United States Department of Labor
Employees' Compensation Appeals Board

V.D., Appellant	)	
and	)	**Docket No. 07-1873**
	)	**Issued: July 10, 2008**
DEPARTMENT OF THE ARMY, DIRCTORATE PUBLIC WORKS, Fort Lewis, WA, Employer	)	

Appearances:
Martin Kaplan, Esq., for the appellant
No appearance, for the Director

Oral Argument April 10, 2008

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 9, 2007 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated November 17, 2006 and May 4, 2007 that denied her 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 met her burden of proof to establish that she sustained an emotional condition in the performance of duty causally related to factors of her federal employment that occurred up to and including September 14, 2001.[1]

[1] Appellant has a companion case, docketed as 08-16, for alleged factors that occurred after September 14, 2001. By order dated May 12, 2008, the Office granted the Solicitor's motion to remand.

FACTUAL HISTORY

On March 16, 2005 appellant, then a 47-year-old contract specialist, filed a Form CA-2, occupational disease claim, alleging that she sustained situational depression and anxiety due to factors of her federal employment at the employing establishment. She had stopped work on October 6, 2003. Appellant submitted several statements and a copy of testimony given on April 4, 2003 at an Equal Employment Opportunity (EEO) fact-finding conference. She alleged that she was harassed by John Brobeck, her supervisor, stating that beginning in October 2000 he began to show favoritism to his secretary, that she and two other employees complained to the EEO office and this led to an investigation. After Mr. Brobeck began to treat her differently, his secretary was transferred and the harassment worsened. In the spring of 2001, appellant filed an EEO claim for racial discrimination and asked that either she or Mr. Brobeck be transferred. She also filed a grievance because she was doing work above her grade level. On August 2, 2001 appellant was informed that make-up leave was not authorized, on August 6, 2001 she received notice that she would be reassigned and on September 14, 2001 she was given a one-day notice to clear her office. She alleged that the manner in which she was instructed was improper because she was to turn in her keys, leave her trash in the office and she was given insufficient time to remove her personal items.

Memoranda regarding an April 20, 2001 meeting indicated that appellant challenged Mr. Brobeck's suggestions regarding redistributing the Office workload and he asked her to leave the meeting.[2] In a statement dated September 17, 2001, Ms. Peterson stated that she observed appellant clearing her desk on September 14, 2001, noted that she was told to leave her trash there and felt bad for the way appellant was treated.

In an October 26, 2001 treatment note, Dr. Douglas P. Olberding, a clinical psychologist, diagnosed adjustment disorder with depressed mood, rule-out major depressive disorder. In an April 2, 2002 treatment note, Dr. Russell D. Hicks, a Board-certified internist, diagnosed major depressive disorder, single episode. In an April 12, 2002 report, Dr. John P. Haws, Board-certified in psychiatry, diagnosed situational depression. He submitted an attending physician's report dated March 15, 2005 in which he additionally diagnosed post-traumatic stress disorder that occurred after an incident at work. Dr. Haws checked a "yes" box indicating that the diagnosed condition was employment related, advising that she had a "traumatic experience."

In a September 22, 2001 letter and in testimony at the April 4, 2003 EEO conference, Colonel Richard L. Conte, Director of Public Works, advised that he alone decided to transfer appellant on September 14, 2001 due to a long-standing disruptive relationship with her supervisor. Appellant's new position was in the same job series and grade as her position at the employing establishment. Colonel Conte noted that team training had been conducted, that appellant missed training sessions, continued to challenge her supervisor in an adversarial manner and refused to agree to guiding principles. He transferred appellant because it was the best outcome for her, her supervisor and most importantly, for the organization and that it was not in retaliation for EEO activity. On the day she was packing her office, Colonel Conte was informed that she was shredding documents and he instructed appellant to place work papers in a

[2] The meeting attendees were appellant, Mr. Brobeck and coworkers Karen Wagner and Sandra Peterson.

box so that contract files could be reconstructed. He also described the agency's leave policy. A memorandum dated October 9, 2001 noted that, at the request of the garrison commander, an inquiry had been conducted between November 30 and December 8, 2000.

Randall W. Hanna, Deputy Director of Public Works, also testified at the April 4, 2003 EEO conference and provided a letter dated April 14, 2005. He noted that the November 2000 inquiry found no evidence to substantiate an inappropriate relationship between Mr. Brobeck and his secretary who transferred to another agency. Following the inquiry, numerous team building sessions were performed between March 8 and May 23, 2001 by a management consultant and, at its conclusion, the consultant advised that it was in the best interest of all parties to reassign appellant due to her inability to work as a productive team member. Mr. Hanna stated that appellant's conflict with Mr. Brobeck began when he terminated her weekend overtime, noting that overtime was never demanded or made mandatory except for year-end close-out work. He stated that appellant wanted to be reassigned to work directly under Colonel Conte, but that this was denied as not in keeping with the organizational structure. Appellant then requested a transfer, filed several grievances and appealed her transfer with the Merit Systems Protection Board, which dismissed the appeal on November 13, 2001.[3] Mr. Hanna described the team-building activities and advised that it was determined that appellant was the primary cause of disruption. He stated that appellant's reassignment was not in retaliation for any protected activists and advised that, after consultation with the union, staff judge advocate and civilian personnel office, all parties were in agreement that one day was more than sufficient to clear her office.

