United States Department of Labor
Employees' Compensation Appeals Board

C.B., Appellant	)	
and	)	**Docket No. 20-1259**
	)	**Issued: July 15, 2022**
DEPARTMENT OF DEFENSE, DEFENSE COMMISSARY AGENCY, ROBINS AIR FORCE BASE, GA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On June 5, 2020 appellant filed a timely appeal from a March 10, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 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 met her burden of proof to establish an emotional condition in the performance of duty.

FACTUAL HISTORY

On April 3, 2019 appellant, then a 39-year-old store worker, filed an occupational disease claim (Form CA-2) alleging that she sustained major depressive disorder, anxiety attacks, and a generalized anxiety disorder causally related to factors of her federal employment. She attributed

[1] 5 U.S.C. § 8101 *et seq*.

her condition to verbal threats of bodily harm and harassment, including sexual harassment. Appellant stopped work on September 11, 2018.[2]

By development letter dated April 12, 2019, OWCP advised appellant of the type of factual and medical evidence necessary to establish her claim and provided a questionnaire for her completion. In a separate development letter of even date, it requested that the employing establishment provide additional information regarding her alleged injury, including comments from a knowledgeable supervisor regarding the accuracy of her allegations and witness statements from employees with additional information. OWCP afforded both parties 30 days to submit the requested evidence.

In an April 30, 2019 statement, appellant advised that she had been hired as a supervisory store associate in September 2017 and had temporarily worked as a customer service manager from September 25 to December 5, 2017. At a December 7, 2017 meeting she had advised R.M., her new first-line supervisor, and J.V., her second-line supervisor, that she was personally required work hours consistent with those of her children's daycare center. In response, R.M. had asked appellant's age and told her that she should be able to work full time and take care of children like his wife. Appellant asserted that, from December 2017 to September 2018, R.M. made racist remarks, asked her why she wore her hair braided, commented on her clothing, and referred to her as "Pocahontas" in front of her supervisor, the cashiers she supervised, and store associates. R.M. asked if she had a nice car because she had gotten injured while in the military and made degrading comments about the branch of the military she had served in. On December 13, 2017 he questioned why appellant wore nice clothes to work and told her she resembled "Pocahontas." R.M. also harassed female cashiers and baggers, touching their bottoms and using inappropriate language referring to them as "sweetheart and "*mija*."

On July 10, 2018 R.M. called to appellant, and when she turned to look, he put his hand in his pants and scratched "his genital and groin area." On July 18, 2018 he touched a bagger on the bottom, looked at appellant, and laughed. Appellant related that she had informed J.V. and S.E., the store director, about R.M.'s behavior and had filed Equal Employment Opportunity (EEO) complaints on March 7 and September 19, 2018.

On January 3, 2018 R.M. asked appellant why she was dressed up since he was the supervisor. When appellant approved a sick leave request for a subordinate employee on January 21, 2018, R.M. asked how old she was and asserted that the employee had lied about being sick. From December 12, 2017 to September 18, 2018, R.M. changed appellant's cashiers' schedules and approved leave requests without notifying appellant, creating a shortage in labor. He informed her that he could do whatever he wanted because he was "the boss."

Appellant related that around January 13, 2018 one of her employees had filed a police report contending that R.M. and J.V. had locked her in the cash cage of the store using their bodies to prevent her from opening the door. That employee asserted that R.M. had "swung his fist at her trying to cause her physical harm." From February 16 to March 2018, R.M. locked appellant out of their shared office, took the keys, and changed the access code. On February 21, 2018 he told her that he had changed an employee's shift and she reminded him to always follow union

[2] Accompanying appellant's claim were January 30 and February 7, 2019 letters from the employing establishment regarding her request for reasonable accommodation.

regulations. R.M. responded that he was overwhelmed by his position and told appellant that she had to take over some of his responsibilities or he would change her schedule to conflict with the daycare hours. On March 7, 2018 he and other mangers threatened her because she would not sign a memorandum agreeing to a voluntary downgrade. On March 15, 2018 R.M. was drinking on his lunch break at a bar and on his return had blocked the door to their shared office and slept.

Appellant advised that on April 4, 2018 she had filed a police report with regard to the actions of R.M. because he cursed and screamed at her in front of coworkers and told her that he could schedule employees as he liked. R.M. also repeatedly hit his fist on the wall behind her and maintained that they would all be targets of his gun club.

