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Compensation Courier

The newsletter of the Workers' Compensation Committee

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Committee Leadership

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In This Issue

Leadership Notes

From the Editor

By Peggy Urbanic

It's hard to believe that there are fewer than 90 days left in this decade! For those who were able to attend the Annual Meeting in New Orleans, I hope you that you had a wonderful time. We welcomed Jennifer Jones as our new chair and said farewell to Pepper Cossar who has provided incredible leadership over the last two years. I am honored to consider Jennifer a friend and look forward to her serving as our chair. Thank you to contributors to this edition of the *Compensation Courier*, which includes an interesting article on sexual harassment in the workers' compensation arena and an article on mentorship. I have enjoyed serving as publications chair. Thank you.

Peggy Urbanic is an attorney in the Charleston, South Carolina, office of Clawson and Staubes. She mediates workers compensation and personal injury cases on a regular basis. In doing so, Peggy draws upon her many years of experience to assist parties in resolving their conflicts. Peggy's practice focuses primarily on insurance defense and workers' compensation. She has tried over 100 cases to verdict and has argued cases at the South Carolina Court of Appeals and South Carolina Supreme Court. Peggy handles a wide variety of cases, such as personal injury, motor vehicle liability, wrongful death, and premises liability.

Get to Know Our New Chair: The Fabulous Jennifer Jones

How long have you been with your firm (Cranfill Sumner & Hartzog LLP, Raleigh)?

13 years.

How long practicing?

14 years.

Biggest changes in the practice of law since you started?

The Blackberry and now iPhone/smart phone, which have resulted in constant connectivity. It's really great to have the flexibility to work while on the go and outside of the office, but it makes truly "unplugging" quite challenging.

Do you only handle workers' comp cases, or do you practice in other areas?

Just workers' comp. I'm a Board Certified Specialist in Workers' Comp in North Carolina.

Why is it important to participate in DRI?

DRI provides the opportunity to develop relationships with outstanding practitioners, build referral networks, increase industry involvement, collaborate on strategy, and participate in top-notch educational programming.

What other groups are you active in?

For DRI, I am also actively involved in the Women in the Law Committee, where I serve as the Technology Subcommittee Chair, as well as the PowerPoint Chair for the Annual Seminar. Outside of DRI, I am an Advisory Board member for the National Workers' Compensation Review, as well as a member of the Workers' Compensation Defense Institute. I also serve on the Planning Committee for the Triangle, NC Chapter of the Alliance of Women in Workers' Compensation.

What are you currently reading?

If I'm not reading emails and other work and business development materials, I'm browsing any article/blog post I can find on increasing productivity and top organization tips or the latest edition of *Southern Living* magazine.

Guilty pleasure?

Chocolate!

Favorite non work activity?

Being at the beach—I love to walk and look for seashells and sea glass.

Do you play any sports?

In high school, I played varsity tennis. I still play a friendly game/volley back and forth every now and again, but these days, I get my exercise through vigorous 5 a.m. walks or yoga.

Favorite team to cheer on?

It's complicated! Let's just say I bleed Tobacco Road Blue.

Best thing that has happened in 2019, thus far?

Too, many to count, as I have been truly blessed and most fortunate this year. To just name one, I am honored to have been appointed chair of the Workers' Compensation Committee.

Give us a fun fact about yourself.

I'm ambidextrous.

Feature Article

Sexual Harassment Claims in Workers' Compensation

By Jeffrey C. Napolitano

With the advent of the #MeToo movement nearly two years ago, a large spotlight in the workforce has been pointed toward actions that were too often ignored, tolerated or excused. Due to more publicity on the subject, and a society less accepting of such behavior, claims of sexual harassment and assaults in the workforce became more open and prevalent. The movement caused women to realize that they were not alone in their experiences and more willing to report the violator.

The good news, according to a recent survey conducted by the *Harvard Business Review*, is that currently there is a decline in the number of women in the workforce being sexually coerced, and also a decline in unwanted sexual attention.

However, employers need to be prepared for addressing the claims as they arise from workers who are now less willing to look the other way when such unacceptable behavior occurs.