Janice M. Monti, a contract employee who performed team and organizational development at the employing establishment, testified at the April 4, 2003 EEO conference. She was asked to help create a viable work environment at the employing establishment between March and July 2001 and described the work performed. At the conclusion Ms. Monti made four recommendations: that Mr. Brobeck receive management coaching; that an employee go on disability leave; and that Mr. Brobeck's secretary and appellant be reassigned.

In an undated letter, General James T. Hill, commanding officer, related that in October 2000 appellant visited the EEO office to raise concerns but did not file a complaint. Because of the issues appellant raised, an investigation was conducted which concluded that her concerns were unsubstantiated. General Hill noted that appellant had filed several grievances and EEO claims and was promoted and granted back pay because it was determined that she was performing higher-level duties. Appellant had requested a transfer and, based on the opinion of independent consultants, members of her work group and supervisory personnel, she was reassigned. She was unwilling to abide by the same office behavior as the rest of her work group and there was no expectation of improvement.

By decision dated August 12, 2005, the Office denied the claim, finding that appellant had not sustained an injury in the performance of duty.

[3] The appeal was dismissed for lack of jurisdiction.

On September 7, 2005 appellant requested a review of the written record. In a December 29, 2005 decision, an Office hearing representative affirmed the August 12, 2005 decision.

Appellant appealed to the Board and by order dated June 13, 2006, the Board remanded the case to the Office to review evidence submitted by appellant and received by the Office on December 27, 2005. This evidence included information regarding grievances and an EEO no fault settlement agreement signed by appellant on December 18, 2003 awarding her $50,000.00 and $3,000.00 in attorney's fees regarding several claims filed.[4] In a March 16, 2006 report, Dr. Jeff Bremer, Ph.D., noted conducting mental status and psychological examinations. He reported that appellant did not have a psychiatric condition prior to a work-related incident in 2001. Dr. Brewer diagnosed major depression, single episode, without psychotic features, chronic, anxiety disorder, dysomnia, a motivation, anergia, gastric bypass scheduled, psychosocial stressors and financial stressors. He advised that appellant could not return to her previous employment or similar placement.

By decision dated November 17, 2006, the Office denied the claim on the grounds that appellant did not establish any compensable factor of employment.

On November 28, 2006 appellant, through her attorney, requested a hearing, that was held on February 23, 2007. At the hearing appellant's attorney contended that she had established compensable factors of employment and resubmitted the April 4, 2003 EEO memorandum.

In a May 4, 2007 decision, an Office hearing representative affirmed the November 17, 2006 decision.

LEGAL PRECEDENT

To establish an emotional condition in the performance of duty, a claimant must submit the following: (1) medical evidence establishing that he or she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to the emotional condition.[5]

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*,[6] the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees' Compensation Act.[7]

[4] Docket No. 06-649 (issued June 13, 2006). Appellant also submitted evidence relevant to the claim adjudicated under 08-16.

[5] *Ronald K. Jablanski*, 56 ECAB 616 (2005).

[6] 28 ECAB 125 (1976).

[7] 5 U.S.C. §§ 8101-8193.

There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.[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] 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.[10]

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.[11] 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.[12]

For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. Rather, the issue is whether the claimant under the Act has submitted sufficient evidence to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[13]

Generally, 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 fall, as a rule, outside the scope of coverage provided by the Act. This principle recognizes that a supervisor or manager in general must be allowed to perform his 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.[14] Absent error or abuse, the assignment of work is an administrative function of the employer and the manner in which a supervisor exercises his or her discretion falls outside the ambit of the Act.[15] Although the handling of leave requests and

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

[9] *Lillian Cutler, supra* note 6.

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

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

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

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

[14] *T.G.*, 58 ECAB ____ (Docket No. 06-1411, issued November 28, 2006).

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

attendance matters are generally related to employment, they too are administrative functions of the employer and not duties of the employee[16] and perceptions of unfair treatment are not enough to establish error or abuse. A claimant's own feeling or perception that a form of criticism by or disagreement with a supervisor is unjustified, inconvenient or embarrassing is self-generated and does not give rise to coverage under the Act absent evidence that the interaction was, in fact, erroneous or abusive. This principle recognizes that a supervisor or manager must be allowed to perform his or her duties and that, in performing such duties, employees will at times dislike the actions taken.[17] A claimant must submit real proof that management did in fact commit error or abuse.[18] In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[19]

ANALYSIS

The Board finds that appellant did not meet her burden of proof to establish that she sustained an emotional condition in the performance of duty causally related to factors of her federal employment.

