

On November 17, 2006, Claimant filed a complaint in the District of Columbia Superior Court (hereinafter, Superior Court). Therein Claimant asserted a claim for assault, battery and intentional infliction of emotional distress against his supervisor Laurent Lala, who was an employee of Employer. Laurent Lala raised as a defense, the applicability of the Act to the proceedings before the Superior Court. As a result, the Superior Court issued an Order to stay its proceedings pending a determination by this tribunal regarding the applicability of the Act to Claimant's claim.

CLAIM FOR RELIEF

Claimant seeks an Order dismissing its application for formal hearing.

ISSUE

Do Claimant's injuries fall within the jurisdiction of the Act?

FINDINGS OF FACT

The parties have stipulated, and I accordingly find, an employer/employee relationship existed between Claimant and Employer.

Based upon review of the record evidence and briefs submitted by the parties, I find the following to be facts. Claimant was employed by Employer since 1997 as a full-time parking valet manager. By May, 2005, Laurent Lala was hired by Employer and became Claimant's supervisor. By December, 2005, Claimant and Lala were involved in a confrontation that Claimant asserts resulted in an assault and battery. Claimant also asserts he has been subjected to an intentional infliction of emotional distress as a result of sexual

harassment inflicted by Lala.

Claimant is not entitled to wage loss benefits as he has not suffered any wage loss as a result of his alleged injuries. Claimant's alleged injuries do not fall within the jurisdiction of the Act. Claimant's emotional distress did not arise out of and in the course of his employment. The circumstances of the assault and battery claim arose out of and in the course of Claimant's employment but falls outside the jurisdiction of the Act as Claimant suffered no wage loss as a result of the assault and battery.

PRINCIPLES OF LAW

The Workers' Compensation Act is a wage loss statute, and disability means injury that results in wage loss. *Landesberg v. District of Columbia Department of Employment Services*, 2002, 794 a.2d 607. The purpose of the Act is to advance the humanitarian goal of statute to provide compensation to employees for work-related disabilities reasonably expeditiously, even in arguable cases.

Section 32-1501 (12) of the Act defines "injury" to mean;

accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of third persons directed against an employee because of his employment.

Section 32-1501 (8) of the Act defines

“disability” as “physical or mental incapacity because of injury which results in the loss of wages”.

Section 7-299 of the D.C. Municipal regulations offers the following definitions:

Claim: an application for benefits made by an injured employee or his or her beneficiary under Section 8, 9, and 10 of the Act.

Benefits: compensation for death, wage loss, medical and hospital treatment, health insurance coverage, and vocational rehabilitation provided pursuant to the Act.

Section 32-1521 of the Act states in relevant part,

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of evidence to the contrary; (1) That the claim comes within the provisions of this chapter...

Section 32-1504 of the Act states in relevant part;

(a) the liability of an employer prescribed in §32-1503 shall be exclusive and in place of all liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to

recover damages from such employer at law on account of such injury or death.

(B) The compensation to which an employee is entitled under this chapter shall constitute the employee’s exclusive remedy against the employer, or any collective-bargaining agent of the employer’s employees and any employee, officer, director or agent of such employer, insurer, or collective-bargaining agent (while acting within the scope of his employment) for any illness, injury, or death arising out of and in the course of his employment...

“Because appellant does not allege an ‘injury’ causing a “disability” which, in combination, would entitle him to guaranteed compensation under the Merit Personnel Act, the exclusivity provision... has no effect on his ability to exercise whatever common law rights are available to him.” *Meklete Telke, v. Foot Traffic*, 699 A.2d 410 at 414 (D.C. 1997) citing *Newman v. District of Columbia*, 518 A2d 698 at 706 (D.C. 1986).¹

