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WORKERS’ COMPENSATION AND SEXUAL HARASSMENT IN THE WORKPLACE: A REMEDY FOR EMPLOYEES, OR A SHIELD FOR EMPLOYERS?

Ruth C. Vance*

I. INTRODUCTION

Because of the Anita Hill-Clarence Thomas hearings, the Tailhook incident, and the attention that the media devoted to them, the public is now familiar with the term “sexual harassment.” Despite familiarity with the term, many people remain uncertain about what sexual harassment is. Actually, this offensive workplace activity had no label until the mid-1970s. Sexual harassment was first defined in the mid-1970’s by feminist scholars as “unsolicited non-reciprocal male behavior that asserts a woman’s sex role over her function as a worker,” and as the “unwanted imposition of sexual requirements in the context of a relationship of unequal power.” With these sociological definitions of sexual harassment as a foundation, the Equal Employment Opportunity Commission (“EEOC”) developed guidelines in the mid-1980’s that interpreted Title VII’s ban against sexual discrimination. Currently, according to those guidelines,

[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employ-

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I would like to give special thanks to Sue Collins for her editorial assistance. Thanks also goes to my research assistants, Lynn Malkowski and Jim Kraayeveld, and to my secretary, Bonnie Morrison.


2. Id. at 14, 15. Although this article could also apply to sexual harassment of men by women, women by women, and men by men, reference will be made to sexual harassment of women by men because that is the most pervasive problem. See CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 28 (1979).

3. MACKINNON, supra note 2, at 1.

ment, (2) submission to or rejection of such conduct by an individu-
al is used as the basis for employment decisions affecting such
individual, or (3) such conduct has the purpose or effect of unre-
sensibly interfering with an individual’s work performance or creat-
ing an intimidating, hostile, or offensive working environment.5

During the twenty years since sexual harassment was given that label,
society and the legal system have struggled to define it clearly and to
deal with it effectively. Most people now know that sexual harass-
ment may occur as an isolated incident or as a continuing, pervasive
workplace condition.6 Additionally, most people understand that sexu-
al harassment may be verbal or physical, and that it may range from
suggestive remarks and derogatory comments to direct demands for
sex, and from accidental unwanted touching to physical assault and
rape.7 However, despite the increased attention from legal scholars
and the media, for most of us, lawyer and non-lawyer alike, the defi-
nition of sexual harassment remains elusive.

Researchers have raised concerns that sexual harassment is an
economic issue as well as a personal and legal one. Recent studies
show that sexual harassment has negative consequences for individu-
als and businesses.8 Individuals who refuse to accept sexual harass-
ment at work face verbal attacks, lack of cooperation by male co-
workers, poor job evaluations, refusal of promotions, demotions, trans-
fers, reassignment of shifts or hours, denial of job training, impossible
expectations, and termination of employment.9 Victims of sexual ha-

5. Id.
6. MACKINNON, supra note 2, at 2.
7. See FARLEY, supra note 1, at 15; MACKINNON, supra note 2, at 2; see also Krista
J. Schoenhelder, A Theory of Tort Liability for Sexual Harassment in the Workplace, 134 U.
8. Kate Stone Lombardi, Seeking to End Sexual Harassment, N.Y. TIMES, Aug. 23,
9. FARLEY, supra note 1, at 15.
10. Lombardi, supra note 8, at BWC6.
11. Id. (citing a 1987 study by the United States Merit Systems Protection Board).
The Hill-Thomas hearings have raised the consciousness of the American public regarding sexual harassment and have galvanized government and business leaders to confront the issue. Since the hearings, many sexual harassment victims have come forward, despite the personal pain involved in making a claim. Indeed, the number of complaints filed with the EEOC during the first half of this year was fifty percent higher than for the same period last year. Quite possibly, the Hill-Thomas hearings may have given the women who were harassed by Navy personnel at the Tailhook convention the courage to make their claims. Additionally, the manner in which the all-male Judiciary Committee conducted the Hill-Thomas hearings prompted an increase in the number of women running for office nationwide, giving rise to the 1992 election slogan “Year of the Woman.”

Because sexual harassment law is still in its infancy, predicting how courts will apply the law to specific situations and determining what recourse victims have is difficult. Women received their first federal statutory protections against sexual discrimination in the workplace in the early 1960’s from the Equal Pay Act and Title VII of the Civil Rights Act of 1964. However, the first reported case of sexual harassment under Title VII was not decided until 1974. The United States Supreme Court’s only case on sexual harassment was decided in 1986, twenty-two years after Congress enacted Title VII.

Although Title VII of the Civil Rights Act of 1964 and state

12. *Id.* (citing a 1988 survey by *Working Woman* magazine).
14. *Id.*
civil rights statutes\(^\text{22}\) provide equitable remedies for victims of sexual harassment, compensatory and punitive damages have not usually been available.\(^\text{23}\) Last year, Congress passed the Civil Rights Act of 1991\(^\text{24}\) to amend Title VII to allow for such damages. However, employers with fewer than fifteen employees are exempt, and damage caps exist for the employers who are covered.\(^\text{25}\) Therefore, this amendment may not provide adequate remedies to all victims.

Additionally, if the Sixth Circuit’s interpretation of Title VII is followed, the statute may not be able to accomplish its purpose of eliminating sexual harassment from the workplace.\(^\text{26}\) In *Rabidue*, the court held that if the workplace was sexually hostile before the plaintiff became an employee, then the employer could not be held liable for sexual harassment unless its level increased.\(^\text{27}\) The court reasoned that Title VII was not enacted to change existing workplace conditions.\(^\text{28}\) This type of interpretation of Title VII may cause some attorneys to bring actions under state civil rights acts. Although some courts have criticized *Rabidue*,\(^\text{29}\) attorneys may increasingly file sexu-

\(^{22}\) See, e.g., N.J. STAT. ANN. §§ 10:5-1 to 5-42 (West 1992).

\(^{23}\) Although most states do not provide compensatory and punitive damages, four states do: California, Michigan, Minnesota, and Wisconsin. See infra note 63.


\(^{25}\) 42 U.S.C. § 1981(b)(3). The Act states, in relevant part:

(3) Limitations.—The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000;

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.


\(^{27}\) Id. at 620-21.

\(^{28}\) Id.

\(^{29}\) See Ellison v. Brady, 924 F.2d 871 (9th Cir. 1991); Andrews v. City of Philadel-
al harassment claims in state courts, fearing that federal judges, more than one-half of whom have been appointed by a Republican administration, may take a conservative, pro-employer approach to resolving this highly political issue.

As the law of sexual harassment evolves, attorneys have sought to broaden victims' means of redress by using traditional tort theories in addition to statutory causes of action. Tort claims based on sexual harassment have some advantages that Title VII and similar state statutes do not. Plaintiffs suing under tort theories can file their claims directly in court without first having to exhaust their administrative remedies as claimants under Title VII must do. The typically longer statute of limitations on tort actions provides a larger window of opportunity to seek relief than does the 180-day deadline for filing a claim with the EEOC. Attorneys may find that they have fewer proof problems in bringing a tort claim for clients whose relationships began consentually than they have if they must prove that the sexual harassment was unwelcome under Title VII. Even though the Civil Rights Act of 1991 provides for compensatory and punitive damages, tort claims are still important to plaintiffs who are employed by employers with less than fifteen employees and to plaintiffs who face caps on damages that will not allow full compensation. Furthermore, the coverage of the 1991 Act is unclear as to sexual harassment that occurred before its passage. However, the use of tort law to provide a remedy for sexual harassment has been accepted by some state courts and rejected by others.

This article begins by tracing the development of sexual harassment claims, both statutory and tort. This article continues by exploring how courts have used workers' compensation law to either allow or bar tort claims based on sexual harassment. This article then concludes that tort actions against employers based on sexual harassment


The Supreme Court has granted certiorari on two cases, which it has consolidated, to decide whether the Civil Rights Act of 1991 applies to cases pending on the Act's effective date. Landgraf v. USI Film Prods., 968 F.2d 427 (5th Cir. 1992), cert. granted, 113 S. Ct. 1250 (1993); Harvis v. Roadway Express, Inc., 973 F.2d 490 (6th Cir. 1992), cert. granted sub nom. Rivers v. Roadway Express, Inc., 113 S. Ct. 1250 (1993).
should not be barred under the exclusive remedy provisions of workers' compensation acts. The major reason not to use workers' compensation law to bar tort suits based on sexual harassment is that workers' compensation laws do not take into account the strong public policy against sexual harassment in the workplace and therefore should not be allowed to render this policy ineffective. Neither workers' compensation nor Title VII was meant to address the individual rights violated by acts of sexual harassment. Workers' compensation has as its policy the redressing of industrial injuries, and the policy of Title VII is to prevent group discrimination. Therefore, tort suits are necessary to protect the sexual harassment victim's individual rights.

The availability of tort suits to sexual harassment victims is not uniform because of legislators' avoidance of the issue and because of varying positions that the judiciary has taken as to its role in interpreting the workers' compensation statutes. Legislators have avoided the issue because sexual harassment is a political hot potato. Any legislative action to clarify workers' compensation acts as they apply to sexual harassment will alienate either labor or management. Courts that have barred tort suits based on sexual harassment under the exclusive remedy provision have stated that to rule otherwise would usurp the legislature's function. On the other hand, some courts have found it easy to hold that sexual harassment is outside the scope of workers' compensation and hence not governed by the exclusive remedy rule. Despite the politically controversial nature of this issue, state legislatures need to address it instead of leaving it to the courts.

The author of this article is not suggesting that employers should be held strictly liable for sexual harassment if tort suits are allowed. Even if the exclusive remedy provision is not used to bar tort actions, the agency principles used to determine employer liability limit the frequency with which employers can be found liable for sexual harassment. In the final analysis, the most successful lawsuits against employers are those for negligent hiring or retention because they do not rely on agency principles. However, plaintiffs do deserve the opportunity to try to prove their tort claims without the automatic barrier of workers' compensation.

32. See discussion infra parts IV, V.
33. See infra pp. 150, 157.
34. See infra pp. 150, 158.
II. REMEDIES AVAILABLE FOR SEXUAL HARASSMENT

American workers first obtained legal protection from sex discrimination\(^{35}\) by accident.\(^{36}\) Sex discrimination was not included in the original draft of Title VII of the proposed Civil Rights Act of 1964, but was added at the last minute in an effort to prevent passage of the Act.\(^{29}\) Therefore, using legislative history to interpret the sex discrimination portion of Title VII is problematic. Although Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of sex, courts did not initially recognize a cause of action for sexual harassment under Title VII.\(^{38}\) Judges did not want to hold employers liable for the sexually harassing acts of their employees, which the judges viewed as personal in nature.\(^{29}\) Courts eventually included sexual harassment under the coverage of Title VII by interpreting the language “terms and conditions of employment” broadly.\(^{40}\)

In interpreting the language of Title VII, courts have recognized two types of sexual harassment: quid pro quo and hostile environment. In quid pro quo sexual harassment, a supervisor conditions the receipt of job benefits on the giving of sexual favors and retaliates if the request is denied.\(^{41}\) Hostile environment sexual harassment exists


\(^{37}\) 110 CONG. REC. 2577-84 (1964).

\(^{38}\) 42 U.S.C. § 2000(e)-2(a)(1) provides in pertinent part:

> It shall be an unlawful employment practice for an employer

> (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex . . . .

> See Garber v. Saxon Business Prod., Inc., 552 F.2d 1032 (4th Cir. 1977); Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553, 556 (D.N.J. 1976) (“Sexual harassment and sexually motivated assault do not constitute sex discrimination under Title VII”) (emphasis in original), rev’d, 568 F.2d 1044 (3d Cir. 1977); Miller v. Bank of Am., 418 F. Supp. 233, 236 (N.D. Cal. 1976) (holding that Title VII does not impose liability for a supervisor’s sexual harassment), rev’d, 600 F.2d 211 (9th Cir. 1979); Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975) (stating that it is “ludicrous to hold that the sort of activity involved here [a supervisor’s physical and sexual advances] was contemplated by the Act”), vacated without op., 562 F.2d 55 (9th Cir. 1977).

\(^{39}\) Paul, supra note 35, at 333.

\(^{40}\) Id. at 334.

\(^{41}\) Id.
when supervisors or co-workers harass the victim to the point of "unreasonably interfering with an individual's work or academic performance or creating an intimidating, hostile, or offensive working or academic environment."42

Initially, courts used the Title VII disparate treatment model to recognize quid pro quo sexual harassment as a type of sexual discrimination.43 To have a prima facie case of quid pro quo sexual harassment, the plaintiff must show that the plaintiff is a member of a protected class; that she was subjected to unwelcome sexual harassment; that the harassment was because of sex; that the harassment affected a term, condition, or privilege of employment; and that the employer is liable.44 Once the victim establishes a prima facie case of quid pro quo sexual harassment, the employer may defend by showing that it had a legitimate reason for its actions. The plaintiff then may show that the reason was pretextual.45 To recover, a plaintiff must show that she suffered an economic harm from the harassment.46 The courts have adopted the EEOC Guidelines on Discrimination Because of Sex, which place strict liability on employers for quid pro quo sexual harassment by supervisors.47

Reliance on a risk allocation theory is implicit in the courts' holding an employer strictly liable for quid pro quo sexual harassment.48 The courts see employers as the most efficient risk avoiders or risk insurers.49 They seek to eradicate sexual harassment by enforcing strict liability, creating an incentive for the employer to avoid hiring and retaining sexist supervisors.50

In 1986, the United States Supreme Court held that hostile environment sexual harassment is actionable under Title VII as a form of sex discrimination.51 The Supreme Court in Meritor adopted the EEOC's Guidelines on Discrimination Because of Sex as the Guide-

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42. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (1991) [hereinafter Guidelines].
43. Paul, supra note 35, at 338.
49. Id.
50. Id.; Horn, 755 F.2d 599.
lines relate to hostile environment. The hostile environment sexual harassment action was modeled after racial hostile environment actions. The Court found that a hostile environment exists under Title VII when harassment reaches a level of severity or pervasiveness so as "to alter conditions of employment and create an abusive working environment." To present a prima facie case for hostile environment sexual harassment, the plaintiff must show that she is a member of a protected group; that she was subjected to unwelcome sexual harassment; that the harassment was based on sex; that the harassment affected a "term, condition, or privilege of employment," and that the employer knew or should have known of the harassment and failed to take prompt remedial action. The Supreme Court in Meritor did not make a definitive statement on employer liability for hostile environment sexual harassment cases, but suggested that lower courts use traditional agency principles to make the determination.

The Restatement (Second) of Agency imposes liability on the employer if the employee's act falls within the scope of employment. Factors that go into determining whether the employee acted within the scope of his employment are the timing and location of the sexual harassment, whether it was authorized or foreseeable by the employer, and whether it somehow furthered the employer's business. These agency principles incorporate an individual rights perspective regarding responsibility, delegation of responsibility, and scope of employment. According to the individual rights theory, people are free to choose but are responsible for the consequences of making those choices. People are additionally responsible for the consequences of acts delegated to others. The use of agency principles to determine employer liability in hostile environment cases makes recovery against an employer more difficult than in quid pro quo cases.

