United States Department of Labor
Employees' Compensation Appeals Board

N.H., Appellant	)	
and	)	**Docket No. 14-0360**
	)	**Issued: October 6, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Hicksville, NY, Employer	)	

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 November 23, 2013[1] appellant filed a timely appeal of a May 31, 2013 Office of Workers' Compensation Programs' (OWCP) merit decision denying her emotional condition claim. Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.[3]

[1] Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from May 31, 2013, the date of OWCP's last decision was November 27, 2013. Since using December 2, 2013, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is November 23, 2013, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

[2] 5 U.S.C. § 8101 *et seq.*

[3] Appellant submitted new evidence on appeal. As OWCP did not consider this evidence in reaching a final decision, the Board may not consider this evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

ISSUE

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

On appeal, appellant submitted a brief arguing that she had established compensable factors of employment including harassment, discrimination, an emotional reaction to her regular or specially assigned duties, and error or abuse by the employing establishment. She relisted her alleged factors of employment and argued that these were compensable. Appellant also alleged that she had established additional factual elements of her claim which were denied by the hearing representative.

FACTUAL HISTORY

On March 2, 2012 appellant, then a 51-year-old general clerk, filed an occupational disease and claim for compensation (Form CA-2) alleging that she had developed stress, anxiety, and depression due to factors of her federal employment. She first became aware of her condition in June 2005 and stated that the condition had been ongoing. On the reverse side of the claim form, appellant's regular work hours were listed as 7:00 a.m. to 3:30 p.m., Monday through Friday.

Appellant submitted a narrative statement describing herself as a whistleblower with a lawsuit pending against the employing establishment. She stated that she reported unethical practices at the employing establishment and that this information was provided to the supervisor about whom she had complained, M.C., the supervisor for Tour I. M.C. then had appellant served with a lawsuit when she reported to work on February 13, 2012. Appellant alleged that employees observed this action and laughed at her. She alleged that she developed heart palpitations, sweats, dizziness, and nausea.

Appellant alleged that her emotional condition began in June 2005 and that she was ostracized at work which caused or contributed to her stress and anxiety. She claimed that T.L., a coworker, came into her work area repeatedly after being prohibited by management and caused her distress, that other employees with whom appellant had issues waited around her work area, the sign out book, or the employing establishment door and caused her stress.

Dr. Bernard Hoffman, a Board-certified psychiatrist, completed a report on February 23, 2012 and diagnosed depressive disorder and post-traumatic stress disorder. He stated that "her symptoms are correlated to her work atmosphere."

The employing establishment challenged appellant's claim on March 14, 2012 and stated that she had not yet begun to work when she was served with the subpoena. It further noted that M.C., who initiated the subpoena, was not appellant's supervisor, but a supervisor on another tour. The employing establishment alleged that this was a private matter not related to appellant's performance. It noted that appellant had previously returned to work with restrictions so that no one could go behind her desk or be behind her without her knowledge. Appellant worked in a cubicle as a general clerk. The employing establishment noted that she failed to report to work on February 10, 2012 and did not call to report her absence. Appellant requested

paid administrative leave due to a court appearance. Employing establishment attorneys advised that she was not on the list of witnesses to be called on February 10, 2012.

The employing establishment submitted a statement dated March 9, 2012 from G.P who stated on February 13, 2012 appellant alleged F.C. and A.C. were standing by the dumpster laughing at her. T.L. denied observing this behavior. At 7:40 a.m. he asked appellant to complete a leave request form in regard to her unscheduled absence on February 10, 2012. Appellant requested administrative leave as she had been required to be in court. G.P asked that she provide a written request.

In a letter dated March 28, 2012, OWCP requested that appellant provide additional factual and medical information in support of her emotional condition claim. On March 19, 2012 appellant alleged that her emotional condition was caused by both sexual harassment and discrimination. She alleged that she experienced a hostile work environment. Appellant stated that she experienced language of a disparaging and degrading sexual nature. She asserted that she overheard sexual comments on the workroom floor and the break room. Appellant stated that she complained about these comments which she felt were disparaging, vile, and offensive. She alleged that her complaints were dismissed and that she was subjected to a continued unwelcome behavior of a sexual and offensive nature which interfered with her work performance and created a hostile, intimidating, and offensive work environment for her. Appellant stated that her name was written on the walls of the men's bathroom at work. Her husband observed graffiti when he utilized the restroom at the employing establishment. Appellant asserted that it was written, "Norma needs c…" She asserted that this statement made her feel degraded, distraught, and humiliated as well as embarrassed to be around her male coworkers and anyone who would use that facility. Appellant further stated that a *Playboy* magazine was left in one of the vehicles that a mechanic was repairing at the employing establishment. The magazine was left on the dashboard and was visible to anyone who passed the vehicle which was located near the ladies room at the employing establishment. Appellant stated that this magazine remained in its location for a week until she complained to management.

