The Temperature Is Rising: Effects of the #Metoo Movement in the Workplace and in Workers’ Compensation Claims

Authored by
ALFA International Attorney:

Dawn Dillon Raynor
YOUNG MOORE AND HENDERSON P.A.
Raleigh, North Carolina
dawn.raynor@youngmoorelaw.com

Doug Kotarek
HALL & EVANS, LLC
Denver, Colorado
kotarekd@hallevans.com
States Allowing Employees To Bring Psychological Stress Claims For Mental Injury Arising Out Of Sexual Harassment

1. Alaska

Pursuant to Alaska's Workers' Compensation Act, "[c]ompensation and benefits under this chapter are not payable for mental injury caused by mental stress, unless it is established that (1) the work stress was extraordinary and unusual in comparison to pressures and tensions experienced by individuals in a comparable work environment; and (2) the work stress was the predominant cause of the mental injury." A.S. § 23.30.010(b).

2. Arizona

Pursuant to Arizona's Workers' Compensation statutes “[a] mental injury, illness or condition shall not be considered a personal injury by accident arising out of and in the course of employment and is not compensable pursuant to this chapter unless some unexpected, unusual or extraordinary stress related to the employment or some physical injury related to the employment was a substantial contributing cause of the mental injury, illness or condition.” A.R.S. § 23-1043.01(B); see Irvin Investors, Inc. v. Superior Court In and For County of Maricopa, 166 Ariz. 113, 115, 800 P.2d 979, 981 (1990) (noting “that stress from sexual harassment results from 'a situation of greater dimension than the day-to-day mental stresses and tensions which all employees must experience' and is therefore compensable under workers’ compensation”).
3. California

According to the California Labor Code, “[a] psychiatric injury shall be compensable if it is a mental disorder which causes disability or need for medical treatment, and it is diagnosed pursuant to procedures promulgated under paragraph (4) of subdivision (j) of Section 139.2” or “is diagnosed using the terminology and diagnostic criteria of other psychiatric diagnostic manuals generally approved and accepted nationally by practitioners in the field of psychiatric medicine.” Cal. Lab. Code § 3208.3(a). The employee must demonstrate by a preponderance of the evidence “that actual events of employment were a substantial cause of the injury.” Id. § 3208.3(b)(1). Additionally, the employee must demonstrate by a preponderance of the finding of sexual harassment by any trier of fact. Id. § 3208.3(e)(4).

4. Colorado

According to Colorado law, “[a] claim of mental impairment must be proven by evidence supported by the testimony of a licensed psychiatrist or psychologist.” C.R.S.A. § 8-41-301(2)(a). “The mental impairment that is the basis of the claim must have arisen primarily from the claimant’s then occupation and place of employment in order to be compensable.” Id. However, the scope of claims of mental impairment due to sexual harassment is narrow given that sexual harassment is “highly personal and, except in the most unusual cases . . . will fall into the category of inherently private assault that ‘d[o] not arise out of the employment under any test.’ ” Horodyskyj v. Karanian, 32 P.3d 470, 478 (2001).
5. **Delaware**

The Delaware Supreme Court held “that a mental injury is compensable even if (1) there was no prior physical trauma, (2) the injury was the result of gradual stimuli rather than a sudden shock, and (3) the job-related stress causing the injury was not unusual.” *State v. Cephas*, 637 A.2d 20, 21 (1994); see also *Konstantopoulos v. Westvaco Corp.*, 690 A.2d 936, 939 (1996) (explaining that “[b]ecause the [Workers’ Compensation] Act does not contain any provision excluding sexual harassment claims, an employee cannot maintain a common law action against her employer for personal injury caused by the on-job sexual harassment by co-employees”).

6. **Hawaii**

The workers’ compensation statute “provides ‘an injured employee’s exclusive remedy for an injury arising out of and in the course of employment,’ ” *Ihara v. State Dep’t of Land and Nat’l Res.*, 141 Hawai‘i 36, 42, 404 P.3d 302, 308 (2017) (quoting *Iddings v. Mee-Lee*, 62 Hawai‘i 1, 5, 919 P.2d 263, 267 (1996)), “except for sexual harassment or asexual assault and infliction of emotional distress or invasion of privacy related thereto, in which a civil action may also be brought,” H.R.S. § 386-5.

7. **Illinois**
“Whether mental illness qualifies as an occupational disease depends upon whether the employee can establish the risk to which he was exposed arose out of and in the course of his employment and has a clear causal relationship to the disability suffered.” Chicago Bd. Of Educ. V. Industrial Com’n of Ill., 169 Ill. App. 3d 459, 466, 523 N.E.2d 912, 917 (1988). While Illinois court have not directly “addressed the question whether an injury resulting from sexual harassment by a co-employee is one that ‘arises out of’ employment,” the Seventh Circuit has found that “the harassment-prone co-employee clearly is ‘as much a part of the victim’s work environment as a defective tool might be.’ ” Juarz v. Ameritech Mobile Comm., Inc., 957 F.2d 317, 324 (1992).