Appellant asserted that from March 11 to September 8, 2018 R.M. and S.E., the store director, altered her timesheet and changed her approved leave to absent without leave (AWOL). R.M. advised that he would approve leave based on how he felt that day. S.E. told appellant that she would not sign sick leave requests for medical appointments unless appellant disclosed all of her health care information.

In a March 9, 2018 memorandum, J.V. advised that on March 9, 2018 he and appellant met in his office to discuss her allegations that R.M. had harassed her and created a hostile work environment. Appellant informed him that R.M.'s tone and the way he approached her appeared threatening and that she was uncomfortable because he called the cashiers inappropriate names. She also advised that she felt undermined when R.M. locked her out of the office, noting that she was unable to check e-mail or prepare schedules. Appellant indicated that her issues with R.M. had been ongoing and that he appeared overwhelmed. J.V. informed her to call her supervisor rather than the "sick phone" if she required leave.

On March 11, 2018 J.V. related that on that date he had discussed with R.M. appellant's complaints of harassment and a hostile work environment. R.M. indicated that he could not confirm or deny her account of events. He advised that he "may have" referred to cashiers as "sweetheart" and "*mija*" because that was how he spoke to waitresses and other females in his life. J.V. indicated that he had told R.M. not to use such terms at work, to leave the door to the office open, to "keep a calm and approachable tone to his voice," and to collect himself if he became upset or overwhelmed.

In a March 15, 2018 e-mail, M.K., a manager, advised S.E. that over the past three months appellant had left her cash office keys at her home, discussed management issues with the union, asserted that appellant had to work a set schedule due to child care requirements, changed an employee's schedule without telling the employee, left the building without permission, called for leave on the employee call-in line instead of to her immediate supervisor, and been AWOL on various occasions. He noted that S.E. had advised all managers to telephone their supervisors if they were unable to work.

In an April 4, 2018 statement of suspect/witness/complainant police form, appellant advised that on that date she had knocked on the door of the office she shared with R.M. R.M. had hung up the telephone and jumped up shaking his arms and head and saying he needed to go outside. Appellant told him that she needed to use the office computer. She met with R.M. and an employee who requested union representation by A.S., a union representative and coworker.

R.M. became angry and mumbled under his breath while walking in and out of the office with a red face.

In an August 14, 2018 letter, S.E. notified appellant that she had to contact her personally to request leave due to her unsatisfactory leave record for the previous six-month period.

In an April 26, 2019 e-mail message, A.S., related that R.M. had become manager in December 2017. She maintained that he bullied and harassed appellant and told appellant that she should do both of their jobs. A.S. advised that R.M. made inappropriate comments on appellant's hair and clothing. She asserted that appellant informed management and sent J.V. e-mails and text messages about the harassment, but no action was taken. A.S. indicated that she was the only manager that could not call in for sick leave. She advised that the hostility had increased after appellant found R.M. drinking during work hours.

In a May 4, 2019 statement, S.E. advised that she had not heard R.M. refer to appellant as Pocahontas, ask her age, or address her in a hostile manner. She related that employees' schedules sometimes had to be changed due to emergencies and that the manager and assistant manager should work together on the changes. S.E. had no knowledge of J.V. and R.M. locking an employee in a cash office, and noted that the door locked and opened to the inside. She was unaware of R.M. placing furniture against the door and indicated that on one occasion the key had been improperly coded. S.E. asserted that appellant had not found childcare arrangements to fit a shifting schedule. She noted that R.M. denied drinking at lunch. S.E. had no knowledge of the April 4, 2018 incident. She indicated that appellant had been charged as AWOL and told to document appellant's medical appointments. S.E. advised that appellant had reported harassment and drinking by R.M. in March 2018 and that the claims of harassment had been "looked into and appropriate action taken." She related that EEO had not issued a decision on appellant's complaint.

In a May 7, 2019 e-mail, J.V. advised that he had reviewed appellant's statement. He indicated that he had no knowledge of a meeting on December 7, 2017. On January 13, 2018 J.V. related that he had a meeting in the cash office with A.S. and a store associate. He was unaware that the police had been called.

On May 13, 2019 the employing establishment controverted the claim. It noted that the April 4, 2018 police report was inconsistent with appellant's description of what had happened and that she had not submitted evidence corroborating her claim. The employing establishment advised "there is no decision as to whether she was discriminated against as per EEO" and that appellant had refused an offer of reasonable accommodation.

On June 19, 2019 J.V., in reference to A.S.' statement, related that appellant had not sent him e-mails and texts claiming that she was working in a hostile environment and that he had not witnessed unusual activity between appellant and R.M.

