COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. Division of Administrative Law Appeals

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DEBORAH FAGGIOLI, Fax: (617) 626-7220

 *Petitioner* **www.mass.gov/dala**

Docket No: CR-14-296

 *v.*

FALL RIVER RETIREMENT BOARD,

 *Respondent*

**Appearance for Petitioner:**

 Mark A. Azar, Esq.

 Azar & Wheatley

 170 Pleasant Street, Suite 203

 Fall River, MA 02721

**Appearance for Respondent:**

 Christopher Collins, Esq.

 Law Offices of Michael Sacco, P.C.

 P.O. Box 479

 Southampton, MA 01073

**Administrative Magistrate:**

Angela McConney Scheepers, Esq.

**SUMMARY**

The Petitioner has failed to prove by a preponderance of the evidence that she suffered a personal injury or hazard undergone while in the performance of her duties. The Respondent’s decision to deny the Petitioner’s accidental disability retirement application without convening a medical panel is affirmed.

**DECISION**

Pursuant to G.L. c. 32, § 16(4), the Petitioner, Deborah Faggioli, appealed the May 22, 2014 decision of the Fall River Retirement Board (Board), denying her application for accidental disability retirement benefits.

I held a hearing at the offices of the Division of Administrative Law Appeals (DALA) on January 26, 2016. The hearing was digitally recorded. Ms. Faggioli called Paul Marshall, the former principal of the BMC Durfee High School (Durfee), and testified on her own behalf. I marked the Petitioner’s Pre-Hearing Memorandum “A” for identification and the Board’s Pre-Hearing Memorandum “B” for identification. I admitted fifteen exhibits (Exhibits 1-15) into evidence.

Ms. Faggioli submitted a Post-Hearing brief on April 22, 2016. The Board submitted a Post-Hearing Brief on April 28, 2016, whereupon the administrative record closed.

**FINDINGS OF FACT**

Based on the documents admitted into evidence and the testimony presented at the hearing, I make the following findings of fact:

1. The Petitioner, Deborah Faggioli (born in 1956), was hired by the Fall River Public Schools (FRPS) as an Information Systems Clerk in the Special Education Department in September 2004. Her last position was as the Special Education Secretary, with her office located at the Durfee High School (Durfee). There were four hundred students at the Durfee. (Exhibits 7 and 13; Testimony of Faggioli.)
2. The Job Description Form for the position of Clerical/Secretary listed the following essential job duties for the incumbent:
	* Demonstrated ability to collect, process and maintain confidential data related to staff and/or students
	* Demonstrated experience in working with various software applications (e.g. Microsoft Office, X2, MUNIS)
	* Demonstrated ability to communicating effectively with others and to maintain confidentiality at all times
	* Demonstrated ability to prepare official correspondence, maintain filing system for confidential staffing records and files (e.g. personnel, medical)
	* Demonstrated ability to take initiative and work collaboratively with others within an educational office environment.
	* Ability to perform occasional note taking during interview sessions and investigations.

(Exhibit 7.)