8. Indiana


9. Iowa

According to Iowa’s Supreme Court, with regards to workers’ compensation law, “the term ‘personal injuries’ . . . includes a mental injury standing alone . . . . it naturally follows that an employee’s pure nontraumatic mental injury ‘arising out of and in the course of the employment’ is compensable.” Dunlavey v. Economy Fire and Cas. Co., 526 N.W. 845, 851 (1995). Accordingly, an incident of sexual
harassment that arose out of and in the course of employment that results in an employee’s mental injury would be compensable.

10. **Maine**

To demonstrate that a mental injury sustained due to workplace sexual harassment plaintiff must show that (1) “the employee was promoting an interest of the employer at the time of the injury,” (2) “the employee’s activities were within the terms, conditions or customs of the employment,” (3) “the hazard or causative condition can be viewed as employer or employee created,” (4) “the actions of the employee were unreasonably reckless or created excessive risk or perils,” (5) “the injury occurred on the premises of the employer.” *Frank v. L.L. Bean, Inc.*, 352 F. Supp. 2d 8, 12 (2005) (finding that plaintiff in this case “was not acting outside the scope of her job duties when she was subjected to harassment,” “all of the harassment occurred on L.L. Bean premises,” and “[d]efendant caused the harassment by negligently supervising its employees and failing to respond to repeated complaints,” therefore workers’ compensation applies).

11. **Maryland**

The Court of Appeals of Maryland held that an injury pursuant to the Workers’ Compensation “Act may be psychological in nature if the mental state for which recovery is sought is capable of objective determination.” *Belcher v. T. Rowe Price*, 329 Md. 709, 745-46 (1993). However, “a mere showing that a mental injury was related to general conditions of employment, or to incidents occurring over an
extended period of time, is not enough to entitle the claimant to compensation.”

*Id.* A mental disease resulting from workplace sexual harassment must be “due to the nature of an employment in which hazards of the occupational disease [or sexual harassment] exist.” *Davis v. Dyncorp*, 336 Md. 226, 235 (1994) (quoting M.D. Cord § 9-502(d)(1)(i)). In other words, “the question becomes whether mental disease caused by [one’s] job harassment may be reasonably characterized as due to the general character of [one’s] employment.” *Id.* at 237.

12. **Massachusetts**

“The workers’ compensation act allows employees to recover for emotional injuries which are shown to have arisen out of and in the course of employment.” *Doe v. Purity Supreme, Inc.*, 422 Mass. 563, 565 (1996). “[T]he workers’ compensation action also precludes an action against an employer for negligent infliction of emotional distress arising out of sexual harassment in the workplace.” *Id.* at 566.

13. **Michigan**

Mental injury as a result of workplace sexual harassment is compensable if the harassing events are “more than ordinary or relatively innocuous job stresses colored by the plaintiff’s hypersensitive or idiosyncratic reactions.” *Lombardi v. William Beaumont Hosp.*, 199 Mich. App. 428, 436 (1993).

14. **Minnesota**
In order to make a compensable mental impairment claim, an employee must be diagnosed with post-traumatic stress disorder by a licensed psychiatrist or psychologist. M.S.A. § 176.011(15)(d).

15. **Mississippi**

The Court of Appeals of Mississippi explained that “Mississippi law allows compensability for mental nervous situations not caused by physical trauma.” *Kemper Nat. Ins. Co. v. Coleman*, 812 So.2d 1119, 1124 (2002). “[A] claimant must prove the connection between the employment and the injury by clear and convincing evidence,” and the injury must be related “to some ‘untoward event, unusual occurrence.’” *Id.*

16. **Nevada**

Pursuant to Nevada law,

[a]n injury or disease caused by stress shall be deemed to arise out of and in the course of employment only if the employee proves by clear and convincing medical or psychiatric evidence that

(a) The employee has a mental injury caused by extreme stress in time of danger

(b) The primary cause of injury was an event that arose out of and during the course of his or her employment; and
(c) The stress was not caused by his or her layoff, the termination of his or her employment or any disciplinary action taken against him or her.

N.R.S. § 616C.180(3).

17. New Jersey


18. New York

“For a mental injury premised on work-related stress to be compensable, ‘a claimant must demonstrate that the stress that caused the claimed mental injury was greater than that which other similarly situated workers experienced in the normal work environment.’” *Kraus v. Wegmans Food Markets, Inc.*, 156 A.D.3d 1132, 1134 (2017). Claims of negligence against an employer arising out of sexual harassment in the course of employment is exclusively governed by Workers’ Compensation Law. *See Sormani v. Orange County Community College*, 240 A.D.2d 724 (1997).

19. North Carolina
Mental injuries are compensable if employee proves that the mental illness or injury was due to stresses different than those borne by general public. *Pitillo v. N.C. Dep’t of Envt. Health & Natural Res.*, 151 N.C. App. 641 (2002). Further a mental injury is not a compensable “injury by accident” if the relevant events were “neither unexpected nor extraordinary.” *Cody v. Snider Lumber Co.*, 328 N.C. 67, 71 (1991). If an employee’s mental injury claim is based upon negligent mishandling of harassment complaints or investigation by the employer, it is more likely to fall within the Workers’ Compensation Act. *See Hall v. Rockingham Co.*, 2016 WL 5400413, *8 (Sept. 27, 2016).

