



## ISSUE

The issue is whether appellant sustained an emotional condition in the performance of duty.

## FACTUAL HISTORY

On February 17, 2015 appellant, then a 52-year-old vocational rehabilitation specialist, filed an occupational disease claim (Form CA-2) alleging that she was emotionally and physically injured as a result of sexual harassment by her immediate supervisor. She reported that seeing her supervisor in her work environment aggravated a preexisting condition and increased her anxiety, depression, and overall mental health stability as a result of the stress caused by his sexual harassment. Appellant first became aware of her condition on January 7, 2015 and related it to her employment on February 11, 2015. On the reverse side of the claim form, her second-line supervisor reported that she had never been notified of any harassment and had only received notice after receiving an e-mail from the Equal Employment Opportunity (EEO) office on February 13, 2015.

By letter dated March 16, 2015, OWCP informed appellant that the evidence of record was insufficient to support her claim. Appellant was advised of the medical and factual evidence necessary to establish the claim and was afforded 30 days to submit the additional evidence. By letter of the same date, OWCP requested additional information from the employing establishment.

In an undated narrative statement, appellant reported that on February 11, 2015 she submitted an e-mail to the EEO office to file a sexual harassment charge against her immediate supervisor. She was then immediately contacted by employing establishment police officers for an interview and written statement detailing the incident.

The employing establishment police interviewed appellant on February 11, 2015 pertaining to a possible sexual assault. The police investigative report classified the complaint as disorderly conduct and disturbing the peace. The investigation revealed that appellant had been in a meeting with her supervisor who was standing next to her. She reported that, during the meeting, her supervisor turned with his back to her and sat on her right thigh. The supervisor placed his left arm around appellant on her shoulder and cuddled her. He then leaned over and put his face on her face and stated something to the effect of "I [a]m going to kiss you or give me a kiss." Appellant told her supervisor to get up from her leg which he did. The report documented a February 19, 2015 interview with appellant's supervisor who admitted to sitting on appellant's leg at the end of the meeting. The investigative report reflected that the employing establishment prosecutor declined to prosecute the claim as a sexual assault, but did find that the supervisor had committed a simple battery.

In a February 13, 2015 statement, appellant reported that on or around January 7, 2015 her supervisor requested a meeting with her and a coworker. During the meeting, her supervisor discussed a list of issues. Appellant responded that she dreaded opening his e-mails because he was too quick to place blame on her for everything without reading the message correctly. The supervisor then stated that he did not want to be that way with her and they should kiss and make

up. He told appellant that he would go back to his office and send her some good e-mails, like a blank e-mail stating "hello," which she reported subsequently receiving. The supervisor then spread his legs and sat on her right thigh with his genitals touching her, cuddling, and placing his face against hers. Appellant stated that she was in shock and moments later she told him to move and get off her, which he did. She reported that her coworker witnessed the incident and exchange. Appellant reported that she was afraid to report the incident to her second-line supervisor because she was worried that she would not believe her, ridicule her, blame her for getting her supervisor in trouble, protect him, and misuse her authority to make her work life miserable. She requested a transfer from her current work environment because she was extremely uncomfortable in her supervisor's presence.

In a February 17, 2015 medical report, Dr. Rudolph V. Tacoronti, Board-certified in occupational medicine, reported that appellant complained of anxiety, depression, and sexual harassment. On February 11, 2015 appellant filed an EEO complaint for sexual harassment from her immediate supervisor and EEO forwarded the complaint to her second-line supervisor. She reported that her second-line supervisor immediately sent an e-mail changing her duty assignment, but did not apologize or acknowledge the EEO complaint. Appellant reported feeling too emotionally unstable to return to the worksite and requested leave following evaluation from her physician. Dr. Tacoronti diagnosed situational stress and recommended that she be off work to allow for evaluation and treatment from her personal physician.

In a March 2, 2015 narrative statement, appellant reported that the January 7, 2015 sexual assault by her immediate supervisor caused her to experience abrupt and sudden functional impairment, heightened anxiety, agitation, and severe depression. She reported that she suffered daily from environmental stressors related to the incident and experienced embarrassment and shame out of fear of not being believed. Appellant reported the sexual assault and made a statement to the investigating employing establishment police officer on February 11, 2015. Having to recall the details of the incident caused her increased mental, emotional, and physical stress. Appellant's overall functional capability was impaired and she had difficulty continuing with eight hours of daily exposure to the environmental stressors in her workplace. She stated that she no longer felt safe in her work environment, suffered from acute psychological stress, and was plagued with severe depression and thoughts of suicide. To date, appellant had lost two weeks of work as a result of the incident and was under the care of her primary physician.