¹The District of Columbia Government comprehensive Merit Personnel Act of 1978, as amended, 2001 D.C. Code §1-623.1, *et seq.* governs claims for work related injuries of District Government employees. Its sister statute is the Worker’s Compensation Act D.C. Code 32-1501, *et seq.*, which governs employees of the private sector in the District of Columbia. The precursor to both statutes, or parent statute, is the Longshoremen’s and Harbor Worker’s Compensation Act, 33 U.S.C. §901 *et seq.* It is a common practice in this forum when addressing an issue in the private sector to refer to decisions of the D.C. Court of Appeals in both decisions involving D.C. Code §1-623, and 33-U.S.C. §901, as persuasive authority in

DISCUSSION

The undersigned has reviewed and considered the totality of the evidence, as well as the argument presented by the parties on the issues presented for resolution. To the extent an argument is consistent with the findings of fact, analysis, and conclusions of law contained herein, it is accepted; to the extent an argument is inconsistent therewith, it is specifically rejected.

Claimant was employed with employer as a full-time parking valet manager. His employment began in October, 1997 and ended on September 29, 2006 when Claimant was terminated.

As parking valet manager, Claimant was required to park and retrieve cars and supervise employees who also parked and returned cars. In May, 2005, Employer hired Laurent Lala as a maitre d' and sommelier. Mr. Lala was Claimant's direct supervisor.

Claimant alleges, at the onset of Mr. Lala's employment with employer, Claimant and Mr. Lala had differences of opinion regarding Mr. Lala's management style. It is uncontroverted that throughout the fall of 2005, Mr. Lala made comments to Claimant that were about women and were sexual in nature. By December, 2005, Mr. Lala began making sexual comments and inquiries about Claimant's daughter to Claimant.

It is also uncontroverted that on December 31, 2005, Claimant submitted a request for leave time to Mr. Lala. Claimant requested leave for New Years Eve. During the course of the discussion between Claimant and Mr. Lala concerning the requested leave, the two became

confrontational. The tenor of the conversation escalated when Mr. Lala became aggressive in his posture and eventually hit Claimant in his chest.

Claimant brought an action against Mr. Lala for intentional infliction of emotional distress and assault and battery.

Claimant originally sought resolution of this matter with the Superior Court, *Melaku Teferra v. Laurent Lala*, D.C. Super. Ct. 06ca008409. The Superior Court ordered a stay in *Teferra v. Lala, Id.*, and Ordered Claimant to present a claim before this court for this tribunal to determine whether Claimant's injuries fall within the jurisdiction of the Act.

Section 32-1504 of the Act states in relevant part;

(a) the liability of an employer prescribed in §32-1503 shall be exclusive and in place of all liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law on account of such injury or death.

(B) The compensation to which an employee is entitled under this chapter shall constitute the employee's exclusive remedy against the employer, or any collective-bargaining agent of the employer's employees and any employee, officer, director or agent of such employer, insurer, or collective-bargaining

the private sector.

agent (while acting within the scope of his employment) for any illness, injury, or death arising out of and in the course of his employment...

On January 3, 2008, Claimant filed an application for formal hearing seeking a determination from this tribunal regarding the issue of jurisdiction. Claimant asserts he has suffered two work related injuries, emotional distress that is due to sexual harassment; and an injury due to assault and battery. Claimant has made no claim for disability compensation and Claimant makes no assertion that the injuries he suffered while working for employer resulted in a loss of wages. As his claim for relief, Claimant seeks an order dismissing this matter for lack of jurisdiction.

Claimant argues, as he does not claim to have suffered any wage loss, he has not suffered a disability as defined by the Act and therefore the Act is inapplicable to this case.

Employer asserts Claimant alleged a loss of wages in the complaint filed with the Superior Court and by doing so, Claimant contradicts his own arguments herein that he did not suffer a wage loss. I reject the Employer's assertion in this regard.

The type of wage loss asserted by Claimant in his Superior Court complaint is clearly distinguishable from the type of wage loss covered by the Act. The Superior Court complaint does not assert Claimant's wage loss was a result of his physical or mental inability to perform his work duties, but rather the complaint alleges his wage loss occurred because he was wrongfully terminated.

