

Worker's Compensation As A Defense To Sexual Harassment?
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An article entitled "Worker's Compensation: A Possible Defense to Claims of Sexual Harassment?" published in the April, 1995 edition of For The Defense discusses using the exclusivity provision in worker's compensation statutes to bar tort claims for sexual harassment. In short, it would allow employer's to dismiss sexual harassment suits filed against them by claiming that the injuries caused by sexual harassment fall within the worker's compensation statute. An independent tort action by the employee for injuries sustained as a result of sexual harassment would be precluded because remedies available to employees under worker's compensation statutes are exclusive.

While this is a novel idea and catching on in many jurisdictions, such a defense would not prevail in Georgia. A survey of Georgia case law reveals no cases directly on point as to "sexual harassment." However, two cases in Georgia provide a good picture of how a Georgia court is likely to construe its own Worker's Compensation Act.

In Murphy v. ARA Services, Inc., 164 Ga.App. 859, 298 S.E.2d 528 (1982), the Georgia Court of Appeals confronted the worker's compensation exclusivity issue in the context of a suit for "damages arising from a supervisor's verbal and physical abuse of a sexual nature." While not couched in those terms, this claim is likely to be called "sexual harassment" today. From that standpoint, this case is directly on point with the issue raised in the article.

In that case, a cafeteria worker sued her supervisor claiming that from the day she was employed, the supervisor "began to sexually molest and abuse her, demanding under threat of firing that she have sexual intercourse with him." Id. at 529. The complained of behavior took place entirely during the hours of both employees.

The trial court granted the employer's motion for summary judgment concluding that the exclusive remedy for appellant's claim was provided for under the Georgia Worker's Compensation Act. Id. The Act provides:

The rights and the remedies herein granted to an employee shall exclude all other rights and remedies of such employee . . . at common law or otherwise, on account of such injury, loss of service or death . . ."

O.C.G.A. § 34-9-11 (emphasis added). Therefore, in those instances where an employee's claim against his employer is one which is covered by the Act, his rights are determinable solely

under its provisions and any rights or remedies otherwise available to him against the employer are excluded.

The Court of Appeals, in reviewing the lower court's decision, began its analysis of whether the employee's claims fell within the Act by looking to the definition of "injury" under the Act. *Id.* at 530. The Court noted that O.C.G.A. § 34-9-1(4) defined injury for purposes of the Act as "injury by accident arising out of and in the course of employment. . ." *Id.* This section also specifically excludes from the definition "injury caused by the willful act of a third person directed against an employee for reasons personal to such employee. . ."

Next, the Court construed the language "arising out of and in the course of employment." *Id.* It concluded that the terms "arising out of" and "in the course of" are not synonymous. An injury can occur "in the course of" employment and not "arise out of" the employment. In this case, the Court concluded that the supervisor's misconduct occurred in the course of employment but not arising out of the employment. *Id.* Both conditions must occur before the Worker's Compensation Act can be applied. In discussing this distinction, the Court stated:

Under the Act an injury 'arises out of' the employment, when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work, and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises "out of" the employment. But it excludes an injury which can not fairly be traced to the employment as a contributing proximate cause, and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work. . . It must be incidental to the character of the business, and not independent of the relation of master and servant."

Id. (quoting, Hartford Accident, Etc., Co. v. Zachery, 69 Ga.App. 250(1), 25 S.E.2d 135 (1943)).

In applying this test to sexual misconduct, the Court held:

We refuse to say that the risk of verbal and physical abuse of a sexual nature alleged by [the employee] belongs to or is in any way connected with what [the employee] had to do in fulfilling her responsibilities of employment . . . On the contrary, the risk of the offensive conduct alleged by [the employee] is,

unfortunately, a hazard to which she would be equally exposed aside from her employment."

Id. at 531.

The Court did note that the Georgia Worker's Compensation Act applied to intentional torts arising over work-related actions. However, the Court dismissed this notion in relation to sexual misconduct because it clearly does not arise because of "any work-related dispute or altercation." Id. Sexual abuse or assault could only have "been entirely in furtherance of the supervisor's own very personal reasons." Id. Therefore, the Court of Appeals concluded that these claims were not covered under Georgia's Worker's Compensation Act nor were they part of its exclusive remedy.

In the second case, Kennedy v. Pineland State Bank, 211 Ga.App. 375, 439 S.E.2d 106 (1993), the Georgia Court of Appeals revisited the same issues. A former employee of a bank brought suit, alleging that a member of the bank's board of directors sexually assaulted her in the bank's vault. Citing Murphy as authority, the Court held that an injury compensable under the Worker's Compensation Act "shall not include injury caused by the willful act of a third person directed against an employee for reasons personal to such employee . . ." Id. at 107. Moreover, an injury caused by the willful act of a third person is personal to the injured employee if the injury cannot fairly be traced to the employment as a contributing proximate cause and the injury comes from a hazard which the employee would have been equally exposed apart from the employment. Id. The Court of Appeals reaffirmed its prior holding.

While sexual harassment can be distinguished from sexual assault, Georgia courts likely will treat them synonymously. Sexual harassment contains a lesser degree of conduct than sexual assault. Also, sexual harassment could technically be "unintentional." However, sexual misconduct, whether it is called "harassment" or "assault," usually is made up of the same type of conduct with similar intentions of the wrongdoer.

It appears that the only way to use the worker's compensation exclusivity defense is to argue that sexual harassment is not an "intentional" tort. In that event, however, liability insurance coverage would apply. Sexual harassment is normally characterized as an intentional action and it is unlikely to be related to the employment of the employee. Barring a very unusual factual scenario, Georgia courts are not likely to recognize sexual harassment as falling within the Georgia Worker's Compensation Act.