

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

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**D.H., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Santa Clarita, CA, Employer**

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**Docket No. 09-439  
Issued: December 29, 2009**

*Appearances:*  
*William H. Brawner, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On December 1, 2008 appellant, through her attorney, filed a timely appeal from a February 8, 2008 merit decision of the Office of Workers' Compensation Programs and a September 3, 2008 decision denying her emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant has established that she sustained an emotional condition in the performance of duty.

**FACTUAL HISTORY**

On August 13, 2007 appellant, then a 53-year-old sales manager, filed an occupational disease claim alleging that she sustained stress due to a lack of support from management and her reassignment to another position. She stopped work on July 23, 2007 and did not return. Appellant's supervisor indicated that the first date of appellant's new assignment was July 23, 2007.

In a statement accompanying her claim, appellant related that she had worked without incident at the employing establishment for almost 30 years. She maintained that over the prior three years, and in particular the last six to twelve months, she had performance issues with her employees. Appellant requested but did not receive support from her managers. Christine Nagasaka, her supervisor, criticized her expectations of her staff which made it difficult to get her work completed. On April 6, 2007 appellant sent Ms. Nagasaka a memorandum requesting specific resources. Ms. Nagasaka met with appellant on April 13, 2007 and informed her that several of her employees had filed a claim of a hostile work environment. On April 13, 2007 appellant was temporarily removed from her position for what she was told to be two weeks but instead took seven. She related, "None of the charges against me were upheld, which I had anticipated, but what happened next was a shock. My boss removed me from my position."

In an April 6, 2007 e-mail message to Ms. Nagasaka, appellant requested support in approving wireless connections for her subordinates for work after hours, a new computer for one employee and a female mentor for one employee. She stated, "[The employee's] direct access to my manager causes difficulties in our relationship, because your management style in [s]ales is not the same as mine. As long as my employee can call my boss when things are [not] to her satisfaction, my ability to maintain a certain expectation is compromised."

The employing establishment submitted statements from appellant's coworkers regarding an investigation into charges that she created a hostile work environment. The employing establishment noted that the investigation took longer than expected due to the number of people interviewed.

By letter dated July 6, 2007, Ms. Nagaska informed appellant that she was being laterally reassigned to the position of sales specialist at the same grade and pay as her current position effective July 21, 2007. A letter from the employing establishment dated October 6, 2004 provided that involuntary transfers should not be used for arbitrary or punitive reasons but instead for operational needs or for development or training purposes.

The record contains numerous e-mail messages between appellant and her supervisees and appellant and Ms. Nagaska. Appellant also forwarded messages she received from her subordinates to her supervisor. In a message dated February 2006, appellant arranged a meeting with Mary Burkhard, a supervisee, to discuss her work methods. In a long response, Ms. Burkhard listed numerous items that she felt showed a negative work environment. Appellant forwarded the message to management. On October 23, 2006 appellant requested that Ms. Burkhard stop sending unpleasant e-mail messages. In a December 15, 2006 e-mail message to Ms. Nagaska, she related that Darrell Morrow, a supervisee, became insubordinate and verbally aggressive. Appellant informed Ms. Nagaska that she did not believe that management assisted her in resolving the situation.

In an undated letter received by the Office on September 24, 2007, appellant requested that the employing establishment upgrade her position. On February 1, 2006 the employing establishment notified her that an upgrade was not currently approved.

On September 21, 2007 appellant submitted numerous letters from former coworkers complimenting her management style and professionalism.<sup>1</sup> In a statement received on September 24, 2007, appellant's attorney related that appellant supervised eight employees and that three of the employees were at her level and pay grade. Ms. Burkhard was president of the union that represented managers at the employing establishment. She and Mr. Morrow worked as partners in selling products and managing accounts. In June 2004, an individual sent an anonymous letter complaining about appellant. Appellant repeatedly asked management for support in dealing with issues regarding her employees. In August 2006, Ms. Nagaska became appellant's supervisor. Ms. Burkhard and Mr. Morrow began to complain to Ms. Nagaska about appellant. In a meeting, Ms. Nagaska allowed Mr. Morrow to call appellant "a liar, ineffective, subversive and hypersensitive." Appellant sent Ms. Nagaska e-mail messages describing his treatment and her feeling of inadequate support. Mr. Morrow and Ms. Burkhard accused her of creating a hostile work environment because she took away account assignments in an attempt to equalize accounts and manage revenues. Ms. Nagaska instructed her to return the former assignments. On April 13, 2007 appellant was removed from her position because of an investigation into charges of a hostile work environment. The investigation lasted for 13 weeks and she did not receive any work to do. The person who managed while appellant was absent criticized her and requested extensive corrections in a report. The Equal Employment Opportunity Commission investigation returned no charges but she was removed from her position. Management ignored appellant's requests for assistance in dealing with insubordinate employees.

