COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 024201-04**

Joanne Talbot	Employee
Department of Correction	Employer
Commonwealth of Massachusetts	Self-Insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan and McCarthy)

APPEARANCES
Robert J. Deubel, Jr., Esq., for the employee
Vincent F. Massey, Esq., for the insurer

HORAN, J. The employee appeals from an administrative judge's decision denying her compensation claim for a mental or emotional disability. [1] We reverse the decision and recommit the case for further findings of fact.

Joanne Talbot, age forty-two at hearing, has been a corrections officer since 1988. She claims incapacity and medical benefits for a work-related emotional injury resulting from workplace harassment by Pamela Painter, who is also a corrections officer. This harassment culminated in a confrontation with Painter at work on May 26, 2004.

Several months prior to the May 26, 2004 incident, the employee asked not to be scheduled to work with Painter. [2] The employee was frightened by what she perceived as Painter's threats to assault another employee, and troubled by the derogatory and vulgar comments Painter made about other female co-workers. The employee felt unsafe when partnered with Painter. (Dec. 603-604.) The employee's supervisor separated the employee and Painter as requested, but the situation between the two employees

[1] General Laws c. 152, § 1(7A), provides, in relevant part:
Personal injuries shall include mental or emotional disabilities only where the predominant contributing cause of such disability is an event or series of events occurring within any employment. . . . No mental or emotional disability arising principally out of a bona fide, personnel action including a transfer, promotion, demotion or termination except such action which is the intentional infliction of emotional harm shall be deemed to be a personal injury within the meaning of this chapter.

[2] Two other female corrections officers had also requested that they not be paired with Painter at work; their requests were also granted. (Dec. 603, 610.)

worsened. The employee heard that Painter was using vulgarities to describe her. (Dec. 604.) The employee and Painter made derogatory drawings and/or notations about each other on a calendar in the workplace. (Dec. 605.) On May 26, 2004, Painter's partner called the employee twice to inform her that Painter had just noticed the notations on the calendar. He said she was "screaming and yelling," saying nasty things about the employee, and that Painter was "psychotic" and "out of control." That evening, Painter came up behind the employee and said, "Joanne, we need to talk." The employee responded that she had nothing to say. Painter yelled at the employee: "You're gonna talk to me you fat assed bitch!" Fearing Painter was going to assault her, the employee opened a "trap door" and confined herself in the prisoners' area. (Dec. 605-606.)

Over the next few days, both the employee and Painter filed complaints against each other. By May 30, 2004, the employee was anxious, teary-eyed, scared, could not sleep, and was nervous about going to work. (Dec. 609.) A few days later, she sought medical treatment at the office of her family practitioner, Dr. William Griever. [3] She was advised to take, and took, a few days off. On June 8, 2004, the day after she returned to work, she had a contentious meeting with the affirmative action officer regarding Painter's complaint. The employee refused to answer any questions without her attorney present, and left the meeting abruptly. She then filed an incident report, and again left work. She called the employer's stress unit, which referred her to counseling. The employee continued to work, taking a few "stress days" off until July 31, 2004, when she finally left work alleging continuing harassment by Painter, and frustration with the lack of progress in the investigation of the May 26, 2004 incident. On October 26, 2004, the employee returned to work because she feared losing her job. (Dec. 611.)

> At conference, the judge denied the employee's claim for three months of weekly incapacity benefits and medical treatment. The employee appealed.
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> In his decision, the judge recounted the events as described by the employee leading up to the incident of May 26, 2004, and found:
> The evidence is uncontroverted that Painter approached the employee and said "Joanne, we need to talk." This is not a hostile act. After the employee refused to talk with her, Painter acted in an extremely inappropriate, unprofessional and vulgar manner. The employee may have responded with an offensive pantomime of her own before retreating into the prisoner's area.

(Dec. 614-615.) Articulating the legal standard to be applied, the judge continued:

[3] Contrary to the judge's finding that the employee was treated by Dr. Griever while she was out of work, Dr. Griever testified that he did not actually see the employee in conjunction with the workplace incident. Rather, the employee saw Dr. Griever's nurse practitioner and physician's assistant. (Dep. 8.)

> The employee's fear of a violent confrontation initiated by Pamela Painter must be viewed from the vantage point of the employee's perspective, not by an objective standard. *However, the employer is not responsible for the bad acts of a co-worker with no supervisory authority, when such bad acts do not result in a physical injury, have no relationship to the employment, and the employer responds promptly and appropriately to the co-worker's bad acts, as the employer did in this action.*

(Dec. 616; emphasis added.)

The judge concluded:

> The employee's psychiatric injury does not arise out of or in the course of a specific work incident or a series of work incidents or from an identifiable condition present in the employment. *The injury arose out of a non-work related personality conflict, writings on a calendar and name-calling. None of the offensive actions or conversations by Pamela Painter and the employee were related to work conditions or issues. The employee did not want to work with Painter due to Painter's gossiping and non-work related subjects.*

(Dec. 613-614; emphasis added.) The judge further found the employer's good faith efforts to resolve the conflict "were all bona fide personnel actions." (Dec. 617.) The judge denied and dismissed the employee's claim without reaching the issues of causal relationship, extent of incapacity, or the employee's entitlement to medical benefits. (Dec. 617.)