52. Id. at 57; Guidelines, supra note 42, § 1604.
54. Meritor, 477 U.S. at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).
55. Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).
56. Meritor, 477 U.S. at 72; Paul, supra note 35, at 354.
57. RESTATEMENT (SECOND) OF AGENCY § 219 (1957).
58. Yates v. AVCO Corp., 819 F.2d 630, 636 (6th Cir. 1987); Paul, supra note 35, at 354.
60. Id.
61. Id.
Before the enactment of the Civil Rights Act of 1991, Title VII remedies were limited to equitable relief such as back pay, injunctions, and reinstatement. Some state employment discrimination statutes that use Title VII as a pattern do provide sexual discrimination victims with compensatory and punitive damages. Although the purpose of Title VII was to remove sexual discrimination from the workplace with respect to compensation, terms, conditions, or privileges of employment, the limited remedies did not serve to deter employers from allowing sexual discrimination in the workplace. Further, the limited remedies did not make sexual discrimination victims whole, which would also serve deterrent purposes.

The Civil Rights Act of 1991 allows damages for victims of sexual discrimination. However, the monetary limits imposed on these damages may prevent some victims from being made whole and may mean that larger employers will not be deterred. Additionally, those victims who work for employers with fewer than fifteen employees are still unable to receive compensatory or punitive damages under Title VII.

Plaintiffs have added tort claims to their Title VII actions to broaden their remedies. One commentator sees a tort action for sexual harassment as having a purpose distinct from a Title VII action for sexual harassment because the tort focuses on the victim’s individual rights rather than on the societal problem of group discrimination, which is the focus of Title VII. These tort suits for sexual harassment provide victims with additional avenues for recovery and serve as an additional deterrent to employers. However, in many states such claims run right into a barrier imposed by the state’s workers’ compensation act.

63. Examples are California, Michigan, Wisconsin, and Minnesota.
65. Id.
66. Id.
68. Id.
70. Id.
71. Id.
72. All states’ workers’ compensation acts provide that workers’ compensation is the exclusive remedy for work-related accidents. Many states find sexual harassment to be an accident arising out of and during the course of employment and apply the exclusive remedy
III. TORT ACTIONS FOR SEXUAL HARASSMENT

Tort actions for sexual harassment allow employees to redress wrongs inflicted upon them individually and allow compensation for all consequences flowing from the sexual harassment, including pain and suffering, emotional damages, and general damages.\(^73\) The purpose of a tort action based on sexual harassment is to redress the individual's rights to privacy, freedom from sexual assault or the threat of it, and freedom from the infliction of emotional distress. Tort actions based on sexual harassment, which focus on individual rights, supplement Title VII actions, which focus on remedying group discrimination by equalizing opportunities in the marketplace. Although a distinct tort of sexual harassment does not exist, the victim of sexual harassment may rely on the torts of negligent hiring, negligent retention, intentional infliction of emotional distress, assault, battery, invasion of privacy, intentional interference with a contractual relationship, and fraud and deceit; these torts, with sexual harassment as their basis, have been successfully maintained.\(^74\)

Under the theory of negligent hiring or retention, the employer may be held liable for the acts an employee commits outside the scope of employment.\(^75\) Most other causes of action against employers rely on agency principles, which require that the employee's tortious act be committed within the scope of employment. Thus, a suit for negligent hiring or retention of an employee who sexually harassed a co-worker has a greater potential for success than some of the other torts listed above because it avoids the employer defense that the employee was acting outside the scope of employment and therefore not furthering the employer's interests. To have a case for negligent hiring or retention, the plaintiff must show that the harasser was unfit, considering the nature of the job and the risk that the employee posed to those who would foreseeably come into contact with him; that the employer knew, or should have known, of the employee's unfitness; and that the employer's hiring or retention of the unfit employee was the proximate cause of the injuries.\(^76\) The

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rule to bar tort actions for sexual harassment.

74. See Montgomery, supra note 30.
75. Ronald M. Green & Richard J. Reibstein, Negligent Hiring, Fraud, Defamation, and Other Emerging Areas of Employer Liability 7 (1988).

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hiring or retention of the employee is the proximate cause of the plaintiff's injuries if it is foreseeable that the plaintiff might be harmed by the employee.77 This cause of action is appropriate when the plaintiff can show that the employer knew or should have known that the harasser had a propensity toward, or a history of, sexual misconduct.

Only recently have courts been allowing tort actions for the intentional infliction of emotional distress. Historically, courts have been reluctant to grant damages for emotional distress unaccompanied by physical impact.78 To recover for intentional infliction of emotional distress, the victim must prove actions so shocking and outrageous that they exceed all bounds of decency so as to be intolerable in civilized society.79 Comment E to the Restatement (Second) of Torts section 46 indicates that abusive conduct by a supervisor who has real or apparent authority over an employee or who has the power to affect the worker’s employment may be considered outrageous.80 A supervisor or co-worker’s conduct may also be deemed outrageous when that person acts despite knowledge that an employee is particularly susceptible to emotional distress.81 Sexually harassing conduct should be regarded as outrageous per se under the Restatement definition.82 In fact, several jurisdictions have recognized actions for the intentional infliction of emotional distress based on sexual harassment.83

Assault and battery have long been recognized as providing a

77. Id.
80. Employer liability may be found where there is an “abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests.” RESTATEMENT (SECOND) OF TORTS § 46 cmt. e.
81. RESTATEMENT (SECOND) OF TORTS § 46 cmt. f.
82. See Montgomery, supra note 30, at 894-95.
83. See, e.g., Ford v. Revlon, Inc., 734 P.2d 580 (Ariz. 1987) (allowing a sexually harassed employee to bring an intentional infliction of emotional distress suit because the manager's and employer's conduct was not accidental in nature so as to limit the employee's recovery to workers' compensation); Pikop v. Burlington N. R.R. Co., 390 N.W.2d 743 (Minn. 1986) (rejecting the employer's defense based on the FELA provisions and finding that, because there was a pattern of sexual harassment by her co-workers and supervisor, the employer was liable for intentional infliction of emotional distress), cert. denied sub nom. Burlington N. R.R. v. Gulati, 480 U.S. 957 (1987).
remedy for unwanted touching of a sexual nature.\textsuperscript{84} Therefore, claims for assault and battery are commonly brought by victims of sexual harassment.\textsuperscript{85} An assault claim is proper where the employee reasonably fears unwanted sexual contact.\textsuperscript{86} A battery claim exists when the unwanted sexual contact has occurred.\textsuperscript{87}

Less common theories of tort liability for sexual harassment are invasion of privacy, intentional interference with a contractual relationship, and fraud. Invasion of privacy arises when a person intentionally intrudes upon the privacy or private affairs of another person.\textsuperscript{88} Plaintiffs must show that the intrusion would be highly offensive to a reasonable person.\textsuperscript{89} Defendants may avoid liability if they prove that they had a legitimate reason to act.\textsuperscript{90}

A claim of intentional interference with a contractual relationship may be appropriate where refusal to give in to sexual demands results in retaliation such as termination, demotion, or loss of advancement, training, or education.\textsuperscript{91} When a supervisor interferes with a contractual relationship through an illegal act such as physical violence or fraud, a cause of action exists.\textsuperscript{92} In addition, a supervisor whose acts of sexual harassment become so intolerable that an employee quits may also be found to have interfered with a contractual relation-

\begin{itemize}
\item \textsuperscript{84} Raefeldt v. Koenig, 140 N.W. 56 (Wis. 1913) (allowing battery suit for touching of a sexual nature); Goodrum v. State, 60 Ga. 509 (1878) (allowing battery suit for touching of a sexual nature).
\item \textsuperscript{85} Davis v. United States Steel Corp., 779 F.2d 209 (4th Cir. 1985) (allowing claim of assault and battery where supervisor's boss witnessed the supervisor touch the plaintiff's buttocks without her consent); Hart v. National Mortgage & Land Co., 235 Cal. Rptr. 68 (Ct. App. 1987) (allowing claim of assault and battery where employee complained to his supervisors about sexual harassment by a male co-employee, and employer took no action); Newsome v. Cooper-Wiss, Inc., 347 S.E.2d 619 (Ga. Ct. App. 1986) (allowing claim for assault and battery where secretary was fired one month after she complained of unwanted touching and rubbing by the comptroller).
\item \textsuperscript{86} Newsome, 347 S.E.2d at 621-22.
\item \textsuperscript{87} Id.
\item \textsuperscript{88} GREEN & REBSTINE, supra note 75, at 61; Phillips v. Smalley Maintenance Servs., Inc., 711 F.2d 1524, 1532 (11th Cir. 1983) (allowing a claim for invasion of privacy where employee's boss repeatedly asked her about her and her husband's sexual practices).
\item \textsuperscript{89} GREEN & REBSTINE, supra note 75, at 61; Phillips, 711 F.2d at 1533.
\item \textsuperscript{90} GREEN & REBSTINE, supra note 75, at 61.
\item \textsuperscript{91} Montgomery, supra note 30, at 895; see RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1977) (listing factors relevant in determining whether a cause of action exists). See also Favors v. Also Mfg. Co., 367 S.E.2d 328 (Ga. Ct. App. 1988) (existing genuine issue of material fact precluded summary judgment on claim that foreman tortiously interfered with worker's employment contract by setting in motion her termination because she would not accede to his sexual requests).
\item \textsuperscript{92} Fifield Manor v. Finston, 354 P.2d 1073, 1075 (Cal. 1960). See Montgomery, supra note 30, at 896, 897.
\end{itemize}
Theoretically, an action for fraud could be based on sexual harassment. Perhaps claims for fraud are not made because of difficulties in proof. To establish a cause of action for fraud, the plaintiff must allege that the employer misrepresented material facts, either through false representation, concealment, or non-disclosure; that the employer knew of the misrepresentation's falsity; that the employer intended to induce the plaintiff to rely on the misrepresentation; that the plaintiff justifiably relied on the misrepresentation, and that the plaintiff was damaged because of the reliance. Most claims of fraud regarding sexual harassment in the workplace would not be based on any actual misrepresentation, but rather on an implied representation of fair treatment and equal opportunity for all employees. A plaintiff could argue that the employer impliedly represented that employees would be evaluated according to the quality of their work and other job-related factors. An employer breaches the implied representation of equal opportunity in the workplace when sexual harassment is a condition of employment. Another implied representation is that of a safe workplace. The employer breaches the implied representation of a safe workplace if the employer knew or should have known of an employee's reputation for sexual harassment. Proof of these representations may exist in the employer's brochures, statements of fair employment practices, OSHA notices posted at the workplace, and employee handbooks. An employer might also be liable for fraud if the employer knows that employees are subjected to sexual harassment by supervisors or co-workers and does not disclose this information at the time of hiring.

Although promising theoretically, the tort of fraud is difficult to prove without actual misrepresentation. Even if actual misrepresentation exists, if it was oral, fraud will be hard to prove.

Remedies provided by any of these tort actions supplement Title VII remedies to make the sexual harassment victim whole. But as previously mentioned, many state courts never reach the merits of

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93. Montgomery, supra note 30, at 897.
95. See Favors, 367 S.E.2d 328 (denying summary judgment to the employer of a female who brought a claim against her employer for negligently failing to provide a workplace free from sexual harassment because the employer should have known of the reputation of its foreman for sexual harassment).
96. Id.
97. Montgomery, supra note 30, at 903.
these tort claims because of the exclusivity of workers’ compensa-
tion.  

IV. WORKERS’ COMPENSATION STATUTES AND CLAIMS FOR SEXUAL HARASSMENT

Workers’ compensation is one of the oldest forms of social in-
insurance in the United States. The rapid industrialization in this
nation at the turn of this century caused a dramatic rise in workplace
injuries, diseases, and death. At that time, the common law pro-
vided that an employer was responsible for an employee’s injury or
death only if the employer was negligent. The employer’s com-
mon law defenses of contributory negligence, assumption of risk, and
negligent acts of fellow servants presented the injured employee with
often insurmountable legal hurdles. Even after many states enacted
laws establishing employer liability for workplace injuries and limiting
an employer’s use of common law defenses, injured workers still
had to establish employer responsibility and prove negligence to re-
cover. Litigation was an uncertain, time-consuming, and costly
process for both the employee and employer.

In 1911, a form of no-fault insurance based on the statutory
scheme of compensation for personal injury and death “arising out of
and in the course of employment” emerged as a new concept. This
no-fault insurance was a swift, sure, and non-litigious system to
help the injured employee become self-sufficient by replacing lost
wages and paying medical expenses.

By 1920, all but eight states had enacted similar laws. Today,
each of the fifty states, American Samoa, Guam, Puerto Rico, and the

100. 1 ARTHUR LARSON, THE LAW OF WORKMEN’S COMPENSATION § 4.00 (1990).
101. Id.
102. UNITED STATES CHAMBER OF COMMERCE, HISTORY OF WORKERS’ COMPENSATION
AND EMPLOYERS’ LIABILITY, 1989 ANALYSIS OF WORKERS’ COMPENSATION LAWS vii [here-
inafter 1989 ANALYSIS].
103. Id.
104. 1 LARSON, supra note 100, §§ 5.20-.30.
105. Id. § 6.00.
106. See OFFICE OF FISCAL REVIEW, INDIANA LEGISLATIVE SERVICES AGENCY, 6 SUNSET
AUDIT ON INDUSTRIAL BOARD AND WORKERS’ COMPENSATION SYSTEM 71-72 (1987) [herein-
after SUNSET AUDIT].
107. 1 LARSON, supra note 100, §§ 6.00-60 (general discussion on the meaning of “aris-
ing out of the employment”).
108. Id. § 5.30.
Virgin Islands have a workers' compensation system. Federal employees are covered by the Federal Employees Compensation Act, while both private and public employees in nationwide maritime work are covered by the Longshoremen's and Harbor Workers' Compensation Act.

In theory, workers' compensation is really a compromise between employers and employees. In the compromise, or quid pro quo agreement, employers assume liability for certain occupational diseases, work-related injuries, and deaths, regardless of fault, in exchange for a monetary limit on that liability and the surrender by injured employees of any common law claims against their employers. In return for their surrender of common law claims, making workers' compensation the exclusive remedy, injured employees are guaranteed monetary benefits regardless of fault. Those benefits are not as great as a lawsuit verdict might be, but they are certain. In economic terms, workers' compensation laws make the economic losses of injury, death, and occupational disease a business cost that is ultimately passed on to consumers.

In making the quid pro quo arrangement, state legislators intended to give financial assistance to employees whose injuries resulted from workplace hazards and negligence. Legislators chose the language "arising out of and in the course of employment" to define those workplace injuries. An employee's injury arises in the course of employment if it occurs during the time and at the place of employment while the employee is engaged in employment-related activities. An employee's injury arises out of the employment if there is a causal connection between a risk of the employment and the employee's injury. These definitions serve as tests to ensure that only workplace injuries are compensable under the workers' compensation system.

110. Id.
111. Id.
114. Id. at 74.
115. 1 LARSON, supra note 100, § 1.00.
116. Id. § 14.00.
117. Id. § 6.00.
Remedies are available only to workers whose compensable injuries produce disability and affect earning power.\textsuperscript{118} Remedies provided under workers' compensation statutes include disability and impairment benefits to compensate for lost earnings and medical benefits to restore the injured worker to an optimum level of health.\textsuperscript{119} These remedies have the ultimate goal of returning the employee to gainful employment and a productive position in the community.\textsuperscript{120} Workers' compensation benefits, unlike tort judgments, are not intended to make the injured worker whole, but to prevent the injured worker from becoming a burden on the community.\textsuperscript{121} For example, workers' compensation laws do not provide compensation for pain and suffering. As an incentive for the worker to return to gainful employment, wage-loss benefits are calculated by statutory formulas that generally do not fully compensate the worker for actual lost wages.\textsuperscript{122} Workers' compensation benefits are essentially a transitional support system designed to provide support to injured workers until they are rehabilitated and self-sufficient.

