SEXUAL HARASSMENT AND SEXUAL ASSAULT INJURY IN THE WORKPLACE: PATHS TO RECOVERY IN AND OUTSIDE OF WORKERS' COMPENSATION

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This article will address how sexual harassment and sexual assault injuries occurring in the workplace are addressed across the country.

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I. OVERVIEW OF WORKERS' COMPENSATION STATUTORY SYSTEMS AND EXCLUSIVITY OF WORKPLACE INJURY CLAIMS

Workers' compensation is a form of accident or illness insurance paid for by employers to compensate workers for injuries arising out of and in the course of employment. In exchange for relinquishing a right to sue in tort, injured workers are provided with swift access to medical and wage replacement benefits. If an employee is injured on the job or contracts a work-related illness, workers' compensation insurance will pay his or her medical expenses. If an employee is unable to work, workers' compensation insurance also provides wage-loss compensation until he or she can return to work. Most states also provide a wage differential if the employee returns to a lower paying job, either with the pre-injury employer or with a new employer, as long as the lower wages result from the lingering effects of the work injury. Employees who sustain permanent debilitating injuries that prevent a return to gainful employment in the ordinary labor market may be eligible to receive benefits for the rest of their lives. In most jurisdictions, surviving dependents can receive death benefits, and in some jurisdictions, surviving parents may also receive death benefits.

Available benefits are paid by a private insurance company, the self-insured employer, or state-run workers' compensation funds. Statutes and precedential case law dictating what constitutes a "covered injury" and benefits available to individual workers vary throughout the country because employer obligations regarding workers' compensation are governed by state law.

Workers' compensation statutory systems provide a no-fault avenue for employees when they are injured in the workplace in exchange for employer protection against civil liability. The system depends on workers' compensation statutes providing exclusive remedy for any claims brought against the employer. However, most states provide some exceptions to exclusivity.

Typically, an employee cannot receive workers' compensation benefits while simultaneously pursuing tort causes of action against his or her employer. However, employees may be able to avoid exclusive recovery under their state's workers' compensation statute by proving their injury was caused by an intentional tort. If an employee can show the employer's failure to prevent injury was intentional, his or her recovery should not be limited to available workers' compensation benefits.[1] Additionally, non-pecuniary losses may be recoverable outside of the framework of workers'

1. *See* Suarez v. Dickmont Plastics Corp., 639 A.2d 507 (Conn. 1994) (holding there was sufficient evidence for a jury to determine the employer's actions were intentional and would fall under the intentional tort exception to workers' compensation exclusivity).

compensation insurance, because those losses are not considered part of the "grand bargain."

Sexual harassment and sexual assault are intentional torts that present unique legal questions for courts to consider. While some states only provide for sexual harassment and sexual assault victims to recover damages pursuant to workers' compensation law, others recognize sexual harassment and sexual assault as an exception and permit further recovery outside of the workers' compensation arena.

The traditional course of civil litigation for claims that are potentially compensable under workers' compensation is for the employer to raise an affirmative defense that any civil claim is barred by the exclusive remedy provision of the state's worker's compensation statute.[2] At that point, the burden shifts to the plaintiff or employee to assert an exception to exclusivity on which the plaintiff can prevail in court.[3] If no exception applies, the employee is barred from bringing the civil case and may only look to the workers' compensation statute for recovery.[4]

II. STATES WITH AN EXPLICIT EXEMPTION FOR SEXUAL HARASSMENT AND SEXUAL ASSAULT IN THE STATUTE

Only Hawaii explicitly provides a remedy for sexual harassment and sexual assault in the workers' compensation statute. Hawaii specifically excludes "sexual harassment or sexual assault and infliction of emotional distress or invasion of privacy related thereto" from workers' compensation exclusivity.[5] This extends to negligent and intentional emotional distress claims as well.[6] Hawaii also permits double recovery under both its Workers' Compensation Law and civil actions because the legislature explicitly states that "persons seeking statutory relief under [the] Hawaii Workers' Compensation Law should not be precluded from maintaining a cause of

2. *See* McCracken v. Wal-Mart Stores E., LP, 298 S.W.3d 473, 478 (Mo. 2009) (reasoning that exclusive jurisdiction under the Workers' Compensation Act is traditionally treated as an affirmative defense and not an issue of subject matter jurisdiction; if the defense is not waived it is avoided).

3. Geise v. Phoenix Co. of Chicago, Inc., 639 N.E.2d 1273, 1275–76 (Ill. 1994) (holding that the employer waived the affirmative defense of workers' compensation exclusivity by failing to raise at the trial court level).

4. Downer v. Detroit Receiving Hosp., 477 N.W.2d 146, 147–48 (Mich. Ct. App. 1991) (holding the employee's negligent hiring claim against her employer did not fall under the intentional tort exception and therefore workers' compensation exclusivity barred her civil suit).

