

SUPPLEMENTING STATE WORKERS’ COMPENSATION LAWS WITH CAUSES OF ACTION UNDER STATE COMMON LAW REGIMES FOR EMPLOYEE THIRD- PARTY SEXUAL HARASSMENT SUITS AGAINST EMPLOYERS

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INTRODUCTION

*Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only.*¹

Sexual harassment remains a pervasive and insidious form of gender discrimination in the American workplace more than forty years after Title VII of the Civil Rights Act of 1964 explicitly prohibited sex-based discrimination in the employment context.² Today, sexual harassment claimants continue to suffer unjust economic consequences in addition to debilitating physical, mental, and emotional harms.³ However, sexual harassment perpetrators increasingly include not only coworkers and supervisors, but also clients, independent contractors, patients, and other third parties occupying ancillary positions in relation to an employee's

1. IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 54 (Lewis White Beck trans., Bobbs-Merril 1969) (1785).

2. See Equal Employment Opportunity Commission ("EEOC"), Sexual Harassment Charges: EEOC & FEPAs Combined, <http://www.eeoc.gov/stats/harass.html> (illustrating that individuals filed 13,136 sexual harassment charges with the EEOC in fiscal year 2004, resulting in monetary damages of \$37.1 million). See generally Civil Rights Act of 1964, 42 U.S.C. § 2000e (1964) (proscribing employers from discriminating in the workplace based on race, color, religion, sex, and national origin).

3. See Krista J. Schoenheider, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. PA. L. REV. 1461, 1464-65 (1986) (arguing that sexual harassment hinders women's economic opportunities and leads to grave physical and psychological ailments such as insomnia, nervousness, strokes, and emotional breakdown).

primary workplace.⁴

The rise in third-party sexual harassment lawsuits can be traced to the astronomical growth in the economy's service sector and an increase in the number of employers outsourcing their basic services.⁵ Thus, in attempting to further develop a cogent body of sexual harassment case law, courts increasingly face unique causes of action from claimants seeking relief against employers for third-party sexual harassment.⁶ Predictably, both state and federal courts are sharply split on the availability and scope of remedies available to claimants.⁷

This Comment argues that state courts should apply the cumulative remedy theory to employees' third-party sexual harassment claims against employers, permitting remedies under state common law regimes for injuries that workers' compensation laws should not exclusively cover. Part I of this Comment discusses the development of federal court sexual harassment case law under Title VII and the emergence of third-party sexual harassment claims in state courts. It also examines the intersection between state workers' compensation laws, which traditionally serve as the exclusive remedy for workplace injuries, sexual harassment suits, state common law torts, and contracts causes of actions. Part II argues that state courts should reject the exclusivity doctrine, which limits redress for most workplace injuries to recovery under state workers' compensation laws, where employees' third-party sexual harassment suits against employers fall outside the purview of those compensation laws. Finally, Part III analyzes the applicable common law torts and contracts causes of action and argues that state courts should apply the common law causes of action

4. See, e.g., Associated Press, *Nurses Face Sexual Harassment from Patients*, CBS NEWS, Dec. 15, 2005, <http://www.cbsnews.com/stories/2005/12/15/ap/health/mainD8EGUJ182.shtml> (reporting that sexual harassment among patients toward nurses has become a widespread problem that creates workplace tension and forces nurses to walk a fine line between meeting their professional responsibilities and protecting themselves from sexually aggressive patients).

5. See David S. Warner, *Third-Party Sexual Harassment in the Workplace: An Examination of Client Control*, 12 HOFSTRA LAB. & EMP. L.J. 361, 363-64 (1995) (noting an increase in third-party sexual harassment cases, and finding that some commentators expect further victimization in the sales and services sector, where employees must strive to please customers and accept mistreatment as a part of their work routines).

6. See Jeannie Scalfani Rhee, *Redressing for Success: The Liability of Hooter's Restaurant for Customer Harassment of Waitresses*, 20 HARV. WOMEN'S L.J. 163, 165-66 (1997) ("This latter type of liability in sexual harassment law, employers' culpability for third-party transgressions, has neither been extensively litigated nor frequently written about in academic literature.").