According to the quid pro quo arrangement, if a workplace injury is found to have arisen out of and in the course of employment, workers' compensation is the exclusive remedy for the injury, and the employer is immune from a suit based on any other theory.\textsuperscript{123} An employee who has a workplace injury that does not require medical treatment or absence from work will not receive any benefits. Notwithstanding the lack of a remedy under the workers' compensation act, such an employee, in many jurisdictions, is barred from pursuing legal action against the employer by the exclusive remedy provision of the workers' compensation act.

Despite the purposes behind the enactment of workers' compensation statutes, many jurisdictions have found sexual harassment to be

\textsuperscript{118} \textit{Id}. § 2.40; \textit{see also} Kawalar, supra note 78, at 185.

\textsuperscript{119} 2 \textsc{Larson}, supra note 100, §§ 57.10-11.

\textsuperscript{120} \textit{Id}. § 61.21.

\textsuperscript{121} \textit{Id}. § 2.50; \textit{see also} Kawalar, supra note 78, at 185.

\textsuperscript{122} Income or cash benefits payable under either temporary or permanent disability vary significantly between jurisdictions. In many states, these benefits are based on a wage-loss replacement percentage. The majority of states use a payment formula that establishes maximum weekly benefits in an amount that equals 66\% of that state's average weekly wage (SAWW). 1989 \textsc{Analysis}, supra note 102, at 18-20 (Chart VI); \textit{see also} \textsc{Audit Report}, supra note 112.

\textsuperscript{123} 2A \textsc{Larson}, supra note 100, § 65.11; \textit{see also} Deborah A. Ballam, \textit{The Workers' Compensation Exclusivity Doctrine: A Threat to Workers' Rights Under State Employment Discrimination Statutes}, 27 \textsc{Am. Bus. L.J.} 95, 105 (1989) [hereinafter Ballam, \textit{The Exclusivity Doctrine}].
a compensable workplace injury. Many states that find sexual harassment to be compensable under workers' compensation acts have denied tort actions based on sexual harassment because of the exclusive remedy provision. This denial of a tort action to sexual harassment victims usually leaves the employee without a remedy because most sexual harassment victims have negligible or no medical expenses and no lost wages. The lack of a suitable remedy for sexual harassment under workers' compensation acts may indicate that workers' compensation never had as its goal the coverage of sexual harassment.

The goal of fair employment laws such as Title VII, to "guarantee equal opportunity in the marketplace," is vastly different from the goal of workers' compensation statutes, "to redress industrial injuries." Providing remedies for sexual harassment is in line with the goal of fair employment laws such as Title VII. It is less clear that providing workers' compensation coverage for sexual harassment on the job fulfills the goal of redressing industrial injuries. Indeed, one might ask whether sexual harassment is an industrial injury. Sexual harassment, an injury occasioned by intentional actions in the workplace, is not a normal risk of employment. No support can be found in early case law for the position that intentional torts were considered a normal risk of employment. The Supreme Court has found that Congress intended Title VII to "supplement, rather than supplant, existing laws and institutions relating to employment discrimination." According to the Supreme Court's ruling, Title VII should supplement tort actions that would provide remedies for sexual harassment. Therefore, the exclusive remedy provision of workers' compensation statutes should not operate to prevent tort actions that would complement Title VII.


125. See cases cited supra note 124.

126. See cases cited supra note 124.


128. Id.


V. WORKERS' COMPENSATION EXCLUSIVE REMEDY DEFENSE

All state workers' compensation systems provide that workers' compensation is the exclusive remedy for employees' injuries as the quid pro quo for employers' acceptance of liability regardless of fault. The scope of the protection from common law tort suits afforded employers through the exclusive remedy provision is unclear, as the amount of litigation involving the exclusive remedy defense indicates. Implicit in the workers' compensation scheme is the notion that coverage is provided for the inevitable employee injuries caused by negligence or other normal hazards of employment. No evidence indicates that the legislatures intended the employer to be protected from financial ruin arising from workplace injuries caused by something other than negligence or a normal hazard or risk of employment. Nevertheless, the exclusive remedy provision offers great protection to employers because most courts and state legislatures have interpreted the exclusive remedy provision broadly and have created few exceptions. Some state legislatures have even reacted to judicially created exceptions by passing legislation that narrows those exceptions.

The broad interpretation courts have given the exclusive remedy provision has left some injured employees without a remedy where their work-related injury does not diminish their wage-earning capacity. A worker in California incurred work-related injuries resulting in sexual impotence. The worker argued that the exclusive remedy provision should not bar his tort suit, because his physical disability was not compensable under the workers' compensation scheme. The California appellate court, like many other state courts, ruled that workers' compensation is the exclusive remedy for work-related injuries resulting in sexual impotence.

132. Arthur Larson devotes a 171-page chapter of his treatise to the exclusivity provision. 2A LARSON, supra note 100, §§ 65.00-67.00.
133. See Blankenship v. Cincinnati Milacron Chems., 433 N.E.2d 572 (Ohio), cert. denied, 459 U.S. 857 (1982) (holding that the public policy behind workers' compensation does not allow employers to protect themselves from liability due to intentional torts).
134. Ballam, The Exclusivity Doctrine, supra note 123, at 106; see generally 2A LARSON, supra note 100, §§ 65.00-67.00.
137. Id. at 815.
138. See 2A LARSON, supra note 100, § 65.20 and cases cited therein.
injuries even if the resulting disability is not compensable.\textsuperscript{139} In its reasoning, the court pointed to the historic tradeoffs made by the employer and employee, and stated that when the employee received protection for loss of earning capacity without fault, he surrendered his common law right to damages, even those unrelated to earning capacity.\textsuperscript{140} This reasoning has likewise been applied to tort claims based on sexual harassment.\textsuperscript{141} An Indiana worker who received no workers' compensation benefits when she was sexually harassed on the job was barred from bringing a tort suit because the court ruled that workers' compensation provided her with her exclusive remedy even though she received no benefits.\textsuperscript{142}

The tradeoff that the California appellate court presumed — benefits to protect earning capacity in return for giving up the right to sue at common law for damages, even those unrelated to earning capacity\textsuperscript{143} — is out of balance. When state legislatures passed the workers' compensation schemes, a more equivalent trade was likely intended. Indeed, some courts do interpret the quid pro quo to exclude from the exclusive remedy provision any work-related injuries that are not compensable.\textsuperscript{144} Specifically, in sexual harassment cases, some courts have created an exception to the exclusive remedy rule for the non-disabling emotional injury brought about by sexual harassment.\textsuperscript{145}

Some state legislatures have tempered the harshness of the exclusive remedy provision with another statutory provision that provides for a percentage increase in the injured worker's award when the injury results from the employer's "serious and wilful misconduct."\textsuperscript{146} Courts in states with these penalty statutes face the dilemma of trying to determine whether the legislature intended the penalty to take the place of an exception to the exclusive remedy rule that would allow a common law suit.\textsuperscript{147} In enacting a penalty provision,

\begin{itemize}
\item \textsuperscript{139} Williams, 123 Cal. Rptr. at 815.
\item \textsuperscript{140} Id.
\item \textsuperscript{141} Fields v. Cummins Employees Fed. Credit Union, 540 N.E.2d 631 (Ind. Ct. App. 1989).
\item \textsuperscript{142} Id. at 637.
\item \textsuperscript{143} Williams, 123 Cal. Rptr. at 815.
\item \textsuperscript{144} 2A LARSON, supra note 100, §§ 68.30-.36.
\item \textsuperscript{145} See infra note 152; see also 2A LARSON, supra note 100, § 68.34(a).
\item \textsuperscript{146} See, e.g., CAL. LAB. CODE § 4553 (West 1989); MASS. GEN. LAWS ANN. ch. 152, § 28 (West 1988); TEX. REV. CIV. STAT. ANN. art. 8306 § 5 (West 1967 & Supp. 1992); see 2A LARSON, supra note 100, § 69.10.
\item \textsuperscript{147} E.g., Johns-Manville Prods. Corp. v. Contra Costa Superior Court, 612 P.2d 948 (Cal. 1980); Renteria v. County of Orange, 147 Cal. Rptr. 447 (Cal. Ct. App. 1978).
\end{itemize}
a state legislature may have been trying to motivate employers to provide a safe workplace rather than intending to abrogate the employee's right to bring a common law action. Nevertheless, the California appellate court pointed out one shortcoming of such a penalty provision when it stated that "[w]here there is no compensable injury, 50 percent of nothing is still nothing, and Labor Code section 4553 cannot function as a deterrent."

Despite courts' and legislatures' broad interpretation of the exclusive remedy provision, a few exceptions have been recognized. Exceptions have been recognized when the employer acts in a dual capacity toward the employee, when the workers' compensation act is preempted by a federal act, when the injury is essentially non-physical, and when the employer commits an intentional tort. Dual capacity and preemption arguments have resulted in few exceptions. Cases involving non-physical injury or intentional torts, on the other hand, have prompted many courts to create exceptions to the exclusive remedy rule and will be discussed in detail in the following two sections.

Under the dual capacity or dual persona doctrine, an employer may be liable in tort if the employer possesses a second persona or relationship with the employee that imposes obligations entirely independent from those obligations related to the status as an employer. The theory behind the dual capacity doctrine is that in the quid pro quo agreement, the employee only gave up all rights against the employer acting as an employer, but reserved any other rights.

The dual capacity doctrine became popular in Ohio and California, especially in products liability cases. In an Ohio case, a truck
driver was injured by a blowout of a tire that had been manufactured by his employer. The court held that the employer had a second capacity as a manufacturer and thus could be held liable for manufacturing a defective tire. The California appellate court recognized the dual capacity doctrine in a products liability case similar to the Ohio case.

The California legislature and the Ohio Supreme Court ended the use of the dual capacity doctrine after subsequent cases had expanded application of the rule. In California, the legislature eliminated the dual capacity doctrine in a 1982 amendment to its labor code. In Ohio, the supreme court narrowed the dual capacity doctrine by substituting the term “dual persona.” In the Ohio case, a police officer riding a motorcycle was injured when he drove over a hole in the street. The court did not allow his lawsuit against the city because it found that the employer was not acting in a second capacity that created obligations to the employee, independent of its obligations as an employer. The court held that any second capacity must be so independent that it creates a separate legal persona. The court reasoned that because the streets were the police officer’s place of employment, maintaining a safe workplace was not an independent obligation of the police officer’s employer. Fear of destroying employer immunity by the expansion of the dual capacity doctrine to include the employer in capacities such as landowner, land occupier, manufacturer, modifier of equipment, vender, vehicle owner, and

157. Id.
158. Douglas v. E. & J. Gallo Winery, 137 Cal. Rptr. 797 (Ct. App. 1977) (allowing an employee to successfully sue his employer when he was injured from a fall due to the collapse of an elevator scaffolding device that was manufactured by the employer).
159. California: D'Angona v. County of Los Angeles, 613 P.2d 238 (Cal. 1980) (extending doctrine to permit suits against the employer for medical treatment furnished under compensation law); Bell v. Industrial Vangas, Inc., 637 P.2d 266 (Cal. 1981) (applying doctrine to employers who assemble a product for their employees’ use and occasional sale to others). Ohio: Guy v. Arthur H. Thomas Co., 378 N.E.2d 488 (Ohio 1978) (extending doctrine to permit a suit against the employer for medical treatment furnished under the compensation law); Walker v. Mid-States Terminal, Inc., 477 N.E.2d 1160 (Ohio Ct. App. 1984) (holding employer liable as a matter of law in its dual capacity as a manufacturer of a hoist even though the hoist used in the accident was different from the personal elevators that the employer manufactured for commercial sale).
160. CAL. LAB. CODE § 3602 (West 1989).
162. Id.
163. Id. at 1114, 1116.
164. Id.
165. Id. at 1116.
health services provider has caused other jurisdictions either to refuse to recognize the dual capacity doctrine or to recognize only the narrower dual persona doctrine. The rejection of the dual capacity doctrine is an example of the broad interpretation given the exclusive remedy provision, which keeps employers largely immune from suit for obligations that they may have toward the employee outside the employment relationship.

The United States Supreme Court has ruled that the exclusivity provision is not so broad as to preempt the federal Migrant and Seasonal Agricultural Worker Protection Act. In Adams Fruit Co., migrant farm workers who were injured in Florida while being transported in the employer’s van sued the employer under the federal Migrant and Seasonal Agricultural Worker Protection Act, alleging that their injuries occurred because of their employer’s intentional violations of the Act’s motor vehicle safety provisions. The Court held that the Act preempts state law in that it does not permit the state to supplant the Act’s remedial scheme with its own.

In reaching its decision, the Supreme Court cited a Florida case in which the court had refused to apply the exclusivity rule to bar a tort action based on sexual harassment in the workplace. In the sexual harassment case, the Florida Supreme Court had refused to apply the rule in an extraterritorial manner that would, in effect, have derogated the policies of federal and state laws against sexual harassment. The Supreme Court in Adams Fruit Co. agreed with the Florida Supreme Court’s decision not to allow the exclusivity rule to limit federal remedies or to create a conflict between the policies of federal and state legislation. Interpreting the exclusive remedy provision so expansively that it denies tort actions based on sexual harassment in the workplace thwarts the strong federal and state public policies against sexual discrimination and harassment that occur in the workplace. Therefore, using the reasoning of the Supreme Court in

166. 2A LARSON, supra note 100, §§ 72.81 and 72.83 lists Illinois, Kentucky, Massachusetts, Michigan, Minnesota, Missouri, North Dakota, Ohio, Wisconsin, and Florida as recognizing the narrower dual persona doctrine. The majority of states hold that an employer who manufactures, modifies, installs, or distributes a product used in work cannot be held liable under products liability. See 2A LARSON, supra note 100, § 72.83 n.21 for cases.
168. Id. at 649.
169. Id. at 647 (citing Byrd v. Richardson-Greenshields Sec., Inc., 552 So. 2d 1099, 1102 (Fla. 1989)).
170. Byrd v. Richardson-Greenshields Sec., Inc., 552 So. 2d 1099, 1102 (Fla. 1989).
171. Adams, 494 U.S. at 647.
Adams Fruit Co. and the Florida Supreme Court in Byrd, the exclusive remedy provision should not be applied to deprive sexually harassed workers of their rights under state tort law.

The most widely recognized exception to the exclusive remedy provision allows a common law action when the employer commits an intentional tort.\(^{172}\) The intentional tort exception may be a creature of statute or common law. The focus of statutes penalizing an employer’s intentional misconduct range from the imposition of a penalty added to the workers’ compensation benefits to the permitting of a common law suit.\(^{173}\) Jurisdictions vary as to the level of intent necessary to warrant an exception to the exclusive remedy provision. Some state courts have refused to use the exclusivity provision to bar intentional tort actions against employers.\(^{174}\) Several states have used the intentional tort exception to the exclusive remedy provision to allow tort actions for sexual harassment in the workplace,\(^{175}\) while other states have refused to recognize an exception and bar those same tort actions.\(^{176}\)

Courts have relied on public policy in carving out exceptions to the exclusive remedy rule so that workers may pursue damages for intentional torts. In their decisions, courts have struggled to define the limits of workers’ compensation coverage. Too broad an interpretation of the quid pro quo agreement allows workers’ compensation systems to pre-empt other possible statutory and common law remedies, based on equally important policies, that otherwise would be available to

\(^{172}\) For a discussion of the trend to allow common law actions for intentional torts see Kawalar, supra note 78.

\(^{173}\) The following are examples of states that permit a common law action if the employer had an actual intent to produce the injury that occurred: ARIZ. REV. STAT. ANN. § 23-1022 (1983 & Supp. 1991) (common law suit allowed); CAL. LAB. CODE § 4553 (West 1989); MASS. GEN. LAWS ANN. ch. 152, § 28 (West 1988) (100% penalty); OR. REV. STAT. § 655.156 (1991); WASH. REV. CODE ANN. § 51.24.020 (West 1990).