Appellant alleged that she was denied make-up leave. Although the handling of leave requests and attendance matters are generally related to employment, they are administrative functions of the employer and not duties of the employee.[20] Absent error or abuse, this would not be a compensable factor.[21] Appellant has not submitted evidence to establish that this denial was abusive in any way. She also alleged that she was doing work beyond her pay grade. The employing establishment explained that, after review of her workload, she was granted a promotion and back pay. 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.[22] The mere fact that actions of the employing establishment were later modified does not, in and of itself, establish error or abuse by management in its administrative duties.[23] In this case, there is no evidence to establish error or abuse regarding this administrative matter.[24]

Regarding the April 20, 2001 meeting, since it involved the assignment of work, it was administrative in nature. While the evidence supports that there were differences of opinion

[16] *Joe M. Hagewood*, 56 ECAB 479 (2005).

[17] *See Michael A. Deas*, 53 ECAB 208 (2001).

[18] *L.S.*, 58 ECAB ____ (Docket No. 06-1808, issued December 29, 2006).

[19] *Peter D. Butt, Jr.*, 56 ECAB 227 (2004).

[20] *Joe M. Hagewood, supra* note 16.

[21] *Charles D. Edwards, supra* note 11.

[22] *Id*.

[23] *Peter D. Butt, Jr., supra* note 19.

[24] *Kim Nguyen, supra* note 12.

expressed at the meeting, it also shows that appellant became confrontational before she was asked to leave by Mr. Brobeck, her supervisor. Verbal altercations and difficult relationships with supervisors, when sufficiently detailed by the claimant and supported by the record, may constitute compensable factors of employment.[25] The mere fact a supervisor or employee may raise his voice during the course of a conversation does not warrant a finding of verbal abuse.[26] The Board finds that it was a reasonable exercise of supervisory discretion for Mr. Brobeck to ask appellant to leave the meeting and her reaction to this meeting would be considered self-generated and not a compensable factor of employment.[27]

Regarding appellant's complaint that Mr. Brobeck, showed favoritism to his secretary, the employing establishment noted that this matter had been investigated and the allegation was found to be unsubstantiated. Perceptions of unfair treatment are not enough to establish error or abuse. A claimant must submit evidence that management did in fact commit error or abuse.[28] Appellant has not submitted sufficient evidence as to her allegations.

Regarding her transfer on September 14, 2001, the assignment of work is also an administrative function of the employing establishment and not a duty of the employee.[29] An employee's dissatisfaction with being transferred constitutes frustration from not being permitted to work in a particular environment or to hold a particular position and is not compensable.[30] As noted by Colonel Conte and Mr. Hanna, appellant had requested a transfer and, following team-building workshops, a consultant recommended that she be transferred because she was not a team player. The employing establishment explained that after consultation with the union, staff judge advocate and civilian personnel office, all parties were in agreement that one day was sufficient to clear her office. In this case, there is no evidence of error or abuse regarding the September 14, 2001 transfer itself or in regard to the manner in which she was notified and these would not be compensable factors of employment. Appellant also generally alleged that she was harassed by the employing establishment on the day of the transfer because she was questioned about shredding papers and was told to leave her trash in the office. Mere disagreement or dislike of a management action will not be compensable absent error or abuse.[31] The Board finds that it was reasonable for the employing establishment to monitor her activity that day to ensure that employing establishment records were properly maintained.

As to appellant's allegation that she was harassed by Mr. Brobeck, mere perceptions of harassment or discrimination are not compensable under the Act.[32] A claimant must establish a

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

[26] *Joe M. Hagewood, supra* note 16.

[27] *See Linda J. Edwards-Delgado*, 55 ECAB 401 (2004).

[28] *L.S.*, 58 ECAB ____ (Docket No. 06-1808, issued December 29, 2006).

[29] *Linda K. Mitchell*, 54 ECAB 748 (2003).

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

[31] *T.G., supra* note 14.

[32] *James E. Norris, supra* note 13.

factual basis for his or her allegations with probative and reliable evidence.[33] In the case at hand, appellant submitted no evidence to substantiate harassment on the part of Mr. Brobeck or other member of employing establishment management. While she submitted statements in which Ms. Peterson opined that appellant was not treated fairly, these do not contain sufficient detailed information to establish that harassment in fact occurred.[34] In this case, there is no affirmative evidence of record to establish that Mr. Brobeck committed any supervisory action that constituted harassment.[35] Appellant also indicated that she had filed a grievance and/or EEO claim. In assessing the evidence, the Board has held that grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.[36] While appellant submitted an EEO settlement agreement signed by her on December 18, 2003, it was a no fault agreement and does not show that the employing establishment erred in any way. She therefore did not establish harassment or discrimination on the part of the employing establishment.[37] Appellant identified no compensable work factors substantiated by the record.[38] She therefore failed to establish a factual basis for her claim by probative and reliable evidence.[39]

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained an emotional condition in the performance of duty for claimed factors that occurred up to and including September 14, 2001.

[33] *Id.*

[34] *Joe M. Hagewood, supra* note 16.

[35] *See Charles D. Edwards, supra* note 11.

[36] *Michael L. Deas, supra* note 17.

[37] *James E. Norris, supra* note 13.

[38] *Roger Williams, supra* note 10.

[39] *Id.* Because appellant failed to establish a compensable employment factor, it was not necessary to consider the medical evidence. *Marlon Vera*, 54 ECAB 834 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 4, 2007 be affirmed.

Issued: July 10, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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