5. Haw. Rev Stat Ann. § 386-5; *see also* Nelson v. Univ. of Hawaii, 38 P.3d 95, 112–13 (Haw. 2001) ("HRS § 386–5 was amended in 1992 to include an exception to the exclusive remedy provision of the workers' compensation law for certain claims related to sexual harassment and sexual assault.").

6. *Nelson*, 38 P.3d at 114 (holding the intentional emotional distress exception to exclusivity applied to plaintiff's claim related to sexual harassment from her co-employees).

action arising out of the same facts as the workers' compensation claim in a court of law."[7]

III. WHERE THERE IS NO EXPLICIT EXEMPTION FOR SEXUAL HARASSMENT AND SEXUAL ASSAULT IN THE STATUTE, BUT AN EXPLICIT EXEMPTION FOR ANOTHER CAUSE OF ACTION THAT INCLUDES ELEMENTS OF SEXUAL HARASSMENT OR SEXUAL ASSAULT

A few states explicitly allow for intentional torts as exceptions to exclusivity in their statutes. These intentional tort exceptions have been used to support civil actions around sexual harassment, including assault,[8] battery,[9] and intentional infliction of emotional distress.[10]

- **Michigan:** The Michigan Workers' Disability Compensation Act states that "the only exception to this exclusive remedy is an intentional tort."[11] The statute defines intentional tort as occurring "when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury . . . [meaning] the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge."[12] Courts use this analysis for sexual harassment and sexual assault claims when brought as intentional torts.[13]
- **Ohio:** An employer may be held liable for certain intentional torts if the employee proves that the employer "committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur."[14] In *Kerans v. Porter Paint Co.*, the Ohio Supreme Court explicitly said that not only are intentional torts permitted, but to exclude sexual harassment claims would be to "contravene the legislative intent behind the workers' compensation laws."[15]

7. H. Stand. Comm. Rep. No. 766, at 1107 (Haw. 1991).
8. Doe v. State, 933 N.Y.S.2d 688, 690 (App. Div. 2011) (allowing sexual harassment tort claim as assault and battery).
9. *Id.*
10. *See* Randall v. Tod-Nik Audiology, Inc., 704 N.Y.S.2d 228, 229–30 (App. Div. 2000) (permitting sexual assault and battery and intentional infliction of emotional distress claims).
11. Mich. Comp. Laws § 418.131 (1).
12. *Id.*
13. Downer v. Detroit Receiving Hosp., 477 N.W.2d 146, 148 (Mich. Ct. App. 1991) (finding exclusivity applied for claims of negligent hiring related to sexual harassment because plaintiff did not assert employer acted intentionally but negligently).
14. Ohio Rev. Code Ann. § 2745.01(A).
15. Kerans v. Porter Paint Co., 575 N.E. 2d 428, 431 (Ohio 1991) (finding sexual harassment claims resulting in purely psychological injuries not compensable under the Ohio Workers' Compensation Act; therefore exclusivity did not apply).

- **Oklahoma:** An employee has a private right of action for damages for intentional torts committed by an employer resulting in injury to the employee. An intentional tort is defined as an injury occurring because of the willful, deliberate, and specific intent of the employer to cause such injury.[16] This language in the statute codified previous court findings that intentional torts such as sexual assault were not included under workers' compensation exclusivity.[17] The Oklahoma legislature has proposed legislation to amend the applicability of the worker's compensation statute to compensable injuries and death "arising out of the course and scope of employment."[18]
- **Pennsylvania:** Pennsylvania's Workers' Compensation Act excludes injuries inflicted by third parties for personal reasons unrelated to the injured workers' employment under the "personal animus" exception.[19] The statutory definition of "injury arising in the course of his employment" does not include intentional injuries by a third person, which are personal in nature and not tied to the employee's employment.[20] The employer must raise the personal animus exception as an affirmative defense to the workers' compensation claim.[21] If the personal animus exception applies, then "the employer is not immune from tort liability for the injury"; however, the plaintiff has the burden in the common law tort action of proving that the personal animus exception applies.[22]
- **South Dakota:** An employee has a private right of action if an employer commits a sexually motivated intentional tort that results in injury to the employee.[23] However, South Dakota invokes the "alter ego rule,"

16. Okla. Stat. Ann. tit. 85A, § 5(B)(2) (West 2019) (portion of the law granting automatic immunity from civil liability for owners and operators or oil and gas wells found unconstitutional under *Strickland v. Stephens Production Co.*, 2018 OK 6, 411 P.3d 369).

17. Pursell v. Pizza Inn Inc., 786 P.2d 716, 717 (Okla. Civ. App. 1990) (holding exclusivity did not apply for sexual battery and negligent hiring).

18. S.B. 324, 58th Leg., 1st Reg. Sess. (Okla. Mar. 11, 2021). See Section 3.A for further discussion of the "arising out of and in the course of employment" test.