\(^{174}\) Gulden v. Crown Zellerbach Corp., 890 F.2d 195 (9th Cir. 1989) (holding under Oregon law that an employer who ordered employees to clean up a PCB spill without protective clothing may have intended that the employees be injured, and therefore denying the employer summary judgment); Cunningham v. Anchor Hocking Corp., 558 So. 2d 93 (Fla. Dist. Ct. App. 1990) (holding that suit alleging that employer diverted smoke stack so that fumes went into workplace not barred); Kennedy v. Parrino, 555 So. 2d 993 (La. Ct. App. 1989) (holding that suit for intentional batteries by employer not barred).


employees. Many courts have decided that the policy of providing economic certainty to employers and employees should not be so pervasive that it makes the tort law goal of redressing wrongs inflicted upon injured parties inoperable. These courts have made exceptions to the exclusivity provision in cases of inadequate compensation benefits, total non-availability of benefits, and lack of an effective deterrent against the employer, especially when these are accompanied by intentional acts of the employer.\

VI. THE INTENTIONAL TORT EXCEPTION TO THE EXCLUSIVE REMEDY RULE

The most egregious intentional tortious conduct occurs when the actor intends the injurious consequences of an act. At the other end of the continuum of tortious conduct is ordinary negligence, which consists of a mere risk that a certain consequence will follow. Tort scholars generally agree that a person who intentionally acts knowing that certain results are substantially certain to follow also commits an intentional tort, albeit not the most egregious type. Most jurisdictions have decided that the exclusivity provision was never intended to be used by employers as a shield from liability for intentional

178. Raden v. City of Azusa, 158 Cal. Rptr. 689 (Ct. App. 1979) (allowing a civil action for retaliation for filing a workers’ compensation claim on the grounds that workers’ compensation did not “adequately protect” the worker); Meyer v. Graphic Arts Int'l Union, Local 63-A, 63-B, 151 Cal. Rptr. 597 (Ct. App. 1979) (allowing a sexual harassment suit for assault, battery, false imprisonment, and rape, holding that workers’ compensation was not the exclusive remedy for assaults committed by the employer’s agents); Renteria v. County of Orange, 147 Cal. Rptr. 447 (Ct. App. 1978) (holding that the exclusivity provision did not bar an intentional infliction of emotional distress claim based on racial discrimination); see Montgomery, supra note 30, at 910.
179. “[I]ntent is broader than a desire . . . to bring about physical results. It extends not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what the actor does.” W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 8, at 35 (5th ed. 1984); “As the probability that . . . [a certain] consequence will follow decreases, and becomes less than substantially certain, the actor's conduct loses the character of intent, and becomes mere recklessness . . . . As the probability decreases further, and amounts only to a risk that the result will follow, it becomes ordinary negligence . . . .” RESTATEMENT (SECOND) OF TORTS § 8A cmt. b (1965); “Lying between intent to do harm, which . . . . includes proceeding with knowledge that the harm is substantially certain to occur, and the mere unreasonable risk of harm to another involved in ordinary negligence, there is a penumbra of what has been called 'quasi-intent.' To this area, the words 'wilful,' 'wanton,' or 'reckless,' are customarily applied; and sometimes, in a single sentence, all three.” KEETON, supra note 73, § 34, at 212 (footnotes omitted).
torts, but conflict exists as to the definition of intentional tort.

Courts that allow suits for intentional torts against employers despite the exclusive remedy rule have used three theories. First, courts have reasoned that an intentional injury cannot be an accident, and therefore workers' compensation coverage was never intended. Second, courts have reasoned that intentional torts are not a normal risk of the workplace; therefore, the injury does not arise out of the employment relationship and does not meet the test for compensability. Finally, courts have also found that, at the time of the intentional tort, the employment relationship is severed, and again, the injury does not meet the compensability test.

Jurisdictions draw the line at different points on the continuum of tortious conduct in deciding whether to allow intentional tort claims for work-related injuries. To support an intentional tort claim for a work-related injury, some jurisdictions require a specific intent to injure, while others require only that the employer's misconduct be wilful and wanton. Most states, either by statute or case law, allow employees to bring suits for intentional torts if the employee can prove that the employer specifically intended to injure the employee, as in the case of assaults. Actions for intentional torts

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180. Renteria v. County of Orange, 147 Cal. Rptr. 447, 452 (Ct. App. 1987) (holding that the exclusivity provision did not bar a tort claim based on racial discrimination); Jablonski v. Multack, 380 N.E.2d 924 (Ill. App. Ct. 1978) (preventing an employee who was assaulted by a co-employee to recover under workers' compensation law because the co-employee was not acting as an alter ego for the employer, stating that workers' compensation law must avoid shielding the wrongdoer from liability and reasoning that the legislature would not permit the intentional tortfeasor to shift his liability to a fund paid for with premiums collected from innocent employers); Copelin v. Reed Tool Co., 596 S.W.2d 302 (Tex. Civ. App. 1980) (interpreting the state constitution, stating that the legislature does not have the power to deny a citizen the right to resort to the courts for the redress of any intentional injury because that right is constitutionally protected).

181. 2A LARSON, supra note 100, § 68.11.

182. Id.

183. Id.

184. Id.

185. Lusk v. Monaco Motor Homes, Inc., 775 P.2d 891 (Or. Ct. App. 1989); see 2A LARSON, supra note 100, § 68.13 and cases cited therein.

186. Mandolidis v. Elkins Indus., Inc., 246 S.E.2d 907 (W. Va. 1978) (allowing exception for tort claims in cases of knowingly maintaining an unsafe workplace in violation of a statute or regulation, despite a 1983 amendment to West Virginia's Workmens' Compensation Act that overruled the Mandolidis definition of "deliberate intention" as wilful and reckless misconduct); see W. VA. CODE § 23-4-2 (1985); see also Mayles v. Shoney's, Inc., 405 S.E.2d 15 (W. Va. 1990) (allowing employee's tort suit for burns under 1983 amendment because of a high risk of harm and violation of safety regulations).


188. 2A LARSON, supra note 100, § 68.11. See Gulden v. Crown Zellerbach Corp., 890
such as false imprisonment, defamation, and intentional infliction of emotional distress have also been allowed, but usually specific intent to injure the employee is necessary. Although a few states have broadened the scope of the intentional tort exception to include injuries that are substantially certain to occur, Arthur Larson suggests that the exception to the exclusive remedy rule cannot be stretched to include the employer's wanton, wilful, reckless, or malicious negligence because these acts do not rise to the level of a specific intent to cause injury, which is necessary for the injury to lose its accidental, and hence compensable, character. This reasoning is flawed, however, because one can hardly say that a worker's injury was accidental when it was caused by the employer's wanton, wilful, or reckless conduct.

Some courts have categorically refused to recognize any intentional act exception to the exclusive remedy rule, no matter what the employer's conduct. Other courts have either not decided the

189. 2A LARSON, supra note 100, § 68.11.
190. Mayer v. Valentine Sugars, Inc., 444 So. 2d 618 (La. 1984) (allowing action for injuries occurring in an explosion and fire because it was substantially certain to occur when employer violated safety regulations); VerBouwens v. Hamm Wood Prods., 334 N.W.2d 874 (S.D. 1983) (finding that although it was probable that the employee's injury resulted from the design of the employer-manufactured saw, it was not substantially certain).
191. 2A LARSON, supra note 100, § 68.00.
192. Buford v. AT & T, 881 F.2d 432 (7th Cir. 1989) (holding that there is no intentional act exception to the Indiana Occupational Disease Act's exclusivity provision where worker was exposed to benzene); Cox v. American Aggregates Corp., 580 N.E.2d 679 (Ind. Ct. App. 1991) (finding no intentional tort where a welder welded in a poorly ventilated area with rods that emitted manganese and chromium fumes, which are known to cause lung damage; the plaintiff did not present evidence showing that the employer intended to injure him, and the employer's conduct was at most grossly negligent or wanton); National Can Corp. v. Jovanovich, 503 N.E.2d 1224 (Ind. Ct. App. 1987) (though barring the injured worker's intentional tort action for failure to prove that the employer had the specific intent to harm the worker, the court stated that "it would be a total perversion of the humanitarian purposes of the Act to permit an employer to use the Act as a shelter against liability for an intentional tort"); Rajala v. Doresky, 661 P.2d 1251 (Kan. 1983) (finding no exception for an intentional tort, the court stated that the exclusive remedy rule is valid even when the employer conduct is intentionally tortious or culpably negligent, or when the plaintiff is left without a remedy); Barber v. Pittsburgh Corning Corp., 555 A.2d 766 (Pa. 1989) (holding that even if the injured workers could prove that the employers exposed the workers to asbestos dust knowing that it would cause disease, the Occupational Disease Act would still
question of whether to create an intentional tort exception to the exclusive remedy provision, or have not found a set of facts strong enough to support finding that an employer specifically intended to injure an employee.¹⁹³

Courts that have broadened the intentional tort exception have done so by referring to the doctrine of "constructive intent" from the Restatement (Second) of Torts.¹⁹⁴ West Virginia and Ohio were two of the first states to broaden the intentional tort exception.¹⁹⁵ In Mandolidis v. Elkins Industries, Inc.,¹⁹⁶ the West Virginia Supreme Court interpreted its statute to allow a lawsuit for "wilful, wanton,


In Buford, the Seventh Circuit held, based on workers' compensation cases, that no intentional act exception exists to the Indiana Occupational Disease Act's exclusivity provision. Buford, 881 F.2d at 436. However, the court did recognize the possibility that the Indiana Court of Appeals may find exceptions where the employer has specific intent to injure, or where a violent crime has been committed. Id. at 434 (citing National Can Corp. v. Jovanovich, 503 N.E.2d 1224 (Ind. Ct. App. 1987) and House v. D.P.D., Inc., 519 N.E.2d 1274 (Ind. Ct. App. 1988)). Despite the dicta of these cases, the Indiana Court of Appeals for the Third District refused to find physical sexual assault an intentional act sufficient to overcome the exclusive remedy rule. Arrow Uniform Rental, Inc. v. Suter, 545 N.E.2d 832 (Ind. Ct. App. 1989). On the other hand, the Indiana Court of Appeals for the First District relied on the National Can dicta to allow a tort suit based on racial harassment. Perry v. Sitter Buick, GMC, Inc., 604 N.E.2d 613 (Ind. Ct. App. 1992). To clarify seemingly conflicting decisions, the question of whether Indiana recognizes an intentional tort exception has been certified to the Indiana Supreme Court by the United States District Court for the Southern District of Indiana. Baker v. Westinghouse Elec. Corp., No. 49-S-009309 CQ-1004 (Ind. Sept. 9, 1993).

¹⁹³ National Can Corp., 503 N.E.2d at 1233-34 (finding evidence insufficient to show that employer specifically intended employee's injury when it refused to assign employee to light duty work after he injured his back).

¹⁹⁴ The Restatement (Second) of Torts states:

Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act and still goes ahead, he is treated by the law as if he had in fact desired to produce the result. As the probability that the consequences will follow decreases and becomes less than substantial certainty, the actor's conduct loses the character of intent, and becomes mere recklessness . . . .


and reckless misconduct. 197 The court stated that employers will be found liable if they act with an appreciation of the great risk of physical harm they have created. 198 The legislature overruled Mandolidis in 1983 when it modified the supreme court's definition of deliberate intent by outlining requirements for a tort action that would allow such an action only in aggravated cases of knowingly maintaining unsafe workplaces and in cases where the employer has violated statutes or regulations. 199

In Blankenship, 200 the Ohio Supreme Court looked to the Ohio Constitution, which establishes the workers' compensation system, to the Act's exclusive remedy provision, and to public policy to determine that employers should not be allowed to escape liability for their intentional torts. 201 In interpreting the constitutional provision that requires liberal construction of the Act to provide broad coverage along with the Act's exclusive remedy provision, the court decided that the legislature intended to limit employer immunity to claims based on compensable injuries. 202 The court then determined that one of the purposes of the Act is to protect employers from tort actions based on negligence, but that protecting employers from liability for intentional torts would undermine the Act's additional purpose of promoting a safe workplace. 203 The court also stated that the Act "is founded upon the principle of insurance," but that the insurance principle does not include shielding employers from liability for their intentional torts. 204 In a subsequent case, the Ohio Supreme Court defined an intentional tort as not requiring a specific intent to injure, but requiring only knowledge that harm is a substantially certain consequence of the employer's act. 205

In 1986, the Ohio legislature narrowed the court's definition of intentional tort. 206 The statute allows suits for intentional torts and defines an intentional tort as an act committed with the belief that the

197. Id. at 914.
198. Id.
200. 433 N.E.2d 572 (Ohio 1982).
201. Id. at 575-77.
202. Id. at 577.
203. Id.
204. Id.
205. Jones v. VIP Dev. Co., 472 N.E.2d 1046, 1051 (Ohio 1984) "The actor must know or believe that harm is a substantially certain consequence of his act before intent to injure will be inferred. The existence of this knowledge or intent on the part of the actor may be inferred from his conduct and surrounding circumstances." Id.
206. OHIO REV. CODE ANN. § 4121.80(B) (Anderson 1986).
injury is substantially certain to occur,²⁰⁷ but the definition of "substantially certain" states that the employer has to act with "deliberate intent" to cause an employee to suffer an injury.²⁰⁸ By defining substantial certainty as "deliberate intent," the legislature, in effect, eliminated the substantial certainty test and returned to a specific intent requirement.

The West Virginia and Ohio legislatures most likely enacted the more restrictive statutes out of a fear that a weakened exclusive remedy doctrine would fail to protect employers from financial ruin from large judgments, a major objective of the quid pro quo.²⁰⁹ Although judicial decisions in Michigan, Ohio, and West Virginia adopting either the wilful and wanton misconduct or substantial certainty standard have been modified by statute, the modifications only narrow the application of the judicially set standards rather than abolish them.²¹⁰ Indeed, Michigan, Ohio, and West Virginia courts have each allowed intentional tort suits in cases where there was substantial certainty of harm since the legislatures passed their amendments to the workers' compensation acts.²¹¹ These recent cases indicate a trend toward recognizing the substantial certainty rule.

Professor Larson is concerned that a broad definition of intentional tort will erode the no-fault basis of workers' compensation.²¹² He begins with the premise that because one of the purposes of the workers' compensation system was to minimize litigation, all presumptions should be against allowing lawsuits.²¹³ In deciding how

²⁰⁷ OHIO REV. CODE ANN. § 4121.80(G)(1) (Anderson 1986).
²⁰⁸ Id.
²⁰⁹ See Ballam, The Exclusivity Doctrine, supra note 123, at 112, 113.
²¹¹ Adams v. Shepherd Prods., U.S., Inc., 468 N.W.2d 332 (Mich. Ct. App. 1991) (allowing an intentional tort claim to an employee who lost three fingers while operating a circular saw from which the blade guard had been removed, where the employer allegedly wilfully disregarded the certainty of harm); Fyffe v. Jeno's, Inc., 570 N.E.2d 1108 (Ohio 1991) (denying the employer's motion for summary judgment, holding that it was possible for a jury to find that there was a "substantial certainty" that injury would result when safety guards were removed from a conveyer belt); Mayles v. Shoney's, Inc., 405 S.E.2d 15 (W. Va. 1990) (allowing a restaurant employee who was burned by a container of hot grease to collect damages in an intentional tort suit because the court found that there was a high risk of harm and that safety regulations had been violated); accord Woodson v. Rowland, 407 S.E.2d 222 (N.C. 1991) (allowing an intentional tort claim where an employee was killed in a trench cave-in, adopting the substantial certainty rule, and finding that such misconduct is tantamount to an intentional tort).
²¹² 2A LARSON, supra note 100, § 68.15(e).
²¹³ Id.
intentional torts should fit into the quid pro quo balance, Larson states that “unjust” results under the workers’ compensation system are normal. For example, employees who negligently injure themselves get benefits. He believes that an intentional tort should be allowed only if the employer specifically intended the injury, because that is the only situation where the injury would be non-accidental. In addition, Professor Larson suggests that specific intent provides the only bright line rule that would be the least intrusive in administering workers’ compensation laws.

