

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

VINCENT C. GRAY  
MAYOR



LISA MARÍA MALLORY  
DIRECTOR

COMPENSATION REVIEW BOARD

**CRB No. 12-042**

**DENISE CALLENS,  
Claimant–Petitioner,**

v.

**WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,  
Employer/Carrier–Respondent.**

Appeal from a March 6, 2012 Compensation Order on Remand by  
Administrative Law Judge Amelia G. Govan  
AHD No. 10-224, OWC No. 663470

Justin M. Beall, Esquire for Petitioner  
Donna J. Henderson, Esquire for Respondent

Before MELISSA LIN JONES and JEFFREY P. RUSSELL, *Administrative Appeals Judges* and  
LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board.

**DECISION AND ORDER**

FACTS OF RECORD AND PROCEDURAL HISTORY

In November 2006, Ms. Denise Callens filed a complaint with the Equal Employment Opportunity Commission alleging racial and sexual discrimination. In December 2009, she filed a civil lawsuit against her employer, Washington Metropolitan Area Transit Authority (“WMATA”).

In 2010, Ms. Callens filed an Application for Formal Hearing to address a claim for injuries allegedly caused

(1) when other WMATA employees, in retaliation for filing her 2006 EEOC complaint, in 2009 “dropped signals,” that is, intentionally signaled the claimant to stop her train without reason or notice, (2) when WMATA failed to perform an investigation after the claimant reported the dropped signals, and (3) by the distraction on September 9, 2009, when a WMATA supervisor (Ms. McKenzie)

rode with the claimant to investigate the claimant's allegation concerning the dropped signals.<sup>[1]</sup>

In response, WMATA filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction. Ms. Callens filed an opposition, and in an Order dated August 11, 2010, an administrative law judge ("ALJ") denied the motion.

WMATA renewed its motion. On November 10, 2010, the ALJ dismissed the Application for Formal Hearing.<sup>2</sup>

An appeal ensued, and the Compensation Review Board ("CRB") vacated the November 10, 2010 Order dismissing Ms. Callens' Application for Formal Hearing.<sup>3</sup> The matter was remanded for an explanation of why Ms. Callens' workers' compensation case was barred; the ALJ, again, dismissed Ms. Callens' Application for Formal Hearing.<sup>4</sup>

Ms. Callens appeals the March 6, 2012 Compensation Order on Remand. Ms. Callens asserts her complaints of dropped signals, WMATA's failure to investigate her complaints, and a "ride-along" by a supervisor caused her to suffer a psychological injury arising out of and in the course of her employment. She also asserts these claims are distinguishable from her discrimination lawsuit. Ms. Callens argues that because her injury is compensable under the District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.* ("Act") and because her Right to Sue Letter only applies to charges claimed in November 2006, the Office of Hearings and Adjudication, Administrative Hearings Division ("AHD") had jurisdiction to conduct a formal hearing, and she requests the CRB vacate the dismissal order.

In response, WMATA argues AHD lacks jurisdiction because Ms. Callens' claims are wholly attributable to the events that form the basis of her discrimination lawsuit. WMATA requests the CRB affirm the dismissal order.

#### ISSUE ON APPEAL

1. Was dismissing Ms. Callens' Application for Formal Hearing for lack of jurisdiction arbitrary and capricious?

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<sup>1</sup> *Callens v. Washington Metropolitan Area Transit Authority*, CRB No. 10-199, AHD No. 10-224, OWC No. 663470 (August 23, 2011), p. 2.

<sup>2</sup> *Callens v. Washington Metropolitan Area Transit Authority*, AHD No. 10-224, OWC No. 663470 (November 10, 2010).

<sup>3</sup> *Callens v. Washington Metropolitan Area Transit Authority*, CRB No. 10-199, AHD No. 10-224, OWC No. 663470 (August 23, 2011).

<sup>4</sup> *Callens v. Washington Metropolitan Area Transit Authority*, AHD No. 10-224, OWC No. 663470 (March 6, 2012).

## ANALYSIS<sup>5</sup>

As stated in *Underwood*, as a matter of law, sexual harassment does not arise out of or in the course of employment; therefore, any claim for emotional distress based upon allegations of sexual harassment does not qualify as a compensable injury under the Act:

[W]hen emotional distress allegedly attributable to sexual harassment (in contrast with some other cause) results in disabling injuries in fact, the language of the [Act] itself easily demonstrates that these are not statutory “injuries,” and thus are not compensable disabilities, under the [Act]. Accordingly, as elaborated below, the statutory language does not present a “substantial question” whether disabling injuries from emotional distress caused by sexual harassment are covered by the [Act]; such injuries “*clearly* are not compensable under the statute.”<sup>6</sup>

We find no distinction between sexual harassment and racial discrimination which likewise is prohibited by law during day-to-day workplace interaction and is unrelated to any work task. We also find AHD lacks jurisdiction over Ms. Callens’ claim.

