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

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| **E.M., Appellant** | ) | |
| **and** | ) | **Docket No. 16-1695** |
| | ) | **Issued: June 27, 2017** |
| **DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Kansas City, MO, Employer** | ) | |

*Appearances:*
*Melford V. McCormick, J.D.*, for the appellant[1]
*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
VALERIE D. EVANS-HARRELL, Alternate Judge

### ***JURISDICTION***

On August 23, 2016 appellant, through her representative, filed a timely appeal from a July 27, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

## ***ISSUE***

The issue is whether appellant met her burden of proof to establish an emotional condition in the performance of duty causally related to factors of her federal employment.

On appeal appellant's representative asserts that the wrong legal standard was applied, noting that two witnesses saw the claimed incidents.

## ***FACTUAL HISTORY***

On November 10, 2014 appellant, then a 38-year-old tax examiner, filed an occupational disease claim (Form CA-2) alleging that working in a hostile workplace caused health conditions. She stated that she first became aware of the condition on May 21, 2012 and its relationship to her federal employment on May 5, 2014.

By letter dated December 29, 2014, OWCP informed appellant of the evidence needed to support her claim.

In a January 12, 2015 response, appellant alleged that: (1) in 2011 her manager M.C. grabbed her arm to prevent her from making a copy of a signed absent-without-leave (AWOL) memorandum, and continued to harass and retaliate until she was transferred; (2) in 2013, while on the nightshift, Managers C.J. and K.B. denied her requests for a transfer to the dayshift in retaliation for Equal Employment Opportunity (EEO) activity; (3) in 2014 she requested Family and Medical Leave Act (FMLA) leave, and while on leave was continually charged with AWOL by Managers D.E. and L.S., which caused financial hardship; and, (4) C.G., the union president, interfered with an EEO investigation.

In a letter dated April 30, 2015, OWCP asked the employing establishment to respond to appellant's claim.

The record contains copious evidence regarding appellant's allegations. An August 4, 2011 report of investigation by the employing establishment's Office of the Inspector General (OIG) covering March 9 through July 19, 2011 noted appellant's allegation that M.C. grabbed her arm and pushed her while she was in Supervisor M.C.'s cubicle discussing an AWOL memorandum. M.C. agreed that she and appellant were discussing an AWOL memorandum, but denied that she touched appellant. A witness, L.R., described an incident that occurred on or about March 9, 2011 when M.C. became upset with appellant because she had been talking with a new employee. L.R. indicated that M.C. began berating appellant, and then placed her hands on appellant and gently pushed her away. The employing establishment noted, in a September 21, 2011 letter, that it had closed the investigation with no action. M.C. had been cautioned to create and sustain a positive workplace. A September 18, 2012 report indicated that the OIG investigation was closed and noted that appellant had filed an EEO complaint.

Regarding appellant's 2013 request for a hardship transfer from the nightshift to the dayshift included a May 16, 2013 memorandum to appellant from C.J., senior manager, indicated that no position was available on the dayshift at that time and that appellant's name had been

placed on a list for consideration when a position became open. C.J. noted that appellant had permanently transferred to the dayshift under a new division.

In a grievance resolution signed on October 16, 2012, 20 hours of sick leave were restored to appellant and 8 hours of AWOL was changed to 8 hours of FMLA. The employing establishment was to respond to appellant's request for a transfer and secure a new position for her. Neither party admitted to wrongdoing. A second grievance settlement agreement dated October 9, 2014 indicated that 62 hours of AWOL would be changed to appropriate leave. The agreement provided that it did not constitute an admission of wrongdoing on the part of the employing establishment. A February 13, 2015 report regarding this indicated that, at the time appellant requested 480 hours of FMLA in May 2014, it exceeded the 168 hours that had been approved, and that it was not until June 9, 2014 that sufficient medical documentation was received to support the additional hours. At that time the AWOL was changed to annual leave, sick leave, leave bank, and leave transfer hours.

Evidence regarding interaction with C.G., who was president of the union local, described an October 22, 2014 event when appellant alleged that C.G. approached her desk with an envelope, telling her to sign it, and he shoved the envelope at her, and then on October 24, 2014 L.S., a manager, told appellant that she needed to meet with her and C.G., but C.G. requested another union representative. A management inquiry dated January 22, 2015 indicated that no evidence was found that a physical assault occurred.

The record also contains additional evidence regarding EEO claims and grievances filed,[3] and appellant's performance appraisals.

In a January 12, 2015 statement, C.D., a coworker, advised that, while she and appellant were cordially speaking to each other on September 10, 2014, L.S. came and commented: "ladies we have a lot of work to do." She also indicated that she knew that C.G. became aggressive when he asked appellant to sign some papers and threw them at her.

