# United States Department of Labor
# Employees' Compensation Appeals Board

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| **RITA A. BOWLES, Appellant** | ) | |
| **and** | ) | **Docket No. 03-2074** |
| | ) | **Issued: January 7, 2004** |
| **SOCIAL SECURITY ADMINISTRATION, Big Rapids, MI, Employer** | ) | |

*Appearances:*
*Alan J. Shapiro, Esq.*, for the appellant
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

### *JURISDICTION*

On August 20, 2003 appellant, through her attorney, filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated July 22, 2003. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has *de novo* jurisdiction over the merits of this case.

### *ISSUE*

The issue is whether appellant has established that she sustained an emotional condition in the performance of duty.

### *FACTUAL HISTORY*

On October 25, 2001 appellant, then a 48-year-old claims representative, filed a claim for depression caused by sexual harassment. She identified October 17, 2001 as the date she first became aware of her illness. Appellant stated that she was sexually harassed in the office by the computer trainer, Michael Peterson, and that, when he called her at home on the evening of October 17, 2001, she was coerced into having sexual relations with him. Appellant stopped working on October 23, 2001 and has not returned.

In an October 29, 2001 statement, appellant stated that she started training with the computer trainer, Mr. Peterson,[1] on Monday, October 15, 2001. She indicated that she was being hospitable as a coworker and they went to lunch together. During lunch, the conversation turned to personal matters concerning relationships and sex and appellant learned that Mr. Peterson and his wife were "swingers." When they returned to the office, appellant alleged that Mr. Peterson showed her pictures of his wife and him on the computer. Appellant indicated that the picture showed Mr. Peterson's penis and she had laughed because she was embarrassed and nervous. She also indicated that when she told Mr. Peterson that she would get in trouble and lose her job for him pulling up a porno site on her computer, Mr. Peterson took it off the computer. Appellant stated that Mr. Peterson had asked her to go to bed with him, but she said "no." Appellant stated that Mr. Peterson called her at home that night and he left a message on the answering machine. The next day, Tuesday, appellant stated that she went to lunch with Mr. Peterson and her friend, Lou Ann. When they got back to the office, she and Mr. Peterson wrote notes back and forth to each other. Appellant asserted that she kept telling him "no." On Wednesday, October 17, 2001 during training, appellant again indicated that she told Mr. Peterson "no" when he requested that she go home with him. Appellant stated that, when she got home, she told her boyfriend, Ron, that she was going to bed at 7:00 p.m. again. Appellant indicated that Mr. Peterson called her at home that night and asked her whether she was coming over. She stated that she said "no," but then called him back saying that she would come over. She indicated that she was so sick of the nagging that she gave in. She stated that she called Mr. Peterson back, first saying that she had to take a shower and then, as it was getting late, saying that she had to call for a taxicab. When she got home, appellant stated that she cried, took another shower, and went to bed. On Thursday, appellant indicated that she tried to avoid Mr. Peterson, but could not because of the small office. Appellant indicated that Mr. Peterson had told her that he had told his wife about what transpired, that he could help her get a computer, and that he would send appellant some of the weight loss pills his wife took. Appellant also indicated that she got an 87 percent on her test and did not realize that she had taken a test on Wednesday.

By letter dated November 28, 2001, the Office requested additional factual and medical evidence from appellant.

In a November 15, 2001 police investigation report from Officer Joy Beno, appellant related that Mr. Peterson was from an out-of-state training company who was hired to train her on Monday, October 15 through Wednesday, October 17, 2001 and then train her coworker, Thursday, October 18 to Friday, October 19, 2001 on the new software system installed on their computers. Appellant reiterated her interactions with Mr. Peterson from Monday, October 15 through Wednesday, October 17, 2001 and the evening of October 17, 2001 when she went to Mr. Peterson's hotel room. She stated that Mr. Peterson had invited her to his hotel room for dinner and to discuss business. When she arrived at his door, he started kissing her and she told him that she did not want to do this. He told her to relax and to have fun and she again told him that she did not want to do this. Appellant stated that she took off her clothes and had sex three

[1] The employing establishment indicated that Mr. Peterson was contracted by Unysis to provide training on some new software during the week of October 15, 2001 for two visually impaired employees, appellant and another coworker. Appellant underwent training from October 15 to October 17, 2001.

times in various positions. She stated that Mr. Peterson had walked her to the front desk to call a taxicab and waited with her in the lobby for approximately 20 minutes until the taxicab got there. Appellant indicated that she had shook hands with Mr. Peterson and had the taxicab go through the Taco Bell drive-through for some dinner, before going home. She further stated that she was raped and wanted to press charges.

In a November 18, 2001 police investigation report, Officer Beno noted her telephone conversation with Mr. Peterson, who indicated that it was appellant who asked him to have sex with her. He indicated that appellant had called him at the hotel two to three times on Wednesday evening and said she was coming over to his hotel room. Mr. Peterson stated that he did not invite her to dinner or his hotel room as she had stated in her report. He stated that they had consensual sex, that he had held appellant for approximately one hour and that she had left around 10:30 p.m. via taxicab. Mr. Peterson indicated that he had never told appellant not to tell anyone and indicated that it was she that had told him numerous times not to tell anyone about what had happened. Mr. Peterson indicated that he had went to lunch with appellant on several occasions, but could not remember if he went to lunch with her on Friday.