In practice, many of these claims are handled solely under employment law. However, when the harassment and/or assaults result in injury, we will explore how the various state jurisdictions handle claims brought under workers' compensation.

May Claims for Injuries Resulting from Assaults of a Sexual Nature upon and/or Sexually Harassing Behavior Towards an Employee by a Person in a Supervisory Capacity over That Employee Be Compensable Under the Workers' Compensation Act?

The various state jurisdictions have differed on how these claims should be viewed. Those jurisdictions who entertain these claims under their workers' compensation laws tend to look for some causal connection between the conditions under which the employee worked and the injury she received. Other jurisdictions deny coverage under their workers' compensation laws usually finding that the offending behavior did not "arise out of" the employment, or because that jurisdiction did not recognize mental/mental injury claims.

Cases Finding Coverage under the Workers' Compensation Act

In *Knox v. Combined Insurance Company*, 542 A.2d 363 (Me. June 7, 1988), the Supreme Judicial Court of Maine was asked to determine whether injuries from sexual assault and sexual harassment towards an employee by a person in a supervisory capacity over that employee could be compensable under the Maine Workers' Compensation Act. The court opined that sexual assault cases should be handled in the same manner as assault cases.

Assaults arise out of employment:

1. If the risk of assault is increased because of the nature or setting of the work, or

2.If the reason for the assault was a quarrel having its origin in the work.

Therefore, the issue is whether there is "some causal connection between the conditions under which the employee worked and the injury he received." Knox argued that the risk of sexual assault was increased by the social settings in which much of her work was conducted, and that the requirement of her presence in hotels and the supervisor's home provided a causal connection between her working conditions and her injuries. The court found that the assault in this case was related to the employment because it brought the employee into contact with the offending supervisor.

In *Cremen v. Harrah's Marina Hotel Casino*, 680 F.Supp. 150 (D.N.J. 1988), New Jersey law took this a step further by finding that assaults by co-employees have been held compensable "even if the subject of the dispute is unrelated to the work..." if "the work of the participants brought them together and created the relations and conditions which resulted in the clash." The assault in this case was related to the employment because it brought the employee into contact with a vicious, criminal or hot-tempered person.

The court noted that the term "accident" has traditionally been construed to include all work-related episodes and events resulting in injury and indeed all unexpected injuries. "Accidents" for workers' compensation purposes thus may even include assaults by co-workers or supervisory employees of a "willful or criminal nature" and all injuries which are occasioned by such assaults. An assault at work could meet the requirements of "in the course of" employment if it occurred within the period of employment, at a place where the worker might reasonably be, and while she was performing her duties of employment or doing something incidental to it. New Jersey courts employ a positional risk or "but for" test for determining whether an incident "arose out of" employment for the purposes of workers' compensation. The positional risk analysis requires only that the employment in some fashion physically facilitated the occurrence of the incident.

A similar analysis was used in the case of *In Re: Questions Submitted by U.S. Court of Appeals for Tenth Circuit,* 759 P.2d 17, 1988 Colo. LEXIS 111 (1988). An employee was raped by a janitor on the employer's campus while walking to the cafeteria. This claim was ultimately deemed covered under the Workers' Compensation Act due to the time and place of the assault. The assault on the employee was neutral because it did not arise out of the employee's working relationship with the janitor or any private dispute with the janitor. Even though the employment was not the proximate cause of the assault on the employee, it provided the janitor the time, place and opportunity to assault the employee.

The U.S. Seventh Circuit quoted Illinois law in the case of *Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317 (7th Cir. 1992) in finding that a sexually harassing co-employee is similarly a "risk inherent in employment." Under such circumstances, the harassment-prone co-employee clearly is "as much a part of the victim's work environment as a defective tool might be."

