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

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| **N.H., Appellant** | ) | |
| **and** | ) | **Docket No. 17-1203** |
| | ) | **Issued: January 9, 2018** |
| **U.S. POSTAL SERVICE, RICHLAND STATION, Dallas, TX, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

### ***JURISDICTION***

On May 9, 2017[1] appellant filed a timely appeal from a November 10, 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 to consider the merits of the case.

### ***ISSUE***

The issue is whether appellant has met her burden of proof to establish that she developed an emotional condition in the performance of duty.

[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 November 10, 2016, the date of OWCP's last decision was May 9, 2017. Since using May 10, 2017, 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 May 9, 2017, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

[2] 5 U.S.C. § 8101 *et seq.*

## ***FACTUAL HISTORY***

On January 12, 2015 appellant, then a 28-year-old city carrier assistant, filed a traumatic injury claim (Form CA-1) alleging that she developed post-traumatic stress disorder and mental stress on December 6, 2014. The employing establishment advised that appellant stopped work on December 31, 2014 and had not returned.

In a narrative statement, appellant asserted that on December 6, 2014 she received a text message from S.W., her supervisor. She reported that the text read, "Well at least I tried, one day you might say what the hell I'm gonna give him some." Appellant alleged that this message made her uncomfortable, caused her stress, and exacerbated her gastrointestinal issues. She felt weak and vomited for a few days and then sought medical attention. Appellant's physician informed her that her stress and anxiety were causing her stomach symptoms. Appellant reported the sexual harassment to her station manager, J.S., on December 18, 2014 when she returned to work. She also worked on December 26 and 30, 2014. Appellant indicated that S.W. appeared at her duty station after her return to work.

Appellant's supervisor, J.S., controverted appellant's claim on January 20, 2015 and asserted that she filed the claim due to pending corrective action and because she was a disgruntled employee. The employing establishment noted that an internal investigation was being conducted regarding appellant's allegations of sexual harassment, but was still pending.

In a letter dated February 12, 2015, OWCP requested additional factual and medical evidence from appellant. It also requested additional information from the employing establishment on that same date.

Appellant provided a statement from a coworker, C.T., alleging that S.W. had made unwanted sexual advances toward her. She also submitted a report by Dr. Jerry Franz, an occupational medicine physician, who diagnosed anxiety, depression, and stress due to appellant's work duties.

In a decision dated April 1, 2015, OWCP denied appellant's emotional condition claim, finding that she had not substantiated a compensable factor of employment as causing or contributing to her diagnosed condition.

Appellant requested reconsideration on November 30, 2015. She provided her Equal Employment Opportunity (EEO) investigative file and an affidavit. The EEO materials included appellant's review of text messages with S.W. beginning with a breakfast invitation on October 14, 2014 which she declined. Appellant denied providing S.W. with her telephone number. She applied for and received a position as a 204B and S.W. began training her. This interaction began professionally, but S.W. later began to make suggestive comments after the last carrier left for the day. He continued to contact appellant directly, through calls and texts, for dates, sex, oral sex, as well as offering her money. Appellant declined S.W.'s requests and informed him that she had a boyfriend. S.W. invited her to his house on November 17, 2014 and again asked for sex on December 6, 2014. Appellant alleged that S.W. sexually harassed her from October through December 2014. She alleged that she was afraid of S.W. because he had been a Marine and "knew how to put people down." S.W. informed her of his physical altercations at the workplace and that he brought guns to work. He insinuated that he struggled

with post-traumatic stress disorder which caused him to explode with coworkers. S.W. informed appellant that he had software which enabled him to gain access to personal information including home addresses. He told appellant that supervisors, J.S., and S.O., spread rumors that he and appellant were having a sexual relationship. Appellant stopped working as a 204B because she was uncomfortable with S.W. A coworker informed her of similar harassment by S.W.

Appellant noted on December 18, 2014 that S.O., a female supervisor, instructed her to report for an attendance-related predisciplinary interview. She asked that supervisors S.O. and J.S. stop spreading rumors concerning her relationship with S.W. Both denied knowledge of the rumors. Appellant then informed the supervisors of S.W.'s sexual harassment of her and that she had documentation. On that same date J.S. instructed appellant to go home after she confronted him and S.W. about the harassment, alleging that she had instigated a verbal altercation. J.S. asserted that S.W. was pending removal from the employing establishment. Appellant claimed that J.S. retaliated against her because of her harassment complaint and that the employing establishment investigator, R.D., was alleged to have had a sexual relationship with J.S. She noted that she had no further contact with R.D. after the initial interview. J.S. denied that appellant's discipline was retaliation for EEO activity or based on discrimination.