In the Act, "disability" means physical or mental

incapacity caused by an injury which results in the loss of wages, D.C. Official Code §§ 32-1501 (8) (2001). Disability is an economic concept and not a medical concept. *Washington Post v. D.C. Department of Employment Services (Mukhtar)*, 675 A.2d 37, 39-41, citing *American Mutual Insurance Co. v. Jones*, 138 U.S. Appl D.C. 269, 271 (1970). "A continuing injury that does not result in any loss of wage-earning capacity cannot be the foundation for a finding of disability." *American Mutual Insurance Co.* at 272.

Because appellant does not allege an "injury" causing a "disability" which, in combination, would entitle him to guaranteed compensation under the Merit Personnel Act, the exclusivity provision... has no effect on his ability to exercise whatever common law rights are available to him. *Meklete Telke, v. Foot Traffic*, 699 a.2d 410 at 414 (D.C. 1997) citing *Newman v. District of Columbia*, 518 A2d 698 at 706 (D.C. 1986).²

Neither Claimant nor employer has presented evidence to show Claimant experienced a wage loss. As Claimant's work related injury caused no wage loss, Claimant is not entitled to wage replacement benefits. *Telke, Id.*

In its brief Employer asserts Claimant need not have a disability to have a claim under the Act. In support of this argument Employer presents *Burge v. D.C. Dep't of Empl. Servs.*, 842 A.2d 661, (DC App. 2004). In that case the Court of Appeals determined, "Under the Workers' Compensation Act, D.C. Code Ann. §32-1501et seq. (2001), once a claimant demonstrates that a disability resulted from a work-related injury, there is a presumption that his or her claim comes within the provisions of

²See footnote 1 herein.

the Act. In order to benefit from that presumption, a claimant must present some evidence of a work-related event, activity or requirement which has the potential of resulting in a disability." 842 A.2d 661 at 665.

Employer asserts the presumption standard must be applied when determining whether this case falls within the jurisdiction of the Act. Employer argues that an actual wage loss by Claimant is not required for this tribunal to adjudicate this case. Employer asserts the Act grants Claimant the benefit of a presumption of compensability and said presumption does not require Claimant to show he suffered an actual wage loss but rather, merely show the existence of an incident that has the potential to cause a wage loss.

Section 32-1521 of the Act states in relevant part,

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, **in the absence of evidence to the contrary**; (1) That the claim comes within the provisions of this chapter...

Emphasis added.

Section 7-299 of the D.C. Municipal regulations offers the following definitions:

Claim: an application for benefits made by an injured employee or his or her beneficiary under Section 8, 9, and 10 of the Act.

Benefits: compensation for death, wage loss, medical and

hospital treatment, health insurance coverage, and vocational rehabilitation provided pursuant to the Act.

D.C. Code §32-1521 (1) provides claimants with a rebuttable presumption that the claim for workers' compensation benefits comes within the provisions of the Act. This presumption exists "to effectuate the humanitarian purposes" of the compensation statute, and evidences a strong legislative policy favoring awards in close or arguable cases. *Parodi v. District of Columbia Department of Employment Services*, 560 A.2d 524 (D.C. 1989). See also, *Spartin v. District of Columbia Department of Employment Services*, 584 A.2d 564 (D.C. 1990); and, *Muller v. Lanham Company*, Dir. Dkt. 8601, H&AS No. 85-36, OWC No. 0700456 (March 15, 1988).

Section 32-1521 of the Act mandates, any proceeding for a claim shall be presumed to fall within the jurisdiction of the Act. A claim is defined as an application for benefits. Benefits are payments for wage loss, death, medical/hospital treatment, and health insurance coverage, Section 7-299, D.C. Municipal Regulations. The Act, §32-1501 (8), requires a showing of an occurrence of wage loss that is due to the work related injury in order for a claimant to be deemed to have suffered a disability as defined by the Act.