Appellant also stated that she experienced discrimination including the denial of an early start time, discipline for using the copy machine for her Equal Employment Opportunity (EEO) complaint, and the lawsuit filed by M.C. She requested sick leave from February 14 through 16, 2012 following her trip to the emergency room. Appellant stated that she informed the employing establishment *via* the ERMS call-in center of her occupational disease claim. She returned to work on February 17, 2012 and completed a notice of occupational disease. Appellant continued to work February 20 through March 2, 2012 on her scheduled days. Her supervisor informed her that she did not have medical clearance to work beginning in the afternoon of March 5, 2012 after she had completed seven hours of her shift.

Appellant stated that she was called as a witness in the case of a coworker who was alleging a hostile work environment at the employing establishment. She stated that she was required to wait in the same area as her manager. Later that day, appellant's manager informed appellant that she was not listed as a witness and would not be paid for her time at court. He instructed her to produce documentation from her attorney and, when she provided this, requested further documentation from the judge.

Appellant attributed her emotional condition to being ignored by her supervisors and managers. She stated that her supervisors did not speak to her unless she spoke to them first. Appellant stated that she was not greeted or told good bye. She alleged that supervisors carried on nonwork-related conversations with the other clerk in the office, but not with her. Appellant stated that her supervisors accused her of imagining things or stated that she reported her perception of events, but not actual occurrences.

Appellant submitted an e-mail dated March 5, 2012 describing the *Playboy* magazine with photos facing out in the front windshield of a car parked in front of the women's restroom for at least a week. Supervisor M.F. responded on March 5, 2012 and stated that inappropriate magazines would not be tolerated and that the magazine was immediately removed and destroyed. Appellant also submitted a handwritten note stating, "Norma needs c… We see ya. We are watching so beware. Coo, Coo, Coo, Coo." This note was signed "Tour I."

Appellant submitted an additional statement on April 15, 2012. She stated that property on her desk was tampered with. Appellant also alleged that M.C's lawsuit was based on her actions as an employee as his complaint was based on information and documentation he obtained from the employing establishment. She provided M.C's verification that the grounds of his complaint were all based upon information and documentation obtained from the employing establishment.

Appellant stated that T.L. entered her work area. She stated that management had not addressed her issues with T.L. and that he continued to contribute to and increase her anxiety. Appellant stated that he had spat at her in the past and that he had received a letter of warning regarding this activity when a coworker witnessed it. She alleged that management was aware of her difficult relationship between T.L. and that she should have been separated from him because he caused her anxiety and stress as well as intimidated her. Appellant stated that T.L. used the copy machine in her office despite the fact that there were two other machines available for him to use, including one in his office. She asserted that he also entered her office for envelopes and tape and remained to address his letters and place them in the mail pickup. Appellant asked that he keep supplies in his office space and that alternative means for sending the mail be instituted such that T.L. no longer had to enter her office space. She provided a list of nine occasions he had entered her office in March 2012 for copies, envelopes, tape, a credit card, water and to use the refrigerator. Appellant opined that T.L. could have used alternative water coolers or refrigerators.

In an e-mail dated April 18, 2012, appellant alleged that personal items on her desk had been tampered with, specifically that a vase of flowers had been emptied of water. She stated that she found it disturbing that her personal space had been invaded.

OWCP provided the employing establishment with appellant's statements and allowed 30 days for a response. On May 14, 2012 the employing establishment stated that appellant was known to have a series of stressors outside her work environment. It indicated that the writing on the bathroom stall occurred over five years ago, that the writing was immediately removed once management was made aware of it and that the person who wrote it was never identified. It, as well as the Long Island District Human Resources Department, investigated appellant's allegations of sexual harassment and hostile working conditions and found these claims

unfounded. The employing establishment stated that there was no more cursing on the premises than in any other workplace and that no one cursed at appellant.