1. Ms. Faggioli was also responsible for arranging transportation of the students, opening and sorting mail, answering phones, and creating meeting agendas for the teachers. (Testimony of Faggioli.)
2. Ms. Faggioli reported to Gerald Lima, the Special Education Department Head. (Exhibit 9.)
3. In the summer of 2010, there were four other information systems clerks sharing the Depertment’s work responsibilities with Ms. Faggioli. Due to budget cuts, by 2011, Ms. Faggioli was the only clerk performing the work. (Exhibit 13; Testimony of Faggioli.)
4. When the teaching staff left for vacation in June 2011, the clerks had completed 235 out of the 400 individualized education plans needed for the students. This left more than 150 incomplete plans. (Exhibit 13; Testimony of Faggioli.)
5. On August 2, 2011, Ms. Faggioli was informed by Principal Paul Marshall that in addition to her regular job duties and the more than 150 individualized education plans, she was now responsible for completing the middle school transportation list. Ms. Faggioli felt that this information had been communicated to her in strident tones. She felt overwhelmed by this great expansion of her work duties, and experienced various symptoms including dizziness, increased anxiety and stress. She left during her lunch break, and went home. There, she called the school and said that she would not be returning to work. (Exhibit 13; Testimony of Faggioli.)
6. On August 5, 2011, Ms. Faggioli’s Primary Care Physician (PCP), Christine Pacheco, M.D., diagnosed her with adjustment disorder associated with work. The physician advised that Ms. Faggioli not return to work until further notice due to stress. Ms. Faggioli saw Dr. Pacheco again on August 19 and September 2, 2011. On September 2, 2011, Dr. Pacheco faxed a note to the FRPS that Ms. Faggioli could return to work after the week of September 12, 2011. On September 14, 2011, Dr. Pacheco advised that Ms. Faggioli return to work in a part-time or light duty capacity in October 2011. (Exhibits 10 and 13; Testimony of Faggioli.)
7. On September 20, 2011, Ms. Faggioli met with the Employee Assistance Program (EAP). Ronald G. Pelletier, LICSW, assessed that Ms. Faggioli expressed “frustration about multiple work issues,” including but not limited to “work overload and staffing communication.” (Exhibits 10 and 11). (Exhibit 13.)
8. In the meantime, Ms. Faggioli’s father-in-law had passed away, and she was responsible for making funeral arrangements. (Exhibit 13; Testimony of Faggioli.)
9. On October 24, 2011, Ms. Faggioli met with Mr. Marshall, Mr. Lima, an EAP counselor and a representative from the Human Resources (HR) office in order to plan her return to work. Ms. Faggioli requested personal and vacation days in addition to bereavement time. Mr. Marshall informed Ms. Faggioli that he expected her to return to work on Monday, November 7, 2011, and to contact Mr. Lima if she needed extra time. (Exhibits 8 and 13; Testimony of Faggioli.)
10. On October 26, 2011, Ms. Faggioli went to the Durfee to see Mr. Lima. He advised her to see Mr. Marshall. Mr. Marshall spoke to Ms. Faggioli in strident language, making her feel that she was not welcome to return to work. (Testimony of Faggioli.)
11. On November 2, 2011, Ms. Faggioli received a phone call from the high school reminding her to report for work on November 7, 2011. Ms. Faggioli responded that Mr. Marshall did not want her to report to work. (Exhibit 13; Testimony of Faggioli.)
12. On November 7, 2011, Ms. Faggioli did not appear for work. (Exhibits 8 and 9; Testimony of Faggioli.)
13. On November 8, 2011, the HR Executive Director, Joany Santa, telephoned Ms. Faggioli. Ms. Santa told Ms. Faggioli that she was not on an approved leave, and had been expected to return to work on November 7, 2011. Ms. Santa asked Ms. Faggioli to report to Mr. Lima on November 9, 2011 at 7:30 a.m., and also sent Ms. Faggioli an electronic mail message confirming the conversation. (Exhibit 9.)
14. When Ms. Faggioli failed to appear at work on November 9, 2011, Ms. Santa sent her another electronic mail message reminding her of the conversation they had had the day before. (Exhibit 9.)
15. On November 14, 2011, Mr. Marshall issued Ms. Faggioli a written reprimand for failing to report to work on November 7, 2011 and for failing to contact the school. (Exhibits 8 and 9.)
16. Ms. Faggioli met with Ms. Santa on November 18, 2011. Ms. Santa inquired about Ms. Faggioli’s intentions since she had not reported to work in over ten days, informed her that termination proceedings had begun, and advised her to see the FRPS superintendent. Ms. Faggioli declined to meet with Mr. Marshall. (Exhibit 9.)
17. On November 18, 2011, Ms. Faggioli applied for unemployment insurance benefits. (Exhibit 9.)
18. By letter dated December 1, 2011, FRPS Superintendent Meg Mayo Brown informed Ms. Faggioli that she was involuntarily terminated for position abandonment, effective December 5, 2011, due to her failure to return to work or contact the Human Resource Officer in order to resign. (Exhibit 9.)
19. On December 14, 2011, Ms. Faggioli filed a workers’ compensation claim related to her August 2, 2011 injury. (Exhibit 13.)
20. Michael Rater, M.D. conducted an Independent Medical Examination (IME) for Ms. Faggioli’s workers’ compensation claim on February 10, 2012. He spoke with Ms. Faggioli and examined Dr. Pacheo’s records and the EAP counseling records. (Exhibit 13.)
21. Ms. Faggioli reported that when she left work, she had been performing the work of four other people in addition to her own job responsibilities. Based on Ms. Faggioli’s statements, Dr. Rater could not discern her specific job assignments, and whether they were unreasonable. He found that Ms. Faggioli’s claims were vague and made in the guise of allegations and second-hand information. It was clear to him that she was in conflict with people at her job. (Exhibit 13).
22. Dr. Rater wrote:

Assuming the school was acting in good faith with Ms. Faggioli and having her work reasonable job assignments there has got to be other information that I am not aware of regarding Ms. Faggioli’s work performance that has led her employer to have concerns about her work performance. ...

