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TRENDS IN COMPENSATING SEXUAL HARASSMENT VICTIMS: THE THREAT OF DOUBLE RECOVERY

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ABSTRACT

A frightening trend for employers is emerging with respect to recovery in sexual harassment cases. In many states, courts are allowing victims a double recovery by combining workers' compensation awards with damages available under federal or state civil rights statutes. These courts have repeatedly shown a willingness to consider workers' compensation and civil rights statutes as providing separate remedies for the different injuries which may occur as a result of sexual harassment. This article examines the new trend first by looking at traditional workers' compensation and its exclusivity doctrine and then by focusing on the cases in which courts have refused to apply the doctrine in sexual harassment claims because of the unique nature of the injury.

Most articles focusing on sexual harassment center on a discussion of Title VII. Although managers need to be familiar with Title VII and the new damages which can be imposed thereunder through the Civil Rights Act of 1991 [1], employers are faced with the possibility of paying double damages from the combination of workers' compensation and state or federal civil rights statutes. This article explores new trends emerging in this area to compensate victims who are deemed by the courts to suffer a unique injury from sexual harassment.

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WORKERS' COMPENSATION

Workers' compensation arose, in a sense, as a bargain between employer and employee. The employee was guaranteed specific, definite compensation for physical injury occurring in the course of employment, and the employer was given immunity from common law causes of action such as negligence. Workers' compensation was designed by its very nature to be an exclusive remedy. Often, employees who received injuries that could not realistically be compensated by the act were left without a remedy. To receive compensation, the injury that formed the basis of the claim had to be an accident arising in the course of employment, causally connected to the performance of the job, and a risk of the employment. In determining the compensability of injuries resulting from sexual harassment, the courts have reviewed the same criteria. Basically, the courts have looked at whether the risk of sexual assault is connected to the conditions under which the employee must work, whether the incident took place at work, and whether it occurred where the employee would be expected to be while performing the job [2]. As workers' compensation statutes vary from state to state, the case law in this area can be difficult to analyze. Usually the decisions hinge on factual differences related to specifics of each state's workers' compensation act. However, it is clear that employees may claim straight workers' compensation based on sexual harassment at work [3].

Although some jurisdictions fail to recognize strictly mental injuries in their workers' compensation acts [4], most states do compensate victims of harassing behavior regardless of the type of injury that is received. Generally, the courts have awarded workers' compensation for stress-related injuries arising through sexual harassment. For example, in a Florida case, a worker received workers' compensation as a result of a depression she suffered. Although the worker had numerous reasons to be depressed, the court focused on the nonconsensual sexual relations between the worker and her supervisor [5]. In a New York case, a worker received disability payments for more than a two-year period based on nonthreatening comments of a sexual nature made to her by a coworker on two separate occasions [6]. A Wyoming court held that stress from sexual harassment exceeded that of the normal day-to-day mental stress incurred by employees and therefore was compensable under workers' compensation [7]. Due to the compensability of such injuries under workers' compensation, claims for failure to provide a safe workplace [8], negligence [9], assault and battery [10], and other common law claims [11] are often barred by the courts due to provisions in state laws making workers' compensation the exclusive remedy available.

THE EXCLUSIVITY DOCTRINE OF WORKERS' COMPENSATION

The exclusivity doctrine of workers' compensation has received strong judicial support, often making workers' compensation the only remedy for employees.

Indeed, in one article written on workers' compensation, the author referred to the exclusivity doctrine as the "sacred cow of workers' compensation" [12]. In the area of sexual harassment and related claims, the exclusivity doctrine has been repeatedly raised. In a 1991 Michigan case, the employee's claim was barred by the exclusive remedy provision of a workers' disability compensation act. The claim was based on negligent hiring of the supervisor who was fired after the complaint of sexual harassment was received [13]. Similarly, in a New York case, the court determined that the employee's physical and mental injuries due to an assault by a coemployee arose out of and in the course of employment. Therefore, her negligence claim was barred by the court due to New York's workers compensation statute [14]. In a 1990 Arizona case, an employee was not allowed by the court to pursue tort action against the employer after suffering psychological injury as a result of a coworker's sexual molestation. The employee was under 18, and the incident occurred after the man had already molested another female employee a month earlier. The employer had failed to verify the man's former employment or find out anything about his background. The court found that, absent evidence of the employer's intentional conduct, her only remedy would lie within the coverage of the compensation statute [15]. Such results should be expected, since workers' compensation laws were designed to shield employers from negligence claims as well as other remedies at common law.