On June 7, 2012 A.H. of the employing establishment stated that the *Playboy* magazine issue was addressed within moments of appellant's e-mail and that pictures were not visible, only the name of the magazine. She stated that it was unclear who left the magazine. A.H. stated that T.L. must be permitted to perform the duties of his job and as a storekeeper must occasionally enter the area where appellant worked. Appellant stated that preventing T.L. from being near appellant would upset the entire operation. A.H. stated that the subpoena was served in a personal complaint involving a night supervisor who had no direct dealing with appellant. She stated in regard to appellant's request for administrative leave, that the attorney handling the case for the employing establishment verified that appellant was not required to appear as a witness and was not on the witness list for the days she was absent. A.H. stated that the fact that appellant was allowed to return to work without a note was not discrimination but an error in the compensation process. She stated that as a compensation claim was filed medical evidence was needed to show the necessity for absence, medical treatment, and diagnosis. A.H. stated, "Management … is not proficient on all compensation procedures since they handle few claims over the years. It was the [i]njury [c]ompensation [m]anager who advised her supervisors that medical was now needed to have her return to work showing she was medically capable of performing her duties once the claim was received in the office days after her return. This was the failure of management to be aware of the required documentation for the claim later filed through our office."

By decision dated September 4, 2012, OWCP denied appellant's claim finding that she had not substantiated a compensable factor of employment. Appellant requested an oral hearing before an OWCP hearing representative on October 2, 2012.

Appellant testified at the oral hearing on February 13, 2013 and was at that time represented by counsel. Former counsel alleged that a sexual comment was written on a Postal truck, "Norma s…. c…" He stated that appellant filed whistleblower complaints against M.C. for sleeping on the job, processing fraudulent invoices and stealing fuel. Former counsel stated that the suit was dismissed in federal court as M.C. plead guilty to a reduced charge of theft of fuel, as appellant's complaints were work related, and as she was a protected employee. Appellant alleged that she had been subjected to a hostile work environment since June 2005. She alleged that pictures were put up around the time clock stating, "Herbst s.… c… and takes it up the a…" Appellant also stated that an employee spit at her. She stated that T.L. stopped spitting at her in 2011 but that he had been spitting at her once a month from 2005. Appellant described T.L.'s method of spitting and the fact that a witness reported an incident. She noted the writing on the bathroom wall which her husband observed. Appellant stated that the word "c..t" was carved into the table and that M.C. once referred to her as a slut. She alleged that she was restricted from taking her breaks in the swing room and required to take them at her desk, her car, or in the bathroom. Appellant stated that her supervisor stopped talking to her, but had conversations with everyone except her. She alleged that she was not able to park in the employee parking lot. Appellant stated that Supervisor K.F. instructed her to get used to the way men talked in 2010. She stated that pictures of women from *Playboy* were on toolboxes and the magazine was in a postal vehicle. Appellant stated that she was instructed to remove rosary beads from around her desk area. She stated that a week prior to the hearing a truck in the

building near the time clock had "Norma needs c…" written on it. Appellant also stated that people go through her desk and draw on her family pictures. She stated that T.L. had a fax and copier in his office, but came into her office to make copies and glare at appellant. Appellant further stated that he blocked her behind her desk and accused her of pushing him.

Following the oral hearing, appellant's former counsel submitted additional documents including leave requests. He submitted excerpts from depositions from C.T., T.L., K.F., and M.F. These persons agreed that cursing and inappropriate language occurred at the employing establishment. M.F. also stated that some people used profanity in the break room, but they stopped when he instructed them to do so. He stated that there was no more cursing at the employing establishment than in any other work facility. P.C. witnessed T.L. spitting on the floor and appellant asking him to stop.

Appellant alleged harassment in a complaint dated April 21, 2008 against T.L. She stated that on April 11, 2008 she was standing at the time clock waiting to ring out for lunch, when T.L. stated to her, "Get out of my f--king way, a……."

In an e-mail dated 11:03 a.m. February 1, 2013, appellant reported that she and J.B. observed a postal truck inside the facility with the phrase "Norma needs c…" written on it on January 30, 2013. S.Y. noted that J.B. observed the writing and interviewed 44 employees who denied seeing anything. J.B. instructed employees that he would not tolerate this behavior and conducted a service talk on respect in the workplace.