She stated that she had gone from a “10 to a 5” regarding the intensity of her symptoms, though it was not clear from the records over what period of time that was. Ms. Faggioli was not down and depressed most of the day most every day. She had good energy and initiative and motivation. She described a very active daily life that included exercise, family, responsibilities, social engagement, church attendance, and special areas of interest that she pursued. The history was not consistent with someone with a significant mental condition.

(Exhibit 13.)

1. In regard to treatment, Dr. Rater wrote, “Ms. Faggioli does not require any further mental health treatment. She has a condition that is in remission or has resolved.” (Exhibit 13.)
2. On February 15, 2013, Mrs. Faggioli submitted an application for accidental disability retirement benefits. (Exhibit 3.)
3. On her application, Ms. Faggioli cited Post-Traumatic Stress Disorder (PTSD) injury, claiming that she was “unable to go back into school,” had a “fear of harsh treatment,” was “unable to stay focused,” experienced “sleepless nights, nightmares, depression, anxiety, a short fuse” and “headaches.” Under the heading, “Please describe the duties that you were required to perform in your current position,” Ms. Faggioli wrote that she was required to, “Greet parents, answer phones, process IEP’s, maintain logs, and schedule meetings” everyday. She stated that she was last able to perform all of the essential duties of her position on August 2, 2011. (Exhibit 3.)
4. Mrs. Faggioli cited August 2, 2011 and October 26, 2011 as the dates of her disability. Under “Description of Incident(s) or hazard,” Ms. Faggioli wrote, “Verbally abused by my principal – After hearing remarks felt horror and helplessness.” (Ex. 3).
5. Ms. Faggioli submitted a January 31, 2013 Physician’s Statement from Lucille Bess Mehring, a psychiatrist. Dr. Mehring diagnosed the petitioner with post-traumatic stress disorder (PTSD), and noted that Ms. Faggioli’s symptoms “easily met DSM IV criteria for PTSD. In response to the heading, “Applicant’s Date(s) of Injury(s) of exposure(s), Dr. Mehring wrote August 2, 2011 as the date of injury. Later in the same document, Dr. Mehring certified causation of Ms. Faggioli’s condition due to the “main incident [on] … October 26, 2011, when patient was verbally attacked and intimidated by superior. A hostile work environment was experienced in the months preceding this incident.” Dr. Mehring prescribed a daily drug regimen of Prazosin 3mg and citalopram 30mg. She wrote that Ms. Faggioli was undergoing “psychotherapy EMDR,” and had made mild improvement in the previous year. Dr. Mehring certified permanency, finding that the “Patient has not made significant progress in the 18 months of treatment.” (Exhibit 4.)
6. The FRPS submitted the Employer’s Statement, signed by Mr. Marshall on July 30, 2013. Mr. Marshall stated that Ms. Faggioli was discharged on December 5, 2011 for job abandonment, and alleged PTSD “due to workplace/supervisor.” (Exhibit 6.)
7. On May 22, 2014, the Board denied Ms. Faggioli’s application for accidental disability benefits without convening a medical panel. In its letter, the Board wrote, “Ms. Faggioli’s claim does not constitute a personal injury or hazard undergone while in the performance of her duties.” (Exhibit 1.)
8. On June 6, 2014, Ms. Faggioli filed a timely appeal. (Exhibit 2.)

**CONCLUSION AND ORDER**

The decision of the Fall River Retirement Board to deny the accidental retirement application filed by Deborah Faggioli, without first convening a regional medical panel, is affirmed.

To qualify for accidental disability retirement, the Petitioner must prove that she is permanently and totally disabled “by reason of a personal injury sustained or a hazard undergone as a result of, and while in the performance of, [her] duties at some definite place and at some definite time ... .” G.L. c. 32, § 7(1). An applicant bears the burden of proving her entitlement to accidental disability retirement by a preponderance of the evidence. *Lisbon v. Contributory Retirement Appeal Bd*., [41 Mass. App. Ct. 246](http://sll.gvpi.net/document.php?id=sjcapp:41_mass_app_ct_246), 255 (1996).