The exclusivity doctrine of workers' compensation must be raised as a defense by the employer, however, or it is waived. Some employees have received large damage awards in tort due to the failure of defense attorneys either to raise the defense or to pursue it during trial. In one case based on extreme and disabling emotional distress due to sexual harassment, the defendant changed attorneys, and the new one failed to argue this defense. As a result, the plaintiff received an award based on punitive damages of $500,000 and compensatory damages of $150,000 due to the intentional infliction of emotional distress claim [16]. In a footnote to the case, the court stated that the Wisconsin Supreme Court had recently held that intentional injuries were within the workers' compensation statute. Therefore, the plaintiff's claims would probably have been completely barred had the exclusivity doctrine been raised [16, at 19, n. 2].

Obviously, the courts have been called upon to resolve recovery problems between workers' compensation and other available remedies. In the specific case of sexual harassment, the courts have had the additional task of determining when the exclusivity doctrine of workers' compensation may or may not bar action under state and federal discrimination statutes.

STATE STATUTORY TRENDS IN SEXUAL HARASSMENT CASES

Although workers' compensation was intended to be the exclusive remedy for work-related injuries, recent court decisions have recognized injuries arising from

sexual harassment as exceptions to the exclusivity provision. For the most part, employers who have attempted to use the exclusivity bar of workers' compensation to avoid liability for sexual harassment under state and federal employment discrimination statutes have been unsuccessful. In general, it seems that the courts afford sexual harassment a special status, and the statutes aimed specifically at eliminating this form of sex discrimination are seen as having different goals from workers' compensation acts.

In states that have their own discrimination acts, the courts seem to follow similar reasoning when determining whether workers' compensation is the exclusive remedy for sexual harassment injuries. For example, in California, claims under the Fair Employment and Housing Act (FEHA) have not been preempted by the Workers' Compensation Act [17]. The California courts have strongly stated that the acts were set up for different purposes and that FEHA was established for the express purpose of eliminating employment discrimination. A claim under FEHA can be much more expensive to the employer, since the establishment of a successful cause of action may result in both compensatory and punitive damages [18].

The courts of Michigan use similar logic in their application of the Michigan Civil Rights Act (Elliott-Larsen Act) in several cases [19]. The Supreme Court in *Boscaglia v. Michigan Bell Telephone Company* stated that "the evils at which the civil rights acts are aimed are different from those at which the workers' compensation act is directed." The court found that the intent of the legislature in developing civil rights acts was to provide a remedy for physical, mental, and emotional injury arising from discrimination. According to the court, the legislature did not intend for the exclusive remedy provision of the workers' compensation act to limit the protection of civil rights legislation. Thus, workers' compensation cannot be used to bar civil rights action when mental suffering, such as humiliation, embarrassment, and damage to reputation, has occurred as a result of sexual harassment [20].

The Supreme Court of Florida in *Byrd v. Richardson-Greenshields Securities, Inc.* "generated one of the strongest statements aimed at ensuring that workers' compensation cannot act as a shield for employers against sexual harassment claims" [21]. This court determined "that both federal and state laws have engendered a strong public policy by which employers are charged with the responsibility of maintaining a workplace free from sexual harassment. In this court's view, the exclusivity rule would serve to diminish clear public policy" and would undermine the functions of Florida's civil rights act and Title VII of the Civil Rights Act.

The public policy condemning sexual harassment was also applied in recent Tennessee and Oregon cases [22]. Citing *Boscaglia* and *Byrd,* the Tennessee court noted the injury to personal rights involved in sexual harassment and refused to recognize sexual harassment as a risk inherent in employment. The court determined that the exclusive remedy provision could not be used to bar employee

claims under Tennessee's Human Rights Act. Consistent with this trend, recent Oregon cases have shown the tendency to recognize the statutory right to be free from sexual harassment in the workplace [23]. In each of these cases, the employer could not use the exclusivity provision of the workers' compensation act to prevent claims under either the state's discrimination statute or Title VII.

These cases highlight the tendency in many states to view sexual harassment in the strictest terms possible. They also point to the possibility that recovery under more than one avenue may be available to the employee.

EMPLOYERS' POTENTIAL LIABILITY FOR DOUBLE RECOVERY

As exemplified in the preceding discussion, there can be conflict in remedies between state workers' compensation acts and state civil rights acts in sexual harassment cases. While this conflict has often arisen in cases where individuals desire to choose a remedy other than that of workers' compensation, the situation of recovery under more than one avenue is also presented. Several states, in light of their own laws, have grappled with the issue of recovery under both their workers' compensation and state civil rights acts.