Ronald J. Schinderele, appellant's boyfriend, submitted two statements. In an October 29, 2001 statement, he related the events of Monday, October 15 through the evening of Wednesday, October 17, 2001 as told to him by appellant. He indicated that Remona Abberton and he were visiting appellant on Monday evening when, at 6:15 p.m., Mr. Peterson had called appellant at her home and had left a message leaving his telephone number and room number at the hotel. He stated that appellant had called her pastor, who advised her not to say anything about what Mr. Peterson was doing. On Tuesday night, appellant excused herself at 7:00 p.m. stating that she was exhausted. On Wednesday night, he indicated that appellant again stated that she was exhausted and was going to bed at 7:00 p.m. In a December 2, 2001 statement, Mr. Schinderele indicated that he had listened to Mr. Peterson's telephone message which was left on October 15, 2001.

In a December 10, 2001 statement, Ms. Abberton, appellant's friend, indicated that appellant had told her about her computer instructor and had indicated that he was a swinger. She further stated that Ron and her were present when the telephone rang and a message was left on appellant's answering machine, which indicated that the caller was Mike, he needed to talk to Rita, and a telephone number and room number were left.

In a January 29, 2002 statement, Peter Ross, assistant district manager, indicated that he was not in the position to verify the accuracy of appellant's statement based on the fact that most of the events happened away from the workplace. He advised that Mr. Peterson was in appellant's office the week of October 15, 2001 and training was held during that time. Mr. Ross stated that he was in the office on October 18, 2001 and observed the training that was going on with appellant and the other visually impaired employee. He further indicated that he had met with appellant privately for about 45 minutes and at no time was the October 17, 2001 evening incident mentioned. He stated that appellant appeared to be in a good mood and was very happy with the training she had received.[2]

[2] Mr. Ross further mentioned that an informal resolution had been reached. However, there is no indication that the informal resolution had anything to do with Mr. Peterson and the October 17, 2001 incident.

By decision dated March 13, 2002, the Office denied appellant's claim based upon her failure to establish that the work incidents claimed arose in the scope of the performance of duty. The Office found that appellant had not submitted substantiating evidence to support alleged sexual harassment during training. The Office further found that the events which took place during lunch and in Mr. Peterson's hotel room were outside of the workplace and consensual in nature.

On March 30, 2002 appellant requested an oral hearing, which was held on May 24, 2003. In a decision dated July 22, 2003, an Office hearing representative affirmed the March 13, 2002 decision.

## ***LEGAL PRECEDENT***

Perceptions and feelings alone are not compensable. Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which she claims compensation was caused or adversely affected by factors of her federal employment.[3] To establish that she sustained an emotional condition causally related to factors of her federal employment, appellant must submit: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to her condition; (2) rationalized medical evidence establishing that she has an emotional condition or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that her emotional condition is causally related to the identified compensable employment factors.[4]

Workers' compensation law is not applicable to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within the coverage 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 comes within coverage of the Federal Employees' Compensation Act.[5] On the other hand, there are situations when an injury has some connection with the employment, but nonetheless does not come within the coverage of workers' compensation because it is not considered to have arisen in the course of the employment.[6]

## ***ANALYSIS***

Appellant has alleged sexual harassment on the part of a computer training instructor, Mr. Peterson, who was hired to train both herself and another visually-impaired employee on new software during the week of October 15, 2001. For harassment or discrimination to give

[3] *Pamela R. Rice*, 38 ECAB 838 (1987).

[4] *See Kathleen D. Walker*, 42 ECAB 603 (1991). Unless a claimant establishes a compensable factor of employment, it is unnecessary to address the medical evidence of record. *Garry M. Carlo*, 47 ECAB 299, 305 (1996).

[5] 5 U.S.C. §§ 8101-8193.

[6] *Joel Parker, Sr.*, 43 ECAB 220 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur.[7] Mere perceptions or feelings of harassment do not constitute a compensable factor of employment.[8] An employee's charges that he or she was harassed or discriminated against is not determinative of whether or not harassment or discrimination occurred.[9] To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting her allegations with probative and reliable evidence.[10]

A claimant must also sustain the alleged injury while in the performance of duty.[11] The phrase "while in the performance of duty" in the Act has been interpreted to be the equivalent of the commonly found prerequisite in workers' compensation law of "arising out of and in the course of employment."[12] In the course of employment deals primarily with the work setting, the locale and time of the employee's performance of his or her work duties; "arising out of the employment" encompasses not only the work setting but also a causal concept, the requirement being that the employment caused the injury.[13] In determining whether an injury is covered by the Act, the test is whether, under all the circumstances, a causal relationship exists between the employment itself, or the conditions under which it is required to be performed, and the resultant injury.[14] For this reason, appellant has the burden of establishing the occurrence of an alleged injury: (1) at a time when the employee may reasonably be said to be engaged in her master's business; (2) at a place where the employee may reasonably be expected to be in connection with the employment; and (3) while the employee was reasonably fulfilling the duties of her employment or engaged in doing something incidental thereto.[15]

