

When is Workers' Compensation the Exclusive Remedy
in Sexual Harassment Cases?
by Steven G. Biddle and Mary Jo Foster

Workers' compensation statutes, as enacted by all 50 states, provide payments to employees injured during the course of their employment. With some exceptions, these statutes provide the exclusive remedy for workplace injuries, and employees are barred from bringing civil actions alleging common law claims against their employers. Employers increasingly are asserting the exclusivity of workers' compensation as a defense in employment discrimination lawsuits and, in particular, sexual harassment cases. The success of this defense varies from jurisdiction to jurisdiction and depends in part on the wording of the particular statute, the court's interpretation of the statute, and the specific claims asserted. Sexual harassment lawsuits often encompass a variety of claims, including state and federal statutory claims of sexual harassment, wrongful termination in violation of public policy, intentional and negligent infliction of emotional distress, assault and battery, negligent hiring, supervision and retention, defamation, invasion of privacy, and other claims. Some of these claims may be barred by workers' compensation exclusivity and others may not.

This article will examine the exclusive remedy provisions of Arizona's workers' compensation law, discuss Arizona cases that have addressed the application of its provisions to claims arising from sexual harassment in the workplace, and review decisions from other jurisdictions that provide some insight into how Arizona courts may approach and decide these cases in the future.

Arizona's Workers' Compensation Statutes as an Exclusive Remedy

The primary exclusive remedy provision of Arizona's workers' compensation statute states "[t]he right to recover compensation [under the statute]... for injuries sustained by an employee...is the exclusive remedy against the employer or any co-employee acting in the scope of his employment..."¹ The statute further provides that an employer "...shall not be liable for damages at common law or by statute" for injuries to employees.² As a result of these provisions, Arizona courts generally lack subject matter jurisdiction in a tort action brought by an employee who has been injured in the course of employment.³ However, certain exceptions to this exclusivity rule exist. For example, Arizona's statute provides: "If the injury is caused by the employer's [or co-employee's] wilful misconduct,...and the act causing the injury... indicates a wilful disregard of the life, limb or bodily safety of employees....," an employee may either seek workers' compensation or bring an action against the employer for damages.⁴ The statute defines "wilful misconduct" as "an act done knowingly and purposely with the direct object of injuring another."⁵ In finding "wilful misconduct," courts have required proof of "a deliberate intent to inflict injury upon the employee," and have held this cannot be inferred from gross negligence.⁶

Arizona's workers' compensation scheme provides compensation only for injuries that occur "by accident arising out of and in the course of employment."⁷ The law does not compensate employees for mental or emotional injuries or serve as the exclusive remedy for such injuries unless some "unexpected, unusual or extraordinary stress...or some physical injury related to the employment was a substantial contributing cause...."⁸ As a result, there is some question about when workers' compensation will provide the exclusive remedy in a case involving emotional injuries.

Only two Arizona decisions have addressed the application of Arizona's workers' compensation exclusivity provision to common law claims arising out of sexual harassment, including claims of intentional infliction of emotional distress and negligent hiring, supervision and retention.⁹ The courts in both cases focused on whether the injuries were caused by the intentional conduct of the employer or could be deemed to have been accidental.

In *Ford v. Revlon*, a majority of the Arizona Supreme Court held that the Arizona workers' compensation law does not provide the exclusive remedy for claims of intentional infliction of emotional distress, reasoning that the emotional injuries suffered by the plaintiff were not accidental, but resulted from intentional acts.¹⁰ The court found it significant that the plaintiff had complained repeatedly to her employer over a period of months that she was being sexually harassed by her supervisor, and concluded that because of the employer's knowledge of and failure to respond to these complaints, the plaintiff's emotional injuries could not have been "unexpected" within the meaning of the statute.