Courts in Michigan, for example, have struggled with the issue of double recovery in a series of cases [24]. At first, the courts seemed inclined to bar additional claims for injuries resulting from sexual harassment if the injuries were compensable under state workers' compensation [25]. Subsequent courts, however, focused on the purpose and intent of the Elliott-Larsen Act [26], rather than simply on the compensability of the injury under workers' compensation. As stated in *Freeman v. Moll* and re-stated in *McCalla v. Ellis*:

> The source of the defendant's misconception is perhaps its belief that the injury which flows from discrimination is akin to mental injuries sustained by workers from compensable sources. It is not. The discrimination injury is unique. Its source is deliberate or inadvertent disregard by the employer of the fundamental rights of his employees [27].

Thus, these courts have not accepted the notion that lawmakers intended for workers' compensation to be the only remedy in cases where physical injury was present. Noting that the right to be free from discrimination is a separate and independent right that distinguishes discrimination statutes from other statutes, these and other Michigan courts have allowed additional claims arising from sexual harassment to be pursued under the Elliott-Larsen Act [28]. Finally, in *Boscaglia,* the Supreme Court of Michigan confirmed that the exclusive remedy provision cannot bar claims for physical, mental, or emotional injury arising from sexual harassment under the state civil rights act. Also citing the different

purposes of the acts, the court in *Boscaglia* allowed the plaintiff to pursue both workers' compensation and civil rights remedies.

Other courts have similarly interpreted the intent and purpose of their own state workers' compensation and civil rights acts in resolving recovery conflicts. For example, in *Byrd,* Florida's Supreme Court stated, "there is equal obligation to honor intent and policy of other enactments" [29], when it made its decision not to limit certain injuries to recovery only under workers' compensation. This court enforced the two acts separately, since workers' compensation addresses purely economic injury, and sexual harassment laws address more intangible personal rights. In Tennessee, the court in *Harman v. Moores' Quality Snack Foods, Inc.,* depended heavily on the Michigan and Florida courts' interpretations of their own state civil rights statutes in addressing the conflict between Tennessee's workers' compensation and civil rights domains [30]. In an examination of the workers' compensation act and the Tennessee Human Rights Act, the court concluded that "their respective purposes reveal that they are designed to protect the employees of this state in two entirely different ways [30, p. 523]. As a result, the court did not allow the workers' compensation act to operate as a bar to claims under state or federal civil rights laws, thereby setting the stage for recovery under both avenues.

The courts in California have specifically addressed double recovery under statutes such as the states' civil rights act, the Fair Employment and Housing Act, and its workers' compensation act. In *Meninga v. Raley's Inc.,* the court allowed the employee to pursue a separate claim under FEHA even though the employee had received workers' compensation benefits due to cumulative stress [31]. As with courts in other states, this court relied strongly on the legislative intent behind FEHA in making its decision. According to the court, it could not be legislative intent to disregard such a strong public policy against sexual harassment as that represented in FEHA, despite the recovery for workplace injuries under the workers' compensation act. Because two separate wrongs were involved, one of workplace injury and one of harassment, two separate liabilities were incurred by the employer.

Courts in Oregon have determined that the statutory right to be free from sexual harassment is unrelated to any compensable claim under workers' compensation [32]. Similar to the language in the *Meninga* case, the court in *Palmer v. The Bi-Mart Company, Inc.* ruled that the victim of sexual harassment had suffered two distinct injuries: a personal injury for work-related stress and an injury to her right to be free from sexual harassment in the workplace. Because two separate statutes—workers' compensation statute and state discrimination statute—are available for each of these injuries, the employee could recover under both. Citing the ruling in *Palmer,* the court found in *Seitz v. Albina Human Resources Center* that the exclusivity provision of workers' compensation did not apply to injuries compensable for unlawful employment practices. The plaintiff was allowed to keep over fifteen thousand dollars that she received as workers' compensation,

and she was allowed additional recovery amounting to almost twenty-five thousand dollars [33].