Allowing intentional tort actions under either the specific intent to injure standard or the substantial certainty standard does not undermine the tradeoffs of the quid pro quo agreement. Granted, one of the purposes of enacting workers’ compensation acts was to minimize litigation. However, it does not follow that lawsuits should be disallowed at all costs. The no-fault basis of workers’ compensation that Larson speaks of is a no-fault system only in terms of negligent conduct on the part of both employers and employees. Intentional misconduct, determined under either the specific intent or the substantial certainty standard, is not part of the quid pro quo, as evidenced by state statutes that disallow benefits in cases of employee wilful misconduct. Likewise, most states that have addressed the issue allow actions against employers for intentional torts. Actions should be allowed not only when the employer specifically intends the injury, but also when an employer’s intentional misconduct is substantially certain to result in injury, because such misconduct retains the character of intent and amounts to more than mere recklessness. Moreover, employers should not be able to hide behind the shield of the exclusive remedy provision merely to preserve a convenient, bright-line test.

Larson’s characterization of benefits awarded to workers who negligently injure themselves as an “unjust” result is flawed because this type of result was intended by the legislators who enacted workers’ compensation systems. Truly unjust results that were not considered in the quid pro quo, which throw it out of balance if included, such as an employer avoiding liability for conduct that is

214. Id.
215. Id.
216. Id.
217. Id.
218. See 2A LARSON, supra note 100, § 68.15(e).
219. Id. § 68.15.
substantially certain or specifically intended to cause injury, should not be accepted as "normal." Furthermore, allowing tort actions in cases of intentional wrongs motivates employers to provide a safe workplace, an additional purpose of workers' compensation systems, and prevents them from using the exclusive remedy provision as a shield against liability.

Allowing tort suits in cases of sexual harassment, cases that involve intentional rather than negligent acts, does not undermine the quid pro quo, because intentional acts were not a part of the quid pro quo. In fact, courts have allowed tort suits based on sexual harassment using both the specific intent and substantial certainty standards. In *Ford v. Revlon, Inc.*, the Arizona Supreme Court used the substantial certainty standard to allow an employee to bring an intentional tort claim for the intentional infliction of emotional distress against her employer. In *Ford*, despite numerous contacts with Revlon management, the plaintiff was unable to get Revlon to take any action on her complaints of sexual harassment until one year after making the first complaint. The court classified Revlon's conduct as extreme or outrageous and found that even though Revlon may not have intended to cause the plaintiff's emotional distress, Revlon's failure to take remedial action made it a near certainty that the plaintiff's emotional distress would occur.

Oregon's workers' compensation statute contains a provision that allows an intentional tort action where the employer has a specific intent to injure the employee. In *Palmer v. Bi-Mart Co.*, the plaintiff

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220. *Ford v. Revlon, Inc.*, 734 P.2d 580, 586 (Ariz. 1987) (relying on intentional nature of the corporation's failure to take action when the employee complained of sexual harassment by the manager in allowing the claim for intentional infliction of emotional distress); *O'Connell v. Chasdi*, 511 N.E.2d 349, 351-52 (Mass. 1987) (allowing an action against a co-employee, finding sexual harassment to be an intentional tort unrelated to the interests of the employer); *Hogan v. Forsyth Country Club Co.*, 340 S.E.2d 116, 120 (N.C. Ct. App. 1986) (allowing a tort claim against the employer based on sexual harassment, stating that the Workers' Compensation Act does not bar a lawsuit against the employer for the employer's intentional conduct); accord *Brown v. Burlington Indus.*, 378 S.E.2d 232 (N.C. Ct. App. 1989); *Pursell v. Pizza Inn, Inc.*, 786 P.2d 716, 717 (Okla. Ct. App. 1990) (allowing a tort action based on sexual harassment, finding that the workers' compensation statutes were not meant to shield employers from "willful, intentional or even violent conduct"); *Palmer v. Bi-Mart Co.*, 758 P.2d 888, 891-92 (Or. Ct. App. 1988) (finding an employer's failure to stop continuous harassment after being made aware of it sufficient for the jury to find that the employer specifically intended to produce the injury).

221. *Ford*, 734 P.2d at 585.
222. *Id.* at 582-83.
223. *Id.* at 585.
224. *Id.*
complained of her supervisor's sexually harassing conduct for six months before the employer attempted to remedy the situation. The Oregon Court of Appeals found those facts sufficient to support an inference that her supervisor had a specific intent to harm her, and a tort action was allowed.

The intentional tort exception, although widely recognized, is controversial in terms of the choice of standard and its application. As discussed above, both the specific intent test and the substantial certainty test have been used to allow tort suits in similar cases of sexual harassment. The degree of intent problem can be avoided by more properly analyzing on-the-job sexual harassment as being outside the scope of the workers' compensation system. Workers' compensation schemes were enacted to compensate workers for injuries that result from a normal risk of the employment. Workers do not expect sexual harassment to be a normal risk of the employment. Therefore, the exclusive remedy provision of the quid pro quo agreement should not apply to bar the sexually harassed employee.

Allowing employee tort claims based on sexual harassment because sexual harassment falls outside the workers' compensation scheme also permits actions based on negligence. For example, the Ohio Supreme Court found the legislature's narrow substantial certainty standard inapplicable in a case where the plaintiff alleged that the employer "intentionally or negligently maintained a policy of encouraging, permitting, or condoning sexual harassment." In allowing the tort action, the court held that in light of Ohio's public policy against sexual harassment on the job, forcing victims of workplace sexual harassment to meet a strict intent test in order to sue the employer when the workers' compensation system fails to provide a true remedy for sexual harassment contravenes the public policy against sexual harassment.

In sum, sexual harassment is an intentional act, and as such can provide the basis for an exception to the exclusive remedy rule. Torts based on sexual harassment have been allowed under both the specific

226. Id. at 891.
227. Id. at 892.
231. Id. at 435.
intent and substantial certainty standards, but the whole problem of
the degree of intent can be avoided by focusing on the core issue of
compensability. Sexual harassment is not an accident and is not a
normal risk of employment; hence, sexual harassment is outside the
scope of the workers’ compensation system. Furthermore, the lack of
a meaningful remedy for sexual harassment within the workers’ com-
pen sation system points to the necessity of allowing tort actions so as
not to thwart the public policy against sexual harassment.

VII. THE NATURE OF THE INJURY AND WORKERS’
COMPENSATION COVERAGE

Another factor courts have used to determine whether to allow a
tort suit is the nature of the injury. Courts have recognized the exclu-
sive remedy defense to a tort claim only if the nature of the injury is
such that it is covered under the act.\textsuperscript{232} Traditionally, if the injury is
non-physical, then there is no compensation coverage and a tort suit
is allowed.\textsuperscript{233} Non-physical injuries that may give rise to tort actions
such as invasion of privacy, fraud, deceit, and intentional infliction of
emotional distress do not come within the basic coverage criteria of
“personal injury by accident.”\textsuperscript{234} Focusing on the nature of the work-related injury in deciding
whether to allow a tort action has led to anomalous results. The Cali-
ifornia courts have dealt with this issue in a series of cases. In 1978,

\textsuperscript{232} 2A LARSON, supra note 100, § 65.40.
\textsuperscript{233} Id.
\textsuperscript{234} Id. § 68.30; Hamilton v. East Ohio Gas Co., 351 N.E.2d 775 (Ohio Ct. App. 1973)
(stating that finding an intentional tort to be an “injury” is difficult because of the accidental
quality of the term “injury” in a suit against a woman’s employer and co-employees for false
imprisonment, invasion of privacy, slander, and intentional infliction of emotional distress).
Arthur Larson supports the physical versus non-physical harm distinction and states,

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\text{[I]f the essence of the tort . . . is non-physical, and if the injuries are of the usual non-physical sort, with physical injury being at most added to the list of injuries as a makeweight, the suit should not be barred. But if the essence of the action is recovery for physical injury or death . . . the action should be barred even if it can be cast in the form of a normally non-physical tort.}
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2A LARSON, supra note 100, § 68.34(a).

Professor Larson’s statement would seem to support allowing tort actions based on
sexual harassment because sexual harassment does not normally result in significant physical
injury. However, Professor Larson’s approach would probably bar tort suits based on sexual
harassment that result in physical injury, both under the nature-of-the-injury test and under his
bright line specific intent standard for allowing intentional tort exceptions. Using these tests
would create the potential for greater recovery to those who sustain solely psychological
damage.
the California Court of Appeals allowed a tort action for a county employee who alleged intentional racial harassment. In *Renteria v. County of Orange*, the plaintiff brought a claim for intentional infliction of emotional distress that did not result in a disabling physical injury. The court distinguished this case from a non-compensable, non-disabling physical injury, such as impotence, which is non-compensable only because it does not affect wage-earning capacity. The court held that the intentional harassment was in a "class of civil wrongs outside the contemplation of the workers' compensation system." The court further reasoned that a civil suit had to be allowed to provide the employee with a remedy and the employer with a deterrent.

In 1987, the California Supreme Court distinguished *Renteria* and barred a plaintiff's action for intentional infliction of emotional distress. In *Cole v. Fair Oaks Fire Protection District*, a firefighter, who was subjected to continual harassment by the assistant chief, developed hypertension and eventually had a disabling stroke. In barring his tort action, the court stated that if the tort claim had not been allowed in *Renteria*, the plaintiff would not have had a remedy. The court found that the firefighter had a physical disability that was compensable under the Workers' Compensation Act. The court refused to find an intentional tort exception to the exclusivity rule, stating that evaluations and personnel decisions were inherently intentional, a normal risk of employment, and therefore covered under the Workers' Compensation Act. The court did not adopt the ruling in *Renteria* that intentional harassment belonged to a "class of civil wrongs outside the contemplation of the workers' compensation system." The court used the nature-of-the-injury test even though it recognized the possibility that an employee who has suffered emotional distress without a resulting physical injury could recover damages, while an employee who has suffered a physical injury in com-

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236. Id. at 451.
237. Id.
238. Id.
239. Id. at 451-52.
241. Id. at 744.
242. Id. at 747, 748.
243. Id. at 744, 750.
244. Id. at 750.
245. Id. at 747.
bination with emotional distress, which is usually a more reprehensible injury, would be limited to workers’ compensation benefits.246 Two months after the California Supreme Court used the nature-of-the-injury test in Cole, the California Court of Appeals decided to abandon the test when it allowed an employee, who alleged both physical and mental injuries, to bring a suit for intentional infliction of emotional distress, negligent retention, and assault and battery based on homosexual harassment.247 The appellate court pointed out the anomalous results that can occur under the nature-of-the-injury test that the Cole court had recognized.248 The court also discussed the difficulty of separating physical and mental damages, and the difficulty of deciding which one is dominant at the pre-trial stage.249 The court replaced250 the physical versus non-physical harm distinction with inquiries as to whether the acts were a “normal part of the employment relationship”251 or were “incidents of the employment relationship.”252 These factors were also used by the Supreme Court in Cole.253 Professor Larson states that if a court abandons the nature-of-the-injury test, workers’ compensation will become a less exclusive remedy as the seriousness of the injuries increases.254 However, abandoning the nature-of-the-injury test may be necessary to avoid anomalous results. In fact, distinguishing between physical and non-physical injuries is contrary to the purpose of workers’ compensation to provide benefits for reduced wage-earning capacity. To achieve results that are internally consistent and consistent with the purpose of workers’ compensation, the inquiry must be focused on public policy and the inherent risks of employment. Recently, the California Supreme Court reconciled the courts’ analysis in Renteria and Cole.255 While agreeing with the result that

246. Id.
248. Id. at 73, 74.
249. Id. at 73.
250. In Miller v. Fairchild Indus., Inc., 885 F.2d 498 (9th Cir. 1989), the Ninth Circuit followed the nature-of-the-injury test enunciated in Cole. The court stated that the court of appeals in Hart was powerless to abandon the supreme court’s test and substitute the “normal part of the employment relationship” test.
252. Hart, 235 Cal. Rptr. at 73 (citing Johns-Manville Prods. Corp. v. Superior Court, 612 P.2d 948 (Cal. 1980)).
254. 2A LARSON, supra note 100, § 68.34(d).
the court of appeals reached in *Renteria*, the supreme court suggested that the court of appeals erred in stating that emotional injury that results in work-related disability is not compensable. The supreme court would not tolerate the anomalous results guaranteed by using the nature-of-the-injury test and found that regardless of whether an injury is physical or non-physical, the injury is compensable if it affects wage-earning capacity. The supreme court added that if the employer’s conduct contravenes fundamental public policy or exceeds the inherent risks of employment, then workers’ compensation will not be the exclusive remedy.

Focusing on the nature of the work-related injury has also led to conflicting results in sexual harassment cases. A civilian Army employee brought a lawsuit under the Federal Tort Claims Act for intentional and negligent infliction of emotional distress resulting from sexual harassment. She did not claim any physical injuries. In allowing the tort suit, the Ninth Circuit held that the Federal Employee Compensation Act, which provides workers’ compensation to federal employees, compensates government employees for physical injury only. Presumably, a tort suit alleging physical harm would be barred.

Two Florida Court of Appeals cases decided the same day barred assault, battery, negligent hiring and retention, and intentional infliction of emotional distress claims based on sexual harassment. Both cases involved a battery of unwanted touching that resulted in mental injury. In each decision, the court interpreted the statutory definition of “accident,” which states that “mental or nervous injury due to stress, fright or excitement only . . . shall be deemed not to be an injury by accident arising out of the employment.” The court found that the emotional distress claim in each case was not “due to fright or excitement only,” but was caused by a battery. In

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256. *Id.* at 1202.
257. *Id.* at 1201-02.
258. *Id.* at 1202.
261. *Id.* at 1169.
262. *Id.* at 1174.
264. Schwartz, 470 So. 2d at 721; Brown, 469 So. 2d at 158.
265. FLA. STAT. ANN. § 440.02(1) (West 1991).
266. Brown, 469 So. 2d at 158; Schwartz, 470 So. 2d at 722.
The court added that the touchings were more than technical batteries. Even the intentional infliction of emotional distress claim in Brown was barred. The court stated that the label placed on the tort was irrelevant because all the tort claims were based on the impermissible touching. The fact that the Workers’ Compensation Act provided the plaintiffs with no remedy was irrelevant to the court. As Judge Ervin’s partial dissent points out, if the sexual harassment had been accomplished without physical contact, then the conduct would not have been covered by the Workers’ Compensation Act, and the common law suit would not have been barred. Whether the physical/non-physical distinction is made regarding the manner of sexual harassment or regarding the type of injury caused by sexual harassment, making such a distinction leads to inconsistent decisions on the allowance of tort suits.