By decision dated June 27, 2019, OWCP denied appellant's emotional condition claim.

Subsequently, appellant submitted evidence regarding her request for reasonable accommodation by the employing establishment.

In a March 8, 2018 e-mail, appellant advised J.V. that she was filing an EEO complaint due to harassment by R.M. She maintained that R.M. had threatened her and created a hostile work environment.

On September 12, 2018 the employing establishment's investigations and resolution directorate requested additional information from appellant's management regarding her discrimination complaint, including an organization chart, a description of any harassment training provided, documentation of whether management was aware of her complaint, and copies of any investigation conducted and corrected action taken.

In a supplemental declaration dated January 9, 2019,[3] J.V. advised that he had no knowledge of R.M. changing the schedules of appellant's subordinates. Regarding R.M. denying her access to her office, he indicated that R.M. had changed the key because things had gone missing. J.V. told R.M. to give appellant access to the office and to leave the door open. He had no knowledge of R.M. blocking the door with furniture or drinking during work hours, but learned about it from S.E., the store director. J.V. asserted that he was unsure whether appellant had been harassed or whether the employing establishment had reached a determination regarding whether she had been harassed at work.

On July 12, 2019 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review. She related that she had filed an EEO complaint due to harassment, sexual harassment, verbal threats, and a hostile work environment from March 5 to September 11, 2018. Appellant indicated that the employing establishment had approved her request for leave under the Family Medical Leave Act starting September 11, 2018. In another statement of even date, she advised that she had experienced verbal threats related to her childcare responsibilities and witnessed unwelcome sexual advances made toward herself and coworkers by a supervisor. In a July 17, 2019 statement, appellant related that she was performing her assigned work duties at the time she was harassed and threatened with bodily harm. She maintained that the employing establishment had failed to resolve the matter.

Thereafter, OWCP received an April 4, 2018 suspect/witness/complainant police report filed by A.S. A.S. related that on that date she went to R.M.'s office in her capacity as union representative. R.M. wanted her official timesheet and she told him that it was in her vehicle. A.S. left and was talking to a manager when R.M. had begun yelling and waving his hands. She indicated that he had previously engaged in inappropriate behavior and repeatedly mentioned his hunting club. A.S. advised that R.M. had followed her around the store when she was shopping with her daughter after work hours. She had informed J.V. of the situation.

In an October 29, 2018 declaration under penalty of perjury, appellant alleged discrimination by R.M., S.E., and J.V. based on her race and sex. She related that on December 7, 2017 she had advised J.V. and R.M. that she needed time off for treatment of a service-connected disability and a work schedule with rotating weekends consistent with the hours of the daycare. R.M. had asked appellant how old she was and told her she should be like his wife and take care of three kids, work, and cook. Appellant related that R.M. made offensive statements nearly every day, including asking about her military service and calling her Pocahontas. She asserted that J.V. and A.S. had witnessed his behavior. Appellant advised that on December 12, 2017 and other

[3] J.V. dated the statement January 9, 2018; however, this appears to be a typographical error.

dates R.M. had changed her employees' work schedules without notifying her and the employees had complained to her and the union about the changes. R.M. told her that he was the boss and could do what he wanted and that upper management supported him. He also changed appellant's schedule and failed to rotate her weekends.

Appellant additionally related that on February 21, 2018 R.M. had told her that he would deny her leave requests and change her work schedule to conflict with daycare hours if she did not take on some of his job assignments. R.M. requested that she sign a voluntary downgrade, but she refused. On April 4, 2018 he became upset in a meeting with an employee. When A.S. arrived R.M. used profanity and related that he was going to practice at the gun range. He smelled of alcohol. Appellant related that R.M. had punched the inside of his hands in front of her and two other employees. She believed that her safety and those of her employees were at risk and noted that the police had been contacted on April 4 and January 14, 2018 about R.M.'s behavior. R.M. commented about her hair and clothing in front of A.S. and laughed when he asked her to stop. On July 10, 2018 he had called to appellant and then put his hands down his pants.

Appellant further submitted evidence regarding her request for reasonable accommodation by the employing establishment.

By decision dated November 8, 2019, OWCP's hearing representative vacated the June 27, 2019 decision. She noted that OWCP had termed numerous incidents as factors of employment, but had also found that appellant had not established the occurrence of many of the listed incidents or that they had not occurred in the performance of duty. The hearing representative remanded the case for OWCP to make proper findings of fact regarding the alleged employment factors.