In e-mails dated August 8, 2012, appellant stated that T.L. came into her office while she was alone. When she noticed him he laughed and showed her his middle finger with his hand behind his back. Appellant asked S.L., S.Y., R.M., M.F., and L.C. to prohibit T.L. from entering her work area when she was alone.

On September 5, 2005 D.M., a former coworker, submitted a statement noting that foul language was used routinely at the employing establishment. She submitted a statement dated February 19, 2013 and noted that she worked with appellant from June 1999 through June 2008. D.M. stated that appellant was treated poorly and that coworkers made derogatory remarks and tried to make her uncomfortable. She stated that the use of curse words in the office made the work environment difficult. D.M. stated that she was directed to provide appellant with instructions and that she felt that this was because the supervisors did not want to talk to appellant. She stated that common courtesies such as good night or good morning were spoken to her and pointedly not to appellant.

K.H., appellant's husband, completed a statement on February 25, 2013 and stated that inappropriate words were used in the workplace. He reported writings on the men's room about appellant. K.H. stated that he saw T.L. spit in appellant's direction on numerous occasions. He further stated that he had seen *Playboy* pictures posted on toolboxes and on lockers as well as a *Playboy* calendar on the wall of the body shop.

By decision dated May 31, 2013, the hearing representative accepted as factual that appellant was not permitted to work the 5:00 a.m. shift, that she was not permitted to use the copy machine for EEO-related material, that she saw a *Playboy* magazine partially wrapped in a

folder, that she was required to produce medical clearance for her return to duty, that she was placed in an AWOL status, that T.L. was allowed to enter her work area, and that she was subpoenaed in the workplace for a lawsuit filed against her by M.C. He stated, "Of those incidents deemed by this reviewer to have occurred none are deemed by this reviewer as having been incurred by the claimant in the performance of her federal duties. All are administrative in nature and absent evidence of error or abuse on the part of the employing [establishment] cannot be deemed to have been incurred in the performance of her federal duties."[4]

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*,[5] the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under FECA.[6] There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under FECA.[7] 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.[8] 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.[9]

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.[10] Where the evidence

[4] In an order dated July 23, 2014, the Board denied the Director's motion to remand the case. The Director requested remand to enable OWCP to undertake additional development of appellant's allegation of a sexually explicit offensive message as resulting in her diagnosed emotional condition. Appellant requested that the Board deny the Director's motion as she felt that the medical evidence established that the sexually explicit offensive comment written as well as her other allegations caused her emotional condition. The Board denied the Director's motion as it could adequately address appellant's allegations in a merit decision with supporting factual evidence and applicable legal precedent. *Order Denying Motion to Remand,* Docket No. 14-360 (issued July 23, 2014).

[5] 28 ECAB 125 (1976).

[6] *Supra* note 2.

[7] *See Robert W. Johns*, 51 ECAB 136 (1999).

[8] *Supra* note 5.

[9] *Id.*

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

demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.[11] 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.[12]

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.[13]

ANALYSIS

Appellant has not asserted that she had difficulty or was unable to complete assigned tasks or other aspects of her job. Appellant attributed her emotional condition to the actions of M.C., a Tour I supervisor, who served her with a subpoena for a libel suit at work on February 13, 2012. Appellant's supervisor has substantiated that this event occurred as alleged. The employing establishment contended that this was a private matter not related to appellant's performance.

The Board finds that appellant has not submitted sufficient evidence to establish that the libel suit and the service upon her were due to her employment. While appellant has submitted some evidence indicating that the basis for the libel suit was in part due to information and documentation obtained from the employing establishment, she has not established a sufficient relationship to her regular or specially assigned duties to render it a compensable factor of employment.[14] Generally, the Board has held that personal disputes between coworkers are not compensable if they arise outside the scope of employment and are then imported into the workplace.[15] As appellant has not submitted the necessary factual evidence to establish that the libel suit and resulting service originated in regular or specially assigned duties or other requirements imposed by the employing establishment or by the nature of the work, she has not established these events as compensable factors of employment and has not met her burden of proof.[16]

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

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

[13] *Alice M. Washington*, 46 ECAB 382 (1994).

[14] *H.C.*, Docket No. 12-1836 (issued August 19, 2013).

[15] *James P. Schilling*, 54 ECAB 641 (2003).

[16] *Supra* note 5.