SEXUAL HARASSMENT IN FEDERAL COURT

The exclusivity issue of workers' compensation has been raised in Title VII cases as well. For example, in *King v. Consolidated Freightways Corp.,* the court held that sexual harassment was not barred under Arkansas law unless sexual harassment could be considered a "risk" inherent in the work environment. Therefore, the claimant was allowed to proceed with her Title VII claim and her pendant state tort claims [34]. The aspect of double recovery has also been considered. The Ninth Circuit Federal Court, for example, showed that workers' compensation (under Federal Employees' Compensation Act) and Title VI may be examined separately when determining coverage for sexual harassment injuries. In *Nichols v. Frank,* the plaintiff was allowed to pursue back pay, annual and sick leave, and retirement benefits under Title VII, even though workers' compensation had been received. The court allowed the Title VII remedies provided the additional compensation did not constitute double recovery of back pay in light of her workers' compensation payments [35]. This case involved an unusual fact situation because the sexual harasser was given supervisory power over the claimant due to his ability to communicate with her through sign language. Because the supervisor's sexual demands were made while she assisted him in performing employment-related duties, the court found that the harassment occurred in the normal course of employment and while furthering the goals of the organization. Thus, the court awarded workers' compensation for the injury arising out of the course of employment, as well as Title VII remedies for the sexual harassment. While this case does represent a unique fact situation, it nevertheless shows the willingness of federal courts to consider workers' compensation and Title VII as separate remedies for the different injuries that may occur as a result of sexual harassment.

CONCLUSION

The trends discussed in this article indicate that managers need to be knowledgeable about the laws in their states to understand fully their potential liability in the event that sexual harassment occurs in the workplace. Even in states that do not currently have civil rights statutes, employers need to be aware of proposed legislation that could have an impact on their business. The state courts rely on the precedents discussed herein to allow double recovery against employers once legislation furthering the public policy against sexual harassment is passed. In addition, double recovery from workers' compensation and Title VII may become a greater issue as mental or emotional injuries arising from sexual harassment increasingly are included under workers' compensation acts.

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ENDNOTES

1. Under Title VII of the Civil Rights Act of 1991, compensatory and punitive damages are available for intentional discrimination. The total damages any one person can receive (compensatory plus punitive) cannot be more than $50,000 if the employer has more than 14 but fewer than 101 employees; $100,000 if the employer has more than 100 but fewer than 201 employees; $200,000 if the employer has more than 200 but fewer than 501 employees; $300,000 if the employer has more than 500 employees. 42 U.S.C. Section 1981, Revised Statutes Section 1977.
2. Eliot J. Katz, Annotation, *Workers' Compensation: Sexual Assaults As Compensable,* 52 A.L.R. 4th 731, 737.
3. *See, Brown v. Alos Micrographics Corp.,* 540 N.Y.S.2d 911 (A.D.3 Dept. 1989); *Knox v. Combined Insurance Company of America,* 542 A.2d 363 (Me. 1988); *Cremen v. Harrah's Marina Hotel Casino,* 680 F.Supp. 150 (D.C.N.J. 1988); *Irvin Investors, Inc. v. Superior Court of the State of Arizona,* 800 P.2d 979 (Ariz.App. 1990).
4. *Douglass v. State, Reg. & Licensing,* 812 P.2d 1331 (N.M.App. 1991).
5. *Ramada Inn Surfside v. Swanson,* 560 So.2d 300 (Fla. 1990).
6. *See, Brown v. Alos Micrographics Corp.,* 540 N.Y.S.2d 911 (A.D.3 Dept. 1989).
7. *Baker v. Wendy's of Montana, Inc.,* 687 P.2d 885 (Wyo. 1984).
8. *See, Stewart v. Little,* 797 S.W.2d 862 (Mo.Ct.App. 1990). In this case, the plaintiff conceded workers' compensation was her sole recourse against the employer, but she sued two assistant principals in her school for breach of duty to provide a safe

workplace. The court found her tort suits barred by the exclusive remedy provisions of workers' compensation.