The Workers' compensation Act is a wage loss statute, and disability means injury that results in wage loss. *Landesberg v. District of Columbia Department of Employment Services*, 2002, 794 a.2d 607. The purpose of the Act is to advance the humanitarian goal of statute to provide compensation to employees for work-related disabilities reasonably expeditiously, even in arguable cases. With no occurrence of

death, wage loss, need for medical/hospital treatment or health insurance coverage, Claimant has not suffered a disability as defined by the Act and without a claim for compensation benefits, the presumption guaranteed by the Act cannot be invoked.

Assuming arguendo, that Claimant did suffer a wage loss, Employer's presumption argument would fail when applied to Claimant's claim for emotional distress. In the District of Columbia to qualify for a presumption, a claimant must present some initial demonstration of an employment connection to his disability.

Pursuant to the ruling in *Estate of Underwood v. National Credit Union Administration*, 665 A.2d 621 (D.C. 1995), emotional distress caused by sexual harassment is not a work related injury.

In *Underwood*, the Court determined, emotional distress caused by sexual harassment cannot satisfy the presumption standard. The Court ruled, "...The fact that the injury is contemporaneous or coincident with employment is not alone a sufficient basis for an award." *Underwood* at 634, citing *Fazio v. Cardillo*, 71 App. D.C. 264, 109 F.2d 835. The Court stated, "We conclude as a matter of law that sexual harassment is not "a risk involved in or incidental to employment...because sexual harassment is altogether unrelated to any work task." The Court ruled that injuries resulting from emotional distress that are attributable to sexual harassment are not injuries arising out of ones employment. *Id* at 634.

"Injury" as defined by, Section 32-1501 (12) of the Act includes, "an injury caused by the willful act of third persons directed against an employee because of his employment"... "It is well established that the deliberate assault upon

an innocent employee by some third person or co-employee is an 'accidental injury'." *Grillo v. National Bank of Washington*, 540 A.2d. 743, 751 (D.C. 1988), citing 2A Larson, Workmen's Compensation Law §68.12, at 13-9 (1985).

Claimant alleges he was subjected to assault and battery by his Supervisor during a discussion regarding his request for leave time. The evidence shows Supervisor describes the incident as being "personal" because Supervisor became enraged only after Claimant mentioned Supervisor's father. Despite Supervisor's assertion, a causal connection between the alleged injury and Claimant's employment has been established. The Causal connection in this instance is evidenced by the fact the alleged assault and battery originated from a conversation between Claimant and Supervisor regarding Claimant's request for leave, a work related issue.

The alleged assault and battery injury is one that arises out of and in the course of Claimant's employment however Claimant is unable to invoke the statutory presumption for this alleged injury as he has failed to demonstrate a disability resulted from the injury.

Section 32-1521(1) of the Act provides a presumption that Claimant's claim for compensation is within the jurisdiction of the Act, "in the absence of evidence to the contrary." The Act grants a presumption only when there is no evidence to controvert the existence of a presumption. In the instant case, there is evidence to controvert the statutory presumption. The record evidence shows claimant suffered no wage loss, and Claimant has not made any claim for compensation benefits. Therefore it is evident claimant is not

entitled to a presumption in this instance.

The statutory presumption cannot be invoked as Employer argues. Although the assault and battery inflicted on Claimant arose out of and in the course of his employment, neither it nor Claimant's claim for emotional distress caused Claimant to suffer a wage loss. Additionally, it has been clearly established by the court in *Underwood*, Claimant's claim for emotional distress due to sexual harassment, is an impairment that cannot satisfy the presumption standard.

Employer presents an additional argument to support its case; Employer posits this tribunal has jurisdiction to determine claims of intentional infliction of emotional distress that stem partly from sexual harassment. In support of this argument Employer offers its interpretation of *Parkhurst v. D.C. Department of Employment Services*, 710 A.2d 854 (D.C. 1995). Employer argues the Court in *Parkhurst* distinguished its case from *Underwood*. Employer asserts the Court in *Parkhurst* found, "an employee who seeks benefits for an emotional disability stemming partly but not wholly from alleged sexual harassment that occurred in the course of their employment had a claim before the DOES..." (Employer's brief p. 7). Employer further asserts the allegations of this case, like *Parkhurst*, are mixed and based upon the decision in *Parkhurst*, should be decided pursuant to the Act.