On appeal and before OWCP, appellant has also alleged that error or abuse in administrative actions caused or contributed to her diagnosed emotional condition. In *Thomas D. McEuen*,[17] 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 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 that administrative or personnel action established error or abuse by management 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 supervisors have acted reasonably.[18]

Appellant attributed her emotional condition to the denial of administrative leave to attend a hearing on February 10, 2012. Although the handling of leave requests is generally related to employment, this is an administrative function of the employer and not the duty of the employee. An administrative or personnel matter will be considered to be an employment factor only where the evidence discloses error or abuse on the part of the employing establishment.[19] There is no evidence in the record that the employing establishment improperly denied appellant's requested administrative leave on February 10, 2012. A.H., responding on behalf of the employing establishment, stated that the attorney handling the case for the employing establishment verified that appellant was not required to appear as a witness and was not on the witness list for the days she took off and requested administrative leave. Appellant did not submit any documentation or other evidence that she was in fact required to appear in court on February 10, 2012. The Board finds that appellant has not submitted evidence that there was error or abuse on the part of the employing establishment in denying her requested administrative leave.

Appellant returned to work on February 17, 2012 and filed an occupational disease (Form CA-2). She continued to work February 20 through March 2, 2012 on her scheduled days. Appellant's supervisor informed her that she did not have medical clearance to work beginning in the afternoon of March 5, 2012 after she had completed seven hours of her shift. Appellant attributed her emotional condition to the employing establishment actions in suddenly requiring medical documentation and sending appellant home due to the absence of medical documentation. She has alleged error or abuse in these administrative actions. A.H. stated that the fact that appellant was allowed to return to work without a medical note was an error by the employing establishment. She stated that as soon as a compensation claim was filed medical evidence was needed to show the necessity for absence, medical treatment and diagnosis. A.H. stated, "Management … is not proficient on all compensation procedures since they handle few claims over the years…. This was the failure of management to be aware of the required documentation for the claim later filed through our office." A.H. noted that Human Resources pointed out the error to appellant's supervisors. The Board finds that appellant has substantiated

[17] *See* 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

[18] *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

[19] *C.S.*, 58 ECAB 137 (2006).

an error on the part of the employing establishment in the handling of her claim, such that the employing establishment did not timely advise her of the medical evidence needed for a legitimate return to work following the filing of a notice of an occupational disease. The Board finds that appellant has established a compensable factor of employment in this regard.[20]

Appellant stated that a *Playboy* magazine was left in one of the vehicles that a mechanic was repairing at the employing establishment. This magazine was left on the dashboard and was visible to anyone who passed the vehicle which was located near the ladies room at the employing establishment. Appellant stated that this magazine remained in its location for a week until she complained to management. She submitted an e-mail dated March 5, 2012 describing the *Playboy* magazine with photos facing out in the front windshield of a car parked in front of the women's restroom for at least a week. Supervisor M.F. responded on March 5, 2012 and stated that inappropriate magazines would not be tolerated and that the magazine was immediately removed and destroyed. Appellant noted that the *Playboy* magazine issue was not addressed until she reported it to management. She asserted that management should have addressed this issue on its own initiative. M.F. witnessed the magazine and removed it. As the employing establishment responded promptly to appellant's complaint and removed the magazine, no error or abuse on the part of the employing establishment is found.

In an e-mail dated 11:03 a.m. February 1, 2013, appellant reported that she and J.B. observed a postal truck inside the facility with the phrase "Norma needs c…" written on it on January 30, 2013. S.Y. noted that J.B. observed the writing and interviewed 44 employees who denied seeing anything. J.B. instructed employees that he would not tolerate this behavior and conducted a service talk on respect in the workplace. Although the display of such a sexually explicit phrase was contrary to employing establishment policy, the Board finds that the employing establishment promptly handled the matter and there was no error or abuse by the employing establishment.[21]

In her brief on appeal and before OWCP, appellant also alleged error or abuse on the part of the employing establishment as she was denied an early start time[22] as she was disciplined[23] for using the copy machine to aid in her Equal Employment Opportunity complaint, as she was restricted from taking her breaks in the swing room and required to take them at her desk, her car, or in the bathroom. She stated that supervisor stopped talking to her, but had conversation with everyone except her. Appellant alleged that she was not able to park in the employee parking lot. While the employing establishment admitted that decisions were made regarding start time and the copy machine, appellant has not submitted any corroborating evidence

[20] *See Bernard Snowden,* 49 ECAB 144, 150 (1997) (finding that when the employing establishment has admitted error in administrative actions, the medical evidence should be reviewed to determine if this administrative action contributed to the diagnosed emotional condition).

