NC Workers' Comp NEWS

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In the #MeToo Era

Workplace Harassment and Workers' Comp

by Courtney Britt

Discussion of workplace harassment reached a fever pitch last fall when media reports streamed seemingly endless claims against Hollywood moguls and corporate giants alike. The #MeToo movement has added force to the discussion, no doubt leaving employers feeling exposed.

Although harassment allegations are often handled in civil courts, certain allegations can be litigated in workers' compensation claims. Decisions in the past few years by our appellate courts and federal courts interpreting North Carolina law seem to indicate that whether alleged workplace harassment will be treated exclusively through workers' compensation may depend on how it is pled.

Courtney Britt

It is well established in North Carolina that an injured worker can be compensated under the North Carolina Workers' Compensation Act ("the Act") for a mental injury. *Jordan v. Cent. Piedmont Cmty. Coll.* This is true for both mental injuries resulting from a compensable occupational disease or an injury by accident. *See id; Pulley v. City of Durham.*

Our Court of Appeals considered the viability of a workplace harassment claim in *Hogan v. Forsyth Country Club Co.*, decades before #MeToo. *Hogan* involved former female employees of the defendant country club who brought a civil lawsuit alleging that a chef at the club was verbally abusive, made sexual advances and sexually derogatory remarks. Their claims included intentional infliction of emotional distress (IIED) and negligent infliction of emotional distress (NIED).

On appeal, the club argued that the employees' claims for IIED were barred by the exclusivity provision of the Act. The Court of Appeals disagreed, noting that the damages alleged by the employees included losses that would not be covered under the Act and that the wrongs alleged fell outside the scope of workers' compensation.

In a more recent case, the Court of Appeals reached a different outcome in *Shaw v. Goodyear Tire & Rubber Co.* Shaw claimed she was harassed by her male supervisor, including verbal abuse and intimidation, but the court specifically noted that no physical contact or sexual harassment was alleged. Shaw filed a civil complaint including claims for wrongful discharge and NIED, the only claims that went to trial.

After a jury verdict in Shaw's favor, her employer appealed, arguing that the trial court lacked subject matter jurisdiction over Shaw's NIED claim because it fell exclusively under the Act. The Court agreed, vacating the jury verdict, explaining that Shaw's central allegations in the NIED claim were that she complained to her employer about the harassment by her male supervisor; her employer negligently handled her complaint; and her employer's negligence led to emotional distress and, eventually, her wrongful discharge.

The Court also specifically declined to extend the exception, allowing employees to bring a civil action against a co-employee for willful, wanton and reckless conduct, to employers accused of similar conduct.

Interestingly, the Court also concluded Shaw's NIED claim was an "accident" under the Act which arose out of and in the course and scope of her employment. However, it noted this holding is limited to the unique circumstances of the case, emphasizing that it was "crucial"

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to Shaw's allegations that the claimed emotional distress was due to the employer's mishandling of her claims, not the actual harassment by her supervisor itself.

Since *Shaw*, courts reviewing workplace harassment claims have come down on both sides. In *Lingle v. Pain Relief Centers*, P.A. (unpublished), three former employees of a medical practice alleged a physician at the practice sexually harassed them and had inappropriate physical conduct, including NIED claims. The defendants argued, in part, that the employees' claims for NIED were barred by the exclusivity provision of the Act.

The federal court reviewing the case disagreed, ruling that the employees' NIED claims could proceed to trial. It emphasized that the emotional injuries alleged by the employees were unrelated to their employment and, quoting *Hogan*, that sexual harassment was a risk, "to which the employee could be equally exposed outside the employment."

The federal court in *Hall v. Rockinham County* (unpublished), reached the opposite conclusion regarding an employee's NIED against her employer. Hall was employed as the Director of 911 Communications and alleged harassment by her supervisor, making several employment law claims and NIED against her employer and supervisor.

The Court ruled that the NIED claim against Hall's employer was exclusively under the jurisdiction of the Industrial Commission and should be dismissed from civil court, stating that Halls' injury arose out of her employment, which included the risk that her employer would not properly supervise her workplace or handle her complaints. However, multiple other claims were allowed to proceed in civil court.