Appellant submitted a series of text messages, purportedly from S.W., originating at telephone number xxx-xxx-4151, which began with a breakfast invitation on October 14, 2014 which appellant refused noting that she would like to "keep things professional." In her EEO investigative affidavit appellant provided the dates for the texts she submitted. In a November 14, 2014 text, S.W. noted, "Plus you would look a whole lot sexier in different outfits." He texted on November 15, 2014, "Please don't get upset. But I'm attracted to you respectfully. I truly enjoy speaking with you. I'm afraid of one thing but I still like our conversations." S.W. indicated that he did not want to threaten appellant, but that they could be "buds" and "platonic." Appellant noted that she did not talk to coworkers of the opposite sex outside of work and that she did not want things to be awkward. S.W. replied that she would not feel odd as his personality would not allow it. He asked, "Let's just keep it fun ok?" S.W. then asked if appellant was interested in females. He noted, "I'm not complaining or changing, you still what you are to me." S.W. added, "Beautiful" and then apologized. Appellant assured him that she was not mad on Sunday, November 16, 2014.

In a text dated November 17, 2014, S.W. informed appellant that it was okay if they dated, providing he was her type. Appellant asked that he be specific about dating. S.W. noted that he did not want to offend appellant or chase her away. Appellant replied that they were "cool."

In texts dated November 19, 2014, appellant apologized for missing S.W.'s call and he replied, "Just mistreat me." She indicated that she was shaking her head and laughing out loud. In November 24, 2016 texts, S.W. directed appellant to call him if she needed or wanted him. Appellant indicated that she was working. On November 25, 2014 S.W. noted that he was at a restaurant alone wanting appellant to discuss work. Appellant indicated that she needed more training with S.W. In a November 28, 2014 text, S.W. noted that it was fun working with appellant and that he almost felt he was working with his baby sister and "at time with America's next top model who's full of drama." S.W. noted on November 29, 2014 that he knew appellant had a boyfriend, "but I still want some of you." Appellant replied that he was a trip and

'laugh[ed] out loud'. S.W. noted that appellant could treat him badly, but that he still wanted her respectfully. Appellant replied that she would not do that and 'laugh out loud.' S.W. informed appellant that he had a "huge crush" on her and that he hoped she would "want me sorry mean need me tonight." S.W. then noted, "Haha you did need me." Appellant noted that she needed him "just for that" and that she closed by herself. He noted that he had lost appellant from this day forward. Appellant told him to hush.

On Monday, December 1, 2014 S.W. texted that appellant would miss him when he was gone. In a series of texts dated December 5, 2014, at 8:24 p.m., S.W. asked if appellant wanted him to close, and noted that he would behave. Appellant replied that he could, but that J.S. was still there. At 8:46 p.m. S.W. noted that he was "here waiting for you to be alone." Appellant asked if that were true and S.W. noted that a carrier just came back at 8:56 p.m. In her affidavit, appellant noted her belief that S.W. was parked outside the employing establishment watching during the course of the December 5, 2014 text messages. At 9:14 p.m. he asked if J.S. was still at work and appellant replied in the affirmative. S.W. noted, "Damn, he's blocking." He indicated that he was going to stay until 9:35 p.m. and that he wanted to hold appellant for five seconds adding, "That's like a whole day." S.W. then texted, "What do you think? We should meet somewhere once you leave and just keep it moving?" Appellant replied at 9:37 p.m., "It's up to you. J.S. just left. You don't need no hug do you? LOL." On December 6, 2014 S.W. texted "You looked so sexy in those jeans. Last chance to sleep with you…." Appellant replied, "Thank [you]. That's not going to happen, sir." S.W. texted, "Well at least I tried. One day you might say what the hell I'm gonna give him some."