A subsequent Colorado decision in the case of *Horodyskyj v. Karanian*, 32 P.3rd 470, 2001 Colo. LEXIS 784 (Colo. 2001) also found compensability under the Act. The court developed a test for determining whether injuries arise out of employment for purposes of workers' compensation. Willful assaults by co-employees were divided into three categories: (1) those assaults that have an inherent connection with the employment; (2) those assaults that are inherently private; and (3) those assaults that are neutral. If the assault has an inherent connection with the employment, or if it is neutral, then the assault is said to arise out of the employment for purposes of workers' compensation and are the exclusive remedy for the employee. If the assault is inherently private, then it does not arise out of the employment.

The courts in Hawaii and Florida found these assaults by a supervisor during work hours to be covered by the Workers' Compensation Act and thus barred any civil suit filed by the employee. The court in *Lui v. Intercontinental Hotels Corp.*, 634 F.Supp. 684 (D.Hawaii 1986) noted that only a tenuous connection to work was required for a finding of compensability under the Workers' Compensation Act. A similar decision was reached in *Schwartz v. Zippy Mart, Inc.*, 470 So.2d 720 (Fla. Dist. Ct. App. 1985). In the cases of *Lui* and *Schwartz*, the finding of compensability under the Workers' Compensation Act was used to bar a civil action filed by the employee against the employer.

In *Wood v. Safeway, Inc.*, 121 Nev. 724; 121 P.3rd 1026 (Nev. 2005), the court held that an employee sexually assaulted by a worker for the contractor was covered under the Workers' Compensation Act and thus barred recovery under tort. A similar finding was reached in Massachusetts in the case of *Doe v. Purity Supreme,* 422 Mass. 563 (1996) wherein a sexual assault and rape by an assistant manager was covered under the Workers' Compensation Act and barred recovery under tort.

Cases Finding No Coverage Under the Workers' Compensation Act

In the case of *Anderson v. Save-a-Lot*, 989 S.W. 2nd 277; 1999 Tenn. LEXIS 45 (Tenn. 1999), the Tennessee Supreme Court went to the other way finding that a claim for injuries arising out of sexual assault was not compensable under the Workers' Compensation Act. The court stated the general rule that an injury arising from an assault on an employee committed solely to gratify his personal ill-will, anger, or hatred, or an injury received in a fight purely personal in nature with a fellow employee, does not arise out of the employment within the meaning of the Workers' Compensation Act.

This opinion had the added bonus of an extensive discussion of sexual assault cases in various state jurisdictions across the nation. The opinion cited the rationale for each jurisdiction's reasoning in why these claims should be or should not be considered as compensable under the Workers' Compensation Act.

The court weighed the testimony of the claimant and made certain reasonable inferences regarding the motives of the assailant. The court held that it was logical to construe his purported activity as seeking to further a personal perverse sexual desire. It was also logical to interpret his conduct as being motivated by a demented animosity against Anderson in which he sought to control and humiliate her. The court found that it would be unreasonable to characterize the assailant's motivation as anything other than "purely personal in nature" and not related to furthering the business of the employer. His actions were in no fashion performed in the best interest of Save-a-Lot.

Also, there was no indication that the nature of Save-a-Lot's business was such that the risk of harassment was a "reasonably considered hazard" so that it was a normal component of Anderson's employment relationship. There was no allegation that Save-a-Lot requires or encourages employees to engage in a practice or dress in any manner that may invite sexual advances. Furthermore, there was no suggestion of an established policy or systematic behavior by the employer in which sexual harassment was condoned. To her knowledge, the assailant was the only Save-a-Lot employee who had engaged in such inappropriate harassing conduct.

The fact that Anderson was exposed to him during the course of her employment was not in and of itself dispositive. The alleged harassment had absolutely no connection with what Anderson had to do in fulfilling her responsibilities of employment with Save-a-Lot. There was no evidence to demonstrate that sexual harassment was an inherent risk to which Anderson was exposed when she accepted employment with Save-a-Lot. To the contrary, the alleged harassment was an unanticipated risk that was not a condition of Anderson's employment. Accordingly, the court found that Anderson's alleged injury was not compensable under the Tennessee Worker's Compensation law.