19. Grabowski v. Carelink Cmty. Support Servs., Inc., 230 A.3d 465, 471 (Pa. Super. 2020) ("If the employee was acting in the course of her employment when the injury occurred, the injury is presumed to be work-related and the burden is on the party asserting the personal animus/third party attack exception to prove that the exception applies and the injury is therefore not covered by the [Workers' Compensation Act]." (citing Heath v. Workers' Comp. Appeal Bd. (Pa. Bd. of Prob. & Parole), 860 A.2d 25, 29–30 (Pa. 2004)) (employer bears burden to prove "personal animus" exception in workers' compensation proceeding).

20. 77 Pa. Stat. Ann. § 411 (1) (West).

21. *See Heath*, 580 Pa. at 182–83.

22. *Grabowski*, 230 A.3d at 471 (citing Kohler v. McCrory Stores, 615 A.2d 27, 32–33 n.5 (Pa. 1992)).

23. S.D. Codified Laws § 62-3-2; *see also* Benson v. Goble, 593 N.W.2d 402, 406 (S.D. 1999) (noting the intentional tort exception is narrow and that an "actor must know or believe that the harm is a substantially certain consequence of his act before intent to injure will be inferred").

which states that the harasser must be "so dominant in the corporation that he could be deemed the alter ego of the corporation."[24]
- **Texas:** The Workers' Compensation Act "does not prohibit the recovery of exemplary damages . . . by an intentional act or omission of the employer or by the employer's gross negligence."[25] Texas courts give exclusivity for sexual harassment and sexual assault claims to the Texas Commission on Human Rights Act and not the Texas Workers' Compensation Act.[26]

Many other states have language that courts have commonly interpreted to apply an exception to exclusivity for intentional torts, which covers sexual harassment and sexual assault claims:

- **California:** Exclusivity does not apply "[w]here the employee's injury or death is proximately caused by a willful physical assault by the employer."[27] California courts interpret this language narrowly, only allowing exceptions to exclusivity where "the employer's conduct contravenes fundamental public policy [and] exceeds the risks inherent in the employment relationship."[28]
- **Louisiana:** The exclusivity of the Workers' Compensation Act does not "affect the liability of the employer, or any officer, director, stockholder, partner, or employee of such employer or principal to a fine or penalty under any other statute or the liability, civil or criminal, resulting from an intentional act."[29] In Louisiana, it is not enough to allege negligent torts related to sexual harassment; only intentional torts are enough to support the exception to exclusivity.[30]

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24. *See* Ruschenberg v. Eliason, 850 N.W.2d 810, 820–21 (S.D. 2014) (citing the alter ego rule from *Benson*, 593 N.W.2d at 406, but ultimately finding the issue moot due to other resolved issues in the case).

25. Tex. Lab. Code § 408.001(b).

26. Waffle House, Inc. v. Williams, 313 S.W.3d 796, 803 (Tex. 2010) (holding that sexual harassment claim was not barred under the Workers' Compensation Act but preempted under the exclusivity of the Texas Commission on Human Rights Act).

27. Cal. Lab. Code § 3602 (West).

28. Jones v. Dep't of Corr. & Rehab., 62 Cal. Rptr. 3d 200, 212 (Ct. App. 2007) (holding that plaintiff's claims of emotional distress and assault and battery tied to sexual harassment at work was barred by exclusivity). *Jones* also addresses civil suits brought against co-employees for a "willful and unprovoked physical act of aggression." *Jones*, 62 Cal. Rptr. 3d at 213. The term "aggression" suggests intentional harmful conduct . . . and a "willful and unprovoked physical act of aggression includes an intent to injure requirement." *Id*. *Jones* is distinguished in *Light v. Department of Parks & Recreation*, 221 Cal. Rptr. 3d 668 (Ct. App. 2017) because *Jones* upholds exclusivity in regards to an emotional distress claim based on allegations of discrimination. However, *Light* clarifies that where there is a valid FEHA violation, these claims are not barred by workers' compensation exclusivity. *Light*, 221 Cal. Rptr. 3d at 689–90.

29. La Stat. Ann. 23:1032(B).

30. *See* Adams v. Time Saver Stores, Inc., 615 So. 2d 460, 461–62 (La. Ct. App.), *writ denied*, 617 So. 2d 910 (La. 1993) (holding that questions of negligence for an employee sexually assaulted while working the graveyard shift were not sufficient to constitute an intentional act under the statute). The court noted that, in determining intentional acts, "terms such as

- **Montana:** An employer is liable in tort when an employee is "intentionally injured by an intentional and deliberate act of the employee's employer or by the intentional and deliberate act of a fellow employee while performing the duties of employment."[31] The employer is vicariously liable for intentional actions of co-employees under the statute.[32] Montana courts have explicitly interpreted intentional acts to include sexual harassment.[33]
- **Nevada:** In 1997, Nevada added language to its workers' compensation statute that employers are *not* liable for "the intentional conduct of an employee" if the action was a "truly independent venture of the employee; was not committed in the course of the very task assigned to the employee; and was not reasonably foreseeable under the facts and circumstances of the case considering the nature and scope of his or her employment."[34] Nevada's Supreme Court has used this language when analyzing whether employers are liable for the sexually harassing behavior of their employees.[35] Nevada's adoption of this statutory language mirrors the judicial analysis that a compensable injury "arising out of and in the course of employment" may exclude sexual harassment and sexual assault from exclusivity.[36]
- **New York:** The New York Workers' Compensation Law does not apply when the employer engages in conduct constituting an intentional tort.[37] An employee has a private right of action in tort if an employee shows that the employer committed an intentional sexual act resulting in injury to the employee.[38]

'reasonably foreseeable', 'likely to occur' and 'should have known' may raise issues of negligence, or gross negligence but do not amount to 'intentional' as that term is used in the Worker's Compensation Act." *Adams*, 615 So. 2d at 461–62.

31. Mont. Code Ann. § 39-71-413 (1)(a) (West).

32. *Id.* § 39-71-413(2).

33. *See* Vainio v. Brookshire, 852 P.2d 596, 601 (Mont. 1993) (holding that plaintiff's remedy was not exclusively under the Workers' Compensation Act because "[s]exual harassment is an intentional act not arising from an accident").

34. Nev. Rev. Stat. Ann. § 41.745 (1) (West).

35. *See* Wood v. Safeway, Inc., 121 P.3d 1026, 1037–38 (Nev. 2005) (holding exclusivity applied because the employee's "sexual assault arose out of and in the course of her employment," but the employer was not liable for the employee's actions under the workers' compensation statute because the employee's "actions were independent of employment, were not committed within the course and scope of employment, and were not reasonably foreseeable under the circumstances").

36. *Wood*, 121 Nev. at 1032 ("[I]njuries that fall within the ambit of the NIIA's coverage are those that both arise out of the employment and occur within the course of that employment.").

37. *See* Corcoran v. N.Y. Power Auth., 202 F.3d 530, 541 (2d Cir. 1999) (applying New York law and allowing executrix of estate of deceased employee to bring negligence and tort claims).

38. Hanford v. Plaza Packaging Corp., 811 N.E.2d 30, 31–32 (N.Y. 2004) (holding plaintiff's claims for intentional infliction of emotional distress, discrimination and sexual harassment as prima facie tort fell under the intentional tort exception to exclusivity).

- **North Dakota:** The North Dakota Workers' Compensation Act reads: "The sole exception to an employer's immunity from civil liability under this title . . . is an action for an injury to an employee caused by an employer's intentional act done with the conscious purpose of inflicting the injury."[39] However, showing that the intentional action of the co-employee is the intentional act of the employer in sexual harassment cases can prove tricky.[40]
- **Washington:** The workers' compensation statute in Washington provides: "If injury results to a worker from the deliberate intention of his or her employer to produce such injury, the worker or beneficiary of the worker shall have the privilege to take under this title [worker's compensation] *and* also have cause of action against the employer as if this title had not been enacted, for any damages in excess of compensation and benefits paid or payable under this title."[41] In sexual harassment claims, negligence or substantial certainty are not enough to invoke the intentional tort bar to workers' compensation exclusivity.[42]
- **Wyoming:** Exclusivity of the Workers' Compensation Act applies "unless the [co]employees intentionally act to cause physical harm or injury to the injured employee, but does not supersede any rights and remedies available to an employee and his dependents against any other person."[43] In sexual harassment and sexual assault cases, Wyoming cases have determined that "[t]he test for determining whether the exclusive-remedy provisions of the Worker's Compensation Act operate to prevent actions against covered employers for intentional acts of employees is whether or not the claimed injury would be compensable under the Act."[44]

Occasionally, but rarely, double recovery is allowed in certain jurisdictions. New York and Washington provide for double recovery.[45] The majority of jurisdictions do not allow for double recovery. Some states explicitly

39. N.D. Cent. Code Ann. § 65-01-01.1 (West).

40. *See* Richard v. Washburn Pub. Sch., 809 N.W.2d 288, 296 (N.D. 2011) (holding the employer liable for the employee's civil suit not because the employee proved intention but because the sexual harassment was non-compensable under the workers' compensation act as a physical-mental injury).

41. Wash. Rev. Code Ann. §51.24.020

42. *See* LaRose v. King Cnty., 437 P.3d 701, 719 (Wash. Ct. App. 2019) (finding the plaintiff did not present enough specific facts to show her employer's conduct fell under the deliberate intention exception).

43. Wyo. Stat. Ann. § 27-14-104(a).

44. Baker v. Wendy's of Montana, Inc., 687 P.2d 885, 889 (Wyo. 1984) (holding the plaintiff's claims for sexual assault and intentional infliction of emotion distress were covered under the Wyoming Workers' Compensation Act because they were in the course of employment).

45. Hanford v. Plaza Packaging Corp., 811 N.E.2d 30, 32 (N.Y. 2004) ("[T]he Workers' Compensation Law does not bar an employee who has accepted compensation benefits from suing a coemployee who has committed an intentional assault upon him."); *see also supra* note 37.

preclude double recovery, going so far as to require claimants to make an active election to pursue their workers' compensation claim and opt out of their private action rights or vice versa.[46] Most of these jurisdictions view the intentional act exception to workers' compensation exclusivity as a codification of the premise that workers' compensation remedy is for accidental workplace injuries. Therefore, these intentional actions are not governed by applicable workers' compensation statutes, and no means of recovery exists without a civil action.

IV. STATES WHERE SEXUAL HARASSMENT AND SEXUAL ASSAULT ARE NOT COMPENSABLE UNDER THE WORKERS' COMPENSATION STATUTE

Where states provide no statutory basis for suits for intentional acts to avoid exclusivity, courts have created exceptions to workers' compensation statutes if the act committed would be compensable under the workers' compensation statute. Like the states that have provided some statutory language to indicate intentional acts are not compensable under workers' compensation statutes, the reasoning behind these decisions is that employees injured in the workplace should have some means of recovery. If recovery is barred under the workers' compensation statute, then exclusivity does not apply and a private action can be brought.

Many states use a test based on the statutory coverage of "an accidental injury [arising] out of and in the course of employment."[47] Some states have additional prongs to this basic analysis.

- **Delaware:** A workers' compensation claimant must be able to show that an assault was within the scope of employment or somehow connected to the employment, and that it was not personal in nature. A personally motivated assault is not compensable.[48]

46. *See* Advanced Countertop Design, Inc. v. Second Judicial Dist. Court of State *ex rel.* Cnty. of Washoe, 984 P.2d 756, 759 (Nev. 1999) (noting double recovery was not permitted for an intentional tort where the plaintiff had already recovered under the workers' compensation act); Tex. Labor Code § 406.034(a) ("To retain a common law right of action to recover damages for personal injuries or death, a covered employee must notify the employer in writing that the employee waives coverage and retains all rights of action under common law."); *see also* Bias v. E. Associated Coal Corp., 640 S.E.2d 540, 546 (W. Va. 2006) ("An employee who is precluded . . . from receiving workers' compensation benefits for a mental injury without physical manifestation cannot, because of the immunity afforded employers . . ., maintain a common law negligence action against his employer for such injury.").

47. Orr v. Holiday Inns, Inc., 627 P.2d 1193, 1196–97 (Kan. Ct. App.), *aff'd*, 634 P.2d 1067 (Kan. 1981) (finding bartender sexually assaulted in the bathroom during her break qualified as arising out of and in the course of employment, thus exclusivity applied).

48. *See* Brogan v. Value City Furniture, No. 01A-06-002 (Del Super. Ct. 2002) (holding the Industrial Accident Board properly deemed that an attack by a supervisor's wife was personal and, therefore, not compensable under the state's workers' compensation statute).

- **Georgia:** An employee who was sexually assaulted in the parking lot on the way to her car after work suffered an injury arising out of and occurring in the course of the employee's employment.[49]
- **Illinois:** To avoid exclusivity, the employee-plaintiff must show the following: "(1) that the injury was not accidental; (2) that the injury did not arise from his or her employment; (3) that the injury was not received during the course of employment; or (4) that the injury was not compensable under the Act."[50] Illinois courts have "stress[ed] that it is only where the injury is the type of work-related injury within the purview of the [Compensation Act] that an employer's liability is governed exclusively by the provisions of that act."[51]
- **Indiana:** "[T]he Indiana Workmen's Compensation Act is the exclusive remedy available to injured employees if the injury suffered was (1) accidental; (2) arose out of the employment relationship; and (3) occurred in the course of employment."[52]
- **Kansas:** The Kansas workers' compensation law applies when "an accidental injury arises out of and in the course of employment."[53] The phrase "in the course of" refers to the time, place, and circumstances of the injury, while "arises out of" refers to the cause or origin of the accident and requires "some casual connection between the accidental injury and the employment."[54]
- **Massachusetts:** Common law actions against employers are barred where "(1) the plaintiff is shown to be an employee; (2) her condition is shown to be a personal injury within the meaning of the workers' compensation act; and (3) the injury is shown to have arisen out of and in the course of her employment."[55]

49. Dawson v. Wal-Mart Stores, Inc., 751 S.E.2d 426 (Ga. Ct. App. 2013) (finding plaintiff's personal injury action against her employer was barred under the exclusivity of the Workers' Compensation Act).

50. Meerbrey v. Marshall Field & Co., 564 N.E.2d 1222, 1226 (Ill. 1990) (holding the Workers' Compensation Act barred the employee's action against his employer for false imprisonment, false arrest, and malicious prosecution, but it did not bar the action against his co-employee).

51. McDonald v. Symphony Bronzeville Park LLC, 174 N.E.3d 578, 584 (Ill. App. Ct. 2020), *appeal allowed*, 163 N.E.3d 746 (Ill. 2021), *aff'd*, 193 N.E.3d 1253, 1261 (Ill. 2022) (holding the exclusivity provisions of the Workers' Compensation Act did not bar an action for a violation of privacy rights under the Illinois Biometric Information Privacy Act (citing Folta v. Ferro Eng'g, 43 N.E.3d 108, 117 (Ill. 2015)).

52. Crowe v. Blum, 9 F.3d 32, 34 (7th Cir. 1993) (holding a physical assault by a co-worker was compensable under the Act because it was accidental and arising out of her employment).

53. Orr v. Holiday Inns, Inc., 627 P.2d 1193, 1197 (Kan. Ct. App.), *aff'd*, 634 P.2d 1067 (Kan. 1981) (finding bartender sexually assaulted in the bathroom during her break qualified as arising out of and in the course of employment, thus exclusivity applied).

54. *Id.* at 1197.

55. Brown v. Nutter, McClennen & Fish, 696 N.E.2d 953, 955 (Mass. App. Ct. 1998) (holding the emotional repercussions employee suffered after her employer forced her to commit offensive and improper acts on his behalf were barred under exclusivity because they arose out of and in the course of her employment).

- **Minnesota:** "When an assault or battery is the source of an employee's injuries, three requirements must be met for compensability under the Act: the injury (1) must arise out of the employment, (2) must be in the course of employment, and (3) must not be excluded by the assault exception."[56] The assault exception states that acts by a third person or co-employee that are "intended to injure the employee because of personal reasons" and not as a result of their employment are excluded from the definition of "personal injury" and not compensable under the workers' compensation statute.[57] Minnesota courts have found sexual assault does not inherently meet the assault exception to personal injury because "it is the motivation of the assailant that determines whether the act is personal" and therefore outside the scope of workers' compensation.[58]
- **New Mexico:** "A claim falls outside the [Workers' Compensation Act (WCA)] for work-related injuries if: 1) the injuries do not arise out of employment; 2) substantial evidence exists that the employer intended to injure the employee; or 3) the injuries are not those compensable under the WCA."[59]
- **Tennessee:** "It is the general rule that an injury arising from an assault on an employee committed solely to gratify his personal ill-will, anger, or hatred, or an injury received in a fight purely personal in nature with a fellow employee, does not arise out of the employment within the meaning of the workmen's compensation acts."[60] In *Anderson v. Save-A-Lot, Ltd.*, the court applied this test to sexual harassment by the Plaintiff's supervisor, finding sexual harassment personal in nature and not meeting the test for workers' compensation exclusivity.[61]

Other jurisdictions do not apply the "arising out of and in the course of employment" test, but have created their own exceptions for sexual harassment and sexual assault actions. As with the states that have some statutory language that can cover sexual harassment and sexual assault, judges have

56. Fernandez v. Ramsey Cnty., 495 N.W.2d 859, 861 (Minn. Ct. App. 1993) (remanding Plaintiff's claims of sexually motivated assault and battery by her supervisors because the issue of whether the action was personal or arising out of and in the course of employment was a question of fact).

57. Minn. Stat. § 176.011 (1990).

58. *Fernandez*, 495 N.W.2d at 862; *see also* Meintsma v. Loram Maint. of Way, Inc., 684 N.W.2d 434, 439 (Minn. 2004) (finding the assault exception not applicable in a situation where an employee was receiving "birthday spankings" because "the provocation or motivation for the spanking arose solely out of the activity of Meintsma as an employee and not out of personal animosity").

59. Coates v. Wal-Mart Stores, Inc., 976 P.2d 999, 1004 (N.M. 1999) (holding that injuries caused by sexual harassment do not arise out of employment).

60. Anderson v. Save-A-Lot, Ltd., 989 S.W.2d 277, 281 (Tenn. 1999) (holding that sexual harassment was personal in nature and did not arise out of employment and was therefore not barred under Workers' Compensation Act).

61. *Id.*

created bright line rules for intentional torts or mental disabilities that have been applied to sexual assault and sexual harassment.

- **Arkansas:** "An employee may file a civil action against an employer where the employee is injured by an employer's willful and malicious acts."[62] In *Truman Arnold Companies v. Miller City Circuit Court*, the court noted that it has jurisdiction when there is a question of law only.[63] With questions of fact or mixed issues of law and fact, the Workers' Compensation Commission has jurisdiction, and cases must be brought through the Workers' Compensation system first to determine jurisdiction before a civil suit may proceed.[64]
- **District of Columbia:** Courts have concluded that sexual harassment is not "a risk involved in or incidental to employment." They base this on the intent behind the Human Rights Act, which "forbids such harassment during day-to-day workplace interaction" but, "more fundamentally, because sexual harassment is altogether unrelated to any work task."[65]
- **Mississippi:** Courts have commonly held that "in order for a willful tort to be outside the exclusivity of the [Mississippi Workers' Compensation Act], the employe[r]'s action must be done with an actual intent to injure the employee."[66]
- **New Jersey:** Employees may bring a private action against their employer for damages against the employer when the employer committed an intentional wrong.[67] The injured worker must prove "not only whether the employer acted with knowledge that injury was substantially certain to occur, but also whether the injury and the

62. Truman Arnold Cos. v. Miller Cnty. Cir. Ct., 513 S.W.3d 838, 841 (Ark. 2017) (holding the employee's sexual harassment-based claims of negligent supervision, retention, and hiring were barred by exclusivity because the inquiry should be addressed by the Workers' Compensation Commission).

63. *Id.*

64. *Id.* (remanding the case because the question of whether a sexual harassment-based injury arises out of and in the course of employment was a question of fact not law).

65. Estate of Underwood v. Nat'l Credit Union Admin., 665 A.2d 621, 634 (D.C. 1995) (holding that the Plaintiff's sexual harassment and intentional infliction of emotional distress claims were not barred by the Workers' Compensation Act because Plaintiff's sexual harassment and related emotional distress did not arise out of her employment).

66. Bowden v. Young, 120 So. 3d 971, 976 (Miss. 2013) (finding plaintiffs failed to state claims for battery, intentional infliction of emotional distress, and conspiracy and aiding and abetting; therefore, the original dismissal under exclusivity was upheld). The Mississippi legislature proposed legislation to amend the exclusivity provision of the workers' compensation statute, exempting the employer's "gross negligence where injury was substantially certain to occur" from exclusivity when that injury results in the employee's death. S.B. 2672, 137th Reg. Sess. (Miss. 2022) (proposed legislation).

67. Laidlow v. Hariton Machinery Co., Inc., 790 A.2d 884, 886–87 (N.J. 2002) (removing a safety device from a dangerous machine that injured the employee could support a finding of intent for the intentional tort exception to exclusivity).

circumstances surrounding it were part and parcel of every day industrial life or plainly outside the legislative grant of immunity."[68]

- **South Carolina:** The exclusivity doctrine does not apply when an "employer acts with a deliberate or specific intent to injure the employee."[69]

V. CIVIL RIGHTS ACTS

Often suits alleging sexual harassment and sexual assault are brought under non-tort legislation, such as the federal Title VII statute, state civil rights statutes, and state statutes specifically drafted to address sexual harassment and sexual assault in the workplace.[70] A number of jurisdictions have adopted the policy rationale set forth by Florida:

> There can be no doubt at this point in time that both the state of Florida and the federal government have committed themselves strongly to outlawing and eliminating sexual discrimination in the workplace, including the related evil of sexual harassment. The statutes, case law, and administrative regulations uniformly and without exception condemn sexual harassment in the strongest possible terms. We find that the present case strongly implicates these sexual harassment policies and, accordingly, may not be decided by a blind adherence to the exclusivity rule of the workers' compensation statute alone. Our clear obligation is to construe both the workers' compensation statute and the enactments dealing with sexual harassment so that the policies of both are preserved to the greatest extent possible.[71]

Sometimes these separate statutes create their own basis for exclusivity.

- **Colorado:** "[S]exual harassment claims are appropriately brought under the Colorado Anti-Discrimination Act and Title VII of the Civil Rights Act, rather than under the Workers' Compensation Act, since these statutes were designed to address workplace harassment."[72]

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68. *Laidlow*, 790 A.2d at 892.

69. Peay v. U.S. Silica Co., 437 S.E.2d 64, 65 (S.C. 1993) (holding employer did not rise to deliberate or specific intent to injure where employer knew of dangerous sand and silica dust exposure for employees but provided respirators and medical screenings).

70. *See* Vainio v. Brookshire, 852 P.2d 596, 601 (Mont. 1993) (Montana Human Rights Act); Waffle House, Inc. v. Williams, 313 S.W.3d 796, 803 (Tex. 2010) (Texas Commission on Human Rights Act); Roe v. Albertson's Inc., 112 P.3d 812, 818 (Idaho 2005) (Idaho Human Rights Act); *see also* Byrd v. Richardson-Greenshields Sec., Inc., 552 So. 2d 1099, 1102 (Fla. 1989) ("The court looked to Title VII and Florida's Human Rights Act of 1977 as the policy sources of Florida's attitudes towards sexual harassment.").

71. *Byrd*, 552 So. 2d at 1102; *see also* Kerans v. Porter Paint Co., 575 N.E. 2d 428, 432 (Ohio 1991) (applying Florida's reasoning that to preempt claims protected under statutes other than the Workers' Compensation Act such as sexual harassment would subvert legislative intent).

72. Horodyskyj v. Karanian, 32 P.3d 470, 479 (Colo. 2001) (holding sexual harassment from a co-employee was inherently private and did not preclude the employee from bringing sexual harassment and related tort claims).

- **Illinois:** Sexual harassment claims are considered a civil rights violation and the Illinois Human Rights Act has the exclusive "jurisdiction over the subject of an alleged civil rights violation."[73] In *Geise v. Phoenix*, an employee who was sexually harassed attempted to bring her claim against her employer under tort. However, the court saw her negligence claims as being civil rights violations because "the [Illinois] Human Rights Act provides that it is a 'civil rights violation' for 'any employer, employee, agent of any employer, employment agency or labor organization to engage in sexual harassment.'"[74] The court went on to say that "the concept of sexual harassment is inextricably linked to the claims made by Geise . . . ."[75] Therefore, even though the employer failed to raise the Illinois workers compensation exclusivity, she could not recover for her tort because of the bar under the Human Rights Act.[76]
- **Indiana:** Indiana's Workers' Compensation Act allows for "an injured employee [to] file a private right of action under Indiana's Compensation for Victims of Violent Crimes Act."[77]
- **Maine:** Courts in Maine have reasoned that many sexual harassment claims are similar to non-sexual assault claims and would fall under the Workers' Compensation Act if they are the result of 1) "a personal injury, 2) that arises out of and 3) in the course of the employment."[78] However, claimants have brought civil actions under the Maine Human Rights Act and Title VII of the Civil Rights Act.[79]

73. Geise v. Phoenix Co. of Chicago, Inc., 639 N.E.2d 1273, 1276 (Ill. 1994) (identifying plaintiff's tort claims as disguised sexual harassment claims with exclusive jurisdiction under the Illinois Human Rights Act).

74. *Id.*

75. *Id.* at 1277. The holding in *Geise* was clarified by the Illinois Supreme Court in 2009, by noting that not all tort claims will be preempted by the Illinois Human Rights Act, but only those human rights violation which are "inextricably linked" to the plaintiff's claims so there is no basis of the tort action without the human rights violation. Blount v. Stroud, 904 N.E.2d 1, 8 (Ill. 2009). The Supreme Court pointed out that, in *Geise*, the court "held that the concept of sexual harassment is 'inextricably linked' to plaintiff's claims of negligent hiring and negligent retention." *Id.*; *see also* Harrison v. Addington, 955 N.E.2d 700, 708 (Ill. Ct. App. 2011) ("No preemption exists if there is an independent basis for the action apart from the Human Rights Act.").

76. *Geise*, 639 N.E.2d at 1277.

77. Ind. Code §§ 5-2-6.1-0.2 to 5-2-6.1-49.

78. Knox v. Combined Ins. Co. of Am., 542 A.2d 363, 365–66 (Me. 1988) (holding plaintiff's claims for mental injuries caused by sexual assault and harassments committed by her co-worker were the exclusive jurisdiction of the Workers' Compensation Act).

79. *See* Bond Builders, Inc. v. Commercial Union Ins. Co., 670 A.2d 1388 (Me. 1996) (holding workers' compensation did not bar plaintiff's discrimination claim brought under the Maine Human Rights Act).

VI. WHERE THE WORKERS' COMPENSATION STATUTE IS THE ONLY MEANS OF RECOVERY FOR SEXUAL ASSAULT AND SEXUAL HARASSMENT INJURIES

The states least favorable to sexual harassment and sexual assault civil actions provide no statutory or judicially created exception to their workers' compensation exclusivity, thereby barring tort claims.

- **Arizona:** Arizona's workers' compensation statute does not exclude mental injuries due to sexual harassment because such injuries are the result of "unexpected, unusual, or extraordinary" stress related to employment which is greater than day-to-day mental stresses and tensions.[80]
- **Delaware:** Sexual harassment clearly does not fall within the exclusion provided for an act "not directed against the employee as an employee or because of the employee's employment."[81]

VII. CONCLUSION

Few states permit double recovery for sexual harassment and sexual assault in tort and workers' compensation. Hawaii, New York, and Washington have created either explicit or implied paths of recovery for both workers' compensation claims and civil actions. On the other end of the spectrum, Arizona and Delaware have interpreted workers' compensation exclusivity strictly, allowing only for the workers' compensation system to address these types of workplace injuries no matter their motivation.

The majority of jurisdictions exist somewhere in the middle. A number of state legislatures have included specific language for intentional acts in their statute. Absent that, courts have interpreted the legislative intent to protect plaintiffs' means of recovery for sexually motivated actions in the workplace. Where legislatures have not acted, judges have acted to enforce what they view as a policy set forth by either their state's legislative body as a whole, or within the workers' compensation exclusivity provision. These jurisdictions ensure some path to recovery. Finally, those states who have not specifically addressed sexual harassment or sexual assault in their workers' compensation legislation or in their case law address the claims on a case-by-case basis, assessing whether the defenses raised by the employer work as a bar to the claim, or whether there is a more appropriate forum

80. *See* Irvin Invs., Inc. v. Superior Court, 800 P.2d 979 (Ariz. Ct. App. 1990).
81. Konstantopoulos v. Westvaco Corp., 690 A.2d 936, 939 (Del. 1996) (citing Spielberg v. State, 558 A.2d 291 (Del. 1989), holding that, if the intent of the legislature is clearly reflected in the statute, the text of the statute controls).

within which to bring a claim of sexual harassment or sexual assault that occurs during, but may not "arise out of" or "in the course of," employment.

The takeaway is that one should educate oneself as to the claims and defenses available that may be covered by the exclusive remedy versus claims that may be raised or perhaps may only be raised using tort or civil rights actions. Different statutes of limitations apply in various forums, and a wise practitioner must be well informed to best represent his or her client.