7. See *Little v. Windermere Relocation Inc.*, 301 F.3d 958, 968 (9th Cir. 2001), *amended* 301 F.3d 958 (2002) ("[W]here the employer either ratifies or acquiesces in the harassment by not taking immediate and/or corrective actions when it knew or should have known of the conduct." (quoting *Folkerson v. Circus Circus Enter.*, 107 F.3d 754, 756 (9th Cir. 1997))). *But see* *Erickson v. Marsh & McLennan Co.*, 569 A.2d 793, 804 (N.J. 1990) (ruling that the claimant cannot recover for third-party sexual harassment because he did not show that the relationship was "coercive in nature").

and their remedies in conjunction with workers' compensation laws to ensure employees an apt recovery.

BACKGROUND

I. DEVELOPMENT OF SEXUAL HARASSMENT CASE LAW IN FEDERAL COURTS

Title VII of the Civil Rights Act, the federal statute that is the foundation for sexual harassment case law, began as racial equality legislation in 1964.⁸ Conservative congressmen added sex discrimination as a last-minute floor amendment intended to derail the bill.⁹ Commentators note that the surreptitious nature of Title VII's addition to the Civil Rights Act makes it difficult to ascertain the intended scope of Title VII's prohibition against sex-based discrimination.¹⁰ Therefore, Title VII's contours have been largely defined by the judiciary with the limited guidance of executive agencies.¹¹

Federal courts first identified sexual harassment with Title VII's ban on sex-based discrimination in 1976.¹² However, the federal judiciary did not fully embrace this approach until the Equal Employment Opportunity Commission ("EEOC") issued guidelines in 1980 articulating that sexual harassment was a form of sex-based discrimination barred by Title VII.¹³ Subsequently, sexual harassment jurisprudence evolved in the form of case law interpreting and applying Title VII's sex discrimination prohibition and the EEOC guidelines' explicit tying of sex-based discrimination to sexual

8. See 110 CONG. REC. 6548 (1964) (statement of Sen. Humphrey).

9. See, e.g., Heather L. Kleinschmidt, Comment, *Reconsidering Severe or Pervasive: Aligning the Standards in Sexual Harassment and Racial Harassment Causes of Action*, 80 IND. L.J. 1119, 1134 (2005).

10. See, e.g., Ruth C. Vance, *Workers' Compensation and Sexual Harassment in the Workplace: A Remedy for Employees, or a Shield for Employers?*, 11 HOFSTRA LAB. & EMP. L.J. 141, 147 (1993).

11. See WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 14-25 (1994) ("[N]one of the originalist schools (intentionalism, purposivism, textualism) is able to generate a theory of what the process or coalition 'would want' over time, after circumstances have happened.").

12. See, e.g., *Williams v. Saxbe*, 413 F. Supp. 654, 655-56 (D.D.C. 1976) (recognizing that a male supervisor's retaliatory actions in response to a female employee's rejection of his sexual advances amounted to sex discrimination under Title VII).

13. See *Bundy v. Jackson*, 641 F.2d 934, 943-44 (D.C. Cir. 1981) (ruling that the claimant established a Title VII sex discrimination claim under the EEOC guidelines by asserting that her sexually hostile work conditions involving stereotyping insults and demeaning sexual propositions resulted in a deleterious psychological and emotional work environment); EEOC, EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. §§ 1604.11 (a) – (f) (2005) (recognizing that unwelcome sexual advances, requests for sexual favors, and other sexual verbal and physical conduct constituted sexual harassment in violation of Title VII even if it did not adversely effect employees' economic benefits).

harassment.¹⁴

Moreover, since the Supreme Court's landmark sexual harassment decision in *Meritor Savings Bank v. Vinson*,¹⁵ the federal judiciary has gradually expanded the traditional scope of Title VII's sexual harassment coverage to comport with modern workplace conditions.¹⁶ For instance, federal courts have found that sexual harassment laws protect both females and males,¹⁷ shield employees from same-sex sexual harassment,¹⁸ co-worker sexual harassment,¹⁹ and third-party sexual harassment.²⁰

Additionally, federal courts constructed two distinct sexual harassment categories.²¹ The first category is known as "hostile work environment" sexual harassment, where a court will hold an employer liable if the employer knew or should have known of workplace sexual harassment and the harassment was so severe and pervasive that it altered the employee's work conditions.²² The second category is referred to as "quid pro quo" sexual harassment, which holds an employer liable for conditioning job benefits on employees' performance of sexual favors or subjugation to sexual advances.²³

14. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986) (holding that the legislative history guiding Title VII's prohibition on sex discrimination is nonexistent, but determining that Title VII sought to strike at the full spectrum of disparate treatment of men and women in employment).