9. *See, O'Brien v. King World Productions, Inc.,* 669 F.Supp. 639 (S.D.N.Y. 1987); *Downer v. Detroit Receiving Hosp.,* 477 N.W. 146 (Mich. App. 1991); *Irvin Investigators v. Superior Court,* 800 P.2d 979 (Ariz.App. 1990).
10. *Knox v. Combined Ins. Co. of America,* 542 A.2d 363 (Me. 1988).
11. For example, a claim for intentional infliction of emotional distress. *See, Miller v. Lindenwood Female College,* 616 F.Supp. 860 (D.C.Mo. 1985). The court found that if the sexual overtures were made in the course of employment, workers' compensation would be the remedy, and if the wrongdoer acted as an independent agent, there would be no cause of action against the employer.
12. Deborah A. Ballam, *The Workers' Compensation Exclusivity Doctrine: A Threat To Workers' Rights Under States Employment Discrimination Statutes,* 27 AM. BUS. L.J. 95-120 (1989).
13. *Downer v. Detroit Receiving Hospital,* 477 N.W.2d 146 (Mich. 1991).
14. *O'Brien v. King World Productions, Inc.,* 669 F.Supp. 639 (S.D.N.Y. 1987).
15. *Irvin Investors, Inc. v. Superior Court of the State of Arizona,* 800 P.2d 979 (Ariz. App. 1990). However, in *Ford v. Revlon, Inc.,* 734 P.2d 580 (Ariz. 1987), the court imputed liability to the employer for intentional infliction of emotional distress because of a failure to investigate immediately or to discipline the erring employee. The employer was held to have ratified the behavior of the harasser.
16. *Heideman v. American Family Insurance Group,* 473 N.W.2d 14 (Wis. 1991).
17. *See, Fisher v. San Pedro Peninsula Hospital,* 262 Cal.Rptr. 842 (Cal.App. 2 Dist. 1989); *Meninga v. Raley's, Inc.,* 264 Cal.Rptr. 319 (Cal.App. 1989); *Cole v. Fair Oaks Fire Protection District,* 233 Cal.Rptr. 308 (Cal. 1987).
18. *Peralta Community College District v. Fair Employment and Housing Commission,* 276 Cal.Rptr. 114 (Cal. 1990).
19. *Moll v. Parkside Livonia Credit Union,* 525 F.Supp. 786 (E.D.Mich. 1981); *Slayton v. Michigan Host, Inc.,* 332 N.W.2d 498 (Mich.App. 1983); *Borchardt-Spicer v. G.A.F. Corporation,* 362 N.W.2d 728 (Mich.App. 1984); *Boscaglia v. Michigan Bell Telephone Company,* 362 N.W.2d 642 (Mich. 1984).
20. *Slayton,* 332 N.W.2d 498 (Mich.App. 1983) and *Borchardt-Spicer,* 362 N.W.2d 728 (Mich.App. 1984).
21. *Byrd v. Richardson-Greenshields Securities, Inc.,* 552 So.2d 1099 (Fla. 1989); *See,* Jane Goodson, Christine Lewis, and Renee Culverhouse, *The Tort of Outrage,* 20 HUMAN RTS. 10-13, at 11 (1993).
22. *Harman v. Moore's Quality Snack Foods, Inc.,* 815 S.W.2d 519 (Tenn.App. 1991).
23. *Nichols v. Frank,* 771 F.Supp. 1075 (D.Or. 1991); *Seitz v. Albina Human Resources Center,* 788 P.2d 1004 (Or.App. 1990); *Carr v. U.S. West Direct Company,* 779 P.2d 154 (Or.App. 1989); *Palmer v. The Bi-Mart Company, Inc.* ,758 P.2d 888 (Or.App. 1988).
24. *See, Stimson v. Michigan Bell Telephone Co.,* 259 N.W.2d 227 (Mich. App. 1977); *Freeman v. Kelvinator, Inc.,* 469 F.Supp. 999 (E.D.Mich. 1979); *Moll v. Parkside Livonia Credit Union,* 525 F.Supp. 786 (E.D.Mich. 1981); *McCalla v. Ellis,* 341 N.W.2d 525 (Mich. 1983); *Boscaglia v. Michigan Bell Telephone Company,* 362 N.W.2d 642 (Mich. 1984); *Borchardt-Spicer v. G.A.F. Corporation,* 362 N.W.2d 728 (Mich.App. 1984).

25. *Stimson,* 259 N.W.2d 227 (Mich.App. 1977).
26. *Freeman,* 469 F.Supp. 999 (E.D.Mich. 1979); Moll, 525 F.Supp. 786 (E.D.Mich. 1981).
27. *Freeman,* 469 F.Supp. at 1000 (E.D.Mich. 1979); *McCalla,* 341 N.W.2d at 529 (Mich. 1983).
28. *See, Moll,* 525 F.Supp. 786 (E.D.Mich. 1981); *McCalla,* 341 N.W.2d 525 (Mich. 1983).
29. *Byrd v. Richardson-Greenshields Securities, Inc.,* 552 So.2d 1099 (Fla. 1989).
30. *Harman v. Moores' Quality Snack Foods,* 815 S.W.2d 519 (Tenn.App. 1991).
31. *Meninga v. Raley's Inc.,* 264 Ca.Rptr. 319 (Cal.App. 1989).
32. *Seitz v. Albina Human Resources Center,* 788 P.2d 1004 (Or.App. 1990); *Palmer v. The Bi-Mart Company, Inc.,* 758 P.2d 888 (Or.App. 1988).
33. *Seitz,* 788 P.2d 1004 (Or.App. 1990).
34. *King v. Consolidated Freightways Corp.,* 763 F.Supp. 1014 (D.Ark. 1991).
35. *Nichols v. Frank,* 771 F.Supp. 1075 (D.Or. 1991).

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