Medical evidence relevant to the claim included a June 1, 2012 report in which Daniel J. Keyser, Ph.D., a clinical psychologist, indicated that appellant was under his care for an anxiety disorder, depression, and an extremely high stress level. In a June 9, 2014 letter, Dr. Keyser indicated that appellant was under his care for work-related stress and depression. He advised that she be on medical leave from May 5 through August 31, 2014. On an attending physician's report (Form CA-20), dated December 9, 2014, Dr. Keyser diagnosed anxiety and depression. On January 5, 2015 he related that he began treating appellant on May 21, 2012 for anxiety and depression due to a hostile work environment. Dr. Keyser maintained that conditions had not changed, and appellant still experienced work-related anxiety and depression caused by the stressors of the hostile environment. On April 20, 2015 he related that appellant was having sleep disturbances and physical symptoms such as muscle spasms, headaches, abdominal pain, chest pain, and digestive problems. Dr. Keyser advised that she was unable to perform her regular work duties.

[3] No additional settlement agreements or final decisions are found in the case record before the Board.

By decision dated November 18, 2015, OWCP found that appellant had not established any compensable factors of employment and denied the claim. It specifically found that the claimed assault by supervisor M.C. did not occur.

Appellant timely requested a hearing with OWCP's Branch of Hearings and Review. She submitted evidence previously of record. D.M., a coworker, provided an April 19, 2011 statement in which she opined that M.C. was rude and unfair. Appellant submitted additional reports from Dr. Keyser. Her representative also submitted additional evidence alleging continued harassment into 2016.

At the hearing held on June 10, 2016, the hearing representative explained that no incidents after November 10, 2014 would be considered. Appellant's representative maintained that harassment was shown by the EEO reversal of leave without pay. Appellant testified regarding the March 2011 event with M.C., and subsequent transfers, indicating that her next team supervisor's wife was a friend of M.C., that the third supervisor was very rude, and that L.S. micromanaged and was very controlling. She also maintained that she had inappropriately been charged AWOL, that her hardship request was improperly denied, and that she had won several EEO claims.

By decision dated July 27, 2016, an OWCP hearing representative affirmed the November 18, 2015 decision.

## ***LEGAL PRECEDENT***

To establish her claim that she sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that she has an emotional or stress-related disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her stress-related condition.[4] If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor.[5] When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, OWCP must base its decision on an analysis of the medical evidence.[6]

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*,[7] 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

[4] *Leslie C. Moore*, 52 ECAB 132 (2000).

[5] *Dennis J. Balogh*, 52 ECAB 232 (2001).

[6] *Id.*

[7] 28 ECAB 125 (1976).

coverage under FECA.[8] 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.[9] Allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.[10] Where the claimant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.[11] Personal perceptions alone are insufficient to establish an employment-related emotional condition.[12]

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.[13] Where the evidence 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.[14]

For harassment or discrimination to give rise to a compensable disability, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. A claimant must establish a factual basis for his or her allegations that the harassment occurred with probative and reliable evidence.[15] With regard to emotional claims arising under FECA, the term "harassment" as applied by the Board is not the equivalent of "harassment" as defined or implemented by other agencies, such as the EEO, which is charged with statutory authority to investigate and evaluate such matters in the workplace. Rather, in evaluating claims for workers' compensation under FECA, the term "harassment" is synonymous, as generally defined, with a persistent disturbance, torment or persecution, *i.e.*, mistreatment by co-employees or coworkers. Mere perceptions and feelings of harassment will not support an award of compensation.[16]

[8] *See Robert W. Johns*, 51 ECAB 137 (1999).

[9] *Supra* note 7.

[10] *J.F.*, 59 ECAB 331 (2008).

[11] *M.D.*, 59 ECAB 211 (2007).

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

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

[14] *Kim Nguyen*, 53 ECAB 127 (2001).

[15] *James E. Norris*, 52 ECAB 93 (2000).

[16] *Beverly R. Jones*, 55 ECAB 411 (2004).

Physical contact arising in the course of employment, if substantiated by the evidence of record, may support an award of compensation if the medical evidence establishes that a condition was thereby caused or aggravated.[17]

## ***ANALYSIS***

The Board finds this case is not in posture for decision.

Appellant has not alleged that her emotional condition was due to any specific job duties. Rather, she has alleged that she was harassed and retaliated against and worked in a hostile work environment, that M.C. inappropriately touched her, that management inappropriately denied FMLA and placed her on AWOL, that she was inappropriately denied a hardship request, and that C.G., the union president, interfered with an EEO investigation.

As a general rule, a claimant's reaction to administrative or personnel matters falls outside the scope of FECA.[18] The Board has long held that disputes regarding leave[19] and the inability to obtain a transfer[20] are administrative functions of the employer and, absent error or abuse, are not compensable.[21] Regarding appellant's allegation that her hardship application to change from the nightshift to the dayshift was inappropriately denied, Manager C.J. explained that appellant had been placed on a waiting list for the next available dayshift position, but, in the meantime, had transferred to a different dayshift position. There is no evidence of error or abuse in this administrative matter.