[21] *Supra* note 11.

[22] *L.A.*, Docket No. 13-1544 (issued September 23, 2014) (the Board found that a request for a change in work schedule was an administrative action and not compensable unless the claimant established error or abuse).

[23] *L.B.*, Docket No 13-1582 (issued September 25, 2014) (finding that discipline is considered an administrative function of the employing establishment).

establishing error or abuse on the part of the employing establishment in these actions. Complaints about the manner in which a supervisor performs his or her duties or the manner in which a supervisor exercises his or her discretion generally fall outside the scope of coverage provided by FECA. This principle recognizes that a supervisor or manager in general must be allowed to perform his or her duties and employees will, at times, dislike the actions taken. Mere disagreement or dislike of a supervisory or managerial action will not be compensable absent evidence of error or abuse.[24] The employing establishment did not agree that appellant was restricted in the location of her breaks, that supervisors stopped talking to appellant, or that appellant was not able to park in the employee parking lot. Appellant has not submitted the necessary factual evidence that these administrative actions occurred nor that these actions constitute error or abuse.

Appellant also consistently alleged that the employing establishment was aware of her difficult relationship with T.L. arising from her prior emotional condition claim when she established that he spat on her and that the employing establishment erred by not taking further steps to ensure that T.L. did not enter her work space. A.H. responded and stated that T.L. must be permitted to perform the duties of his job as a storekeeper. She stated that he must occasionally enter the area where appellant worked. A.H. stated that preventing T.L. from being near appellant would upset the entire operation. While appellant has objected to T.L. entering her work space, the employing establishment has stated that his position requires him to do so and is necessary to fulfill the operation of the employing establishment. She has submitted no witness statements nor other corroborating evidence supporting her specific statements regarding T.L.'s actions, including that he blocked her behind her desk and accused her of pushing him, that he came into her office while she was alone, laughed and showed her his middle finger with his hand behind his back. Appellant has not substantiated these events or established error or abuse by the employing establishment in allowing T.L. to enter her work area. The Board finds that the record supports that the employing establishment acted reasonably in allowing T.L. to carry out necessary job activities while occasionally entering appellant's work space.[25] AH. stated that appellant's restrictions to return to work were that no one could go behind her desk or be behind her without her knowledge. Appellant has not alleged or substantiated that T.L. violated these restrictions, nor that the employing establishment erred in allowing such restricted activity.

Appellant has also attributed her emotional condition to harassment and discrimination both on appeal and before OWCP. She asserted that T.L.'s above-described actions were harassing, that objects on her desk were tampered with, that her supervisors refused to speak with her, and that coworkers laughed at her. 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

[24] *Donney T. Drennon-Gala*, 56 ECAB 469 (2005).

[25] *C.S.*, Docket No. 06-1583 (issued November 6, 2006).

probative and reliable evidence.[26] Appellant has not submitted any factual evidence supporting her claim in regard to these events. While D.M. reported in her February 19, 2013 statement that supervisors did not want to talk to appellant, she did not provide the names of specific supervisors or the dates and times that appellant was mistreated by supervisors. The Board has held that witness statements must be specific as to time and place as well as to content in order to establish a compensable factor of employment.[27] Appellant has not submitted any corroborating evidence regarding the remainder of these incidents and has not established that the incidents occurred or were compensable factors of employment.

Appellant has also alleged sexual harassment based on the crude language employed by her coworkers. She stated that she overhead comments on the workroom floor and the break room. Appellant also submitted a handwritten note stating, "Norma needs c… We see ya. We are watching so beware. Coo, Coo, Coo, Coo." This note was signed "Tour I." Appellant did not provide specific times or dates for the offensive language that she overheard. While she testified regarding specific phrases and statements regarding her sexual activities written by the time clock and repeatedly stated that she was subjected to crude language at the employing establishment, she has not attributed the language to a specific person or persons or provide any documentation of when she heard the statements. Appellant also failed to submit any supporting documentation or witness statements supporting that she received the note at work.