Although the term “personal injury” is not defined in chapter 32, courts have consistently applied the definition of “personal injury” from G.L. c. 152, § 1(7A). *See, e.g.,* *Zavaglia v. Contributory Retirement Appeal Bd*, [345 Mass. 483](http://sll.gvpi.net/document.php?id=sjcapp:345_mass_483) (1963). General Laws c. 152, § 1(7A) provides, “[p]ersonal 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.” Thus, emotional and/or mental disabilities may qualify as personal injuries. *See, e.g*., *Albanese’s Case*, [378 Mass. 14](http://sll.gvpi.net/document.php?id=sjcapp:378_mass_14), 14-15 (1979) (holding employee is entitled to compensation if incapacitated by a mental or emotional disorder causally related to a series of specific stressful work-related incidents).

However, “[n]o mental or emotional disability that arises 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.” G.L. c. 152, § 1(7A). Such bona fide personnel actions include preliminary actions such as investigatory meetings with an employee and similar activities that could lead to any of the enumerated personnel actions:

[I]t appears improbable that the Legislature would purposefully prohibit compensation for such serious and formal events as transfer, promotion, demotion, and termination, but then allow compensation for the preliminary and tentative events of investigation and fact finding about the employment relationship or performance. A formal change of employment status is far more likely to cause emotional or mental health consequences than supervision, criticism, and investigation. Those preliminary activities may cause concern for an employee, but they do not inflict the impact of a final job action. If the Legislature intended to bar coverage for emotional injury caused by status-altering action, it most logically intended to bar coverage for emotional injury caused by the preliminary and less serious processes of supervision, criticism, and investigation.

*Upton's Case,*[84 Mass. App. Ct. 411](http://sll.gvpi.net/document.php?id=sjcapp:app13k-2), 414 (2013).

 Ms. Faggioli checked the “personal injury” box on her application. Both the application and the Physician’s Statement referenced a hostile work environment, verbal attacks and intimidation. Ms. Faggioli specifically cited incidents on August 2, 2011 and October 26, 2011 as the sources of her disability, which included PTSD, headaches, anxiety, and depression. There were no witnesses to these incidents, and there is no evidence that the two events took place. There is no corroborating evidence that Mr. Marshall, or any other member of the Durfee or FRPS staff, ever verbally accosted Ms. Faggioli.

 Even if Ms. Faggioli had felt depressed or anxious as a result of these alleged interactions of Mr. Marshall and her former coworkers, these communications about her new job duties constituted bona fide personnel actions. The addition of the middle school transportation lists to Ms. Faggioli’s duties on August 2, 2011 was a bona fide personnel action, as the FRPS wrestled with budgetary cuts.

Ms. Faggioli failed to introduce any evidence to support a claim that her employment at the Durfee subjected her to such an “identifiable condition … that is not common and necessary to all or a great many occupations.” *Blanchette*, 20 Mass. App. Ct. at 485. Such a failure of proof is understandable in light of the long established principle, first articulated in *Blanchette*, that conflicts with management and other co-employees do not meet the criteria for such a claim. This has often been reiterated. For example, in *Sugrue v. Contributory Retirement Appeal Bd*., [45 Mass. App. Ct. 1](http://sll.gvpi.net/document.php?id=sjcapp:45_mass_app_ct_1), 5-6 (1998), the Appeals Court noted:

[T]he cumulative stress created by [Sugrue's] humiliating encounters and job conflicts with his superiors was not an “identifiable condition . . . that is not common and necessary to all or a great many occupations.” *Blanchette v. Contributory Retirement Appeal Bd*., 20 Mass. App. Ct. at 487(citations omitted). As *Blanchette* teaches, job conflicts and arguments with superiors and subordinates, including a series of incidents over several years creating feelings of “persecution” and unfair treatment and ultimately a diagnosed mental illness, do not ”distinguish [the applicant's] occupation from a wide variety of other occupations where employees face similar pressures and demands.” 20 Mass. App. Ct. at 480, 484-485, 487. Cf. *Adams v. Contributory Retirement Appeal Bd*., [414 Mass. 360](http://sll.gvpi.net/document.php?id=sjcapp:414_mass_360), 366-367, 609 (1993), and cases cited (discussing distinction between physical activities unique to job, contrasted with those required in a “wide variety of other occupations”). Under *Blanchette*, supra at 484, such “long standing problems in [the plaintiff’s] ability to get along with people,” do not, standing alone, satisfy the “cumulative effects” hypothesis that underlay Sugrue’s claim.