A federal court reached a similar outcome in *Baldwin v. Trademen International, Inc*. (unpublished). *Baldwin* involved claims by two employees that their supervisor sexually harassed them and created a hostile work environment. The Court held that the employees' negligence claims directly against their employer were barred by the exclusivity provision. In its ruling, the Court explained that, based on *Shaw*, negligence claims based on an employer's mishandling of sexual harassment complaints falls within the Act.

Reviewing *Shaw, Lingle, Hall* and *Baldwin* offers employers guidance on which NIED claims a civil court will deem workers' compensation claims. If a court concludes that the claim is one of negligent mishandling of harassment complaints or investigation by the employer, it is more likely to be within the exclusive jurisdiction of the Industrial Commission.

However, NIED claims based on the negligence of a co-employee or injuries alleged to be caused by the harassment itself (as opposed to the mishandling of complaints) may be allowed to proceed in civil court. Employers are advised to consult their employment law and workers' compensation attorneys when workplace harassment issues arise to determine the best defense strategy.

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No Headway Against Workplace Drug Use

Drug use among U.S. workers remains at its highest rate in more than a decade, with disturbing increases seen in use of cocaine, methamphetamine, and marijuana.

According to the most-recent annual survey by Quest Diagnostics, the positivity rate for the combined U.S. workforce held steady at 4.2 percent in 2017, the same as in 2016, but up sharply over the 3.5 percent positivity rate from 2012, which represented a thirty-year low.

The analysis of 2017 data also suggests shifting patterns of drug use, with increases seen in use of cocaine and amphetamines in some areas of the country, and marijuana positivity rising sharply in states where it is legal. On the bright side, prescription opiate use in 2017 dropped nearly 17 percent across the U.S. The latest findings were released by Quest Diagnostics earlier in the year.

The most-recent patterns of drug use are problematic because they suggest employers are making little headway. In some parts of the country, workers are testing positive for certain drugs, while in other regions the drugs of choice are different.

"These changing patterns and geographical variations may challenge the ability of employers to anticipate the 'drug of choice' for their workforce or where to best focus their drug prevention efforts to ensure a safe and healthy work environment," says Barry Sample, senior director, science and technology, Quest Diagnostics.

The positivity rate for cocaine, as measured in urine testing, oral fluids, and hair analysis, increased for the fifth consecutive year. A new pattern emerged in this year's analysis, with cocaine positivity increasing significantly in Nebraska (91% increase between 2016 and 2017), Idaho (88% increase), Washington (31%), Nevada (25%), Maryland (22% increase), and Wisconsin (13%).

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President's Note

Sobering Drug Report

Buried in the recent report from Quest Diagnostics on drug use in the workplace (see page 2) is an interesting footnote from the lab on what happens when a state legalizes marijuana. In Nevada, Massachusetts, and California – three states which recently relaxed rules on marijuana – as in Washington and Colorado, positivity rates for marijuana increased sharply among the workforce.

That may or may not be a bad development, but caution is in order. Even as support for marijuana is at an all-time high with nearly 64% of Americans favoring legalization, the scientific consensus is that we don't know how marijuana use affects the workplace.

The National Council on Compensation Insurance cites a comprehensive review by the National Academies of Sciences, Engineering, and Medicine which concluded there is "insufficient evidence to support or refute a statistical association between cannabis use … and occupational accidents or injuries." All we know for sure is that as states adopt more relaxed measures regarding marijuana use, more workers test positive for marijuana.

With recreational marijuana permitted in nine states and medical marijuana legal in 30 states, more and more employers across the country are grappling with rapid changes in cultural values, science, law, and workplace regulations. However, marijuana use remains essentially illegal in North Carolina. Bills are introduced each year in the General Assembly and invariably die in committee.

But as NCCI notes, the debate could change swiftly once we have firm evidence one way or the other. Indeed, given the rising popularity of marijuana across the nation and the millions of Americans who use it daily, it should not be long before we have some clear data on this new phenomenon in the workplace.

With very best wishes,
Jay Norris

WCRI Study

How Promptly Do Injured Workers Receive Treatment?