By decision dated November 22, 2019, OWCP denied appellant's emotional condition claim, finding that she had not established any compensable employment factors.

On December 12, 2019 appellant requested reconsideration.[4] She advised that she was a supervisory store associate rather than a store clerk, as OWCP had indicated in its decision.

Thereafter, in a letter regarding an August 17, 2018 meeting, appellant related that she had not missed more than three days of work without a physician's note and questioned why she needed permission from S.E. to attend appointments with the Department of Veterans Affairs. She asserted that it was retaliation for filing an EEO complaint.

By decision dated March 10, 2020, OWCP denied modification of its November 22, 2019 decision.

LEGAL PRECEDENT

To establish an emotional condition in the performance of duty, a claimant must submit: (1) factual evidence identifying an employment factor or incident alleged to have caused or contributed to his or her claimed emotional condition; (2) medical evidence establishing that he or she has a diagnosed emotional or psychiatric disorder; and (3) rationalized medical opinion

[4] OWCP received a November 12, 2019 affidavit from C.M., a grocery manager. C.M. advised that he was not appellant's supervisor as she did not work in grocery.

evidence establishing that the accepted compensable employment factors are causally related to the diagnosed emotional condition.[5]

Workers' compensation law does not apply to each and every injury or illness that is somehow related to a claimant's employment. There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within the purview of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is deemed compensable.[6] However, disability is not compensable when it results from factors such as an employee's fear of a reduction-in-force, or frustration from not being permitted to work in a particular environment, or to hold a particular position.[7]

For harassment or discrimination to give rise to a compensable disability under FECA, there must be probative and reliable evidence that harassment or discrimination did in fact occur.[8] Mere perceptions of harassment are not compensable under FECA.[9]

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employing establishment rather than the regular or specially assigned work duties of the employee and are not covered under FECA.[10] Where, however, 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.[11]

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 factors of employment and may not be considered.[12] If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor. When the matter asserted is a

[5] *See S.K.*, Docket No. 18-1648 (issued March 14, 2019); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

[6] *A.C.*, Docket No. 18-0507 (issued November 26, 2018); *Pamela D. Casey*, 57 ECAB 260, 263 (2005); *Lillian Cutler*, 28 ECAB 125, 129 (1976).

[7] *Lillian Cutler*, *id*.

[8] *S.L.*, Docket No. 19-0387 (issued October 1, 2019); *S.B.*, Docket No. 18-1113 (issued February 21, 2019).

[9] *Id*.

[10] *See R.M.*, Docket No. 19-1088 (issued November 17, 2020); *Thomas D. McEuen*, 41 ECAB 387 (1990); *reaff'd on recon.*, 42 ECAB 556 (1991).

[11] *M.A.*, Docket No. 19-1017 (issued December 4, 2019).

[12] *See R.B.*, Docket No. 19-0434 (issued November 22, 2019); *O.G.*, Docket No. 18-0359 (issued August 7, 2019).

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.[13]

ANALYSIS

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

Appellant has not attributed her condition to the performance of her regularly or specially assigned duties under *Cutler*.[14] Instead, she alleged error and abuse in administrative matters and harassment and discrimination by management, specifically by R.M., her first-line supervisor.

With regard to her allegations of error and abuse, appellant alleged that the employing establishment erred in matters regarding leave and her requests for reasonable accommodation. She asserted that S.E. required her to disclose health information when requesting sick leave for medical appointments and that J.V. had told her that she needed to call her supervisor to request leave instead of calling the "sick phone." Appellant submitted an e-mail from A.S., a coworker, who advised that appellant was the only manager who could not call in to use sick leave. In *Thomas D. McEuen*,[15] 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 employer and do not bear a direct relation to the work required of the employee. The Board has further held that disputes regarding the handling of leave[16] and requests for reasonable accommodation[17] are administrative functions of the employing establishment and, absent error or abuse, a claimant's disagreement or dislike of such a managerial action is not compensable.[18] While appellant has submitted evidence from A.S. corroborating that she was the only manager who could not call in to use sick leave, this is insufficient to establish error or abuse in an administrative or personnel matter. J.V., a manager, informed her to contact her supervisor if she required leave. M.K., a manager, advised in a March 15, 2018 e-mail that appellant had called the employee line requesting leave instead of informing her supervisor. He noted that S.E. had advised all managers to telephone their supervisors if they are unable to work. On August 14, 2018 S.E. notified appellant that she had to request leave personally because of her unsatisfactory leave record. As appellant has not submitted evidence to establish error or abuse by management in these administrative and personnel matters, the Board finds that she has not established a compensable employment factor in this regard.[19]

With regard to appellant's allegations of harassment, in a statement dated April 30, 2019, appellant alleged that R.M. continually commented on her ethnicity, age, military service, clothing,

[13] *Id*.