In a March 6, 2015 medical report, Dr. Wezyann Gayle, a Board-certified family physician, reported that appellant was seen on February 20, 2015 after she was sexually harassed by her first-line supervisor and treated rudely by her second-line supervisor for filing a complaint. Appellant reported that being in the same office with her abuser was very stressful and caused depression, as well as both suicidal and homicidal ideation towards her abuser and second-line supervisor. Dr. Gayle reported that she was very tearful and agitated and agreed with Dr. Tacoronti's assessment that she remain off work until her psychiatrist found it safe to return.

In April 16, 2015 e-mail correspondence, appellant's second-line supervisor reported that she had never been made aware of appellant's allegations or concerns regarding any inappropriate interactions she had with her first-line supervisor until she learned of the event from the EEO office. She related that she immediately moved appellant directly under her

supervision. Appellant did not dispute the reassignment, but only asked the effective date of the reassignment. Appellant's second-line supervisor then sent appellant subsequent e-mails to verify the immediate change and received no questions or additional information from her regarding the incident.

By decision dated April 20, 2015, OWCP denied appellant's claim finding that the evidence of record did not support that she actually experienced a sexual assault or was being sexually harassed by her supervisor.

On May 11, 2015 appellant requested an oral hearing before an OWCP hearing representative.

In an August 12, 2015 note, Janet P. Williams, a registered nurse, held appellant off work from August through November 2015 for continued mental health treatment.

A hearing was held on December 9, 2015 before an OWCP hearing representative. At the hearing, appellant argued that, although the employing establishment police noted the incident as disorderly conduct, her supervisor's conduct amounted to sexual harassment. She reported that she had not returned to work and that a hearing was pending pertaining to her EEO complaint. Appellant testified that, although her coworker witnessed the incident, appellant preferred not to get a statement from her, but that the police took her statement for the investigation. She described her current medical treatment and noted prior treatment for psychological conditions while on active duty with the U.S. Army. Appellant concluded that she felt mistreated and isolated because of the incident and had a hard time dealing with her condition.

By decision dated January 29, 2016, OWCP's hearing representative affirmed the April 20, 2015 decision, finding that the evidence of record failed to establish any compensable factors of employment.<sup>3</sup>

### **LEGAL PRECEDENT**

A claimant has the burden of proof to establish by the weight of the reliable, probative and substantial evidence that the condition for which he or she claims compensation was caused or adversely affected by factors of his or her federal employment.<sup>4</sup> To establish that he or she sustained an emotional condition in the performance of duty, a claimant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his or her condition; (2) medical evidence establishing that he or she has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his or her emotional condition.<sup>5</sup>

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<sup>3</sup> The hearing representative noted that because the evidence did not establish any compensable factors of employment, it was not necessary to review the medical evidence submitted.

<sup>4</sup> See *Pamela R. Rice*, 38 ECAB 830 (1987).

<sup>5</sup> See *S.J.*, Docket No. 12-1512 (issued February 12, 2013).

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an illness has some connection with the employment, but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his or her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.<sup>6</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>7</sup>

For harassment or discrimination to give rise to a compensable disability, there must be evidence which establishes that the acts alleged or implicated by the employee did, in fact, occur.<sup>8</sup> Mere perceptions of harassment or discrimination are not compensable under FECA.<sup>9</sup> A claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence.<sup>10</sup> Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.<sup>11</sup> A claimant must establish a factual basis for his or her allegations of harassment or discrimination with probative and reliable evidence.<sup>12</sup>

Verbal altercations and difficult relationships with supervisors, when sufficiently detailed by the claimant and supported by the record, may constitute factors of employment. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under FECA.<sup>13</sup> Additionally, physical contact by a coworker or supervisor may give rise to a compensable work factor, if the incident is established factually to have occurred as alleged.<sup>14</sup>

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, OWCP, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed

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<sup>6</sup> *Supra* note 2; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>7</sup> *Gregorio E. Conde*, 52 ECAB 410 (2001).

<sup>8</sup> *K.W.*, 59 ECAB 271 (2007); *Robert Breeden*, 57 ECAB 622 (2006).