Writing separately, with Justice Holohan concurring, Justice Feldman reached the same result, but applied different reasoning. Justice Feldman disagreed with the majority's statement that the plaintiff could seek tort recovery for her injuries because they were not accidental within the meaning of the statute. Citing Arizona's expansive definition of "accident" for workers' compensation purposes, he reasoned that

although Revlon's failure to act was intentional, it had not acted knowingly or purposefully with the direct object of injuring the plaintiff — the statutory requisite to be excepted from the exclusivity provision. Revlon's actions exhibited only reckless disregard of the near certainty that its failure to take action in response to the plaintiff's complaints would cause her emotional distress, which falls short of knowingly or purposely acting with the "direct object of injuring." Nonetheless, Justice Feldman concluded that sexual harassment is not an "inherent or necessary risk of employment," and although Ford's injuries fell within the coverage of the statute, she should be allowed to maintain a tort action against her employer because the employer's conduct violated rights protected by law and public policy and, therefore, should not be solely compensable under the workers' compensation scheme.¹¹

In *Irvin Investors, Inc. v. Superior Court*,¹² the Arizona Court of Appeals held that Arizona's workers' compensation exclusivity provisions barred an employee's tort action against her employer for negligent hiring, retention and supervision of a co-worker who sexually harassed her. The court followed the majority's reasoning in *Ford v. Revlon* and determined that the plaintiff could not maintain the action unless she could show "some evidence of intentional misconduct on the part of the employer itself."¹³ The court noted that unlike Revlon, Irvin Investors was not even aware of the co-workers' sexual harassment until after the plaintiff quit, and its conduct, therefore, was not intentional or even in reckless disregard of the possibility that emotional distress would result. The court concluded that the co-workers' conduct amounted to an "unexpected injury-causing event" falling within the coverage of the workers' compensation statutes.¹⁴

It should be noted that neither *Ford* nor *Irvin Investors* involved statutory sexual harassment claims brought under Title VII of the Federal Civil Rights Act¹⁵ or the Arizona Civil Rights Act (ACRA).¹⁶ Although Arizona's workers' compensation statutes purport to limit an employer's liability for damages "at common law or by statute,"¹⁷ a sexual harassment claim brought under either Title VII or ACRA would not be barred by Arizona's workers' compensation statutes, primarily because such a claim would not constitute a personal injury claim, but would allege discrimination in violation of a statute. Therefore, the exclusivity provision comes into play only with common law claims.

A Look at Other Jurisdictions

As noted above, all 50 states have enacted workers' compensation statutes, and each of these statutes contains some type of exclusive remedy provision. Courts have analyzed the question of whether workers' compensation is the exclusive remedy in sexual harassment cases in a variety of ways. Because only a few Arizona courts have considered the question, it is instructive to look at the treatment of these claims, and the courts' reasoning, in other jurisdictions.

In most states, courts have applied the "intentional/accidental" analysis similar to that used by the Arizona courts in *Ford v. Revlon* and *Irvin Investors*. That is, courts will refuse to bar a civil action when the employer knew or should have known that the harassing conduct was occurring.¹⁸ These courts have held that when an employer knows or should know of sexually harassing conduct, either the injury did not arise from an accidental occurrence or the intentional act exception applies, and workers' compensation is not the exclusive remedy.¹⁹

Several courts have wrestled with the issue of whether the conduct "arises out of the employment" in determining whether a civil action based on sexual harassment and related claims is preempted by workers' compensation. Most courts that have dealt with the "arising out of the employment" factor have held that where an employee's job requires the employee to be present in the workplace when the harassing conduct occurs, the claim arises out of the employment and workers' compensation is the exclusive remedy.²⁰ Conversely, other courts have held that where the harassing actions were personal to the employee-victim, they did not arise out of the employment, and a civil action may be maintained.²¹

Other states have considered the nature of the injury, that is, whether it is physical or non-physical, in determining whether the workers' compensation bar should apply. For example, in *Kerans v. Porter Paint Co.*,²² the court stated that a civil cause of action for claims relating to sexual harassment is not preempted by workers' compensation because the essence of the injury is non-physical.²³ Note, however, that although almost all states now include emotional and psychological injury as "personal injuries" covered by workers' compensation, there are some exceptions and limitations. For example, in Arizona, mental or emotional injuries generally are not covered by workers' compensation unless they are caused by some unexpected, unusual or extraordinary stress related to the employment.²⁴ Certainly, as the Ohio court decided in *Kerans*, an Arizona court could determine that non-physical injuries caused by harassing conduct in the workplace fall outside of workers' compensation coverage because they are the type of

injuries that are expected in the workplace.