Appellant also described conversations with S.W. alleging that he suggested that they get married. She asserted that he told her all the "sexual things" he could do to her and what she could do for him. S.W. allegedly informed appellant that she could live in one of his properties rent free and that he wanted her to have his babies. In a voicemail he noted that appellant was welcome at his home anytime of the day or night. S.W. suggested that he could make people at the employing establishment miserable.

Supervisor S.W. completed an EEO interview on December 23, 2014 and admitted asking appellant for breakfast which she declined. He did not recall asking appellant for sex on December 6, 2014. S.W. denied e-mailing, texting, or calling employees for sex. He indicated that he made comments that a person was sexy if they looked nice. S.W. noted that he did ask appellant out, but that she told him she had a boyfriend. He did not believe that she had a boyfriend and thought she was just telling him that. S.W. agreed that he offered for appellant to come by his house "so that she could use his washer and dryer." He opined that he and appellant were friends and that she never seemed bothered by him. S.W. alleged that he was respectful to appellant. He also asserted that appellant had talked about her personal life and that she told him she "liked talking to him."

The EEO investigator confirmed that the text messages to appellant were from S.W.

Appellant submitted interviews with C.T., who also alleged that S.W. sexually harassed her and T.C., another coworker, who noted that S.W. wanted to be friends and, when she told him she was married with a child, asked for her number. She refused, but later found he attempted to determine her route.

By decision dated February 26, 2016, OWCP denied modification of its April 2, 2015 decision. It reviewed the additional evidence submitted and found that appellant had not substantiated a compensable factor of employment regarding harassment as there was no final decision to show that the employing establishment was at fault related to the alleged sexual harassment. OWCP noted that there was no proof that the text messages came from S.W. It also found no error or abuse on the part of the employing establishment.

On August 16, 2016 appellant requested reconsideration. She disputed the allegation that the text messages did not come from S.W. and provided a telephone number xxx-xxx-4151, from an internet site which was attributed to S.W. and correlated to the number on the texts that appellant received. Appellant also provided an e-mail address from the employing establishment's counsel dated January 28, 2015 which apologized for appellant's subjection to "unwanted advances from [S.W.] and requested any additional information besides the texts and her statement in regard to "pending, potential discipline for [S.W.]." Appellant asserted that S.W. told her how he had avoided a previous sexual harassment case by using the accuser's words against her. She noted that EEO had not issued a final decision.

By decision dated November 10, 2016, OWCP reviewed the merits of appellant's claim, but denied modification of its prior decisions.

## ***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*,[3] the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under FECA.[4] There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within coverage under FECA.[5] 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.[6] In contrast, a disabling condition resulting from an employee's feelings of job insecurity *per se* is insufficient 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.[7]

[3] 28 ECAB 125 (1976).

[4] 5 U.S.C. §§ 8101-8193.

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

[6] *Supra* note 3.

[7] *Id.*

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.[8] 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.[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]

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.[11]

## ***ANALYSIS***

The Board finds this case not in posture for decision.

Appellant has attributed her emotional condition to a variety of factors, but not to difficulties in carrying out her employment duties. She, therefore, has not implicated a compensable factor of employment under *Cutler.*[12]

In *Thomas D. McEuen,*[13] 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 employing establishment 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 facts surrounding the administrative or personnel action established error or abuse by employing establishment superiors 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 employing establishment acted reasonably.[14]

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

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

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

[11] *Alice M. Washington*, 46 ECAB 382 (1994); *E.C.*, Docket No. 15-1743 (issued September 8, 2016).

[12] *Supra* note 3.

[13] *Supra* note 9.

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

Appellant has attributed her emotional condition to administrative actions of the employing establishment which she asserted were erroneous. She alleged that she was improperly subjected to discipline on December 14, 2014 when supervisor J.S. sent her home for refusing to obey instructions and instigating a verbal altercation. Disciplinary actions are considered administrative actions.[15] Appellant did not provide any independent or probative evidence to establish that the J.S. erred or was abusive in issuing the discipline.[16] Therefore she has not established a compensable factor in this regard.

Appellant also alleged that S.W. sexually harassed her from October through December 2014. In support of this allegation, appellant submitted a series of text messages purportedly from S.W. OWCP initially discounted these texts finding that there was no basis for determining that the texts came from S.W. and also asserting that there was no final adverse EEO decision or determination from the employing establishment investigation establishing sexual harassment through the texts.