The Board finds that appellant had removed herself from the performance of duty at the time of the October 17, 2001 hotel incident and during her lunches with Mr. Peterson on October 15 and October 16, 2001. When appellant went to Mr. Peterson's hotel room on the night of October 17, 2001, she had removed herself from the performance of duty. Appellant was off premises and not performing any work-related function reasonably incidental to her employment. The record reflects that the hotel incident occurred in the evening hours, after appellant's normal tour of duty, and there is no evidence of record to substantiate appellant's

[7] *Shelia Arbour (Vincent E. Arbour)*, 43 ECAB 779 (1992).

[8] *See Lorraine E. Schroeder*, 44 ECAB 323 (1992); *Sylvester Blaze*, 42 ECAB 654 (1991).

[9] *William P. George*, 43 ECAB 1159 (1992).

[10] *See Anthony A. Zarcone*, 44 ECAB 751 (1993); *Frank A. McDowell*, 44 ECAB 522 (1993); *Ruthie M. Evans*, 41 ECAB 416 (1990).

[11] *Lenneth W. Richard*, 49 ECAB 337 (1998).

[12] *Lee R. Haywood*, 48 ECAB 145 (1996).

[13] *Maribel Dayap*, 48 ECAB 248 (1996).

[14] *Leo Boyd Purrinson*, 30 ECAB 644, 646 (1979).

[15] *Mary Keszler*, 38 ECAB 735, 739 (1987); *Christine Lawrence*, 36 ECAB 422, 424 (1985).

allegation that she was invited to a business meeting at Mr. Peterson's hotel room. Although appellant may have found herself in a sexual encounter, the Board finds that it was reasonable for the Office hearing representative to have eliminated the notion that appellant was a victim of coercion. From the record, it appears that appellant voluntarily went to Mr. Peterson's hotel room and engaged in consensual sex. Additionally, the Board finds that appellant's lunches with Mr. Peterson on Monday, October 15 and Tuesday, October 16, 2001 were not in the performance of duty. The lunches were off premises and there is no evidence of record to reflect that appellant was required to have lunch with or entertain visitors to the office. Appellant herself indicated that she was just being hospitable as a coworker. Accordingly, appellant's interactions with Mr. Peterson were outside the scope of her employment and not covered by the Act.

The Board notes that, although appellant and Mr. Peterson mutually brought their personal conversation into the workplace by actively engaging in discussions through the exchanging of notes and the evidence strongly suggests that Mr. Peterson might have showed appellant pornographic pictures on the Office computer, this does not amount to sexual harassment. While this tends to support that appellant might have been propositioned in the workplace by Mr. Peterson, appellant's allegation alone does not bear witness to any specific instance of direct harassment as she has failed to present any specific, reliable and probative evidence to support that Mr. Peterson sexually harassed her. The Board notes that the witness statements merely relate appellant's version of events as told to the individual by appellant. They are not an independent assessment or account of the incidents alleged to have occurred during the week of October 15, 2001. None of the witnesses heard Mr. Peterson proposition appellant during the week of October 15, 2001. Additionally, although Mr. Peterson has neither admitted nor denied having shown appellant pornographic pictures on the Office computer on October 15, 2001, there is no specific, reliable or probative evidence to support that Mr. Peterson was trying to harass appellant by showing her the pictures.[16] In fact, appellant stated that, when she expressed some concern over having such pictures on the computer, Mr. Peterson immediately removed the pictures from the computer. Thus, although appellant might have been propositioned by Mr. Peterson during work on October 15, 2001, she has failed to substantiate her allegation that she was sexually harassed during work on that date.

Although the record supports that Mr. Peterson had called appellant at home on October 15, 2001, this does not constitute a factor of employment. The call took place outside of the workplace and there was no clear indication on the message what Mr. Peterson had wanted. Both appellant's friend, Ms. Abberton, and her boyfriend, Mr. Schinderle, had stated that the message indicated the caller's identity as Mike and requested that appellant call him and left a hotel number and room number. Although appellant may not have felt comfortable having Mr. Peterson call her at home, Mr. Peterson's telephone call alone does not rise to the level of compensable sexual harassment as it took place outside of the workplace and appears personal in nature. Moreover, appellant continued to engage in personal conversations with Mr. Peterson by going out to lunch with him the next day with a friend and writing notes to each other.

[16] *See Daniel B. Arroyo*, 48 ECAB 204 (1996) (finding that claimant's supervisor used profanity in the workplace but there was no evidence that this was directed at claimant in an attempt to harass him).

Having considered the totality of the circumstances, the Board finds that the alleged sexual harassment on October 15 through 17, 2001 involving Mr. Peterson does not represent compensable employment factors.[17]

## ***CONCLUSION***

Under the circumstances described above, the Board finds that appellant has not established an emotional condition in the performance of duty.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the July 22, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 7, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[17] *Leroy Thomas, III*, 46 ECAB 946 (1995).