15. See *Vinson*, 477 U.S. at 66-67 (ruling that the plaintiff's claims that her employer fondled her in front of other employees and raped her during the course of her employment constituted sexual harassment actionable under Title VII).

16. See 76 AM. JUR. 3D *Proof of Facts* § 331, at §§ 1.0-7.0 (2007).

17. See, e.g., *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 78-79 (1998) (explaining that Title VII allows male plaintiffs to bring sexual harassment actions against male defendants), *Holman v. Indiana*, 24 F. Supp. 2d 909, 911-13 (N.D. Ind. 1998) (finding that Title VII applied in a case where a male supervisor fondled an employee and gave her a negative performance rating after she refused his sexual overtures because the female employee's gender specific characteristics triggered the sexual harassment).

18. See, e.g., *Williams v. District of Columbia*, 916 F. Supp. 1, 7 (D.D.C. 1996) (holding that Title VII's ban on sex discrimination does not consider sexual orientation and that the determinative question is whether sexual harassment would have occurred "but for" the claimant's gender).

19. See, e.g., *Star v. West*, 237 F.3d 1036, 1038 (9th Cir. 2001) (indicating that when an employer knows or should know of sexual harassment, it must take reasonably calculated measures to halt the harassment in order to avoid Title VII liability).

20. See, e.g., *Coughlin v. Hilton Hotel Corp.*, 879 F. Supp. 1047, 1052-53 (D. Nev. 1995) (holding that the claimant was entitled to \$5.187 million in compensatory and punitive damages because the employer had shown "conscious and deliberate disregard" by permitting armed services members to engage in hostile sexual advances towards eighty-one female employees).

21. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986).

22. See *id.* at 67-68 (reasoning that hostile work environment claims are actionable under Title VII because Congress did not intend to restrict Title VII causes of action to economic or tangible losses; instead Title VII was intended to eviscerate all forms of disparate treatment between the sexes and address intangible injuries).

23. See Sexual Harassment Rule, 29 C.F.R. § 1604.11(a)(1)-(2) (2006) (providing two

II. EMERGENCE OF THIRD-PARTY SEXUAL HARASSMENT CLAIMS

Third-party sexual harassment suits exclusively involve hostile work environment claims.²⁴ Aggrieved employees allege that their employer should be liable for failing to reasonably detect and expediently terminate a third party's pervasive sexual misconduct that creates a hostile work environment for members of the employees' particular gender.²⁵ Under third-party sexual harassment, employers face the prospect of liability if a court determines that an employer had control over the third party's harassing conduct.²⁶ Hostile work environment claims are based on the premise that sexually charged workplaces provoke sexually offensive conduct that ultimately threatens an employee's mental, emotional, physical, and financial welfare.²⁷

Commentators suggest that American society once considered sexually charged work environments inoffensive and even routine in male dominated workplaces.²⁸ Today, courts recognize that third-party sexual misconduct in an integrated workplace may disparately effect a particular gender's capacity to dispense with job duties, constituting a cognizable Title VII sex discrimination claim.²⁹ Consequently, third-party sexual harassment cases present new challenges because an employer's control over third parties often varies from traditional hostile work environment claims involving coworkers and supervisors, where an employer is deemed

theories of recovery for quid pro quo harassment: (i) if an individual's employment is explicitly or implicitly conditioned on his or her submission to an employer, supervisor, or coworkers' sexual advances, or (ii) if submission to or rejection of the employers', supervisor's, or coworkers' sexual advances is used as the basis of tangible employment decisions adversely affecting the individual).