In support of their holding, the court mentioned that Tennessee Workers' Compensation law was enacted to "provide compensation for loss of earning power or capacity sustained by workmen through injuries in industry." The court questioned whether the drafters ever contemplated that the statute would cover injuries suffered as a result of sexual harassment. The court quoted a law review article stating:

> The risks contemplated…as the purpose behind workers' compensation are "all things that can go wrong around a modern factor, mill, mine, transportation system, or construction project – machine breaking, objects falling, explosives exploding, tractors tipping, fingers getting caught in gears…." In passing workers' compensation statutes, legislatures viewed these accidents "as the inevitable accompaniment of industrial production."
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> In contrast, sexual harassment is not an "inevitable accompaniment of industrial production." Sexual harassment is not the equivalent of "machinery breaking, objects falling, explosives exploding, tractors tipping" or "fingers getting caught in gears." It does not happen to every worker – it happens disproportionately to women….Although sexual harassment is commonplace, we need not accept it as a risk inherent in the workplace. It can, unlike true industrial accidents, be eliminated.

Many of the cases denying compensability under the Workers' Compensation Act look to the relationship of the assailant and the employee. If the assailant knew the employee, then the assault was more likely to be labeled as personal in nature. In *Morgan v. MDC Holdings, Inc.*, 54 Va. Cir. 45, 2000 Va. Cir. LEXIS 161 (2000), the court noted that if the assault was not directed at the employee because of his or her employment, it does not arise out of the employment. In other words, if the sexual assault was personal to the plaintiff and it was not directed at him or her because he or she was an employee, it is not covered under the Virginia Workers' Compensation Act. The result does not change if the assailant is a fellow employee or a supervisor. It is not sufficient to find that the employment is what brought the parties into close proximity. In an earlier case, the Supreme Court of Virginia in *Reamer v. National Service Indus.*, 237 Va. 466 (Va. 1989), the court pointed

out that the assailant knew the victim personally so the assault did not arise out of the employment.

Similarly, the court in Georgia in the case of *Cox v. Brazo*, 165 Ga.App. 888, 303 S.E. 2d 71 (1983) held that injuries occasioned by the sexual assault of the worker's supervisor were not compensable under that state's Workers' Compensation Act because they were "caused by the willful act of a third person for personal reasons and did not arise out of her employment."

It is also important to determine whether a particular state's jurisdiction recognizes claims made for a mental/mental injury. In *Pryor v. U.S. Gypsum Co.*, 585 F.Supp. 311 (W.D.Mo. 1984), the court found that the allegations of sexual assault and harassment were not covered by the Workers' Compensation Act on two grounds: (1) most of plaintiff's claimed injuries consisted of "emotional distress, nervousness and damage to reputation" which, because they were not predominantly physical were not "of the type intended to be compensated by the pattern of the Missouri Workers' Compensation Act; and (2) plaintiff's claimed injuries did not arise out of the employment.

Also following this line of cases, a Washington, D.C. court held in a similar fashion. In the case of *Nunnally v. District of Columbia Police & Firefighters' Retirement & Relief Board*, 184 A.3rd 855 (D.C. 2018), the court noted that mental and emotional injuries resulting from sexual harassment in the workplace could not be classified as "injuries" arising out of employment, since sexual harassment does not concern any task the employee was called upon to perform. The court further noted that finding compensability under the Workers' Compensation Act would preclude victims from obtaining full and appropriate relief under tort law theories.

Intentional Tort Recovery

Many of the cases determining compensability for sexual harassment and sexual assault cases arise out of tort claims brought against the employer in which the employer is asserting the exclusive remedy protection provisions under the Workers' Compensation Act.

In *Hunter v. Countryside Association for the Handicapped, Inc.*, 710 F.Supp. 233 (N.D. Ill. 1989), the court held that under Illinois law in order to hold an employer liable for the intentional torts of its employees under *respondeat superior*, plaintiff must show that the torts were committed in furtherance of the employment. The tortfeasing employee must think that he is doing the employer's business in committing the wrong. The court held that the defendant supervisor's alleged sexual assault could in no way be interpreted as furthering Countryside's business.