Appellant also alleged that she was inappropriately denied FMLA and placed on AWOL. Generally, actions of the employing establishment in matters involving the use of leave are not considered compensable factors of employment as they are administrative functions of the employer and not duties of the employee. Approving or denying a leave request is an administrative function of a supervisor.[22] The employing establishment explained that in May 2014, when appellant requested 480 hours of FMLA, she had only been approved for 168 hours. When additional medical evidence was received in June 2014, the AWOL was changed to annual leave, sick leave, leave bank, and leave transfer hours. Although the record contains two settlement agreements dated August 2012 and October 2014 regarding restored leave, each indicated that the employing establishment was not in error. There is no evidence of error or abuse in this administrative matter.

Regarding appellant's perception that she was harassed and retaliated against by employing establishment management, generally, complaints about the manner in which a

[17] *Alton L. White*, 42 ECAB 666 (1991).

[18] *Carolyn S. Philpott*, 51 ECAB 175 (1999).

[19] *Jose L. Gonzalez-Garced*, 46 ECAB 559 (1995).

[20] *Alberta Kinloch-Wright*, 48 ECAB 459 (1997).

[21] *Supra* note 13.

[22] *David C. Lindsey, Jr.*, 56 ECAB 263 (2005).

supervisor performs his or her duties or the manner in which a supervisor exercises his or her 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 his or her duties, and employees will, at times, dislike the actions taken. Here again, as the record contains no evidence that any employing establishment supervisor or manager treated appellant in a disrespectful manner, error or abuse in discharging management duties has not been established, and this allegation is not compensable.[23]

Perceptions of harassment or discrimination are not compensable under FECA,[24] and unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. A claimant must establish a factual basis for his or her allegations with probative and reliable evidence.[25] As noted, the August and October 2012 settlement agreements regarding restored leave were resolved with no admission of error. Although appellant submitted several statements from coworkers, these statements are insufficient to meet appellant's burden of proof. C.D. merely described a comment made by Manager L.S., and D.M. merely opined that Manager M.C. was unfair. While these generally supported appellant's contentions, neither substantiated the type of harassment contemplated under FECA. Appellant, thus, submitted insufficient evidence to show a persistent disturbance, torment, or persecution, *i.e.*, mistreatment by employing establishment management.[26] She, therefore, has not established a factual basis for her claim of harassment by probative and reliable evidence.[27]

Moreover, with regard to appellant's allegation regarding union president C.G., interfering with an EEO investigation, the Board has held that union activities are personal in nature and are not considered to be within the course of employment.[28] While there is a recognized exception to the general rule, in that employees performing representational functions which entitle them to official time are in the performance of duty, the incident claimed in the case at hand was with regard to C.G., the union president, representing appellant regarding a grievance she had filed.[29] Thus, it does not fall within the exception.

With regard to appellant's allegation that M.C. inappropriately touched her on March 9, 2011, the Board finds that, as in the case *Alton L. White*, although there is some discrepancy as to the actual nature and extent of the physical contact between appellant and Manager M.C., the evidence establishes that there was some physical contact.[30] It is not a question of whether the

[23] *Id.*

[24] *Supra* note 15.

[25] *Id.*

[26] *Supra* note 16.

[27] *See Robert Breeden*, 57 ECAB 622 (2006).

[28] *Jimmy E. Norred*, 36 ECAB 726 (1985).

[29] *See L.D.*, Docket No. 15-0706 (issued May 9, 2016).

[30] *Supra* note 17.

physical contact rose to the level of abuse. It is simply a question of whether physical contact arising in the course of employment is substantiated by the evidence of record.[31] Appellant alleged that on March 9, 2011, while she was in M.C.'s cubicle discussing an AWOL memorandum, M.C. grabbed her arm and pushed her. M.C. agreed that she and appellant were discussing an AWOL memorandum, but denied that she touched appellant. L.R., a coworker, informed the OIG that she witnessed an incident that occurred on or about March 9, 2011 when M.C. became upset with appellant regarding her talking with a new employee and began berating appellant. L.R. witnessed M.C. place her hands on appellant and, albeit gently, push her away. Thus the record establishes that there was physical contact between appellant and M.C. A compensable employment factor has, therefore, been established.[32]

In denying appellant's claim, OWCP did not review the medical opinion evidence submitted on the issue of causal relationship. The Board will, therefore, set aside OWCP's July 27, 2016 decision and remand the case for a review of the medical opinion evidence. After such further development as may be necessary, OWCP shall issue a *de novo* decision on appellant's emotional injury claim.

## ***CONCLUSION***

The Board finds this case is not in posture for decision.

[31] *D.S.*, Docket No. 15-0585 (issued July 11, 2016).

[32] *Id*.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the July 27, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: June 27, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board