20. **Oregon**

Pursuant to Oregon’s workers’ compensation law a mental disorder is compensable if “the employment conditions producing the mental disorder exist in real and objective sense,” “the employment conditions producing mental disorder are condition other than conditions generally inherent in every working situation and reasonable disciplinary, corrective or job performance evaluation actions by the employer, or cessation of employment,” “there is a diagnosis of a mental or emotional disorder,” and “there is clear and convincing evidence that the mental disorder arose out of and in the course of employment.” O.R.S. § 656.802(3). *See Palmer v. Bi-Mart Co., Inc.*, 92 Or. App. 470, 474 (1988) (finding that the employee “suffered two distinct injuries:” (1) “her right to a workplace free of sexual harassment, for which she has a remedy under the discrimination statute” and (2)
“a personal injury suffered in the workplace and compensable under the worker’s compensation law”).

21. **Pennsylvania**

Pursuant to Pennsylvania’s workers’ compensation law the mental/mental injury refers to an employee is exposed to a psychologically traumatic stimulus and subsequently develops a psychological or nervous injury. The employee must prove that he or she sustained an injury caused by his or her employment and that an abnormal working condition caused the injury. *C. Hannah & Sons Const. v. W.C.A.B.*, 784 A.2d 860 (2001); see *e.g.* *Grimes v. W.C.A.B.*, 679 A.2d 1356 (1996) (finding that abnormal working conditions were present due to co-workers’ regular use of vulgar and indecent language on the assembly line “was so atrocious, and deviated so far from Employer’s own limits of acceptability”); *City of Pittsburgh v. Sloan*, 779 A.2d 598, 604 (2001) (holding that “ongoing harassment from co-workers or supervisors gives rise to abnormal working conditions”).

22. **Rhode Island**

Pursuant to Rhode Island General Statutes, a mental injury is compensable if an employee proves that the mental injury was caused by dramatically stressful stimuli that were not ordinarily present and expected in the workplace. *Rega v. Kaiser Aluminum & Chemical Corp.*, 475 A.2d 213 (1984). *See also Iacampo v. Hasbro, Inc.*, 929 F. Supp. 562, 582-83 (1996) (finding that plaintiff’s alleged sexual harassment “took place at work, while she was serving as a collection analyst.”
Therefore “she established a causal relationship between her injuries and her employment.”).

23. **South Carolina**

Pursuant to South Carolina’s workers’ compensation law, mental injuries “arising out of and in the course of employment unaccompanied by physical injury” are compensable if employee establishes “by a preponderance of the evidence” that “(1) that the employee’s employment conditions causing the stress, mental injury, or mental illness were extraordinary and unusual in comparison to the normal conditions of the particular employment;” and (2) the medical causation between stress, mental injury, or mental illness, and the stressful employment conditions by medical evidence.” S.C. Code Ann. § 42-1-160(B). *See Dickert v. Metropolitan Life Ins. Co.*, 311 S.C. 218, 221-22 (1993) (finding that the co-employee’s intentional egregious acts of sexual harassment were not ordinary incidents of employment and was therefore considered an “accident” within the meaning of the Workers’ Compensation Act and recovery pursuant to the Act was claimant’s exclusive remedy).

24. **Texas**

“A mental or emotional injury that arises principally from a legitimate personnel action . . . is not a compensable injury under the subtitle.” V.T.C.A. § 408.006(b).
If an employee’s mental injuries from alleged sexual harassment were sustained in the course of her employment, the Workers’ Compensation Act is the exclusive remedy from a claim of negligent supervision, training, and evaluation against an employer. *Mackey v. U.P. Enterprise, Inc.*, 935 S.W.2d 446, 459 (1996).

25. **Vermont**

“[I]n order for mental injury caused by stress at work to be compensable, a claimant must show that the stresses at work were significantly greater dimension than the daily stresses encountered by all employees.” *Bedini v. Frost*, 165 Vt. 167, 169 (1996).

26. **Virginia**

The Court of Appeals of Virginia held that “[w]hen an injury is strictly psychological, it ‘must be causally related to a physical injury or be causally related to an obvious sudden shock or fright arising in the course of employment.’” *Teasley v. Montgomery Ward & Co., Inc.*, 14 Va. App. 45, 48 (1992).

27. **Wisconsin**

The Supreme Court of Wisconsin held that mental injuries that are not the result of a physical injuries are compensable if they “resulted from a situation of greater dimensions than the day-to-day emotional strain and tension which all employees must experience.” *School Dist. No. 1 v. Dep’t of Industry, Labor, and Human Relations*, 62 Wis.2d 370, 377-78 (1974). See also *Zabkowicz v. West Bend Co.*, 62 Wis.2d 370, 377-78 (1974).