In sexual harassment cases, most courts have not relied on the physical versus non-physical injury distinction, but have looked to incidents or risks of the employment and definitions of terms such as “accident,” “arising out of,” and “in the course of” to determine whether to allow a tort action. Indeed, the Florida Supreme Court relied on the broader public policy against sexual harassment in overruling Schwartz and Brown and finding that sexual harassment was not meant to be covered by the Workers’ Compensation Act. In Byrd, the Florida Supreme Court distinguished the battery involved in sexual harassment cases from that in other cases and found that battery in sexual harassment cases usually does not involve lost wages or physical injury, but rather unlawful disregard of personal rights. In the concurring opinion, Judge Grimes quoted Larson and stated that it was important to focus on whether the physical injury produced was the kind covered by the Workers’ Compensation Act, and not automatically bar a tort action based on the mere allegation of a

267. Schwartz, 470 So. 2d at 722.
268. Brown, 469 So. 2d at 159.
269. Id.
270. Id.; Schwartz, 470 So. 2d at 723.
271. Brown, 469 So. 2d at 161 (Ervin, J., concurring in part and dissenting in part).
272. See, e.g., Byrd v. Richardson-Greenshields Sec., Inc., 552 So. 2d 1099, 1100-01 (Fla. 1989); Brown, 469 So. 2d at 158.
273. Byrd, 552 So. 2d at 1102 (Fla. 1989).
274. Id. at 1104 n.8.
275. Id. at 1105 (Grimes, J., concurring and quoting Arthur Larson). See 2A Larson, supra note 100, § 68.34(a).
batteries.276

Florida is not alone in its difficulties regarding the compensability of non-physical, mental injuries; jurisdictions differ as to the compensability of mental injuries, depending on what caused the mental injury. Claims involving mental injuries fall into three categories: 1) a physical injury resulting from a mental stimulus, such as a stress-induced heart attack; 2) a mental injury caused by a physical stimulus, such as depression caused by the loss of a limb; and 3) a mental injury resulting from a mental stimulus, such as post-traumatic stress disorder caused by witnessing a co-employee’s death.277 Most jurisdictions have no difficulty finding injuries in the first two categories compensable because the causation is easier to assess when the injury is accompanied by a physical impact or manifestation.278 In the third category, the jurisdictions do not agree. States, such as Florida, that do not compensate mental-mental claims279 point to the difficulty of proving that the work caused the mental injury and to the speculative nature of mental injury as being incapable of measurement by any legal standard.280 Other states are willing to grant workers’ compensation to mental-mental claims despite the difficulty in formulating legal tests to prove that the work caused the injury; courts in these states find that the proof problems do not justify the denial of claims.281

When the mental stimulus in a mental-mental claim is sudden or traumatic, courts are more likely to award benefits because such a mental stimulus, like a physical stimulus, can be pinpointed to a particular time and place. In cases of gradual or cumulative mental stimuli,282 three tests have emerged to determine work-connectedness. Under the unusual stress test, a mental injury is compensable if the mental injury was caused by exposure to “unexpected, unusual, or extraordinary” stress greater than that experienced by the average

276. Byrd, 552 So. 2d at 1105 (Grimes, J., concurring).
277. These categories are commonly referred to as mental-physical, physical-mental, and mental-mental. See DONALD T. DECARLO & MARTIN MINKOWITZ, WORKERS' COMPENSATION INSURANCE AND LAW PRACTICE: THE NEXT GENERATION 229 (1989). See generally 1B LARSON, supra note 100, § 42.20-23.
278. 1B LARSON, supra note 100, § 42.23; David D. Thamann, Employee Mental Disability Claims and Insurance, 17 N. KY. L. REV. 391, 393 (1990).
279. City of Holmes Beach v. Grace, 598 So. 2d 71 (Fla. 1992).
280. Thamann, supra note 278, at 393.
281. Id. at 393-94.
employee. A claimant in jurisdictions that use the second test, the objective causation test, need only establish a causal connection between the workplace and the mental injury to receive benefits. The objective causation test is a two-part test. First, the claimant must prove that the stressful job conditions actually exist. Second, the claimant must prove that employment conditions contributed more to the cause of the mental disorder than did non-employment conditions. The third test, the subjective causal-nexus test, is rarely used because of its tendency to compensate mental injuries with the slimmest possible work connection. Under the subjective causal-nexus test, compensation will be granted to a claimant whose subjective and honest impression is that the claimant is disabled.

The objective causation test best meets the objective of workers' compensation schemes to cover all genuinely work-related injuries. Jurisdictions relying on the unusual stress test probably do so in the belief that the unusualness will make causation easier to prove. But the unusual stress test does not support the workers' compensation goal of broad coverage because it results in the denial of benefits to claimants who are predisposed to mental injury. Notwithstanding the difficulty of proving the causation of mental injuries, the trend is toward recognizing that mental injury caused by stress is similar to physical injury caused by stress because no true distinction can be made between the two. The trend toward recognizing mental-mental claims has led to more of those claims being filed. One commentator posits that workers' compensation claims for mental stress may have increased because of their publicity, the economic conditions of unemployment, and the increase in tort recoveries for

283. Id. at 850, 851.
284. Id. at 851-53; Swiss Colony, Inc. v. Department of Indus., Labor, & Human Relations, 240 N.W.2d 128, 130 (Wis. 1976).
286. Id. at 171; see Troost, supra note 282, at 852-53.
287. For a thorough discussion of the causal-nexus test and the compensability of mental injuries, see Deziel v. Difco Labs., 268 N.W.2d 1 (Mich. 1978).
288. Id; see generally 1B LARSON, supra note 100, § 42.23(d).
290. See DECARLO & MINKOWITZ, supra note 277, at 286.
292. See Thamann, supra note 278, at 394. The author, citing NPS Corp. v. Insurance Co. of N. Am., 517 A.2d 1211 (N.J. Super. Ct. App. Div. 1986), concludes that mental injury is just as real as physical injury and just as capable of being evaluated. Id.
293. DECARLO & MINKOWITZ, supra note 277, at 230. Stress claims have more than doubled between 1980 and 1988. Id. at 279.
intentional and negligent infliction of emotional distress. 294 Because cases of sexual harassment fit the mental-mental mold, many jurisdictions that recognize mental-mental claims as compensable deny tort suits based on sexual harassment. Conversely, jurisdictions that do not find mental-mental claims compensable are more apt to allow tort suits based on sexual harassment. 295 After considering the issue, most employers would probably rather handle mental-mental claims through the workers' compensation system than risk large verdicts in tort actions. 296

The assertion that jurisdictions recognizing mental-mental claims must then logically bar tort claims based on sexual harassment is erroneous. A rational basis exists for allowing both. Oregon and Michigan have allowed both claims. In 1983, the Oregon Supreme Court adopted a two-part objective causation test in recognizing a mental-mental claim brought by an employee who was subjected to public reprimands and demotion in spite of a high seniority level. 297 Under the two-part objective causation test, mental-mental claimants in Oregon must prove that conditions stressful to an average worker actually existed, 298 and that the employment conditions were the major contributing cause of the mental injury. 299 The Oregon legislature refined the supreme court's objective causation test with a four-part test in 1987. 300

Notwithstanding Oregon's recognition of mental-mental workers' compensation claims, the court of appeals allowed a pharmacy clerk to bring an action for intentional infliction of emotional distress against her employer for verbal sexual harassment by her supervisor. 301 The court did not analyze her mental-mental claims as being limited to workers' compensation benefits. In fact, the court held that

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294. Id. at 280.
295. 2A LARSON, supra note 100, § 68.34(d).
296. DECARLO & MINKOWITZ, supra note 277, at 230.
298. Id. at 171.
299. Id.
300. The Oregon legislature amended its definition of occupational disease to include mental disorders that meet the following four tests: (1) the stressful employment conditions must objectively exist; (2) the stressful employment conditions must be different than conditions inherent in every workplace and do not include reasonable personnel actions; (3) the employee must be diagnosed with a mental or emotional disorder that is generally recognized in the medical or psychological community; and (4) there must be clear and convincing evidence that the mental disorder arose out of and in the course of employment. OR. REV. STAT. § 656.802(3) (1991).
the plaintiff’s receipt of workers’ compensation benefits based on the sexually harassing acts did not prevent her common law claim for intentional infliction of emotional distress. Instead of using the mental-mental nature of her claim to bar her common law suit under the exclusive remedy rule, the court found an intentional tort exception because the employer had failed to stop the supervisor’s harassment once the employer was notified.

In another common law suit based on sexual harassment, in which the employee was ultimately assaulted and raped by her supervisor, the court stated that the type of injury does not determine compensability. The court found no causal link between the harassment and a risk of employment because it lacked evidence that the sexual harassment was work-related. The court therefore concluded that the employer was not entitled to summary judgment based on the exclusive remedy provision. However, the court affirmed summary judgment for the employer because the evidence could not support the employee’s theory of vicarious liability.

Michigan is another state that both recognizes mental-mental workers’ compensation claims and allows tort suits based on sex discrimination. The Michigan Supreme Court allowed a tort suit, which alleged violation of the state Fair Employment Practices Act and the state Civil Rights Act, because these statutes were intended to promote a public policy distinct from that of workers’ compensation. Rather than finding workers’ compensation to be the plaintiff’s exclusive remedy, the court allowed both workers’ compensation benefits and the tort suit because of the statutes’ different purposes. The court found that the purpose of the Workers’ Compensation Act is to assist industrial injury victims, while the Civil

302. Id. at 890-92.
303. Id. at 892.
305. Id. at 156, 157.
306. Id. at 157.
307. Id.
309. MICH. COMP. LAWS § 423.301 (repealed 1969).
312. Id. at 643.
Workers' Compensation and Sexual Harassment Rights Acts address prejudices. The court adopted the Supreme Court's construction of Title VII in Alexander v. Gardner-Denver Co., holding that one statutory scheme should not be allowed to frustrate the purpose of another statutory scheme.

State civil rights statutes echo Title VII's strong public policy against racial discrimination and sexual discrimination, which includes sexual harassment. Upholding this public policy, therefore, is a legitimate reason for allowing tort claims based on sexual harassment to proceed even though the mental injuries may be compensable under the state workers' compensation scheme.

The Michigan Court of Appeals further distinguished compensable mental injuries from mental injuries resulting from sexual harassment in Slayton v. Michigan Host, Inc. In Slayton, a former waitress was allowed to bring her tort action under the Elliott-Larsen Civil Rights Act, which allows compensatory damages for mental anguish resulting from employment discrimination, in addition to equitable relief. The former waitress alleged that her required uniform of high-heeled shoes and a short skirt was discriminatory and subjected her to sexual harassment. The waitress and other female employees had sued the employer in federal court for sexual harassment, and the action had been dismissed without prejudice. The plaintiff then brought suit in the state court, alleging gender discrimination and harassment because her employer forced her to quit her job in retaliation for her federal suit. The court found that tort law compensates for personal injury, and that workers' compensation compensates for disabilities resulting from personal injuries occurring during the course of employment. In other words, although the court allowed the tort suit, it found that some customary elements of damages in the tort suit may be barred by the exclusive remedy provision.

314. Boscaglia, 362 N.W.2d at 645.
316. Boscaglia, 362 N.W.2d at 645, 646.
321. Slayton, 332 N.W.2d at 499.
322. Id.
323. Id.
324. Id.
325. Id.
In distinguishing claims for mental suffering because of discrimination from claims for mental injury as the resulting disability, the court stated that the resulting mental disability would be compensable, but that the mental suffering does not merge with the resulting mental disability.\textsuperscript{326} To explain its decision, the court pointed to the source of the injury.\textsuperscript{327} The court stated that mental injuries resulting from compensable sources should not be confused with mental injuries resulting from sex discrimination.\textsuperscript{328} Mental disability caused by general stress in the workplace is compensable, but mental injury based on sexual discrimination is not compensable because its source is the "deliberate or inadvertent disregard by the employer of the fundamental rights of his employees."\textsuperscript{329} Because the mental injuries flowing from the discrimination were independent of any resulting disability that might be compensable under the Workers' Compensation Act, the court allowed the tort suit.\textsuperscript{330}

In states with civil rights statutes that do not provide compensatory damages, plaintiffs will need to use common law tort claims. The same policy reasons that the Michigan Court of Appeals used to allow statute-based sex discrimination suits support common law tort suits based on sexual discrimination and sexual harassment.

Florida is one of the few states whose statute addresses the compensability of mental injuries resulting from mental stimuli. The Florida statute states that "[a] mental or nervous injury due to stress, fright or excitement only . . . shall be deemed not to be an injury by accident arising out of the employment."\textsuperscript{331} Although under its statute Florida finds only mental injuries that result from physical trauma compensable, the physical trauma requirements have been stretched to allow compensation for mental injuries caused by a physical trauma with minor physical consequences. In \textit{Watson v. Melman, Inc.}, a seamstress was accidentally struck behind the ear with a cardboard spool weighing eight and one-half ounces.\textsuperscript{332} Although her skin was only bruised and she was not disabled, she claimed benefits for a neurosis that developed because the incident reminded her of her son.

\begin{itemize}
  \item \textsuperscript{326} \textit{Id.}
  \item \textsuperscript{327} \textit{Id.}
  \item \textsuperscript{328} \textit{Id.}
  \item \textsuperscript{329} \textit{Id. (quoting Freeman v. Kelvinator, Inc., 469 F. Supp. 999, 1000 (E.D. Mich. 1979)).}
  \item \textsuperscript{330} \textit{Id.}
  \item \textsuperscript{331} \textit{FLA. STAT. ANN. § 440.02(1) (West 1991).}
  \item \textsuperscript{332} \textit{Watson v. Melman, Inc., 106 So. 2d 433, 434 (Fla. Dist. Ct. App. 1958), cert. denied, 111 So. 2d 40 (Fla. 1959).}
\end{itemize}
who had died from a blow to the head.\textsuperscript{333} The innocuous blow provided the court with the physical trauma necessary to make the award for the mental injury.\textsuperscript{334} Such strained reasoning would not be necessary if the focus was on the work connection rather than on the type of trauma that caused the mental injury.

The Florida District Court of Appeals used similar reasoning to bar the tort suits based on sexual harassment in \textit{Schwartz}\textsuperscript{335} and \textit{Brown}.\textsuperscript{336} The batteries or unwanted touchings in these sexual harassment cases did not cause any compensable physical injury, but despite the lack of remedies available under the workers' compensation statute the court held the statute to be the plaintiffs' exclusive remedy.\textsuperscript{337} Using the rationale of the court of appeals in \textit{Schwartz} and \textit{Brown}, sexual harassment suits would be barred or allowed depending on whether physical touching was involved. In \textit{Byrd}, the Florida Supreme Court eliminated the possibility of anomalous results by focusing on the distinct public policies behind workers' compensation laws and sex discrimination laws.\textsuperscript{338} Making broader inquiries that focus on the fundamental policies behind these laws assures more equitable and consistent treatment of sexual harassment victims.