The *Parkhurst* case involved an employee who sought worker's compensation benefits for an emotional disability that stemmed partly but not wholly from alleged sexual harassment *Supra*, 855. The emotional injury stemmed partly from the employee, witnessing an autopsy; being involved in a suicide investigation; and experiencing alleged sexual harassment at work.

The claim was denied based upon the finding that the Department of Employment Services (DOES) lacked jurisdiction to consider the claim because employee's employment was not principally localized in the District of Columbia. On appeal the Director of DOES affirmed the denial on different grounds, stating employee could not recover under the Act because her claimed disability was, to a significant degree, caused by sexual harassment. The Director's decision was appealed to the D.C. Court of Appeals.

The Appellate Court in *Parkhurst* stated,

We think the Director misinterpreted *Underwood*. That case involved a law suit by an employee against her employer and its Board of Directors alleging sexual harassment under the District of Columbia Human Rights Act and common law infliction of emotional distress. The question in *Underwood* relevant to this case was whether the WCA provided the exclusive remedy for the employee's emotional distress claim; more particularly, whether DOES had "primary jurisdiction" to decide whether the WCA covered her emotional injury...

Underwood, in sum, rejected any role for DOES with respect to disabling emotional injuries attributable entirely to sexual harassment. Of key importance to this case, however, is that *Underwood* did not decide whether DOES would have

jurisdiction over such claims of injury "grounded only in part on sexual harassment."

Nothing in *Underwood*, in short, compels the Director to assert jurisdiction over all aspects of a disability claim including sexual harassment. The case at least implies, to the contrary, that the director may properly disregard allegations of sexual harassment as entailing legal-factual determinations outside the competence of DOES hearing examiners. Nonetheless, we do not decide that question because the Director never got that far.

Parkhurst, at 856-857.(citations omitted).

Contrary to Employer's interpretation, the Court in *Parkhurst* did not grant this tribunal jurisdiction in cases partially grounded on claims of sexual harassment. The Court withheld a determination on this issue and simply remanded the case stating, "DOES must decide in the first instance whether petitioner's disability (if proven) is compensable despite being grounded partly in sexual harassment. We hold only that the Director must consider the matter afresh, unconstrained by an improper reading of *Underwood*." *Parkhurst* at 857.

I reject Employer's argument that the claims of the instant case are mixed as they are in *Parkhurst*. The facts of the instant case are distinguishable from the facts in *Parkhurst* in that *Parkhurst*'s claim of emotional distress was asserted to have been the result of a mix of work-related events as well as sexual harassment. In this case, there is no mixed claim. Here, Claimant asserts that sexual

harassment was the sole cause of his emotional distress. However, assuming arguendo, that Claimant's claim is mixed, the application of the ruling in *Parkhurst* would render Claimant's claim outside the jurisdiction of the Act.

Parkhurst advises, upon consideration of cases involving disabilities grounded partly in sexual harassment, this tribunal must first determine whether a claimant's disability is compensable, see *Parkhurst* at 857. Having considered the facts of the instant case, it is evident Claimant's claim for emotional distress is not compensable under the Act as Claimant has not suffered a wage loss. For this reason the injury claimed by Claimant is one that is not covered by the Act.

It is also evident, the assault and battery Claimant suffered resulted from an act that arose out of and in the course of Claimant's employment, however, it is not covered by the Act as it did not cause the Claimant to lose any wages. Claimant's claim for assault and battery fall outside the purview of the Act.