North Carolina ranks among the bottom in a recently reported study by the Workers Compensation Research Institute (WCRI) which examines how 18 states compare in making treatment available to injured workers. The study examined claims with more than seven days of lost time for injuries occurring from October 1, 2014, through September 30, 2015, evaluated as of March 31, 2016.

In addition to North Carolina, other states in the study were Arkansas, California, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, New Jersey, Pennsylvania, Texas, Virginia, and Wisconsin.

Researchers focused on the median number of days from injury to first medical treatment by type of provider, type of service, and type of injury. There was little variation in time to first medical treatment for "entry" services (such as emergency, office visits, and minor radiology) for most injury types, but considerable variation across states in the time from injury to first treatment for physical medicine and specialty services such as major radiology, major surgery, pain - management injections, and neurological/ neuromuscular testing.

For instance, the median number of days it took workers to receive major radiology services in Pennsylvania – which was ranked first - was 17 days, whereas in North Carolina the median time was 31 days. Only Georgia, Louisiana, and California were slower in providing this service.

Similarly, the median number of days it took workers to receive major surgery in Arkansas – ranked first – was 54 days, whereas the median time in North Carolina was 88 days. Only California ranked lower at 118 days.

For pain-management injections, the lowest median time was in Indiana (75 days), compared to 95 days in North Carolina. For physical medicine, the lowest median time was in Pennsylvania (22 days), compared to 38 days in North Carolina. For neurological/neuromuscular testing, the lowest median time was 78 days in Wisconsin, and 105 days in North Carolina.

Overall, based on points assigned by the researchers, North Carolina was ranked 16th among the 18 states. Only Louisiana and California fared worse.

coming up

March 27-29, 2019

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The employers' voice in workers' comp

Industrial Commission News

On June 29, 2018 the NC General Assembly confirmed Commissioner Myra L. Griffin to fill the unexpired term of former Commissioner Linda Cheatham. Governor Cooper appointed Commissioner Griffin as an emergency appointment to allow her to act as a Full Commissioner prior to her confirmation by the legislature.

Commissioner Griffin will serve the remainder of former Commissioner Cheatham's term which ends in 2022. Thereafter, she will then be eligible for reappointment to one additional six year term.

Deputy Commissioner Robert Harris was also nominated by Governor Cooper to join the full Commission to replace Commissioner Nance, whose term expired on June 30, 2018, but Deputy Commissioner Harris was not confirmed by the legislature. He will remain a Deputy Commissioner for the remainder of his term.

Commissioner Nance's slot on the Full Commission remains open as of July 12th and the Full Commission is operating with five members. The legislature is currently out of session, but did not formerly end its term for the year. Consequently, it is unknown if and when the open slot on the Full Commission will be filled.

Governor Cooper could make an emergency appointment, but this appointment would be subject to approval by the General Assembly. The legislature could take up the issue if they come back into a Raleigh for a special session in 2018 or they could wait until January 2019, when the next regular legislative session is scheduled to start.

Ashley M. Moore has been appointed as a deputy commissioner in Raleigh. Ms. Moore served as a law clerk to Chair Allen, former Commissioner Linda Cheatham, and Vice-Chairman Yolanda K. Stith.

Workplace Drug Use *continued from page 2*

Also, marijuana positivity continued its five-year upward trajectory. Marijuana use increased four percent in the general U.S. workforce (2.5% in 2016 versus 2.6% in 2017) and nearly eight percent in the safety-sensitive workforce (0.78% versus 0.84%).

Increases in positivity rates for marijuana were most striking in states that have enacted recreational-use statues since 2016. Those states include: Nevada (43%), Massachusetts (14%) and California (11%). These states also saw significant increases in marijuana positivity in federally-mandated, safety-sensitive workers: Nevada (39%), California (20%), and Massachusetts (11%).

"These increases are similar to the increases we observed after recreational marijuana use statues were passed in Washington and Colorado. While it is too early to tell if this is a trend, our data suggests that the recreational use of marijuana is spilling into the workforce, including among individuals most responsible for keeping our communities safe," notes Barry Sample of Quest Diagnostics.