Even though Florida, by statute, does not compensate mental claims based on sexual harassment,\textsuperscript{339} coverage for many physical-mental claims is, in effect, coverage for mental-mental claims. The general rule that a jurisdiction that recognizes mental-mental claims must logically deny tort suits based on sexual harassment is unfounded because of the strong public policy against sexual harassment and because sexual harassment is outside the scope of workers' compensation systems.\textsuperscript{340} In fact, the Florida District Court of Appeals found that the Florida Supreme Court made it clear that benefits for mental-mental claims and tort suits based on sexual harassment are not mutually exclusive.\textsuperscript{341} In \textit{Ramada Inn Surfside v. Swanson}, a female hotel employee claimed workers' compensation benefits for

\begin{itemize}
\item \textsuperscript{333} \textit{Id.}
\item \textsuperscript{334} \textit{Id.}
\item \textsuperscript{335} \textit{Schwartz v. Zippy Mart, Inc.}, 470 So. 2d 720 (Fla. Dist. Ct. App. 1985), \textit{overruled by} \textit{Byrd v. Richardson-Greenshields Sec., Inc.}, 552 So. 2d 1099 (Fla. 1989).
\item \textsuperscript{336} \textit{Brown v. Winn-Dixie Montgomery, Inc.}, 469 So. 2d 155 (Fla. Dist. Ct. App. 1985), \textit{overruled by} \textit{Byrd v. Richardson-Greenshields Sec., Inc.}, 552 So. 2d 1099 (Fla. 1989).
\item \textsuperscript{337} \textit{Schwartz}, 470 So. 2d at 724; \textit{Brown}, 469 So. 2d at 159.
\item \textsuperscript{338} \textit{Byrd}, 552 So. 2d at 1099.
\item \textsuperscript{339} FLA. STAT. ANN. § 440.02(1) (West 1991).
\item \textsuperscript{340} \textit{Byrd}, 552 So. 2d at 1099.
\item \textsuperscript{341} \textit{Ramada Inn Surfside v. Swanson}, 560 So. 2d 300 (Fla. Ct. App. 1990).
\end{itemize}
unwanted sexual contacts, including intercourse, with her supervi-

sor.\textsuperscript{342} The court of appeals found that awarding the plaintiff benefits was entirely consistent with \textit{Byrd}.\textsuperscript{343} The court stated that in certain cases plaintiffs can pursue separate claims for “qualitatively different injuries.”\textsuperscript{344}

In jurisdictions that bar compensation for mental-mental injuries, plaintiffs face a dilemma because alleging that physical manifestations accompany the emotional injury will strengthen the damages in a tort suit, but that same allegation may cause the tort suit to be barred by the exclusive remedy rule. Focusing on the nature of the injury causes conflicting court decisions because compensation is granted for intentional physical injury but not for intentional mental injury. This focus also results in conflicting decisions regarding the barring of tort suits under the exclusive remedy rule. When using a nature-of-the-injury test, courts ignore the employer’s conduct and allow the employer to use the exclusive remedy provision as a shield to avoid liability for intentional acts.

Instead of looking at the compensable nature of the injury, Michigan courts look to the theory underlying the proposed civil action to decide whether to allow a civil suit.\textsuperscript{345} The Michigan courts have found that the public policy underlying tort actions brought pursuant to the state civil rights act were based on a public policy distinct from the policies furthered by the workers’ compensation act.\textsuperscript{346} The Florida Supreme Court used the Michigan courts’ analysis to look at the theory or public policy underlying tort suits based on sexual harassment, such as intentional infliction of emotional distress.\textsuperscript{347} Other states should follow Michigan’s and Florida’s lead and focus on the conduct of the employer and the theory underlying the claim. This focus will produce more consistent and equitable results, while holding intact the general rule of exclusiveness of the workers’ compensation remedy.

\begin{itemize}
\item \textsuperscript{342} \textit{Id.}
\item \textsuperscript{343} \textit{Id.} at 304.
\item \textsuperscript{344} \textit{Id.}
\item \textsuperscript{347} Byrd v. Richardson-Greenshields Sec., Inc., 552 So. 2d 1099, 1102 (Fla. 1989).
\end{itemize}
VIII. SEXUAL HARASSMENT AS OUTSIDE THE SCOPE OF THE WORKERS' COMPENSATION SCHEME

As shown in the preceding section, courts that rely on the physical or non-physical nature of the injury to determine compensability make conflicting decisions. In addition, the argument that if mental-mental claims are compensable, then sexual harassment tort suits should be barred is unsound because the intentional nature of sexual harassment and the strong public policy against it place sexual harassment outside the scope of the workers' compensation system. Workers' compensation schemes are meant to compensate workers injured by an accident "arising out of" and "in the course" of employment and caused by a "normal risk or incident" of that employment. Therefore, focusing on the definitions of these terms, the conduct of the employer, and the theory underlying the sexual harassment claim should lead to more consistent and equitable results.

A. Sexual Harassment Is Not an Accident

Most states' workers' compensation statutes use the term "accident" to refer to a worker's injury, and this term creates interpretation problems for the courts. A popular definition of accident is "an unlooked for mishap or an untoward event which is not expected or designed." Courts look for four elements to determine whether an accident occurred: unexpected cause, unexpected result, definite time of the event, and definite time of the resulting injury. All these elements are rarely present, so most courts will find that an accident occurred if its cause was unexpected or its result was unexpected.

This definition of accident is worrisome because courts have used it to find sexual harassment accidental. Taking the employee's viewpoint, a court may find that the intentional act of sexual harassment was accidental because the employee did not ex-
pect it to occur.\textsuperscript{354} However, where there is a pattern of sexual harassment in the workplace, a court should have difficulty finding that emotional injury was unexpected by the employee. Additionally, the intentional nature of sexual harassment renders it an expected cause of injury rather than unexpected.\textsuperscript{355} Therefore, sexual harassment is not an accident and is outside the workers' compensation scheme.

B. Sexual Harassment Does Not Occur During the Course of Employment

In determining whether the "course" requirement of the compensability test has been met, courts consider the factors of time, place, and activity.\textsuperscript{356} Sexual harassment that occurs outside the work period or off the employer's premises does not occur during the course of employment. The activity factor is less clear cut. Because of the broad coverage policy of workers' compensation, where employees' activities such as rescuing or using a different method to complete a task have benefitted the employer, courts have liberally construed the activity to be during the course of employment.\textsuperscript{357} Sexual harassment activity does not enhance work performance or benefit the employer in any way. Moreover, in cases of sexual harassment, analyzing the employer's activity and motive along with the employee's activity and motive is also a proper focus in determining whether the course element is met.

Sexual harassment activity is intentional, and the motive is personal. As with other intentional torts, sexual harassment severs the employment relationship, and the course requirement cannot be

\textsuperscript{354} Zabkowicz, 789 F.2d at 545


\begin{itemize}
  \item at some point lost their "unexpected, random and single occasion" characteristic,
  \item thereby ceasing to become "accidental" in the meaning of the IWCA.
\end{itemize}

Thus, once a pattern of abuse had been firmly established, the resultant injuries and correlative personal injury claims no longer fell within the Industrial Board's exclusive jurisdiction, but became compensable by this Court.

Id. at 556-57.

\textsuperscript{356} Professor Larson states, "An injury is said to arise in the course of the employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while he is fulfilling his duties or engaged in doing something incidental thereto." 1 Larson, supra note 100, § 14.00.

\textsuperscript{357} See generally 1A Larson, supra note 100, §§ 20.00-29.00.
Courts that have looked behind the intentional acts to see if the motivation was work-related have reached inconsistent results. To refuse to see the intentional act of sexual harassment as occurring outside the course of employment allows the harassment to continue and shields employers from taking responsibility for preventing sexual harassment in the workplace.

C. Sexual Harassment Does Not Arise out of the Employment

The “arising” element of the compensability test requires that there be a causal relationship between the injury and the employment. Causation exists when the injury arises out of a risk that a reasonably prudent person would understand as an incident of the employment. Most courts have used the increased risk test to determine whether the arising element is satisfied. Under the increased risk test, the risk must be incidental to the employment in an amount greater than that faced by the general public. Most jurisdictions hold that assault cases arise out of the employment when, in the normal friction and strain of the workplace, arguments develop in connection with the work being done. These types of disputes and their consequences can be said to be incidents or increased risks of the employment.

Sexual harassment is not an increased risk of employment. Women may be exposed to sexual harassment in public, at home, or at work. There is no increased risk of sexual harassment on the job. Sexual harassment is typically the result of purely personal motivations and is usually not related to a dispute about work. A causal connection between the harassment injury and the employment is

358. 2A LARSON, supra note 100, § 68.11.
359. See, e.g., Alpine Roofing Co. v. Dalton, 539 P.2d 487 (Colo. Ct. App. 1975) (barring tort suit because assaults by foreman after a work-related dispute and firing was considered work-related and within the course of employment); Smith v. Lannert, 429 S.W.2d 8 (Mo. Ct. App. 1968) (allowing plaintiff to sue in tort for spanking given while taking an unauthorized rest break because taking the break removed the plaintiff from her scope of employment). See generally Kawalar, supra note 78, at 190-94 (discussing sexual harassment in terms of the workers’ compensation compensability test).
360. 1 LARSON, supra note 100, § 6.00.
362. 1 LARSON, supra note 100, §§ 6.00, 6.30.
363. Id.
364. Id. § 11.12(b).
365. Id. § 11.00.
tenuous, at best.\textsuperscript{366} In applying the increased risk test to cases of sexual harassment, the courts should find that the harassment did not arise out of the employment.\textsuperscript{367}

Injuries caused by sexual harassment do not meet any of the three tests of compensability: sexual harassment is not an accident, it does not occur during the course of employment, nor does it arise out of the employment. Therefore, sexual harassment is outside the scope of the workers' compensation scheme.

D. Sexual Harassment Is Outside the Contemplation of the Workers' Compensation System

The right to employment free from sexual harassment is as much a civil right as is the right to employment free from racial discrimination.\textsuperscript{368} The California Court of Appeals' finding in Renteria that intentional racial harassment is in a "class of civil wrongs outside the contemplation of the workers' compensation system"\textsuperscript{369} applies equally to sexual harassment.\textsuperscript{370} As with racial discrimination, sexual harassment is intolerable in view of the great strides made by the women's movement and the public policy evidenced in recent federal and state legislative enactments. The distinct policies behind workers' compensation statutes and employment discrimination statutes require that sexual harassment injuries be viewed differently from workers' compensation injuries.\textsuperscript{371} To allow sexual harassment injuries to be

\textsuperscript{366} A minority of jurisdictions use a liberal positional risk test to compensate injuries resulting from personal risks. Under the positional risk test, the injury arises out of the employment when the employment brings the employee to the zone of danger. This test is rejected by most jurisdictions as allowing compensation when the work connection is minimal. I Larson, supra note 100, §6.50; see also B. Small, Workmen's Compensation Law of Indiana, § 6.8 at 128-30 (1950).

\textsuperscript{367} Murphy v. ARA Servs., Inc., 298 S.E.2d 528 (Ga. Ct. App. 1982) (holding that sexual harassment by a supervisor during the work day did not arise out of the employment because the risk was not peculiar to the work and did not arise out of the character of the position).


\textsuperscript{370} Although the Indiana Court of Appeals for the First District was willing to find that racial harassment is an intentional tort meriting an exception to the exclusivity provision, the Fourth District was not willing to characterize sexual harassment as an intentional tort. Perry, 604 N.E.2d at 617 (allowing a tort suit based on racial harassment); Fields, 540 N.E.2d at 635 (barring a tort action based on sexual harassment). Instead, the Fourth District held that sexual harassment was a compensable "accident." Fields, 540 N.E.2d at 635.

\textsuperscript{371} Freeman v. Kelvinator, Inc., 469 F. Supp. 999, 1000 (E.D. Mich. 1979) (noting that the goal of workers' compensation is "to redress 'industrial injuries';" and that the goal of fair employment laws "is to guarantee equal opportunity in the marketplace . . . ").
compensable only under the workers' compensation system would not give effect to the strong public policy against sexual harassment and other employment discrimination. Workers' compensation benefits do not provide a significant remedy for sexual harassment because most harassment injuries will not result in any disability for which benefits are offered.

Courts that have barred tort suits for sexual harassment have done so to avoid destroying the historic legislative bargain of giving up the right to sue in tort in return for a guarantee of compensation regardless of fault. These courts view the right to sue as an essential concession that must be kept intact to preserve the balance of the workers' compensation system.

Because of the difficulty in ascertaining the original legislative intent behind the workers' compensation systems, which were enacted between 1910 and 1930, courts need not rigidly impose the original quid pro quo agreement. Such blind adherence to the original bargain does not take into account the many changes that have occurred in society and public policies, including the large-scale participation of women in the workforce and civil rights legislation. Furthermore, scholars disagree as to the original legislative purposes in enacting workers' compensation systems. Some scholars believe that the right to sue at common law was insignificant compared to the protection no-fault compensation would afford to workers. Other scholars believe that employers made the bargain to protect themselves from the likelihood that tort liability would become easier to prove.

The value of the right to sue at common law has substantially increased since the bargain was struck early in this century. At the time workers' compensation systems were enacted, the common law defenses of contributory negligence, assumption of risk, and the fel-

373. See, e.g., Kofron, 441 A.2d at 231; Burkhart, 215 N.E.2d at 881.
374. See, e.g., Kofron, 441 A.2d at 231; Burkhart, 215 N.E.2d at 881.
low servant rule made the likelihood of success of a tort suit slim.\textsuperscript{377} Legal developments such as strict liability for defective products,\textsuperscript{378} the easier standard of proof for negligence,\textsuperscript{379} elimination of the fellow servant rule,\textsuperscript{380} and the adoption of comparative negligence\textsuperscript{381} have increased the value of the right to sue at common law, rendering the quid pro quo unacceptable in some cases. Therefore, creating exceptions to the exclusive remedy rule that reflect legal and societal change is appropriate.

Sexual harassment was probably never contemplated by the original authors of workers' compensation systems because women did not have a strong presence in the workplace. Furthermore, public policy against sexual discrimination had not been formulated and translated into statutory law. Therefore, sexual harassment is completely outside the contemplation of the workers' compensation scheme, and employers should not be allowed to use the exclusive remedy provision as a shield to avoid liability for permitting sexual harassment to occur in the workplace.

\textbf{IX. EMPLOYER LIABILITY FOR SEXUAL HARASSMENT}

If public policy favors eliminating sexual harassment from the workplace, then employers, who are in a position to prevent sexual harassment, must be held accountable. Usually, victims of workplace sexual harassment face no difficulty in suing the co-employees responsible.\textsuperscript{382} Even though victims can bring claims against co-employees, co-employees may be unable to pay the damages awarded.

\textsuperscript{377.} See supra notes 100-106 and accompanying text.
\textsuperscript{378.} \textsc{Restatement (Second) of Torts} § 402a (1965) (employers could be held strictly liable for modifying materials used in the workplace). See generally Note, supra note 376, at 1644-45.
\textsuperscript{379.} Robert H. Ashford & William G. Johnson, \textit{Negligence vs. No-Fault Liability: An Analysis of the Workers' Compensation Example}, 12 \textit{Seton Hall L. Rev.} 725, 733-35 (1982) ("Recent plaintiff-oriented developments in tort law have led some commentators to suggest that the 'compromise' struck by the shared liability of workers' compensation should be reassessed. These include developments relating to \ldots \textit{res ipsa loquitur}, the rejection of custom as controlling in determining standards of care \ldots "). See generally Note, supra note 376.
\textsuperscript{380.} See Note, supra note 376, at 1645 n.29.
\textsuperscript{381.} For a discussion of the value of the right to sue in tort see Note, supra note 376.
\textsuperscript{382.} Popovich v. Irlando, 811 P.2d 379 (Colo. 1991) (allowing a claim against a co-employee for intentional infliction of emotional distress resulting from sexual harassment, in addition to workers' compensation benefits); O'Connell v. Chasdi, 511 N.E.2d 349 (Mass. 1987) (allowing claims for assault and battery and intentional infliction of emotional distress against a co-employee).
Furthermore, judgments against co-employees do not deter employers from permitting sexual harassment in the workplace. Unfortunately, because of the intentional act necessary to bring suit in most states, many employers are able to insulate themselves from liability for sexual harassment inflicted by their employees.383

As with employer liability in Title VII claims, liability in tort claims is difficult to prove using agency principles. Only when sexual harassment is seen as being outside the contemplation of the workers’ compensation system and when the employment is seen as providing the apparent authority or opportunity for sexual harassment to occur will more courts place liability on employers. Presently, employers are chiefly found liable because of their own action or inaction when the possibility of sexual harassment is brought to their attention.