The employing establishment stated that there was no more cursing on the premises than in any other workplace and that no one cursed at appellant. In depositions, coworkers agreed that cursing and inappropriate language occurred at the employing establishment. D.M. stated that the use of curse words in the office made the work environment difficult. Verbal altercations and difficult relationships with coworkers and supervisors when sufficiently detailed and supported by the record, may constitute compensable factors of employment.[28] However, this does not imply that every statement uttered in the workplace will give rise to coverage under FECA. The Board finds that the witness statements of record are insufficient to establish a verbal altercation or hostile work environment due to sexual harassment based on language. Neither appellant nor the witnesses provided a specific time or place or the specific persons using the offensive language.

Appellant alleged that T.L. made a specific statement on April 11, 2008 while appellant was waiting to ring out for lunch. However, she did not provide any corroborating this statement. Without supporting documentation, the Board finds that appellant has not established a compensable factor of employment in regard to T.L.'s statement.[29]

[26] *Alice M. Washington*, 46 ECAB 382 (1994).

[27] *M.D.*, Docket No. 13-867 (issued September 26, 2014).

[28] *Marguerite J. Toland*, 52 ECAB 294, 298 (2001).

[29] The Board has recognized the compensability of verbal abuse in certain circumstances, this does not imply that every statement uttered in the workplace will give rise to coverage under FECA. The Board has generally required more than an isolated comment. *Frank B. Gwozdz*, 50 ECAB 434 (1999); *Harriet J. Landry*, 47 ECAB 543 (1996).

Appellant also alleged sexual harassment through the display of the *Playboy* magazine and through the sexually explicit phrase written on the side of an employing establishment truck. The Board has generally held that explicitly sexual remarks and gestures directed at a claimant are compensable.[30] In *D.C.*,[31] a coworker fondled himself while in the cockpit of an airplane with appellant and the Board found that this was sexual harassment. In *Elizabeth R. Shuman*[32] a coworker subjected the claimant to descriptions of his sexual exploits, which the Board found constituted sexual harassment. In *T.B.*,[33] a supervisor made clear her interest in a romantic relationship with the claimant which the Board found was sexual harassment. The Board finds that the phrase written on the truck was directed at appellant, was sexually explicit, and that there is no evidence in the record that this was welcomed attention by appellant.[34] As in *Abe E. Scott*[35] the Board finds that the terms used were derogatory and constituted harassment. Thus the Board finds that appellant has established a compensable factor due to the displaying of the sexually explicit statement on the truck.

In regard to the magazine, however, the Board finds that there is insufficient evidence to establish that the display was directed at appellant or that it was sexually explicit.[36] Other than her accusation, appellant has not provided corroborating evidence or witness statements that there were any nude or semi-nude pictures displayed. There is no dispute that there was a *Playboy* magazine in a truck, parked on the employing establishment, however, the employing establishment indicated that upon investigation by M.F. there were no pictures showing, just the name of the magazine. As appellant has offered no corroborating evidence of nude or semi-nude pictures being displayed she has not substantiated a compensable factor of employment.

As the Board has found that appellant established two compensable employment factors, namely the employing establishment's error in sending appellant home, following the filing of her claim, and the display of the profane writing on the postal truck, OWCP must base its decision on an analysis of the medical evidence. OWCP found there were no compensable employment factors and did not analyze or develop the medical evidence. The case will be remanded to OWCP for this purpose. After such further development as deemed necessary, OWCP should issue a *de novo* decision on this claim.[37]

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[30] *But see Alexander Conrad*, Docket No. 04-1229 (issued September 3, 2004) (finding that the distribution of candy in the form of a penis was not sexual harassment as it was not directed at appellant, but handed out to a group of employees).

[31] Docket No. 09-1087 (issued July 13, 2010).

[32] Docket No. 95-332 (issued April 3, 1997).

[33] Docket No. 08-420 (issued November 10, 2008).

[34] *But see Rita A. Bowles*, Docket No. 03-2074 (issued January 7, 2004) (finding that as appellant had a personal relationship with the alleged harasser and brought the sexualized conversation into the workplace, there was no sexual harassment).

[35] 45 ECAB 164 (1993).

[36] *Supra* note 31.

[37] *Tina E. Francis*, 56 ECAB 180 (2004).

CONCLUSION

The Board finds that appellant has established two compensable employment factors and remands the case for OWCP to review and develop the medical evidence as necessary prior to issuing a *de novo* decision.

ORDER

IT IS HEREBY ORDERED THAT the May 31, 2013 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside and remanded in part for further development consistent with this decision of the Board.

Issued: October 6, 2016
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