In three states, Arkansas, California and Florida, recent cases have held that sexual harassment and related claims are not the types of risk to which one is exposed in the day-to-day workplace, and civil claims based on sexual harassment are not barred by workers' compensation.²⁵ In so holding, the courts referred to their states' public policy prohibiting sexual harassment, and implied that the exclusivity provisions in their workers' compensation statutes should not override such policy. Recall that this public policy argument for permitting civil actions is similar to Justice Feldman's reasoning in his concurrence in *Ford v. Revlon*.²⁶

Similarly, other claims brought by employees who have been harassed, such as defamation and invasion of privacy, are almost never preempted by workers' compensation. Most courts hold that the types of injuries that result, humiliation, embarrassment, and damage to reputation, are not the sort of injuries intended to fall within the workers' compensation scheme.²⁷

Conclusion

In Arizona, workers' compensation generally is the exclusive remedy when an employee is injured while working. However, an employee may bring common law claims when the injury is caused by the intentional conduct of the employer.

In sexual harassment cases, negligence claims, such as negligent hiring and negligent supervision, are preempted in Arizona by workers' compensation, while an employee may sue the employer outside of workers' compensation for intentional tort claims such as assault, battery and intentional infliction of emotional distress. Similarly, statutory sexual harassment and discrimination claims will not be barred.

Other jurisdictions have used different analyses than Arizona's intentional/accidental one in deciding when workers' compensation is the exclusive remedy in a sexual harassment scenario. For example, some states' courts have reasoned that such conduct does not "arise out of the employment" or the injury is non-physical in allowing employees to sue outside of the workers' compensation system. A few others merely have stated that it violates public policy to have workers' compensation bar tort suits in sexual harassment cases. These cases may be instructive for Arizona practitioners considering the dearth of Arizona case law on this issue.

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ENDNOTES:

1. A.R.S. § 23-1022(A) (emphasis added).
2. A.R.S. § 23-906(A).
3. *Bonner v. Minico, Inc.*, 159 Ariz. 246, 249, 766 P.2d 598, 601 (1988); *Swichtenberg v. Brimer*, 171 Ariz. 77, 82, 828 P.2d 1218, 1223 (Ct. App. 1991).
4. A.R.S. § 23-1022(A) (emphasis added). Article 18, Section 8 of the Arizona Constitution contains a similar exception: "... if the injury is the result of an act done by the employer or a person employed by the employer knowingly and purposely with the direct object of injuring another, and the act indicates a wilful disregard of the life, limb or bodily safety of employees, then such employee may... retain the right to sue the person who injured him."
5. A.R.S. § 23-1022(B).
6. *Irvin Investors, Inc. v. Superior Court*, 166 Ariz. 113, 115, 800 P.2d 979, 981 (Ct. App. 1990); *Allen v. Southwest Salt Co.*, 149 Ariz. 368, 371, 718 P.2d 1021, 1024 (Ct. App. 1986) (citing *Serna v. Statewide Contractors, Inc.*, 6 Ariz. App. 12, 429 P.2d 504 (1967)).
7. A.R.S. § 23-1022(B).
8. A.R.S. § 23-1043.01(B).
9. *Ford v. Revlon, Inc.*, 153 Ariz. 38, 734 P.2d 580 (1987) and *Irvin Investors, Inc. v. Superior Court*, 166 Ariz. 113, 800 P.2d 979 (Ct. App. 1990). It should be noted that in a recent case, the Arizona Court of Appeals held that sexually harassing conduct is, by its nature, outside the course and scope of employment. *State of Arizona v. Schallock*, ___ Ariz. ___, 914 P.2d 1306 (Ct. App. 1995). In *Schallock*, the court held that because sexual harassment is outside the scope of employment, a state director-level employee had no immunity from personal liability. See also *Smith v. American Express Travel-Related Servs. Co.*, 179 Ariz. 131, 876 P.2d 1166 (Ct. App. 1994) (in an assault and battery case brought by an employee against her supervisor and employer, the court stated "an employee's sexual harassment of another employee is not within the scope of employment.").
10. 153 Ariz. at 44, 734 P.2d at 586.
11. *Id.* at 47-49, 734 P.2d at 589-91.
12. 166 Ariz. 113, 800 P.2d 979 (Ct. App. 1990).
13. *Id.* at 114-15, 800 P.2d at 980-81.
14. *Id.* at 115, 800 P.2d at 981.
15. 42 U.S.C. § 2000e *et seq.*
16. A.R.S. § 41-1401 *et seq.*
17. A.R.S. § 23-906(A).
18. See, e.g., *Cline v. General Electric Capital Auto Lease, Inc.*, 757 F. Supp. 923 (N.D. Ill. 1991); *Vaino v. Brookshire*, 852 P.2d 596 (Mont. 1993); *Pursell v. Pizza Inn, Inc.*, 786 P.2d 716 (Okla. Ct. App. 1990) (civil allegations of sexual assault or battery not barred because acts were wilful torts); *Lentz v. Young*, 536 N.W. 2d 451 (Wis. Ct. App. 1995).
19. See also *Downer v. Detroit Receiving Hospital*, 477 N.W. 2d 146 (Mich. Ct. App. 1991) (civil action for claims relating to sexual harassment and negligent hiring and retention barred because the employer had no actual knowledge, therefore, not an intentional act of the employer); *Hart v. Sullivan*, 445 N.Y.S. 2d 40 (1991), *aff'd* 434 N.E. 2d 717 (N.Y. 1992) (civil suit for sexual harassment barred because injury not shown to be intentional); *Lentz, supra*, note 18 (intentional conduct of employer is not accidental and, therefore, civil claim not barred).
20. See, e.g., *Bickham v. Orleans Parish School Board*, 488 So. 2d 1248 (La. Ct. App. 1986); *Lui v. Intercontinental Hotels Corp.*, 634 F. Supp. 684 (D. Hawaii 1986); *Williams v. Munford, Inc.*, 683 F.2d 938 (8th Cir. 1982); *Baker v. Wendy's of Montana, Inc.*, 687 P.2d 885 (Wyo. 1984) (sexual advances by supervisor created an environment of stress unique to the work environment and, therefore, injury arose out of employment and a civil action is barred).
21. See, e.g., *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991); *Ward v. General Motors Corp.*, 431 A.2d 1277 (Del. Super. Ct. 1981) (civil claim not barred where sexual assault