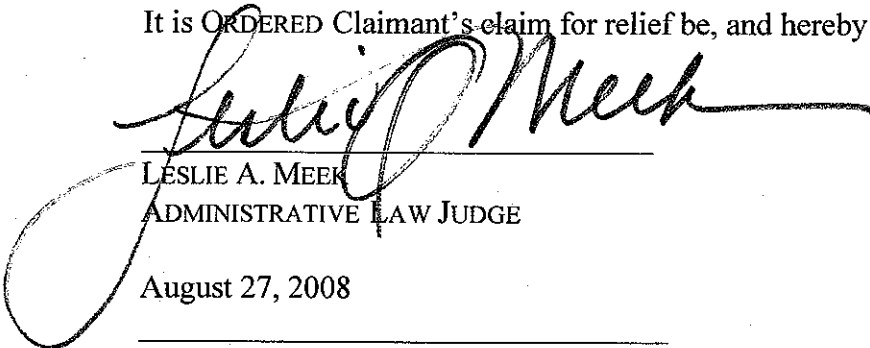
As Claimant's claims for emotional distress; and assault and battery are not covered by the Act, Claimant may pursue whatever common law rights are available to him.

CONCLUSION OF LAW

Based upon a review of the record evidence as a whole, I find and conclude Claimant's claim for emotional distress and assault and battery do not fall within the jurisdiction of the Act.

ORDER

It is ORDERED Claimant's claim for relief be, and hereby is GRANTED.

A large, stylized handwritten signature in black ink, appearing to read "Leslie A. Meek". The signature is written over a horizontal line and extends significantly to the left, looping back under the line.

LESLIE A. MEEK
ADMINISTRATIVE LAW JUDGE

August 27, 2008

Date

RE: **Melaku Teferra v. The Georgetown Club at Suter's Tavern Inc., and the hartford Insurance Co., OWC No.08-098, ADH No. 644471.**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent this 27th day of August, 2008 to the following:

Mohammad R. Sheikh, Acting Assistant Director
Labor Standards
Department of Employment Services
64 New York Ave., N.E., Suite 3923
Washington, D.C. 20002
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Melaku Teferra
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Certified

LINDA F. JORY, CHIEF ALJ
ADMINISTRATIVE HEARING DIVISION

Cory Rusk
DATE

RE: ***Melaku Teferra v. The Georgetown Club at Suter's Tavern Inc., and the hartford Insurance Co., OWC No.08-098, ADH No. 644471.***

APPEAL RIGHTS

This order is effective upon filing with the Mayor pursuant to §21 of the Act, D.C. Code, as amended, §32-1520. 7 DCMR §230.12; §23a of the Act, D.C. Code, as amended, 2001, §32-1522a. Any party aggrieved by this Order may file an application for review with the Chief Judge Compensation Order Review Board³, Labor Standards Bureau, Department of Employment Services.

Send Application for Review to:

Compensation Review Board/Chief Judge
Department of Employment Services
Labor Standards Bureau
64 New York Ave., N.E.
Third Floor
Washington, D.C. 20002

The Application for Review must be filed within 30 days of the date of the filing of this Order with the Mayor as provided in §23a(a) of the Act, D.C. Code, as amended, §32-1522a(a). An Application for Review is perfected by filing with the Chief Judge, Compensation Review Board, Labor Standards Bureau,

1. one (1) original and three (3) copies of an Application for Review,
2. one (1) original and three (3) copies of a Memorandum of Points and Authorities in support of the Application, and
3. certification that copies of the Application and Memorandum have been served by mail or delivery

7 DCMR §§230.1, 230.2; §23a of the Act, D.C. Code, 2001, §32-1522a.

A complete copy of the fore going documents should be filed with the Office of Hearings and Adjudication Administrative Hearings Division at 64 New York Avenue, N.E., Second Floor, Washington, D.C. 20002.

³D.C. Code Ann. § 32-1521.01 (2001) and Title 7 of the District of Columbia Municipal Regulations, Chapter 1, section 118, and Chapter 2, sections 250 *et seq.*, established a Compensation Order Review Board and set forth the authority and responsibilities thereof. The letterhead used for decisions and orders refer to the entity as the "Compensation Review Board", which is the shorter-form designation the Director of the Department of Employment Services used in Administrative Policy Issuance No. 05-01 (February 5, 2005).