24. *See, e.g.*, Warner, *supra* note 5, at 366-67 (observing that the judiciary has consistently relied on the EEOC's expansive view of Title VII's prohibition on sex discrimination to encompass third-party sexual harassment under the hostile work environment category).

25. *See, e.g.*, Folkerson v. Circus Circus Enter., 107 F.3d 754, 756 (9th Cir. 1997) (holding that an employer can be liable for a third party's sexual harassment where the employer ratifies the behavior or acquiesces in sexual harassment by not taking appropriate and timely remedial action when the employer knew or should have known of the third-party misconduct).

26. *See* FRANCIS ACHAMPONG, WORKPLACE SEXUAL HARASSMENT LAW 107 (1999) (asserting that an employer is responsible for a third party's sexual harassment of its employees in the workplace when the employer or its agents knew or should have known of the harassment, yet fail to take prompt corrective action).

27. *See* MICHELE ANTOINETTE PALUDI, THE PSYCHOLOGY OF SEXUAL VICTIMIZATION: A HANDBOOK 156 (1999) (observing that hostile work environments are more difficult for women to work in because offensive sexual behavior creates a demeaning and denigrating atmosphere for female employees).

28. *See, e.g.*, BARBARA LINDEMANN & DAVID KADUE, SEXUAL HARASSMENT IN EMPLOYMENT 86 (1992) (positing that sexually charged workplaces involving sexually inappropriate joking and touching existed for years before legislators and courts recognized such atmospheres as offensive and ultimately discriminatory towards a particular gender).

29. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986).

to control its agents' actions.³⁰ As a result, courts must ascertain the degree of control an employer has over a third party when determining employer liability for a third party's harassing conduct.³¹ Regarding this control analysis, the EEOC compliance manual and corresponding court decisions mandate that employer liability for third-party sexual harassment depends on the unique facts and circumstances of each case.³²

III. IMPETUS FOR BRINGING SEXUAL HARASSMENT SUITS TO STATE COURTS

Attorneys are more likely to litigate third-party sexual harassment claims in state courts in an attempt to expand claimants' causes of action through state common law theories and to circumvent Title VII's requirements on employer size and award ceilings in federal litigation.³³ Moreover, although attorneys may pursue both punitive³⁴ and compensatory³⁵ awards for sexual harassment claimants under Title VII, the Civil Rights Act of 1991, and state common law in state courts, they are less likely to face limitations on the punitive to compensatory recovery ratio in state courts.³⁶

30. See RESTATEMENT (SECOND) OF TORTS § 219 (1977) (stating that a master is liable for the torts his servant committed while acting in the scope of employment).

31. Sexual Harassment Rule, 29 C.F.R. § 1604.11(d)-(e) (2007) (detailing that the standard for finding an employer liable for third-party sexual harassment under Title VII remains the same as that for coworker sexual harassment, but a court must also consider an employer's control and any other legal responsibility it has regarding the third party's conduct).

32. EEOC, EEOC COMPLIANCE MANUAL § 615.3 (1981) (articulating that the total facts and circumstances of each case, include: (i) the employer's knowledge of the harassment; (ii) the employer's control over the harasser's conduct; (iii) corrective actions that the employer took; and (iv) the employer's other legal responsibilities regarding the harasser's conduct).

33. See 42 U.S.C. § 2000-e(b) (2006) (clarifying that an employer for purposes of the Act must employ fifteen or more employees each working day in twenty or more calendar weeks during a year); 42 U.S.C. § 2000-e(h) (limiting application of the Act solely to "industries affecting commerce," meaning businesses, activities, or industry obstructing commerce or the free flow of commerce); Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(3) (1991) (articulating that the amount of monetary damages awarded is a function of employer size and establishing a maximum cap on recovery at \$300,000).

34. See generally RESTATEMENT (SECOND) OF TORTS (1979) (recognizing that punitive damages are exemplary awards intended to deter similarly situated defendants from similarly reprehensible actions, and they are awarded against defendants who commit outrageous conduct with reckless indifference or wrongful purpose or intent).

35. See *id.* at § 903 (articulating that compensatory damages are designed to place a claimant in "a substantially equivalent position" as if the harm never occurred and to provide pecuniary relief for the injuries a claimant suffered or is likely to suffer).