<sup>9</sup> *M.D.*, 59 ECAB 211 (2007); *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>10</sup> *J.F.*, 59 ECAB 331 (2008).

<sup>11</sup> *G.S.*, Docket No. 09-0764 (issued December 18, 2009); *Ronald K. Jablanski*, 56 ECAB 616 (2005); *Penelope C. Owens*, 54 ECAB 684 (2003).

<sup>12</sup> *Beverly R. Jones*, 55 ECAB 411 (2004).

<sup>13</sup> *Marguerite J. Toland*, 52 ECAB 294 (2001).

<sup>14</sup> *Denise Y. McCollum*, 53 ECAB 647 (2002); *Helen Casillas*, 46 ECAB 1044 (1995).

factors of employment and may not be considered.<sup>15</sup> If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor.<sup>16</sup> 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.<sup>17</sup>

### ANALYSIS

Appellant has not alleged that her emotional condition was due to the performance of her regular or specially assigned duties,<sup>18</sup> but rather she alleged that she sustained an emotional condition as a result of conduct by her immediate supervisor. OWCP denied her claim finding that a compensable work factor was not substantiated by the record.

Appellant alleged that an incident occurred on January 7, 2015 involving an unwanted touching by her immediate supervisor. She subsequently filed an EEO complaint on February 11, 2015 and an employing establishment police report was filed documenting the investigation.

It is well established that unwanted physical contact may support a claim for compensation.<sup>19</sup> The record establishes that appellant's supervisor sat on appellant's legs at the end of a meeting. Appellant's supervisor has admitted this incident and it is documented in the investigative police report. The record establishes that there was unwanted physical contact made in the course of employment.<sup>20</sup> Accordingly, the Board finds that appellant has established a compensable employment factor.<sup>21</sup>

Appellant also alleged that her supervisor pressed his face against her face, sent her a blank e-mail with "hello," and told her that he wanted to kiss and make up with her. In the present case, she has not submitted sufficient evidence to establish that these additional events occurred as alleged. Appellant reported that her coworker witnessed these events, but provided no witness statement corroborating them. The record does not establish these allegations. The mere fact that appellant filed an EEO complaint and grievance does not factually establish them.<sup>22</sup> She submitted no evidence corroborating her allegations. The Board has held that mere

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<sup>15</sup> *D.L.*, 58 ECAB 217 (2006).

<sup>16</sup> *K.W.*, *supra* note 8; *David C. Lindsey, Jr.*, 56 ECAB 263 (2005).

<sup>17</sup> *Robert Breeden*, *supra* note 8.

<sup>18</sup> *See supra* note 6.

<sup>19</sup> *See Alton L. White*, 42 ECAB 666 (1991); *see also Mary J. Summers*, 55 ECAB 730 (2004); *Alice F. Harrell*, 53 ECAB 713 (2002); *Donna J. DiBernardo*, 47 ECAB 700 (1996).

<sup>20</sup> *M.B.*, Docket No. 07-1289 (issued September 25, 2007).

<sup>21</sup> *K.L.*, Docket No. issued 10-1331 (January 18, 2011).

<sup>22</sup> Grievances and EEO complaints do not establish that workplace harassment or unfair treatment occurred. *Charles D. Edwards*, 55 ECAB 258, 266 (2004).

allegations, in the absence of factual corroboration, are insufficient to meet a claimant's burden of proof.<sup>23</sup>

The only compensable employment factor established is that appellant's supervisor sat on appellant's legs during the July 7, 2015 meeting. The question for determination, therefore, is whether this incident of physical contact caused or aggravated appellant's diagnosed emotional condition.<sup>24</sup> As OWCP found that there were no compensable employment factors, it did not analyze or develop the medical evidence. Thus, the Board will set aside OWCP's January 29, 2016 decision and remand the case for further action.<sup>25</sup> After further development as deemed necessary, OWCP shall issue a *de novo* decision on appellant's emotional condition claim.

### **CONCLUSION**

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

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<sup>23</sup> *Bonnie Goodman*, 50 ECAB 139 (1998).

<sup>24</sup> *R.W.*, Docket No. 11-0362 (issued October 24, 2011).

<sup>25</sup> *T.F.*, Docket No. 12-0439 (issued August 20, 2012).

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' decision dated January 29, 2016 is set aside and the case is remanded for further development consistent with this decision of the Board.

Issued: March 3, 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