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Handling Employment-Related Injury Claims - Applying Workers' Comp, EPLI or Both

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FC&S

Several years ago, I was the agent handling an employment-related charge of sexual harassment that was filed against a high-ranking officer of a financial institution, who also was a prominent member of the community.

Although the claim was very tame in comparison with headlines of today, people who knew this man could not imagine they were true. Fortunately for the defendant, his company carried an employment practices liability (EPLI) policy that defended the case. Had he been found to have committed a wrongful act, the policy would also have paid the damages.

Many companies, however, do not purchase EPLI coverage. When faced with a similar situation, the alleged harasser and/or the employer may be on the hook for defense and any damages. But are there other insurance avenues that should be considered for defense costs when EPLI is not available?

According to Attorney Brit Weimer and his fellow authors of the second edition of *The EPL Guide to Risk Exposures and Coverage*, employers and their employees may be able to find coverage through other policies when EPLI is not available. In some cases, the exclusive remedy aspects of the workers' compensation system may actually preclude separate lawsuits against employers for alleged harassment or discrimination.

The Workers' Comp Remedy?

There are a number of hurdles to cross in determining whether workers' compensation is the exclusive remedy in certain employment-related claims, including questions of whether the harassing injury qualifies as bodily injury under the workers' compensation policy, how closely the discrimination or harassment is connected to the workplace, and whether the action and injury are intentional or unintentional.

Workers' compensation cases that involve emotional or mental injury typically can be divided into three groups:

- **Mental stimulus** resulting in physical injury.
- **Physical trauma** resulting in mental injury.
- **Physical injury** that results in mental injury.

When physical injury is evident, as in the first two situations, workers' compensation likely will apply. But when only mental injury is evident—such as the case may be in sexual harassment and discrimination claims—the question of compensability and exclusive remedy is not so clear. Some jurisdictions that require physical injury use the argument that mental injury is too difficult to substantiate, leading to a greater possibility of fraud.

Emotional Injuries

Most states have adopted the interpretation that purely emotional or mental injury claims arising from employment are not compensable. Those jurisdictions that do permit workers' compensation coverage for claims for mental injury without accompanying bodily injury emphasize that the difficulty of formulating appropriate legal tests does not justify denying such claims. For example, in *NPS Corp. v. Insurance Company of North America*, the New Jersey appeals court held that emotional distress and mental anguish caused to an employee by sexual harassment from a fellow employee constituted bodily injury. The court stated that New Jersey had come to recognize that mental and emotional distress are just as real as physical pain and that its valuation is no more difficult. The court said, "We are unable to separate a person's nerves and tensions from his body since, clearly, emotional trauma can be as disabling to the body as a visible physical wound."

Note that the New Jersey Supreme Court offered its disagreement with this thinking in *SL Industries, Inc. v. American Motorists Insurance Company*, 607 A.2d 1266 (1992). In that case, the court said that NPS presents "irreconcilable

inconsistencies and ambiguities lacking coherent underlying principles. The court held that "in the context of purely emotional distress without physical manifestations, the phrase 'bodily injury' is not ambiguous; its ordinary meaning connotes some sort of physical problem."

Some jurisdictions may rule that workers' comp is the exclusive remedy in employment-related mental injury claims only when there is extraordinary mental distress that is significantly greater than ordinary workplace stress. This was evident in Arizona, where a fast-food worker tried to sue her employer for sexual assault by a coworker who previously had molested another employee. The court, in *Irvin Investors v. Superior Court*, held that workers' compensation was the exclusive remedy for the employee's injuries. The sexual molestation caused such extraordinary stress that the claim met Arizona's workers' compensation category of unexpected, unusual, or extraordinary mental injury. The mental injury was compensable in Arizona, and the employee's personal injury suit was not allowed to proceed.

Decisions for Dual Claims

Mixed motive cases—where the employer's conduct is comprised of both intentional discrimination and negligence—may result in workers' comp applying to part of the claim and a personal injury claim being permitted to proceed for the intentional discrimination. This is seen in a Vermont case, *Gallipo v. City of Rutland*, where an employee alleged he was injured by an accident for workers' compensation purposes and also claimed that he was injured by unlawful discrimination. The Vermont Supreme Court allowed both claims to proceed, stating that the dual claims were not inconsistent and should be allowed to proceed.

When a personal injury lawsuit is allowed to proceed, the employer may face a difficult situation if an EPLI policy is not in place.

The employer's liability part of the workers' compensation policy addresses employee tort actions against their employers for injury that is not covered by the workers' compensation section of the policy. There are a number of exclusions on the employer's liability portion of the policy, including bodily injury intentionally caused or aggravated by the employer and, even more importantly, damages arising out of coercion, criticism, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination against or termination of any employee, or any personnel practices, policies, acts, or omissions. Thus, the employer's liability coverage would not be triggered for employee claims of harassment or discrimination.

The possible application of workers' compensation coverage to employment-related practices liability claims does not negate the need for an EPLI policy, by any means. It may even preclude claims that qualify for the exclusive-remedy protection of the workers' comp system. At the least, it points out that EPLI claims have to be considered carefully so that all possible coverage is tapped.

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