36. See *State Farm Mut. Auto. Ins. v. Campbell*, 538 U.S. 408, 425 (2003) (refusing to impose a bright line ratio of punitive to compensatory damages on state courts); see also Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 WIS. L. REV. 15, 37 (1998) (finding that the greatest increase in punitive awards has been in business and contracts litigation, including deceptive behavior and wrongful termination in sexual harassment cases). But see Phillip Morris, USA v. Williams, No. 05-1256, 5-8 (2007) (finding that although Oregon had a legitimate interest in imposing punitive

In fact, the recent trend in Supreme Court decisions showing deference toward state court affirmations of large punitive awards against reprehensible defendants displays a trend toward judicial restraint so long as large punitive awards satisfy the *BMW of North America v. Gore*³⁷ test.³⁸ Additionally, attorneys fear that federal judges may view third-party sexual harassment claims as frivolous lawsuits that are likely to overburden federal dockets.³⁹ As an extension, many attorneys recognize that claimants may be more likely to face judicial biases in federal courts as opposed to state courts because politically appointed judges may favor employer or industry interests over those of an employee.⁴⁰

IV. WORKERS' COMPENSATION LAWS, EMPLOYERS' EXCLUSIVITY DEFENSE, AND THE DUAL-CAPACITY DOCTRINE

All states have workers' compensation legislation that serves as no-fault systems intended to provide employees with quick and effective administrative remedies for work-related injuries without assigning potentially burdensome fault to employers.⁴¹ Specifically, workers' compensation statutes seek to return employees to gainful employment by providing payments for lost wages, medical expenses, and vocational rehabilitation.⁴² The goal is to prevent workers from becoming a

damages to punish deceit by tobacco companies and deterring repetition of such misconduct, a verdict resulting in a 100-1 punitive to compensatory ratio against defendant constituted a violation of the Fifth Amendment's Due Process Clause because defendant was punished for injuries inflicted on strangers to the litigation and deprived of an opportunity to adequately defend against the charge and the "standardless" dimension of the awards triggered fundamental due process concerns of arbitrariness, uncertainty, and lack of notice).

37. 517 U.S. 559 (1996) (stating that in determining the punitive to compensatory damages ratio, the court should consider: (i) the degree of reprehensibility of a defendant's conduct, which is the most important factor; (ii) the difference between actual or potential harm and the punitive award; (iii) and the difference between punitive damages awarded by a jury and the civil penalty imposed in similar cases).

38. See Tony Mauro, *Court Wades Into Fracas Over Punitives*, LEGAL TIMES, Oct. 30, 2006, at 15 (on file with author) (observing that the "odd alliance" of Justices Ginsburg, Scalia, and Thomas dissenting in *State Farm v. Campbell*, and the additions of conservative Justices Roberts and Alito, may lead to an interpretation of *State Farm* rejecting bright line limitations on punitive damages).

39. See generally Mark Hansen, *The Next Litigation Frontier?*, 79 A.B.A. J. 26 (Sept. 1993) (asserting that third-party sexual harassment claims will result in an onslaught of excessive litigation).

40. See Adam Nagourney, Richard W. Stevenson, & Neil A. Lewis, *Democrats See Wide Bush Stamp on Court System*, N.Y. TIMES, Jan. 15, 2006, at A1 (reporting that sixty percent of the 165 judges on the federal appeals courts are Republican appointees and nine out of thirteen court of appeals have majorities of Republican appointed judges).

41. See, e.g., S.J. Res. 2144, 19th Leg., 1st Reg. Sess. (Fla. 2005) (explaining that courts should interpret Florida's workers' compensation laws as ensuring quick and efficient delivery of disability and medical benefits to injured employees at a reasonable cost to employers with the goal of restoring employees to working condition).