Ms. Faggioli testified that during her October 26, 2011 meeting with Mr. Marshall and Mr. Lima, the principal said, “I don’t want you in the building. The job is not yours and nobody likes you.” Even if this interaction had occurred, it does not amount to the intentional infliction of emotional distress. For actions to meet the standard of intentional infliction of emotional distress, they must be “extreme and outrageous, beyond all possible bounds of decency, and utterly intolerable in a civilized society.” *See Barnacle v. Winthrop Retirement Bd*., CR-13-367 (Mass. Div. of Admin. Law App., Aug. 21, 2015), citing Foley *v. Polaroid Corp.*, 400 Mass. 82, 99 (1987). Further, liability “cannot be predicated upon ‘mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities,’ nor even is it enough ‘that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by ‘malice.’” *Id.*; *see e.g.* Restatement (Second) of Torts § 46, comment d (1965). Even if Ms. Faggioli felt anxious or depressed, the acts of asking someone to do something they are not ordinarily responsible for doing in workplace, or allegedly telling them that they are not welcome at a job anymore are not “extreme and outrageous.” *See O’Connor v. State Board of Retirement*, CR-13-372 (Mass. Div. of Admin. Law App., Jun. 16, 2017) (“to support a claim for an emotional disability, a petitioner must show that her injury amounts to more than her own feelings of persecution and personal victimization.”)

Ms. Faggiloi left work on August 2, 2011, the date to be used in determining disability. *See, e.g. McGrail v. Boston Retirement Bd.*, CR-90-296 (Mass. Div. of Admin. Law App., Feb. 6, 1992.) There has to be some evidence to demonstrate that Ms. Faggioli stopped working due to the medical condition on which her application is based. Here, Ms. Faggioli has not presented a prima facie case in support of her application for accidental disability retirement. *See Forrest v. Weymouth Retirement Bd*., CR-12-690, (Mass. Div. of Admin. Law App., Feb. 27, 2014), *aff’d* (Contributory Retirement App. Bd., April 13, 2015).

Even if Ms. Faggioli began experiencing symptoms after her last day performing her duties, it would be irrelevant. At best she would have a “subsequently matured disability,” which cannot form the basis for a disability retirement. *See Forrest*, CR-12-690. *Vest v. Contributory Retirement App. Bd.* stands for the proposition that a disability must mature no later than the last day that the member performs her duties. 41 Mass. App. Ct. 191, 192. In *Vest*, the member police officer became disabled due to hypertension four years after he left the police department. The officer had been diagnosed with hypertension 12 years before his last day of service. Nevertheless, he was able to perform the essential duties of a police officer until his severance for nonmedical reasons. The court concluded that the injury had not matured into a disabling one while the officer was a member in service, and held that the officer “could not claim accidental disability retirement status on the basis of a subsequently matured disability.” *Id*. at 192-194.

Ms. Faggioli is not eligible for accidental disability benefits because she was not totally and permanently disabled on her last day of work due to a work-related disabling condition or incapacity. She was unable to prove that her condition was due to a work-related injury, and thus could not be so injured on the last day of her employment. In processing a disability retirement application, the Board is permitted at any stage of the proceedings to deny the application “if it determines that the member cannot be retired as a matter of law.” 840 CMR 10.09(2).[[1]](#footnote-1) As such, the Board’s denial of Ms. Faggioli’s application for accidental disability retirement was proper.

Accordingly, the Fall River Retirement Board’s denial of Deborah Faggioli’s application for accidental disability retirement is affirmed.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

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Angela McConney Scheepers

Administrative Magistrate

DATED: August 18, 2017

1. *See* 840 CMR 10.9 (2) (providing the rules, as promulgated by PERAC, as to when a local retirement board may dismiss an accidental or ordinary retirement application). “At any stage of a proceeding on an ordinary or accidental disability retirement application the retirement board may terminate the proceeding and deny the application if it determines that the member cannot be retired as a matter of law.” *Id.* [↑](#footnote-ref-1)