When analyzing the issues in the *Underwood* case, the D.C. Court of Appeals specifically examined the facts underlying the claim for sexual harassment:

We hold that appellant properly filed in court her common law claim alleging disability from emotional distress based on the same facts as those underlying her statutory claim for sexual harassment. She was not limited to a [workers’ compensation remedy] on her emotional distress claim.<sup>[7]</sup>

The ALJ in this matter performed that same analysis:

In the instant matter, Claimant worked as a train operator for Employer. In her Worker’s Compensation claim, Claimant alleges that signals were “dropped” on her and other white, female employees and that her supervisor’s presence in her train cab caused her to become anxious and go to the hospital. Claimant uses the same allegations as the basis for her civil complaint.<sup>[8]</sup>

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<sup>5</sup> Although the ALJ titled the decision a Compensation Order on Remand, the contents of the decision are not based upon documentary exhibits or oral testimony at a formal hearing. Because the Order on review is not one based on an evidentiary record produced at a formal hearing, the applicable standard of review by which we assess the determination reached by the Office of Hearings and Adjudication is whether the decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See*, 6 Stein, Mitchell & Mezines, *Administrative Law*, § 51.03 (2001).

<sup>6</sup> *Underwood v. National Credit Union Administration*, 665 A.2d 621, 633 (D.C. 1995) (Internal citation and footnote omitted. Emphasis in original.)

<sup>7</sup> *Id.* at 638.

<sup>8</sup> *Callens v. Washington Metropolitan Area Transit Authority*, AHD No. 10-224, OWC No. 663470 (March 6, 2012), p. 2.

All of Ms. Callens' claims arise from a continuous series of actions with their genesis in the alleged discrimination.

We recognize *Parkhurst*<sup>9</sup> clarified that a viable workers' compensation claim may lie if the claimant's emotional disability stems not wholly from alleged discrimination. In other words, workers' compensation coverage is not foreclosed for disabling injuries attributable in part to job-related conditions independent of harassment if the allegations in the workers' compensation claim are severable such that the allegations of discrimination can be disregarded and still leave a viable workers' compensation claim. Such is not the case here.

We agree with the ALJ's assessment that *Parkhurst* is distinguishable from Ms. Callens' case:

In *Parkhurst*, a WMATA Transit Police Officer alleged stress after investigating the scenes of two suicides and the stress from these work experiences contributed to her disability. The Court remanded the matter to DOES holding that DOES was required to consider whether the claimant had a stress claim arising out of her investigation at crime scenes which included investigating [*sic*]. In the instant matter, Claimant is alleging emotional injury related to sexual discrimination, an area in which *Underwood* held best adjudicated in the Courts. As a result, Claimant's Workers' Compensation claim is not severable from her EEO action in the District Court.<sup>[10]</sup>

Ms. Callens' workers' compensation claim is a direct extension of her discrimination allegations and in no way arises out of or in the course of her employment; this conclusion is substantiated by the very findings of the U.S. District Court for the Eastern District of Virginia, Alexandria Division:

Plaintiff filed a subsequent Charge of Discrimination with the EEOC on October 8, 2009, alleging race discrimination, sex discrimination, and retaliation related to a September 9, 2009 incident regarding alleged signal malfunctions. Plaintiff believed that these malfunctions were a deliberate response to her earlier EEOC charge. Further, Plaintiff alleged that the supervisor's presence and activities interfered with the safe operation of the train and that Plaintiff requested that the supervisor take over operation of the train.<sup>[11]</sup>

Even Ms. Callens' allegations of a psychological injury caused by safety concerns are based upon the same facts that underlie her allegations of retaliation:

Prior to filing the civil suit, Claimant filed a workers' compensation claim. In that claim, Claimant alleged that she sustained disabling injuries "from safety concerns" caused when other employees, in retaliation for filing her EEO claim,

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<sup>9</sup> *Parkhurst v. DOES*, 710 A.2d 854 (D.C. 1998).

<sup>10</sup> *Callens v. Washington Metropolitan Area Transit Authority*, AHD No. 10-224, OWC No. 663470 (March 6, 2012), p. 3.

<sup>11</sup> *Callens v. Washington Metropolitan Area Transit Authority*, 2012 U.S. Dist. LEXIS 5733 (E.D. Va. Jan. 18, 2012).

“dropped signals,” intentionally signaling Claimant to stop her train without reason or notice.<sup>[12]</sup>

Ms. Callens’ own argument to the ALJ demonstrates that while safety may have been implicated by the “signal dropping,” lack of investigation, and the distraction caused by her supervisor’s investigatory oversight in Ms. Callens’ cab during the operation of her train, safety is not the basis of her claim; alleged retaliation is the basis of her claim. As such, Ms. Callens’ workers’ compensation claims are pendent to her discrimination lawsuit as ordinarily it would be expected they would be tried in one proceeding.

Finally, Ms. Callens’ is not entitled to a formal hearing to prove jurisdiction. There is no presumption of jurisdiction,<sup>13</sup> and Ms. Callens’ allegations clearly speak for themselves. Contrary to Ms. Callens’ argument that she must be entitled to a hearing because her injury is compensable, by necessity, if there is no jurisdiction under the Act, an injury is not compensable.

#### CONCLUSION AND ORDER

As a matter of law, Ms. Callens’ emotional distress claim clearly is outside coverage of the Act. The March 6, 2012 Compensation Order on Remand dismissing Ms. Callens’ Application for Formal Hearing is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

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MELISSA LIN JONES  
Administrative Appeals Judge

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April 10, 2013

DATE

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<sup>12</sup> *Callens v. Washington Metropolitan Area Transit Authority*, AHD No. 10-224, OWC No. 663470 (March 6, 2012), p. 2.

<sup>13</sup> *Furtick v. DOES*, 921 A.2d 787 (D.C. 2007).