The Board finds that the record supports that the submitted text messages were from S.W. The EEO investigator accepted that the texts were from S.W., appellant supplied evidence that this telephone number was that of S.W., and there is no contrary evidence from the employing establishment or S.W.[17] The Board further notes the issue is not whether the claimant has established harassment under standards applied by the EEO. Rather, the issue is whether the claimant, under FECA, has submitted evidence sufficient to establish an injury arising in the performance of duty. To establish entitlement to benefits, the claimant must establish a factual basis for the claim by supporting allegations with probative and reliable evidence.[18]

The Board notes that OWCP had allotted time for the employing establishment to respond to appellant's allegations. However, no response was received. Nevertheless, OWCP found that appellant had not established any compensable factors of employment.

OWCP procedures provide:

> "If an employing [establishment] fails to respond to a request for comments on the claimant's allegations, the [claims examiner] may usually accept the claimant's statements as factual. However, acceptance of the claimant's statements as factual is not automatic in the absence of a reply from the [employing establishment], especially in instances where performance of duty is questionable. The Board has consistently held that allegations unsupported by probative evidence are not established. *James E. Norris,* 52 ECAB 93 (1999); *Michael Ewanichak,* 48 ECAB 364 (1997). The [claims examiner] should

[15] *L.R.*, Docket No. 14-1990 (issued January 17, 2015).

[16] *E.C.*, Docket No. 15-1743 (issued September 8, 2016).

[1717] *See C.V.*, Docket No. 16-0699 (issued November 4, 2016) (the Board accepted the texts without requiring a substantiating source and with no contrary evidence).

[18] *Kathleen A. Donati,* 53 ECAB 759 (2003); *Martha L. Cook*, 47 ECAB 226, 231 (1995); *D.K.*, Docket No. 08-0157 (issued April 24, 2008).

consider the totality of the evidence and evaluate any inconsistencies prior to making a determination."[19]

Based on appellant's EEO affidavit, the January 20, 2015 letter from J.S., and the e-mail from the employing establishment's attorney, the Board concludes that the employing establishment conducted an investigation into appellant's allegations. Appellant averred that once she presented the evidence and interviewed with the employing establishment official, she did not hear anything further from the employing establishment. The Board finds that it is unable to make an informed decision in this case as the employing establishment did not respond to the request for comment made by OWCP in the February 12, 2015 development letter.

Although it is a claimant's burden of proof to establish his or her claim, OWCP is not a disinterested arbiter but, rather, shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.[20] Since appellant's allegations indicate that the employing establishment would have in its possession evidence relevant to appellant's sexual harassment allegations, (*i.e.*, findings of the Postal Inspection Service's investigation) OWCP should obtain a response from the employing establishment to the allegations of sexual harassment and any relevant evidence or argument.[21]

This issue of the case will, accordingly, be remanded to OWCP for further development of the evidence regarding appellant's allegations of sexual harassment. It shall request that the employing establishment provide a detailed statement and relevant evidence and/or argument regarding appellant's allegations. Following this and any necessary further development, OWCP shall issue a *de novo* decision regarding whether appellant has established any compensable factors of employment regarding sexual harassment and, consequently, sustained an injury in the performance of duty.

## ***CONCLUSION***

The Board finds that appellant has not established any compensable factors of employment relative to administrative or personnel matters. The Board further finds that the case is not in posture for decision with regard to whether appellant has established a compensable factor of employment as to allegations of sexual harassment. The case is remanded for further evidentiary development as to whether appellant has sustained an injury in the performance of duty.

[19] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.5(d)(1) (June 2011).

[20] *See K.W.*, Docket No 1.5-1535 (issued September 23, 2016) (remanding the case for further development by OWCP when the employing establishment did not provide an investigative memorandum in an emotional condition claim based on sexual harassment).

[21] *Id.; see* 20 C.F.R. § 10.117(a), which provides, the employing establishment who has reason to disagree with any aspect of the claimant's report shall submit a statement to OWCP that specifically describes the factual allegation or argument with which it disagrees and provide evidence or argument to support its position. The employing establishment may include supporting documents such as witness statements, medical reports or records, or any other relevant information.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the November 10, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision.

Issued: January 9, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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