Lawsuits against employers for their own intentional acts are generally allowed as exceptions to the exclusive remedy provision384 because an intentional act cannot be accidental.385 However, sexual harassment is usually carried out by a co-employee, and the majority of jurisdictions will not allow suits against the employer when neither the employer nor its alter-ego committed the sexual harassment.386 Courts that do not impose liability on employers for their supervisors’ sexual harassment state that the employers’ liability is derivative, and therefore not intentional.387

Jurisdictions that must find an intentional tort exception to allow a suit against the employer have allowed claims of assault and battery and intentional infliction of emotional distress, but have not allowed claims of negligent hiring or retention. For example, a federal district court in New Jersey disallowed a claim against the employer for negligent hiring, but allowed claims of battery and intentional infliction of emotional distress based on the same act of sexual harassment under the statute’s exception for intentional wrongs.388 In Cremen, a

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384. 2A LARSON, supra note 100, § 68.00.

385. Id.

386. Id. at § 68.21 & n.24.

387. See, e.g., Juarez v. Ameritech Mobile Communications, Inc., 746 F. Supp. 798 (N.D. Ill. 1990) (denying employer liability under the doctrine of respondeat superior); Bailey v. Unocal Corp., 700 F. Supp. 396 (N.D. Ill. 1988) (barring suit because any liability of the employer who did not investigate was only derivative and, therefore, barred by the exclusive remedy provision). See generally 2A LARSON, supra note 100, § 68.00.

supervisor sexually assaulted a casino cocktail server in the supervisor’s office at the end of the workday.\(^ {389} \) Although the cocktail server filed a verbal complaint with her employer’s affirmative action officer the day after the assault, she continued to be harassed until she got her union involved.\(^ {390} \) After determining that the employee’s injuries resulting from the sexual assault were compensable under the workers’ compensation act, the court went on to determine whether workers’ compensation was her exclusive remedy.\(^ {391} \) Because New Jersey law makes an exception to the exclusive remedy provision only for intentional wrongs, the plaintiff’s claims of negligent hiring and retention were dismissed.\(^ {392} \) The court then proceeded to determine whether the plaintiff’s claims of battery and intentional infliction of emotional distress should be allowed.\(^ {393} \)

In making its determination, the federal court applied the substantial certainty test as adopted by the New Jersey Supreme Court.\(^ {394} \) In \textit{Millison}, the New Jersey Supreme Court found that the legislature could not have intended that employers escape liability for all willful misconduct falling short of intentional assault and battery.\(^ {395} \) On the other hand, not wanting the exception for intentional wrongs to swallow the rule, the court, in applying the substantial certainty test, demanded virtual certainty that any complained of harm had occurred because of the employer’s actions.\(^ {396} \) In addition to the substantial certainty test, the New Jersey Supreme Court required that the context of the act be examined.\(^ {397} \) In applying the context test, the court looked at the resulting injury and the circumstances surrounding it to see if the injury was “a fact of life of industrial employment” or beyond the type of injuries that the legislature contemplated when enacting workers’ compensation as the exclusive remedy for work-related injuries.\(^ {398} \)

Applying the supreme court’s two-prong test, the federal district court agreed with other courts that could not accept sexual harassment

\(^ {389} \) \textit{Id.} at 152.

\(^ {390} \) \textit{Id.}

\(^ {391} \) \textit{Id.} at 155.

\(^ {392} \) \textit{Id.} at 155-56.

\(^ {393} \) \textit{Id.} at 156-59.

\(^ {394} \) \textit{Id.} at 157 (citing \textit{Millison v. E.I. du Pont de Nemours & Co.}, 501 A.2d 505, 514 (NJ. 1985)).

\(^ {395} \) \textit{Millison}, 501 A.2d at 513.

\(^ {396} \) \textit{Id.} at 513.

\(^ {397} \) \textit{Id.} at 514.

\(^ {398} \) \textit{Id.}
as "a fact of life of industrial employment."\textsuperscript{399} The court pointed out the importance of the context test by explaining that the quid pro quo breaks down when a risk that is not inherent in the employment is the cause of the injuries.\textsuperscript{400} Following this logic, the court held that sexual harassment is not the type of injury that the legislature had contemplated as being limited to the remedy of workers' compensation.\textsuperscript{401} In addition, the court held that a jury could find that the plaintiff's sexual assault and harassment rose to the level of intentional wrongs under the substantial certainty test and refused to grant summary judgment to the employer.\textsuperscript{402}

In addition to holding an employer vicariously liable for the intentional acts of a supervisor, the Arizona Supreme Court has held an employer directly liable for intentional infliction of emotional distress when it refused to investigate despite numerous complaints.\textsuperscript{403} The court found that this conduct was extreme or outrageous as defined in the Restatement (Second) of Torts section 46, comment (d).\textsuperscript{404}

Because sexual harassment was totally outside the contemplation of the legislatures in enacting a workers' compensation system, the rules of that system should have no influence on whether a tort claim based on sexual harassment is allowed against an employer. Indeed, the context test used in \textit{Cremen} indicates that the workers' compensation law should not govern events of sexual harassment in the workplace. The breakdown of the quid pro quo rationale used by the court in \textit{Cremen} to allow intentional tort claims applies with equal force to negligently permitted sexual harassment. As part of the original bargain, legislators agreed that consumers should pay the price necessary to obtain the product they desired. That price included the


\textsuperscript{400} Id.

\textsuperscript{401} Id.

\textsuperscript{402} Id. at 158-59; accord Palmer v. Bi-Mart Co., 758 P.2d 888 (Or. Ct. App. 1988) (holding that an employer who failed to stop harassment after being notified had a deliberate intent to injure the employee).


\textsuperscript{404} Id. at 585. Comment (d) of the Restatement states that there is liability "where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community . . . in which . . . an average member of the community would . . . exclaim, 'Outrageous!'" \textsc{Restatement (Second) of Torts} § 46 cmt. d (1965).
inevitable industrial injuries that would occur in producing the product. However, sexual harassment is not an injury that is necessarily incurred to produce a consumer product. Therefore, sexual harassment was not part of the quid pro quo agreement, and employers should not be allowed to use the exclusive remedy element of the quid pro quo to avoid their responsibility to rid the workplace of sexual harassment, even negligently allowed sexual harassment.

When workers’ compensation and sexual harassment based claims are seen as distinct, courts have no problem recognizing tort claims based on both intent and negligence. The tort of negligent hiring or retention is most successful against employers because it is based on direct liability rather than vicarious liability. In negligent hiring or retention cases, the jury determines whether the employer knew or should have known of the sexual harassment and either ignored or otherwise ineffectively dealt with it. Because negligent hiring or retention claims are based on direct rather than vicarious liability, whether or not the act of sexual harassment was outside the scope of the employee’s employment is irrelevant. Thus, the common notion that sexual harassment is virtually never within the scope of employment does not hamper finding an employer directly liable.

Besides the rationale that sexual harassment is outside the coverage of the workers’ compensation scheme, courts have relied on the

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406. Ford, 734 P.2d at 580; Byrd, 552 So. 2d at 1099; Cox, 303 S.E.2d at 71; Murphy, 298 S.E.2d at 528; Hogan, 340 S.E.2d at 116; Kerans, 575 N.E.2d at 428.

407. The Restatement (Second) of Torts states:

A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if

(a) the servant

(i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or

(ii) is using a chattel of the master, and

(b) the master

(i) knows or has reason to know that he has the ability to control his servant, and

(ii) knows or should know of the necessity and opportunity for exercising such control.

RESTATEMENT (SECOND) OF TORTS § 317 (1965).

408. Id.
public policy of Title VII and similar state statutes against sexual harassment in allowing tort suits against employers based on sexual harassment.mandated by the Supreme Court in Meritor to determine employer liability. Using agency principles to find employers vicariously liable for harassment by their employees in sexual harassment claims based on either statutory or tort law has met with limited success. Finding the employer vicariously liable is problematic because under agency principles, the master is liable only for the servant's torts that are committed within the scope of employment. Many courts decide that the act of sexual harassment can never benefit the employer and, therefore, the act is committed outside the scope of employment, and the employer cannot be held liable.

However, employers may be liable for the employees' torts committed outside the scope of their employment under an exception listed in the Restatement (Second) of Agency section 219.

409. See Byrd v. Richardson-Greenshields Sec., Inc., 552 So. 2d 1099, 1102-04 (Fla. 1989); Kerans, 575 N.E.2d at 435.
412. Byrd, 552 So. 2d at 1103; Kerans, 575 N.E.2d at 432.
413. See, e.g., Miller v. Lindenwood Female College, 616 F. Supp. 860 (E.D. Mo. 1985) (holding that the college was not vicariously liable for the sexually harassing acts of its agent because the agent was not acting within the scope of his employment at the time of the act); Cox v. Brazo, 303 S.E.2d 71, 73 (Ga. Ct. App. 1983) (stating that a supervisor's harassing acts were not in furtherance of the employer's business and therefore not within the scope of employment so as to impose vicarious liability on the employer); Carr v. U S West Direct Co., 779 P.2d 154 (Or. Ct. App. 1989) (holding that the employer was not vicariously liable for an employee's harassing acts because they were not done within the scope of employment).
415. See, e.g., Cox, 303 S.E.2d at 73; Carr, 779 P.2d at 157. Restatement (Second) of Agency § 228 defines the scope of employment as follows:

(1) Conduct of a servant is within the scope of employment if, but only if:
(a) it is of the kind he is employed to perform;
(b) it occurs substantially within the authorized time and space limits;
(c) it is actuated, at least in part, by a purpose to serve the master, and
(d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

(2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

416. The Restatement (Second) of Agency states:
ployers can be liable for employees' torts committed outside the scope of their employment if the employer intended the conduct or its consequences, or was negligent or reckless.⁴¹⁷ Although courts hearing tort claims based on sexual harassment have not invoked these portions of the Restatement, these exceptions support the rationale courts have used to find employers liable for negligent hiring, negligent retention, and intentional infliction of emotional distress.⁴¹⁸ In holding employers vicariously liable under Title VII, federal courts have used the exception in section 219(2)(d) of the Restatement (Second) of Agency to find an employer vicariously liable when an employee is assisted in carrying out sexual harassment because of the employee’s authority or apparent authority, or because of the existence of the agency relationship.⁴¹⁹ Although courts considering tort claims based on sexual harassment have been divided on using the “apparent authority” exception,⁴²⁰ a general trend in tort law is to hold employers liable because the employment provided an opportunity for the tort to occur.⁴²¹ This straining under agency principles to find employers liable for their employees’ acts of harassment was predicted by Justice Rehnquist in his Meritor opinion when he recognized that agency principles would not be totally transferable in sexu-

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(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

(a) the master intended the conduct or the consequences, or
(b) the master was negligent or reckless, or
(c) the conduct violated a non-delegable duty of the master, or
(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

RESTATEMENT (SECOND) OF AGENCY § 219(2) (1957).

⁴¹⁷ Id. § 219(2)(a)-(b).
⁴²⁰ Kerans v. Porter Paint Co., 575 N.E.2d 428, 432 (Ohio 1991) (holding that summary judgment was improperly granted to the employer). Contra Cox v. Brazo, 303 S.E.2d 71, 73 (Ga. Ct. App. 1983) (denying employer liability based on respondent superior because the alleged harassment did not further the employer’s business); Carr v. U S West Direct Co., 779 P.2d 154, 157 (Or. Ct. App. 1989) (holding that summary judgment was correctly granted to the employer because there were no facts showing that the employment was even remotely connected to the alleged harassment).
al harassment cases.\textsuperscript{422} Indeed, using agency principles may even hamper the enforcement of Title VII and slow the elimination of sexual harassment from America's workplace.

Courts have sometimes confused agency principles with the workers' compensation test for coverage. Some courts have ruled that it is inconsistent to find a harasser's act to be within the scope of employment under agency principles, yet to find that the injuries were not suffered during the course of employment under the workers' compensation system.\textsuperscript{423} These courts conclude that there is an inconsistency because they confuse scope of employment and course of employment. Although these concepts appear to represent similar tests, the two tests serve entirely different purposes. When determining whether an injury occurred during the course of employment, courts are making inquiry as to the work-connectedness of the injury to confirm that the injury resulted from a hazard or risk that is inherent in the employment, and therefore, one that the legislature had designed the workers' compensation system to cover.\textsuperscript{424} The scope of employment test, which is an agency principle, is used to determine when an employer should be liable for the torts of its employee.\textsuperscript{425} Therefore, a finding that sexual harassment did not occur during the course of employment for workers' compensation purposes, but that the harassment was committed within the scope of employment according to agency principles is not necessarily inconsistent.

Employers should not be held strictly liable for sexual harassment in the workplace, but public policy and statutory law require that employers use reasonable care to maintain a safe workplace.\textsuperscript{426} When employers know or have reason to know that sexual harassment is occurring in the workplace, they have a duty to undertake a prompt investigation and effectively eliminate the harassment or face liability for their inaction. Employers are in the best position to pre-

\textsuperscript{422} Meritor, 477 U.S. at 72.

\textsuperscript{423} Sands v. Union Camp Corp., 559 F.2d 1345 (5th Cir. 1977); see also Miller v. Lindenwood Female College, 616 F. Supp. 860 (E.D. Mo. 1985) (holding that a finding that injuries sustained during the course of employment for purposes of vicarious liability but not for workers' compensation coverage was inconsistent).

\textsuperscript{424} 1 LARSON, supra note 100, § 14.00.

\textsuperscript{425} RESTATEMENT (SECOND) OF AGENCY § 219 (1) (1957).

vent sexual harassment in the workplace, and therefore the possibility of employers risking greater liability through tort actions would serve as an additional deterrent to the currently limited Title VII liability. The risk of liability should provide employers with the incentive to take positive steps to prevent sexual harassment. Preventative measures, such as policies against sexual harassment, grievance procedures, and seminars, are key to eliminating sexual harassment from the workplace. Proper use of these policies and procedures, along with effective employer response to complaints of harassment, will not only help to eliminate sexual harassment from the workplace, but will diminish employer liability.

X. CONCLUSION

Tort claims based on sexual harassment should be allowed as a means of redressing sexual harassment victims’ individual rights. Tort claims also serve an important role because they offer some advantages that statutory claims do not. Employers should not be able to preclude these tort claims by invoking the exclusive remedy provision of workers’ compensation statutes, which were enacted at the turn of the century to compensate workers for industrial injuries. Using workers’ compensation concepts shifts the focus from the employer’s conduct and the theory underlying the claim to the nature of the injury, a focus that ignores the strong public policy against sexual harassment. The public policy against sexual harassment along with the intentional nature of sexual harassment places sexual harassment outside the scope of workers’ compensation. Plaintiffs’ claims for sexual harassment should be tried on the merits and not be automatically barred by the workers’ compensation system.

Allowing tort claims based on sexual harassment would not result in strict liability for employers. The agency principles used to determine employer liability make it difficult to impose liability on employers for the harassing acts of their employees. However, the possibility of a tort action would serve as a deterrent and prompt employers to take steps to prevent sexual harassment, which is the ultimate goal.

Courts have reached conflicting results regarding the exclusive remedy defense because they view their roles in determining the legislative intent underlying workers’ compensation statutes differently. Both the courts and potential plaintiffs need direction from state legislators as to the relationship, if any, between workers’ compensation and sexual harassment. Granted, sexual harassment is a politically
controversial issue, but it is demanding and receiving attention from the federal government, labor unions, employers, and the media. The time has come in the development of sexual harassment law for state legislators to clarify its relationship to workers’ compensation.