[14] *Supra* note 6.

[15] *See Thomas D. McEuen, supra* note 10.

[16] *O.G.*, Docket No. 18-0359 (issued August 7, 2019); *Jose L. Gonzalez-Garced*, 46 ECAB 559 (1995).

[17] *M.S.*, Docket No. 19-1589 (issued October 7, 2020); *Judy L. Kahn*, 53 ECAB 321 (2002).

[18] *L.S.*, Docket No. 18-1471 (issued February 26, 2020).

[19] *L.S.*, *id.*; *R.V.*, Docket No. 18-0268 (issued October 17, 2018).

and hairstyle. She maintained that he referred to her as "Pocahontas" and to the cashiers as "sweetheart" and "*mija*." Appellant further asserted that R.M. had locked her out of their shared office. In a March 9, 2018 memorandum, J.V. noted that, on that date, appellant had informed him that R.M.'s manner and tone was threatening and that she was uncomfortable with him referring to the cashiers as "sweetheart" and "*mija*." She also advised that he had locked her out of her office and appeared overwhelmed. On March 11, 2018 J.V. indicated that he had spoken to R.M. about appellant's complaints of harassment. R.M. related that he could neither confirm nor deny her allegations. He acknowledged that he may have referred to cashiers as "sweetheart" and "*mija*." J.V. instructed R.M. to not use such terms at work, to leave the door to the office open, and to remain calm and collected. In a declaration dated January 9, 2019, J.V. related that R.M. had changed the key for the door because things had gone missing and that he had counseled him to make sure appellant had access to the office in the future. J.V. also maintained that he had learned about R.M. blocking the door with furniture during working hours from S.E. J.V.'s statement confirms that R.M. referred to cashiers as "sweetheart" or "*mija*," and prevented appellant from accessing her office. He further acknowledged that he counseled R.M. to remain calm and collected at work. In an April 4, 2018 police report, A.S. corroborated that R.M. was yelling and waving his hands. In an e-mail dated April 26, 2019, he further corroborated appellant's allegation that R.M. had bullied and harassed appellant and inappropriately commented on her hair and clothing. As noted, verbal altercations and difficult relationships with coworkers, when sufficiently detailed and supported by the record, may constitute compensable factors of employment.[20] Consequently, appellant has established harassment by R.M. as a compensable employment factor with respect to the allegations that R.M. referred to female employees as "sweetheart" or "*mija*," locked appellant out of her office, yelled and waved his hands, and commented on her hair and clothing.

Appellant's remaining allegations regarding harassment, however, do not constitute compensable factors of employment. Appellant alleged that on March 15, 2018, after drinking alcohol at lunch, he had blocked the door to their office and slept and that on April 4, 2018, she had filed a police report against R.M. because of his cursing and screaming. In an October 29, 2018 statement, she maintained that when A.S. arrived at R.M.'s office on April 4, 2018, he asserted that he was going to practice at the gun range and punched the inside of his hands with his fist. Appellant further alleged that R.M. put his hands down his pants in front of her on July 10, 2018. However, the case record does not contain evidence to corroborate that these events factually occurred. On May 4, 2019 S.E. advised that she had no knowledge of J.V. and R.M. locking an employee in a cash office and noted that the door locked and opened from the inside. In a statement dated January 9, 2019, J.V. indicated that he had no knowledge of R.M. changing schedules of appellant's subordinates. As appellant has not corroborative evidence in support of these allegations, the Board finds they do not constitute compensable employment factors.[21]

As appellant has established compensable factors of employment, OWCP must review the medical evidence of record in order to determine whether she has established that her emotional

[20] *S.F.*, Docket No. 20-0249 (issued December 31, 2020); *J.M.*, Docket No. 16-0717 (issued January 12, 2017).

[21] *R.M.*, Docket No. 17-1492 (issued July 5, 2018).

condition is causally related to the compensable work factors.[22] After this and other such further development as deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 10, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: July 15, 2022
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

[22] *M.J.*, Docket No. 20-0953 (issued December 8, 2021); *K.W.*, Docket No. 20-1504 (issued July 30, 2021); *Robert Bartlett*, 51 ECAB 664 (2000); *Margaret S. Krzycki*, 43 ECAB 496 (1992).