On November 8, 2007 Ms. Nagaska denied failing to provide appellant with support. She related that a supervisee of appellant asked for help working with her and that when she spoke with appellant she "became very agitated and accusatory...." At a meeting with appellant and the employee both were contentious but agreed to act professionally. A supervisee alleged a hostile work environment which procedurally required an investigation. The investigation lasted 12 weeks because of the number of interviews. Ms. Nagaska noted that many supervisors managed people at their grade level due to reductions-in-force. She denied allowing Mr. Morrow to call appellant names in her presence. Ms. Nagaska spoke with appellant on the telephone about her requests for support. She indicated that the investigation showed instances of "verbal abuse and disrespectful conduct." Ms. Nagaska did not want her to continue as a manager so she found another position at the same level and pay scale as an alternative to disciplinary action.

By decision dated February 8, 2008, the Office denied appellant's claim that she sustained an emotional condition in the performance of duty. It found that she had not established any compensable employment factors.

On February 20, 2008 appellant, through her attorney, requested an oral hearing. At the hearing, held on June 11, 2008, counsel argued that she was reacting to problems carrying out her assigned duties and error or abuse by the employing establishment. Appellant unsuccessfully tried to keep those she supervised from receiving performance improvement plans (PIPs). She described her work duties and noted that she had never received an adverse disciplinary action

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<sup>1</sup> Appellant also submitted medical evidence in support of her claim.

and received very good to excellent performance appraisals. Appellant was involuntarily transferred laterally to a nonmanagement position for punitive reasons rather than to fulfill an operational need. The people that she supervised held positions in the manager's union and went around her to her supervisors with complaints. Appellant wanted to reorganize her subordinates and redistribute the workload but was unable to make the changes due to complaints from her supervisees. She related that she "pleaded with [her] boss" for assistance because she could no longer manage and do her job in an effective manner. In 2006 management informed appellant that she had to issue a PIP to any employee who had not met target performance. She objected to issuing PIPs but was overridden by her managers. Appellant alleged that the employing establishment did not follow the process necessary for involuntary transfers and noted that the transfers should not be punitive. She related that she was unable to do her job and make the changes that she wanted because of opposition and lack of support from her supervisors. Appellant tried to rearrange her workload after vacancies. She chose not to fill a vacancy and her subordinates claimed that they were overworked. Appellant could not function as need to do her position. She related:

"I was emotionally at a point where I didn't know -- I couldn't make my decisions without anxious thoughts about, okay, they're going to complain to my boss, so what am I going to say about this, but I know that I've been asked to do this. I couldn't balance the pressure from below with the pressure from above that said make them happy. It didn't matter how I tried to get the assistance from above to understand my decisions. It was just go to the table and talk to them and work it out and that's -- it just became insurmountable for me. I couldn't cope with it."

On November 1, 2007 an administrative law judge with the Merit Systems Protection Board (MSPB) found that it lacked jurisdiction over her appeal of her involuntary reassignment. The judge found that she did not show a reduction in grade or pay, a constructive suitability determination or allege a "constructive demotion." In a decision dated April 3, 2008, the MSPB denied appellant's petition for review of an initial decision of an administrative law judge after finding that she did not submit significant new evidence or show an error.

By letter dated June 4, 2008, appellant's attorney further described the factors of employment to which appellant attributed her condition. She experienced friction and strain in dealing with her subordinates and maintained that the employing establishment committed error and abuse. In a letter dated July 17, 2008, the employing establishment asserted that there was no evidence of error in the investigation and that appellant received adequate support from management. The employing establishment further noted that she did not experience problems performing her work duties and that it was not part of her duties to dispute PIPs directed by management.

On August 7, 2008 appellant's attorney provided comments on the July 17, 2008 letter from the employing establishment. He asserted that "[m]aintaining authority over subordinate employees is very much in the performance of any manager's duties." Counsel also noted that realigning partnerships and plans to achieve targets were part of her work duties.

By decision dated September 3, 2008, the hearing representative affirmed the February 8, 2008 decision after finding that appellant had not established any compensable work factors.

## LEGAL PRECEDENT

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 her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.<sup>2</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 her frustration from not being permitted to work in a particular environment or to hold a particular position.<sup>3</sup>

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, 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 factors of employment and may not be considered.<sup>4</sup> If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.<sup>5</sup>

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 the Act.<sup>6</sup> However, the Board has held that where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.<sup>7</sup> In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.<sup>8</sup>

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<sup>2</sup> 5 U.S.C. §§ 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>3</sup> *Gregorio E. Conde*, 52 ECAB 410 (2001).

<sup>4</sup> *Dennis J. Balogh*, 52 ECAB 232 (2001).

<sup>5</sup> *Id.*

<sup>6</sup> See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

<sup>7</sup> See *William H. Fortner*, 49 ECAB 324 (1998).

<sup>8</sup> *Ruth S. Johnson*, 46 ECAB 237 (1994).

## ANALYSIS

Appellant alleged that she sustained an emotional condition as a result of a number of employment incidents and conditions. The Office denied her emotional condition claim on the grounds that she did not 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 the Act.