42. See, e.g., OHIO REV. CODE ANN. § 4121.61 (2001).

community burden by providing a transitional support system that supplies statutorily calculated wage-loss benefits until the worker is capable of resuming employment.⁴³

Employers often use state no-fault workers' compensation systems to avoid common law liability by invoking the exclusivity doctrine, which allows workers' compensation statutes to categorically exclude all common law causes of action for employees' workplace sexual harassment-related injuries.⁴⁴ However, under the common law dual-capacity doctrine employers lose this exclusivity defense.⁴⁵ The dual-capacity doctrine provides that when employers assume relationships with employees that are discreet from that of an employer-employee relationship, thereby acting outside the scope of an employment relationship or assuming a distinct legal persona, the employer assumes secondary legal obligations in relation to the injured employee.⁴⁶ As a result, the dual-capacity doctrine allows employees to impute common law liability to employers in derivative liability jurisdictions, where an employer's liability is ordinarily grounded in public policy and is secondary or derivative from the primary wrongs of the individuals the employer controls.⁴⁷ In other words, application of the dual-capacity doctrine does not turn on how separate or different the employer's second function is from its original function as an employer.⁴⁸ Instead, it depends on whether an employer's second function generates legal obligations that are unrelated to those flowing from the employer's original function.⁴⁹

43. *See, e.g.*, ALA. CODE § 25-5-57(a) (2000).

44. *See, e.g.*, ALA. CODE § 25-5-53 (1975).

45. *See* BLACK'S LAW DICTIONARY 222-23 (2nd pocket ed. 2001) (stating that an employer, normally protected from tort liability by workers' compensation laws, is liable in tort to an employee if the employer and employee stand in a secondary relationship, conferring independent obligations on the employer).

46. *See, e.g.*, *Hart v. Nat'l Mortgage & Land Co.*, 235 Cal. Rptr. 68, 74 (Cal. Ct. App. 1987) (holding an employer liable in tort when a supervisor grabbed the claimant's genitals and made sexually suggestive remarks because the acts did not fall within reasonably anticipated work conditions).

47. *Cf. Stulginski v. Cizauskas*, 5 A.2d 10, 12 (Conn. 1939) (finding that a master derives secondary liability from a servant's tortious conduct in the course of employment on policy grounds, while the servant assumes separate primary liability on grounds that he personally committed wrongful acts).

48. *See, e.g.*, *Walter v. AlliedSignal, Inc.*, 722 N.E.2d 164, 169 (Ohio Ct. App. 1999) (ruling that dual-capacity applies when employers become a third party in relation to the employee through engaging in independent transactions with nonemployees, such that the law views the employer as a separate legal person with independent legal duties to its employees and the nonemployees).

49. *See id.* (finding that an employer is susceptible to a tort liability if it possesses a second legal persona, unrelated to its primary status as an employer).

A. Workers' Compensation Statutes' Requirements

Workers' compensation statutes have a threshold requirement that an injury must occur.⁵⁰ Some states require that an employee must suffer physical injuries to recover under workers' compensation statutes, while other states permit recovery on the basis of emotional or psychological injuries resulting from physical injuries.⁵¹ Very few states allow workers' compensation recovery for strictly nonphysical injuries.⁵²

Moreover, states limit workers' compensation recovery to accidental injuries, allowing employees common law causes of action for injuries sustained as a result of employers' intentional conduct.⁵³ However, state courts are split as to whether sexual harassment constitutes intentional or accidental injury for workers' compensation exclusivity purposes.⁵⁴ Some courts narrowly interpret accident to mean a "mishap or unexpected event."⁵⁵ Other state courts broadly construe accident to mean any act that the employer does not intentionally commit with a specific intent to injure.⁵⁶ Most courts require that an accidental injury must be sudden and traceable to a particular time, place, and event.⁵⁷

Furthermore, workers' compensation statutes have causation requirements that employee injuries must, in some particular fashion, "arise out of employment."⁵⁸ States apply differing tests to determine whether the

50. *See, e.g.*, *Anderton v. Wasteaway Serv. LLC*, 880 A.2d 1003, 1011-12 (Conn. App. Ct. 2005).

51. *Compare* *Busby v. Truswal Sys. Corp.*, 551 So. 2d 322, 325 (Ala. 1989) (per curium) (observing that Alabama's workers' compensation laws, which strictly provide remedies for "physical injuries," did not bar plaintiff's common law claims of invasion of privacy and intentional infliction of emotional distress ("IIED")), *with* *Meyers v. Arcudi*, 915 F. