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WORKERS' COMPENSATION LAW—The Sexual Harassment Claim Quandary: Workers' Compensation as an Inadequate and Unavailable Remedy: *Cox v. Chino Mines/Phelps Dodge*

I. INTRODUCTION

In *Cox v. Chino Mines/Phelps Dodge*,[1] the New Mexico Court of Appeals confronted for the first time the issue of whether sexual harassment injuries are compensable under workers' compensation law. Although not permitting recovery in this case, the court recognized that injuries sustained due to on-the-job sexual harassment could be compensable. However, the Court strongly suggested that the policy behind workers' compensation laws does not provide an adequate remedy for sexually harassed workers, and that claims for such injuries are better pursued under other causes of action, such as statutory remedies or common law tort actions.[2]

II. STATEMENT OF THE CASE

Guadalupe P. Cox, while employed by Chino Mines/Phelps Dodge, complained of several instances of sexually harassing behavior towards her by two co-employees and one supervisor between October 1988 and October 1990.[3] The first two incidents involved the sexual advances of co-employee Patrick Feeley, who tried to hug and kiss Cox and made repeated requests to take her to bed. Cox reported these incidents to her immediate supervisor, who confronted Feeley shortly thereafter and threatened him with discharge if such behavior continued. Feeley's improper behavior was not repeated.[4]

A second incident occurred in June 1989 when Cox, while with several other co-employees at the worksite, heard a fellow employee ask whether another employee had "got [sic] his job because he sucked cock."[5] Cox reported the incident to her employer's Industrial Relations Office.

Cox began to see a psychiatrist in August 1989. She complained of emotional and mental injuries[6] allegedly due to the incidents of sexual harassment. The psychiatrist recommended that Cox take some time off work, and she then took several periods of time off in the ensuing year. In August 1990 Cox filed a claim for workers' compensation, alleging

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1. 115 N.M. 335, 850 P.2d 1038 (Ct. App. 1993).
2. *Id.* at 338-39, 850 P.2d at 1041-42.
3. The incident involving the supervisor was not reported in the case.
4. *Cox*, 115 N.M. at 336, 850 P.2d at 1039.
5. *Id.*
6. Cox complained of crying spells, feelings of despair, anxiety, gastric pain, depression, sleeplessness, and lack of energy. *Id.*

psychological and physical injuries resulting from sexual harassment at the workplace. She sought medical and disability benefits.

During this entire period, Chino Mines/Phelps Dodge had a detailed written policy prohibiting sexual harassment in the work environment. The policy prohibited both physical and verbal sexually harassing behavior, whether committed by supervisory or non-supervisory personnel. This behavior would include "offensive flirtation, advances, propositions, . . . sexually degrading words to describe an individual . . . , [or] telling of offensive jokes."[7]

The Workers' Compensation Judge denied the claim, concluding that Cox's injuries did not "arise out of employment," as required by the Workers' Compensation Act,[8] and that sexual harassment was not a permitted practice in the employer's worksite and indeed was contrary to the employer's worksite environment.[9] Cox appealed the decision.

After ruling that Cox's injuries did not arise out of employment, the court of appeals discussed in dicta whether New Mexico's Workers' Compensation Act provided an adequate remedy for the type of injuries typically incurred by victims of sexual harassment, and whether other statutes or common law tort actions provided relief that more adequately furthered public policy against sexual harassment in the workplace.[10] The court's answer to this question sends a strong message to future sexual harassment litigants in New Mexico about how to best pursue legal relief for such injuries.

III. A HISTORY OF THE ISSUES

In order for a claim to be compensable under the New Mexico Workers' Compensation Act, the injury must "arise out of employment" and "in the course" of the employment.[11] An injury is said to arise in the course of employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while he or she is fulfilling job duties or engaged in doing something incidental to the job.[12] Cox clearly met these criteria.[13] The only issue was whether the injuries arose out of the employment.[14]

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7. *Cox*, 115 N.M. at 336, 850 P.2d at 1039.

8. N.M. STAT. ANN. §§ 52-1-1 to -70 (Cum. Supp. 1993). Psychological disabilities arising out of employment are covered by workers' compensation only if the impairment was caused by a single psychologically traumatic event unrelated to the usual stresses of employment or if the mental illness results from a work-related physical impairment. Douglass v. State, 112 N.M. 183, 186, 812 P.2d 1331, 1334 (Ct. App.), *cert. denied*, 112 N.M. 77, 811 P.2d 575 (1991).

9. *Cox*, 115 N.M. at 336-37, 850 P.2d at 1039-40.

10. The court stated "that the way to maintain public policies against sexual harassment on the job is to pursue the common-law or statutory remedies available to promote these policies and not to engraft those policies on to a very different legislative scheme such as the Workers' Compensation Act." *Cox*, 115 N.M. at 338-39, 850 P.2d at 1041-42.

11. N.M. STAT. ANN. § 52-1-2 (Cum. Supp. 1993); *see also* Martinez v. Fidel, 61 N.M. 6, 9, 293 P.2d 654, 657 (1956).

12. Edens v. New Mexico Health & Social Servs. Dept., 89 N.M. 60, 63, 547 P.2d 65, 68 (1976).

13. Cox's injuries all occurred during the time she was employed at the employer's worksite, and while she was performing duties incidental to the job.

14. *Cox*, 115 N.M. at 336, 850 P.2d at 1039.

The New Mexico Workers' Compensation Act provides that employers "shall become liable to and shall pay to any such worker injured by accident arising out of . . . his employment . . . ."[15] In other words, "the accident causing the injury must result from a risk reasonably incident to the employment; a risk common to the public generally and not increased in any way by the circumstances of the employment is not covered by the act . . . ."[16] In other words, there must be some kind of causal connection between the employment and the accident.[17]

A. *"Arising Out Of" Employment*

The probability or improbability of an accident, however, is not conclusive in determining whether recovery is allowed under workers' compensation.[18] The appropriate inquiry is whether the conditions of the workplace environment foreseeably led to the injury-causing accident. Hence, if a particular incident occurs for the first time at a worksite, an injured worker is not precluded from recovery if the accident is "incidental" to the employment, i.e., if under the particular circumstances it was foreseeable that the employment contributed to the risk or aggravated the injuries.[19]

Many sexual harassment/discrimination claims involve accidents which initially cause mental or emotional harm, and which later lead to physically manifested injuries.[20] It is unclear, however, if such claims are compensable in New Mexico if the accident causes only mental harm. Under New Mexico law prior to the 1987 amendments to the Workers' Compensation Act, a claim alleging that work-related stress led to a psychological disability was held compensable.[21] However, after *Candelaria*, the New Mexico Legislature rewrote several definitions sections of the Workers' Compensation Act.[22] These changes had the effect of allowing recovery

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15. N.M. STAT. ANN. § 52-1-2 (Cum. Supp. 1993).

16. Gilbert v. E.B. Law & Son, Inc., 60 N.M. 101, 107, 287 P.2d 992, 996 (1955).

17. Berry v. J.C. Penney Co., 74 N.M. 484, 485, 394 P.2d 996, 997 (1964).

18. *See* Ortiz v. Ortiz & Torres Dri-Wall Co., 83 N.M. 452, 493 P.2d 418 (Ct. App. 1972) (plaintiff who suffered back injury while installing sheet rock and could not pinpoint cause of injury was compensated).

19. *Berry*, 74 N.M. at 486, 394 P.2d at 998.

20. *See, e.g.*, Accardi v. Superior Court, 21 Cal. Rptr. 2d 292 (Cal. Ct. App. 1993); Hill v. John Chezik Imports, 797 S.W.2d 528 (Mo. App. 1990); Phifer v. Herbert, 115 N.M. 135, 848 P.2d 5 (Ct. App. 1993); Harman v. Moore's Quality Snack Foods, 815 S.W.2d 519 (Tenn. App. 1991).

21. Candelaria v. General Elec. Co., 105 N.M. 167, 730 P.2d 470 (Ct. App. 1986). The plaintiff's job consisted of preparing components of jet engines for plating. After cleansing, the parts were placed in a plating bath for a period of time, after which a timer would go off to indicate that the part was ready to be removed. The plaintiff was gradually assigned more and more job duties, including those of a former co-worker who was not replaced. These additional duties complicated the plaintiff's original job of retrieving parts after the timer went off. The foreman made exacting demands on the plaintiff and often made plaintiff drop everything to work on the priority items. Plaintiff's complaints to the foreman, the labor union, and other plant officials were not acted on. The plaintiff, after contemplating the murder of his foreman, went home and was found crying and shaking by his wife. He suffered a nervous breakdown and required several hospitalizations.

22. The amendment redefined "accidental injury," "impairment," "total disability," and "partial disability." N.M. STAT. ANN. § 52-1-19 & -24 to -26 (Repl. Pamp. 1987). *See* Douglass v. State, 112 N.M. 183, 186, 812 P.2d 1331, 1334 (Ct. App.), *cert. denied*, 112 N.M. 77, 811 P.2d 575 (1991).

for mental impairment only if (1) the impairment was caused by a single psychologically traumatic event unrelated to the usual stresses of employment, or (2) the mental illness resulted from a work-related physical impairment.[23] *Cox* did not address whether a mental injury sustained as a result of sexual harassment fits under either of these exceptions. Hence, it is unclear whether mental injuries caused by sexual harassment are compensable.

B. Public Policy Underlying the Workers' Compensation Act

The Workers' Compensation Act is primarily intended to offset the lost wages of a worker injured by a work-related accident, thereby promoting the policy that such workers will not become dependent on state welfare programs.[24] The Act is primarily intended to keep a worker and his or her "family at least minimally secure financially."[25] The Act is, in effect, a broadly-based, state-run insurance program, with employers paying premiums and injured workers collecting an amount set by statute.

In order to effectuate these policies, should an accident occur during the course of employment and arise out of employment, the exclusive remedy for such accident victims is the Act, to the exclusion of all other possible remedies.[26] Thus, a statutorily-imposed compromise is established between an injured worker and the employer. First, the employee whose injury meets the requirements of a workers' compensation claim is barred from pursuing any other statutory or common law cause of action; should the injury result in death, the surviving spouse, personal representative, or next of kin is also bound by the exclusivity of the Act.[27] In situations where the employer's conduct is clearly negligent or intentionally tortious, the result is that the claimant receives a substantially smaller monetary amount than would likely have been recovered in a common law tort claim. In return, the employer surrenders the common law defenses of assumption of risk, the "fellow servant" rule, and contributory negligence.[28] Therefore, it can be said that workers' compensation and tort law are incompatible remedies.[29]

This conflict invites the question of whether workers' compensation statutes preclude separate actions for sexual harassment injuries incurred at the workplace. Two states have decided that it does not.[30] At least

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23. *Id.*

24. *See* Casias v. Zia Co., 93 N.M. 78, 80, 596 P.2d 521, 523 (Ct. App.), *cert. denied*, 93 N.M. 8, 595 P.2d 1203 (1979) (citing Codling v. Aztec Well Serv. Co., 89 N.M. 213, 549 P.2d 628 (Ct. App. 1976)).

25. Aranda v. Mississippi Chem. Corp., 93 N.M. 412, 416, 600 P.2d 1202, 1206 (Ct. App.), *cert. denied*, 93 N.M. 683, 604 P.2d 821 (1979).

26. N.M. STAT. ANN. § 52-1-6(D) (Cum. Supp. 1993).

27. *Id.*

28. N.M. STAT. ANN. § 52-1-8 (Cum. Supp. 1993).

29. Romero v. J.W. Jones Constr. Co., 98 N.M. 658, 661, 651 P.2d 1302, 1305 (Ct. App. 1982).

30. *See* Kerans v. Porter Paint Co., 575 N.E.2d 428 (Ohio 1991) (workers' compensation statute does not provide exclusive remedy for workplace sexual harassment claims); Byrd v. Richardson-Greenshields Sec., Inc., 552 So.2d 1099 (Fla. 1989) (public policy requires that exclusivity provision of workers' compensation does not shield employee from tort liability for sexual harassment).

one jurisdiction has barred actions separate from workers' compensation.[31] Although *Cox* did not address this issue, it appears that in New Mexico, a claimant may be prevented from pursuing a remedy outside of workers' compensation law for injuries resulting from sexual harassment if the court rules that the injuries arose out of and in the course of the employment.[32] However, should the injury not meet the requirements of a workers' compensation claim, a claimant is not precluded from pursuing another remedy, such as a Title VII claim.[33]

IV. ANALYSIS OF POLICY EMPLOYED TO REACH DECISION

In attempting to recover workers' compensation benefits for injuries resulting from sexual harassment, *Cox* is a case of first impression in New Mexico. However, the court relied on previous workers' compensation cases to determine the chief question of whether the injury arises out of employment. The vast majority of these previous cases involved a worker sustaining a physical injury of some sort.[34] Nonetheless, whether physical or non-physical, the injury must arise out of employment. That is, "the disability must have resulted from a 'risk incident to [the] work itself' or 'increased by the circumstances of the employment.'"[35]

The first inquiry in determining whether an injury arises out of employment is whether the disability "resulted from a 'risk incident to [the] work itself.'"[36] For most types of employment, this argument is unlikely to be the basis of a successful sexual harassment claim. First, it is difficult to consider sexual harassment actions incident to the work of most occupations or employment positions. There is no logical nexus between sexual harassment and the job description or job duties of most occupations.[37] However, there may be exceptions. For example, a cocktail

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31. Juarez v. Ameritech Mobile Communications, Inc., 957 F.2d 317 (7th Cir. 1992) (exclusivity of Illinois workers' compensation statute preempts tort claim resulting from sexual harassment by co-employee).

32. *See* Arnold v. State, 94 N.M. 278, 609 P.2d 725 (Ct. App.), *cert. denied*, 94 N.M. 674, 615 P.2d 991 (1980) (injuries to plaintiff who lived in employer-provided housing and was raped and assaulted by a mentally retarded student in her residence held to arise out of and in course of employment, thus invoking exclusivity provisions of workers' compensation statute and precluding plaintiff's tort claim).

33. Following the denial of Cox's claim for workers' compensation benefits for sexual harassment injuries, she filed a Title VII action. After her Title VII claim was denied on the merits by the Federal District Court in New Mexico, Cox v. Chino Mines, No. 91-0590 (D.N.M. 1992), the case was argued before the Tenth Circuit Court of Appeals. Cox v. Phelps Dodge, No. 92-2214 (10th Cir. Nov. 9, 1993). *See also* Harman v. Moore's Quality Snack Foods, 815 S.W.2d 519, 525 (Tenn. App. 1991) (exclusive remedy provisions of workers' compensation law do not preclude a Title VII action).

34. *But see* Douglass v. State, 112 N.M. 183, 812 P.2d 1331 (Ct. App.), *cert. denied*, 112 N.M. 77, 811 P.2d 575 (1991) (worker can be compensated for mental impairment caused by work-related conditions).

35. *Candelaria*, 105 N.M. at 173, 730 P.2d at 476 (citing Kern v. Ideal Basic Indus., 101 N.M. 801, 802, 689 P.2d 1272, 1273 (1984)).

36. *Cox*, 115 N.M. at 337, 850 P.2d at 1040; *see also supra* notes 19-24 and accompanying text.

37. *See* Harman v. Moore's Quality Snack Foods, 815 S.W.2d 519 (Tenn. App. 1991) (holding that acts constituting sexual harassment were never meant to fall under workers' compensation).

waitress required to wear revealing attire, or a stripper, could viably claim that sexual harassment is incident to her employment. Nonetheless, in most cases, the "incidency" factor is only remotely relevant, if at all, to a workers' compensation claim based on sexual harassment.

Cox cited *Arnold v. State*[38] to illustrate when a job or job environment can create or enhance the risk of a sexual assault.[39] In *Arnold*, an employee who was living in employer-provided housing at a state facility was assaulted and raped in her residence by a mentally retarded student.[40] Although the employee was not required to live at employer's premises, the court found that, given the remoteness of the facility, the plaintiff had no other viable choice.[41] Additionally, the employee was required to assist in nonemployment-related duties such as fighting fires on the premises in her off-hours. Thus, the court found that the injuries arose out of her employment.[42] Unfortunately, *Arnold* is not very helpful in analyzing the decision in *Cox*. The decision in *Arnold* rested almost completely on the "bunkhouse" rule,[43] whereby injuries incurred during an employee's off-hours arise out of employment if the employee is required or has little alternative but to live on the employer's premises. As in the majority of employment-related sexual harassment cases, *Cox* did not involve an employee living on employer-provided housing.

The second inquiry for determining whether the injury arises out of employment is whether the likelihood of injury is "increased by the circumstances of the employment."[44] According to the court in *Cox*, this inquiry considers the frequency of incidents involving sexual harassment in the particular workplace, including those not involving the claimant. In *Cox* the claimant testified that she was unaware of any other sexually harassed employees at the workplace.[45] In fact, the claimant stated that in the nine previous years of employment at this workplace, she had not experienced any sexual harassment.[46] Thus, the court concluded that "sexual harassment was not a peculiar risk at this workplace."[47]

The court referred to the "horseplay" cases to demonstrate when an accident becomes a regular incident of employment.[48] In *Woods v. Asplundh Tree Expert Co.*,[49] a worker broke his leg after he and a coworker engaged in wrestling during the course of employment.[50] The court held that horseplay injuries are compensable under workers' compensation only if the employer had "actual or constructive notice" of

38. 94 N.M. 278, 609 P.2d 725 (Ct. App.), *cert. denied*, 94 N.M. 674, 615 P.2d 991 (1980).
39. *Cox*, 115 N.M. at 338, 850 P.2d at 1041.
40. *Arnold*, 94 N.M. at 279, 609 P.2d at 726.
41. *Id.* at 279-80, 609 P.2d at 726-27.
42. *Id.*
43. *Id.* at 279, 609 P.2d at 726.
44. *Cox*, 115 N.M. at 337, 850 P.2d at 1040.
45. *Id.* at 338, 850 P.2d at 1041.
46. *Id.*
47. *Id.*
48. *Id.*
49. 114 N.M. 162, 836 P.2d 81 (Ct. App.), *cert. denied*, 113 N.M. 744, 832 P.2d 1223 (1992).
50. *Id.* at 163, 836 P.2d at 82.

such accidents or the employer had "reason to foresee" the accident.[51] Because wrestling was an unusual activity which the employer discouraged, the horseplay was not a regular incident, and consequently did not arise out of the claimant's employment.[52] Although the court in *Cox* acknowledged that rules concerning horseplay should not be "superimposed onto sexual harassment situations,"[53] the court did exactly that by stating that the infrequency of sexual harassment at the employer's worksite and the employer's written policy prohibiting sexual harassment were sufficient to deny the workers' compensation claim.[54]

In considering whether the circumstances of the employment are likely to increase the chance of injury, the court also found significant that the employer had specific written policies, "known to all employees," that banned sexual harassment in the workplace.[55] Thus, the defendant "neither authorized nor tolerated the sexual harassment incidents."[56] In fact, the defendant, through the immediate supervisor, reprimanded and threatened the offending employee with termination if he did not immediately stop the offensive behavior.[57] Thus, the demonstrated prohibition of sexual harassment negated any argument that the plaintiff's injury arose out of her employment.

The decision in *Cox*, however, left open the question of whether sexual harassment injuries are compensable under workers' compensation law as "incident to the employment" when an employer ignores or tolerates the offensive behavior.[58] Similarly, a claimant who can show that the employer engaged in negligent hiring practices, such as hiring a known sex offender or a person with a history of sexually harassing behavior, could establish the nexus between the employer and the offensive act.[59]

The final reason the court gave for denying Cox's claim is that the Workers' Compensation Act is ill-suited for promoting the social policy against sexual harassment on the job.[60] Although not explicitly mentioned by the court, several distinctions exist between injuries traditionally held compensable under workers' compensation and those resulting from work-

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51. *Id.* at 162.

52. *Id.* at 166-67, 836 P.2d at 85-86.

53. *Cox*, 115 N.M. at 338, 850 P.2d at 1041.

54. *Id.* The court also discussed the "*course* of employment test" for horseplay cases. As previously mentioned, this query is irrelevant to the central issue in *Cox* (what circumstances are needed to meet the "*arising out* of employment" requirement in cases of sexual harassment).

55. *Id.* at 336, 850 P.2d at 1039.

56. *Id.* at 338, 850 P.2d at 1041.

57. *Id.* at 336, 850 P.2d at 1039.

58. *See, e.g.*, Ford v. Revlon, Inc., 734 P.2d 580 (Ariz. 1987) (tort case where employer was liable for failing to investigate injured employee's complaint of sexual harassment by employee's supervisor).

59. *See, e.g.*, Hollrah v. Freidrich, 634 S.W.2d 221 (Mo. App. 1982) (tort case where employer, in exercise of reasonable care, should have known of offending employee's reputation for sexually harassing behavior). *But see* Murphy v. ARA Serv., Inc., 298 S.E.2d 528 (Ga. App. 1982) (plaintiff denied workers' compensation because wilful act by third person with a history of sexual harassing behavior was not work-related, therefore failing to meet the "arising out of employment" requirement).

60. *Cox*, 115 N.M. at 338-39, 850 P.2d at 1041-42.

related sexual harassment. The primary basis for workers' compensation is to provide some relief to injured workers for lost pay and to alleviate burdens on the welfare system.[61] Sexual harassment constitutes an injury to personal rights rather than an economic injury.[62] "While workplace injuries rob a person of resources, sexual harassment robs the person of dignity and self esteem."[63] Another important distinction is that sexual harassment is a behavior rather than an "accident."[64] Hence, it can more readily be regulated by an employer than can a non-foreseeable job accident. Finally, it should be kept in mind that sexual harassment constitutes an outrageous affront to a fundamental principle,[65] namely that a person is not to be treated inequitably on the basis of physical characteristics. The remedies prescribed by the Workers' Compensation Act, which are corrective in nature and result in modest awards, are inadequate to help further policy which aims at eradicating sexual harassment.

V. THE PITFALLS OF NON-WORKERS' COMPENSATION REMEDIES FOR SEXUAL HARASSMENT CLAIMS

The court adopted the employer's argument that in order to further policies against sexual harassment, a claim for sexual harassment injuries would be better pursued under either the New Mexico Human Rights Act,[66] the Civil Rights Act of 1964,[67] or common law tort remedies.[68] This conclusion, although having merit, fails to consider that these non-workers' compensation actions are full of legal obstacles[69] for potential claimants and, consequently, will often provide inadequate relief for sexual harassment victims.

The most obviously inadequate of these remedies is the New Mexico Human Rights Act.[70] In the context of pursuing a sexual harassment claim, the HRA offers little more than meager relief. It provides for a grievance procedure and injunctive relief if "an employer . . . discrim-

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61. *See* Casias v. Zia Co., 93 N.M. 78, 596 P.2d 521 (Ct. App.), *cert. denied*, 93 N.M. 8, 595 P.2d 1203 (1979).

62. *Id.*

63. Harman v. Moore's Quality Snack Foods, 815 S.W.2d 519, 527 (Tenn. App. 1991).

64. An accident is required to permit workers' compensation recovery. *See* Aranbula v. Banner Mining Co., 49 N.M. 253, 161 P.2d 867 (1945).

65. *See, e.g.*, 42 U.S.C. § 1981 (1988) (equal rights under the law for all persons within jurisdiction of the United States).

66. N.M. STAT. ANN. §§ 28-1-1 to -7, 28-1-9 to -14 (Repl. Pamp. 1991) [hereinafter "HRA"].

67. 42 U.S.C. § 2000e-5 (1988 & Supp. III 1991).

68. *Cox*, 115 N.M. at 338-39, 850 P.2d at 1041-42.

69. These would include inadequate compensation, difficult burdens of making a prima facie case, and meeting arduous statutory requirements. *See, e.g.*, Accardi v. Superior Court, 17 Cal. App. 4th 341 (Cal. App. 1993) (under California law, prior to bringing a sexual harassment action, a sexual discrimination claimant must first file a claim with the Department of Fair Employment and Housing within one year of the date of the alleged act); *see also* Peter G. Nash & Jonathan R. Mook, *Employee Tort Actions for Sexual Harassment in Virginia: Negotiating the Liability Mine Field*, 1:2 CIV. RIGHTS J. 247 (1990); Krista J. Schoenheider, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. PA. L. REV. 1461 (1986).

70. N.M. STAT. ANN. §§ 28-1-1 to -7, 28-1-9 to -14 (Repl. Pamp. 1991).

inate[s] in matters of . . . conditions . . . of employment against any person otherwise qualified because of . . . sex . . . ."[71] An aggrieved party who initiates a grievance procedure under the HRA must have exhausted all administrative remedies before filing suit under the HRA.[72] As for compensatory relief, the Human Rights Commission "may" require the employer to pay actual damages and attorney's fees to the employee.[73] Hence, with the exception of a possible award of backpay and attorney's fees, a sexual harassment claimant under the HRA will not recover proper compensatory damages.[74]

A sexually harassed claimant also faces difficulties if the claim is pursued under a common law tort action. New Mexico does not recognize a tort of sexual harassment.[75] Hence, in the absence of a physical assault, a sexually harassed employee wishing to pursue a common law claim is trapped into the tort of intentional infliction of emotional distress, called the law of outrage.[76] The requirements for obtaining relief under this tort are extremely difficult. In *Dominguez v. Stone*, the court defined the tort as follows: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, ..."[77]

Liability requires a finding that the distress "inflicted is so severe that no reasonable man could be expected to endure it."[78] Further, the traditional tort concept known as the "eggshell skull rule" does not apply, unless the emotional distress "results from a peculiar susceptibility to such distress of which the actor [offender] has knowledge."[79] Finally, showing extreme and outrageous conduct by the offending employee is a formidable standard to meet, since liability can only be found if "the conduct . . . [is] 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."[80] Realizing the difficulties presented, it is not surprising to find that sexually harassed

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71. N.M. STAT. ANN. § 28-1-7(A) (Cum. Supp. 1993).

72. Jaramillo v. J.C. Penney Co., 102 N.M. 272, 694 P.2d 528 (Ct. App. 1985). However, a tort claim is not barred by an employee's failure to exhaust the grievance procedure. Phifer v. Herbert, 115 N.M. 135, 138, 848 P.2d 5, 8 (Ct. App. 1993).

73. N.M. STAT. ANN. § 28-1-11(E) (Cum. Supp. 1993).

74. "Proper" in this context seems to mean the amount needed to compensate the victim for medical treatment expenses and emotional distress.

75. *See Phifer*, 115 N.M. at 135, 848 P.2d at 5. Ohio has come closest to recognizing a tort for sexual harassment when it recognized that an employer can be held liable for wilfully or negligently allowing an employee to sexually molest a co-employee. Kerans v. Porter Paint Co., 575 N.E.2d 428, 432 (Ohio 1991).

76. *Phifer*, 115 N.M. at 139, 848 P.2d at 9.

77. 97 N.M. 211, 214, 638 P.2d 423, 426 (Ct. App. 1981) (quoting RESTATEMENT (SECOND) OF TORTS § 46 (1965)).

78. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j.

79. *Id.* cmt. j.

80. *Id.* cmt. d.

employees are increasingly turning to other remedies which offer a more viable possibility of relief.

A growing number of sexual harassment claims are being brought under Title VII of the Civil Rights Act of 1964.[81] The federal courts have recognized sexual harassment as a form of employment discrimination under Title VII.[82] In response to growing concerns that Title VII provided only essentially equitable relief, the 1991 amendment to Title VII was enacted "to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace."[83] This amendment provided for the recovery of both compensatory and punitive damages, subject to a cap on the total amount that could be recovered.[84]

Despite allowing for recovery of damage awards, Title VII still presents several significant legal obstacles to potential claimants. First, Title VII requires that the respondent must have engaged in "unlawful intentional discrimination."[85] Hence, a claim based on an employer's negligence will not suffice.[86] Second, several circuits have adopted the Supreme Court rule that a claim is not actionable unless it is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create[s] an abusive working environment.'"[87] Third, under the 1991 amendment a claimant cannot recover monetary damages if the respondent employs fourteen or fewer employees.[88] Finally, these awards are available only to those plaintiffs who do not have a cause of action under section 1981 of Title VII.[89] Hence, the effect is that the caps imposed by the 1991 amendment arbitrarily limit the rights of women, disabled persons, and members of certain religious groups.[90] Therefore, although it constitutes a notable improvement in many ways over previous sexual harassment remedies, the 1991 amendment still requires claimants to run through a gauntlet of possible legal impediments.

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81. 42 U.S.C. §§ 2000e-5 to -16 (1988 & Supp. III 1991).

82. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986); *see also, e.g.*, Baker v. Weyerhaeuser Co., 903 F.2d 1342 (10th Cir. 1990); Swanson v. Elmhurst Chrysler Plymouth, Inc., 882 F.2d 1235 (7th Cir. 1989), *cert. denied*, 493 U.S. 1036 (1990); Paroline v. Unisys Corp., 879 F.2d 100 (4th Cir. 1989); Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987).

83. 42 U.S.C. § 1981 (Supp. III 1991) (purposes of 1991 amendment).

84. 42 U.S.C. § 1981a(b) (Supp. III 1991).

85. 42 U.S.C. § 1981a (Supp. III 1991).

86. However, tolerance of a hostile work environment could constitute intent. *See Meritor*, 477 U.S at 72 (rejecting view that "mere existence of a grievance procedure and a policy against discrimination . . . must insulate [employer] from liability.").

87. *Id.* at 67; *see, e.g.*, Baker v. Weyerhaeuser Co., 903 F.2d 1342 (10th Cir. 1990) (adopted *Meritor* standard of "sufficiently severe or pervasive"); Paroline v. Unisys Corp., 879 F.2d 100 (4th Cir. 1989) (same).

88. 42 U.S.C. § 1981a(b)(3)(A) (Supp. III 1991).

89. 42 U.S.C. § 1981 (1988 & Supp. III 1991). This section permits recovery of *unlimited* compensatory and punitive damages only for intentional discrimination on grounds of race or ethnicity. If a complaining party cannot recover on these grounds, then and only then can a claimant bring a cause of action pursuant to the 1991 amendment, 42 U.S.C. § 1981a(a)(1) (Supp. III 1991). Recall that the 1991 amendment, which covers employment discrimination based on sex, disability, or religious beliefs, puts a cap on recoverable damages. 42 U.S.C. § 1981a(b)(3) (Supp. III 1991).

90. *Id.*

VI. CONCLUSION

In deciding the question of whether sexual harassment injuries are compensable under workers' compensation law, the court of appeals refused to veer away from a traditional workers' compensation analysis, which includes the dual requirements that an injury must arise out of and in the course of employment. However, uneasy about applying the traditional analysis to a sexual harassment claim, the court incorporated the *Meritor* standard[91] into determining whether the sexual harassment arises out of the employment.

Despite their flaws, the non-workers' compensation remedies are arguably better suited to providing relief to victims of sexual harassment in New Mexico. The standards set forth in *Cox* appear to allow a compensable sexual harassment claim under workers' compensation only if sexual harassment is pervasive in the particular workplace and if the employer either authorizes or permits the offensive behavior to continue unchecked. In making a sexual harassment claim under workers' compensation a substantially onerous legal action, *Cox* will certainly make future sexual harassment plaintiffs wary of bringing workers' compensation claims.

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91. A Title VII claim for sexual harassment injuries is not compensable unless it is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create[s] an abusive working environment." *Meritor*, 477 U.S. at 67.