- was motivated by reasons personal to victim and assailant and, therefore, did not arise out of employment); *Kennedy v. Pineland State Bank*, 439 S.E. 2d 106 (Ga. Ct. App. 1993) (civil claims for sexual harassment and assault not barred because personal to employee and because risk did not arise out of particular character of employment); *Fernandez v. Ramsey County*, 495 N.W. 2d 859 (Minn. Ct. App. 1993); *Cox v. Chino Mines/Phelps Dodge*, 850 P.2d 1038 (N.M. Ct. App. 1993); *Schweitzer v. Rockwell International*, 586 A.2d 383 (Pa. Super. Ct. 1990); *Richmond Newspapers v. Hazelwood*, 457 S.E. 2d 56 (Va. 1995).
22. 575 N.E. 2d 428 (Ohio 1991).
23. See also *Hogan v. Forsyth Country Club Co.*, 340 S.E. 2d 116 (N.C. Ct. App. 1986) (civil claim not barred because essence of injury is non-physical, even though complaint mentioned physical ailments).
24. See *supra* note 8.
25. *King v. Consolidated Freightways Corp.*, 763 F. Supp. 1014 (W.D. Ark. 1991) (civil claim not barred as sexual harassment is not a risk to which an employee is exposed because of the nature of the employment, but is a risk to which the employee is equally exposed outside of employment); *Accardi v. Superior Court of Ventura County*, 21 Cal. Rptr. 2d 292 (Ct. App. 1993) (claims for emotional distress related to sexual harassment and sex discrimination are outside the normal employment environment and violate the state's public policy); *Byrd v. Richardson-Greenshields Securities, Inc.*, 552 So. 2d 1099 (Fla. 1989) (acts constituting sexual harassment and related claims violate the state's policies against sexual harassment and are not the type of claims that should fall under the workers' compensation exclusivity rule).
26. See *supra* note 11 and accompanying text.
27. See, e.g., *Howland v. Balma*, 192 Cal. Rptr. 286 (Ct. App. 1983); *Foley v. Polaroid Corp.*, 413 N.E. 2d 711 (Mass. 1980); *Batish v. Chrysler Corp., Inc.*, 627 S.W. 2d 270 (Ky. Ct. App. 1981); *Oliver v. Wal-Mart Stores*, 434 S.E. 2d 500 (Ga. Ct. App. 1993); *Lovelace v. Long John Silver's, Inc.*, 841 S.E. 2d 682 (Mo. Ct. App. 1992).