Similarly, the Supreme Court of Louisiana, in the case of *Baumeister v. Plunkett*, 673 So.2d 994 (La. 1996), the court listed the factors to consider in holding an employer liable for a supervisor's actions in an intentional tort: (1) whether the tortious act was primarily employment rooted; (2) whether the violence was reasonably incidental to the performance of the employee's duties; (3) whether the act occurred on the employer's premises; and (4) whether it occurred during the hours of employment.

The ultimate issue to be decided was whether the tortious conduct was motivated by "purely personal considerations entirely extraneous to the employer's interests, even though the incident occurred while the employee was working. The court held that the assault was not incidental to the performance of the employee's duties or in furtherance of the employer's interests.

A different result was obtained in the case of *Cremen v. Harrah's Marina Hotel Casino*, 680 F.Supp. 150 (U.S.D.N.J. 1988). In this case, the Court found that the assault was related to the employment because the employment brought the employee into contact with the assailant supervisor. The court noted that just because the claim was covered under Workers' Compensation did not mean that this would be the claimant's exclusive remedy since the claimant had alleged intentional wrongs committed by the employer.

The court noted that they must examine not only the conduct of the employer, but also the context in which that conduct takes place: May the resulting injury or disease, and the circumstances in which it is inflicted on the worker, fairly be viewed as a fact of life of industrial employment, or is it rather plainly beyond anything the legislature could have contemplated as entitling the employee to recover *only* under the Compensation Act?

The court held that since sexual assault is not viewed as a fact of life of industrial employment, Workers' Compensation would not provide the exclusive remedy for the employee. Acts of the supervisor are deemed to be acts of the corporation. Therefore, the claimant would be allowed to proceed against Harrah's in tort for the intentional wrongs of the supervisor, as well as for the intentional wrongs of the employer in keeping the supervisor in a supervisory role over claimant after the report of the assault.

Statute of Limitations

A particular state's laws may have special time limitations applicable for sexual assaults. In the case of *Canosa v. Ziff*, 2019 U.S. Dist. LEXIS 13263 (S.D.N.Y., January 28, 2019), the court noted that New York law extends the statute of limitations to five years for intentional torts associated with a sexual assault. The court noted that the five-year extension only applies to the person committing the intentional tort, and not those who are alleged to be vicariously liable for permitting these actions to happen.

The court noted that for any allegations of intentional infliction of emotional distress claims, the Continuing Violation Doctrine would apply. If the actor who allegedly committed these violations did so over an extended period of time, then all of these allegations could be included in the claim under the Continuing Violation Doctrine even though the earliest actions on their own would have been untimely.

In this case, the plaintiff had brought suit against Harvey Weinstein along with his company and the executive officers of the company. She alleged that her claims were suppressed for a period of time due to the intimidation of Weinstein. The court held that intimidation, though reprehensible, does not fall into the category of misrepresentation of facts that would cause the victim to be unaware that she had a claim that she could file. As such, any claim sounding in negligence would have been time-barred. Finally, the court held that there could be no liability for negligent supervision because the alleged acts did not take place on the company premises. An assault that took place in a hotel room rented by the company would not be a sufficient basis to support a claim for negligent supervision.

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YL Spotlight

Mentorship: A Young Attorney's Perspective

By Zack Anstett

I am the first lawyer in my family, which means a few things. First, to my older brother's dismay when we were growing up, I always had to have the last word in any argument (or as I called them, discussions). Second, when it comes to family holidays, I am officially the family general counsel. New Jersey landlord/tenant law, you say? Why of course I can become an expert.

But on a more serious note, being the first in the family to enter the profession left me stranded on one of the most important things a young attorney needs: a mentor. Now don't get me wrong, I have had (and continue to have) a lot of great mentors in my life. Whether it was a football coach, a leader in my church, or my dad, I was fortunate to have people in my life pouring into me at all different stages. But I was missing someone who had *been there done that* when it came to my career choice.

What I found was a mentor/mentee relationship doesn't have to be the two of you playing catch on the lawn while you talk about which pair of slacks to wear to an outing. The beauty of mentorship is that even if it starts in a more formal setting, it should transform into whatever you want it to be! Mentorship is like parenting without the financial cost and like friendship without the unneeded drama.