Appellant attributed her emotional condition to the failure of her supervisor to support her management decisions or support her conflicts with her supervisees. Complaints about the manner in which a supervisor performs her duties or the manner in which a supervisor exercises her discretion fall, as a rule, outside the scope of coverage provided by the Act.<sup>9</sup> This principle recognizes that a supervisor or manager in general must be allowed to perform her duties and that 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.<sup>10</sup> Appellant submitted e-mail messages requesting assistance in dealing with her employees and in obtaining resources for her employees. Ms. Nagasaka, her supervisor, denied failing to support her and noted that she spoke with her on the telephone about her support requests. Appellant has not factually established a failure of support by her supervisor or any error or abuse by the employing establishment; thus, she has not established a compensable work factor.

Appellant maintained that management instructed her to give her employees PIPs. She opposed the imposition of PIPs but was overridden by her supervisor. Although the assignment of work duties is generally related to the employment, it is an administrative function of the employer and not a duty of the employee. An administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment.<sup>11</sup> Appellant has not provided any evidence of error or abuse by the employing establishment in instructing her to give PIPs to her employees. Thus, she has not established a compensable employment factor.

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<sup>9</sup> See *Judy L. Kahn*, 53 ECAB 321 (2002).

<sup>10</sup> *Id.*

<sup>11</sup> *Lori A. Facey*, 55 ECAB 217 (2004).

Appellant further attributed her condition to being laterally transferred from a management position. The Board has held that 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, absent evidence of error or abuse, is not compensable.<sup>12</sup> Appellant submitted letters from the employing establishment indicating that transfers cannot be for punitive reasons but instead for operational needs. She filed a complaint with the MSPB regarding her lateral transfer. The MSPB denied appellant's claim for lack of jurisdiction after finding that she did not establish a loss of salary or grade, a constructive suitable determination and did not allege a constructive demotion. Appellant has not submitted sufficient evidence to meet her burden of proof to show error or abuse by the employing establishment in transferring her to a lateral position at no loss of salary or grade.

Regarding her contention that the employing establishment erred in denying appellant's request for a promotion, the Board has held that failure to be promoted is not a compensable factor because the lack of a promotion does not involve an employee's regular or specially assigned duties but rather constitutes the employee's desire to work in a different position. As such, any reaction to the failure to obtain a promotion is considered self-generated.<sup>13</sup>

Appellant also noted that she was the subject of an investigation that took a long time and that she had no work during the course of the investigation. Investigations are considered to be an administrative function of the employer when they are not related to an employee's day-to-day duties or specially assigned duties or to a requirement of the employee's employment.<sup>14</sup> The employing establishment retains the right to investigate an employee if wrongdoing is suspected or as part of the evaluation process.<sup>15</sup> An employee's fear of being investigated is not covered under the Act.<sup>16</sup> Appellant has not submitted any evidence that the employing establishment erred in investigating her based on complaints by her subordinates of a hostile work environment; consequently, she has not established a compensable work factor.

Appellant also attributed her condition to managing her employees. She asserted that she sustained stress trying to work out problems with her subordinates. Appellant related that she became anxious trying to make decisions knowing that her employees would complain to her supervisor. The Board has held that emotional reactions to situations in which an employee is trying to meet her or her position requirements are compensable.<sup>17</sup> Appellant's job as a manager required her to manage those she supervised and make day-to-day decisions in her capacity as manager. Where a claimed disability results from an employee's emotional reaction to her regular or specially assigned duties or to an imposed employment requirement, the disability

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<sup>12</sup> *Robert Breeden*, 57 ECAB 622 (2006).

<sup>13</sup> *See Andrew J. Sheppard*, 53 ECAB 170 (2001).

<sup>14</sup> *Thomas O. Potts*, 53 ECAB 353 (2002).

<sup>15</sup> *Sandra F. Powell*, 45 ECAB 877 (1994).

<sup>16</sup> *Gary M. Carlo*, 47 ECAB 299 (1996).

<sup>17</sup> *Trudy A. Scott*, 52 ECAB 309 (2001).

comes within the coverage of the Act.<sup>18</sup> Therefore, appellant has identified a compensable employment factor under the Act.

As appellant attributed her emotional condition in part to the performance of her regular or specially assigned work duties, the case presents a medical question regarding whether his emotional condition resulted from the compensable employment factors. The Office, therefore, must base its decision on an analysis of the medical evidence. As the Office found there were no compensable employment factors, it did not analyze or develop the medical evidence. The case will be remanded to the Office for this purpose.<sup>19</sup> After such further development as deemed necessary, the Office should issue a *de novo* decision on this matter.

On appeal appellant's attorney contends that her subordinates used their position in the management union to influence upper management. He also asserts that the employing establishment erred in transferring her in violation of established policy. Counsel also contends that the Office did not sufficiently consider the evidence of record. As noted, however, appellant has not factually established that she did not receive support from her supervisor due to influence by her subordinates or that the employing establishment committed error or abuse in an administrative matter.

### **CONCLUSION**

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

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<sup>18</sup> *Robert Bartlett*, 51 ECAB 664 (2000); *Ernest St. Pierre*, 51 ECAB 623 (2000).

<sup>19</sup> *See Robert Bartlett*, *supra* note 18.



**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated September 3 and February 8, 2008 are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: December 29, 2009  
Washington, DC

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

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board