We agree the judge's decision is contrary to law. The series of events occurring at the employee's workplace, assuming an adequate medical opinion on causal relationship, support a finding that the employee suffered a personal injury arising out of and in the course of her employment. See Robinson's Case, 416 Mass. 454 (1993). [4] The judge's

[4] The injury arises out of the employment, even in cases where the employee participates in or is the instigator of a conflict, "if it can be seen that the whole affair had its origin in the nature and conditions of the employment, so that the employment bore to it the relation of cause to effect." Dillon's Case, 324 Mass. 102, 107 (1949). Fault plays no role in determining whether an injury arises out of the employment, unless the employee is found guilty of serious and willful misconduct under § 27. Dillon, supra at 106; Frechette v. Northeastern University, 21 Mass. Workers' Comp. Rep. 105, 111 (2007), citing Nason, Koziol and Wall, Workers' Compensation, § 20.5 (3d ed. 2003). These principles apply in cases of emotional injury as well as physical injury. See Robinson, supra at 460, quoting Zerofski's Case, 385 Mass. 590 (1982), and Caswell's Case, 305 Mass. 500 (1940). While the employee must satisfy § 1(7A) by proving her emotional disability was predominantly caused by an event or series of events occurring within the employment,

conclusion that the employer's response was a bona fide personnel action does not change this. Putting aside the threshold question of whether the employer's actions here are of the type contemplated by the phrase "personnel action" in the last sentence of § 1(7A), [5] there is no medical evidence of record to support a finding that the employer's actions are the principal cause of the employee's claimed emotional disability. Payton v. Saint Gobain Norton Co., 21 Mass. Workers' Comp. Rep. ___ (December 19, 2007)(discussing burden of production and proof under § 1(7A) in purely mental or emotional disability claims); cf. Cornetta's Case, 68 Mass. App. Ct. 107 (2007)(discussing standard of proof where emotional disability flows from work-related physical injury). The unanswered question remaining is whether the work events, as found, are the "predominant contributing cause of [the employee's] disability." G. L. c. 152, § 1(7A).

The judge misstated the applicable law when he held that "the employer is not responsible for the bad acts of a co-worker with no supervisory authority, when such bad acts do not result in a physical injury, have no relationship to the employment, and the employer responds promptly and appropriately to the co-worker's bad acts. . . ." (Dec. 616.) The liability of the insurer to pay compensation for purely emotional injuries causally related to the "bad acts" of non-supervisory co-employees is documented in many cases. Albanese's Case, 378 Mass. 14 (1979)(insurer liable for employee's emotional injury resulting from specific incidents of friction with co-workers); May's Case, 67 Mass. App. Ct. 209 (2006)(employee's emotional disability predominantly caused by hostile work environment due to co-workers' verbal abuse and harassment was compensable); Payton, supra (employee's emotional disability predominantly caused by racial harassment by co-employees and supervisors at work was compensable); see Avola v. American Airlines Co., 20 Mass. Workers' Comp. Rep. 293 (2006) (employee's emotional disability resulting, in part, from perceived graffiti threats made by co-employees, arose out of and in the course of employment). We also note the plain meaning of "personal injury" as defined in § 1(7A) imparts no requirement that the harm caused by a co-worker be physical for an industrial injury to be compensable.

Furthermore, the judge's finding that the conflict between the employee and Painter has "no relationship to the employment," (Dec. 616), but "arose out of a non-work-related personality conflict" unrelated to "work conditions or issues," (Dec. 613), is not grounded in the evidence, and misconstrues the type of work connection required for an injury to "arise out of" the employment relationship.[6] Two cases involving the question of whether

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she need not prove that her disability resulted from "an unusual and objectively stressful or traumatic event." Robinson, supra at 460, quoting Kelly's Case, 394 Mass. 684 (1985).

[5] See Agosto v. M.B.T.A., 21 Mass. Workers' Comp. Rep. ___ (December 14, 2007)(Horan, J., concurring).

[6] See n.4, supra.

the exclusivity provision of the workers' compensation act bars an employee's civil suit are instructive.[7] In Green v. Wyman-Gordon Co., 422 Mass. 551 (1996), the court held the employee's emotional injury resulting from threats and harassment by co-workers who used obscene language and sexual slurs arose out of and in course of her employment. Id. at 558. Similarly, in Brown v. Nutter, McClennen & Fish, 45 Mass. App. Ct. 212 (1998), the court held an employee's emotional injury resulting from a co-employee compelling her to forge her signature on his personal mortgage note, and then to notarize the forged document, arose out of and in the course of her employment. In neither case did the employee's emotional injury caused by a co-employee's actions (sexual harassment and coercion to perform acts for the personal benefit of the co-employee, respectively) arise out of the "nature" of the employment. However, the injuries *did* arise out of the "conditions, obligations or incidents of employment . . . looked at in any of its aspects." Caswell's Case, supra at 502; see Brown, supra at 215(arising out of provision to be construed broadly); see also Doe v. Purity Supreme, 422 Mass. 563, 566 (1996)(emotional injury suffered by employee raped at work by assistant store manager arose out of employment; the two employees were not connected in any way except through employment). This case does not present a situation where a personal disagreement was imported into the workplace, with the employment playing no essential role in the injury. Cf. McLean-Jenner v. Beverly Manor of Plymouth Nursing Home, 12 Mass. Workers' Comp. Rep 513 (1998) (workplace murder of employee by estranged husband did not arise out of employment because it was imported into employment from claimant's private life and not exacerbated by the employment).

Accordingly, we reverse the decision and recommit the case for further findings of fact. Because the judge has yet to evaluate the medical evidence, we express no opinion on the issues raised concerning that evidence.

So ordered.

Mark D. Horan
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

[7] Common law actions are ordinarily barred by G. L. c. 152, § 24, when the plaintiff is an employee, his condition is a personal injury, and the injury arises out of and in the course of employment within the meaning of G. L. c. 152, § 26.

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William A. McCarthy
Administrative Law Judge

Filed: March 21, 2008