Let's face it, lawyers are busy. The very fact that you are reading this means you're likely the member of at least three or four professional committees. These things take time. You have meetings, events, and responsibilities that all come with your involvement and it feels like if one more thing gets added to your plate, then something is going to drop. Now for some of you, that might be true. But I think

for the majority of people, adding something to the schedule becomes feasible *once it gets added to the schedule*. What I mean is that, even if the thirty-minute coffee grab is scheduled for a month in advance, you'd be surprised how attainable it is once it finds its way into your calendar. So, let's break things down into two parts: 1) **Three Easy Ways to Be a Great Mentor**; and 2) **The Benefits of Mentorship**.

Three Easy Ways to Be a Great Mentor

1. Volunteer

You probably live near a school. Whether it is a high school, college, or law school, odds are that you live near some sort of facility that houses and/or educates young people. Educational institutions are riddled with all types of volunteer opportunities for professionals such as yourself. No, I'm not asking you to join another committee, but I know schools regularly have a "career night" where professionals in the community can come for an hour or two and just talk to some students about what they are interested in. I also know that law schools often have mock trial, moot court, and other types of competitions that *always need judges*. Once you go to these events, you are bound to meet someone that you connect with. So, when you hand that person your business card and they follow up with a question or thank you for your time, be genuine in your response. Let them know that you're available if they have questions or want to work through a problem.

2. Local Bar

No, not your local pub. Here, what I am talking about may not actually apply to everyone, but in Raleigh, North Carolina, where I went to law school, there is an incredible program that I was a part of. My law school and local bar association partnered up and actually pair practicing attorneys with 3L law students and newly minted attorneys. A little bit about the program can be found here, but basically this program asks each mentor and mentee to fill out a "dating profile" of sorts. For the law students and newly licensed attorneys, the questions ask about what they would look for in a mentor, what type of law they think they want to practice, do they have any special interests outside of school, etc. For the mentor, the questions ask about how long the attorney has been practicing, where the mentor grew up, what type of law the mentor practices, whether the mentor has a preference in the type of mentee, etc. The program then matches you based on your profiles and compatibility and the mentor/mentee relationship begins! Now I know not everyone has access to a program like this, but hey, maybe you could start one.

3. Be Available

We have all gotten that email from a law student or young attorney asking for tips or advice on how to succeed in the profession. Don't just follow up the email with a form response. Ask that student or attorney if they can meet for coffee. Take 30 minutes out of your day and really talk with the person. What if you looked at every interaction as an opportunity? An opportunity to really help someone.

The Benefits of Mentorship

It's human nature to think, "What's in it for me?" Well, let me tell you.

1. Odds are this young attorney or law student lives, studies, or works near you. This person, *whether you like it or not*, will probably practice in your bar. They will be a member of your community. You now have a unique opportunity to mold them into an attorney and person that does things the right way. An attorney that's respectful to the other side and knows how to treat their client or conduct a deposition. And who knows? This young attorney may even find themselves at your office one day, either with a referral or as a new hire. Help to make sure they're prepared.

2. It's the nice and right thing to do. Simple as that. One of things that we should always strive to be is nice. I get that sometimes you gotta play hardball, but this is not one of those things.

3. We all had help along the way. Whether we have the humility to admit it or not is a different question, but every single one of us got here because of the people in our lives. Whether it was our parents, our friends, our families, our neighbors, or our professors, we all had a person or a group of persons that were helping us along the way. Some in big ways and others in small, but regardless of the size of help that you received, let us try to be one of *those* people.

So as one of the youngest members in my legal community, let me encourage you take that step. If you have been waiting for a push, let this be it. And let me leave you with one last idea to chew on: *strive to be the person that you needed when you were younger.*

Zack Anstett is an Associate Attorney with Cranfill Sumner & Hartzog of Raleigh, North Carolina, primarily practicing with the Workers' Compensation Section. Prior to working with Cranfill Sumner, Zack clerked for a year in North Carolina and he received his law degree from Campbell Law School where he graduated cum laude in 2018.