak stated to a male coworker that he should never get a wife like appellant. Mr. McNair noted that Mr. Wolak made a comment stating "something about I wouldn't marry her or something like that" but he indicated that he did not know the specifics of how it was stated or when the exchange took place. The Board finds that the facts of the case do not support any specific incidents of verbal abuse or threats. Appellant provided no corroborating evidence, or witness statements to establish her allegations at a particular time and place.<sup>22</sup> There is no corroborating evidence to support that any verbal interaction with appellant by Mr. Wolak rises to the level of a compensable employment factor.<sup>23</sup>

Consequently, appellant has not established her claim for an emotional condition as she has not attributed her claimed condition to any compensable employment factors.<sup>24</sup> 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.

On appeal, appellant reiterates her allegations, asserting that she has established error or abuse on the part of the employing establishment. As explained, the Board finds that she has not

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<sup>20</sup> *Charles D. Edwards*, 55 ECAB 258 (2004).

<sup>21</sup> *See Joe M. Hagewood*, 56 ECAB 479 (2005) (without a detailed description of the specific statements made, a compensable employment factor was not established; the mere fact a supervisor or employee may raise his voice during the course of a conversation does not warrant a finding of verbal abuse).

<sup>22</sup> *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).

<sup>23</sup> *See Judy L. Kahn*, *supra* note 15.

<sup>24</sup> 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).



established her claim for an emotional condition as she has not factually established any compensable employment factors.

**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 September 15, 2014 decision of Office of Workers' Compensation Programs is affirmed.

Issued: September 10, 2015  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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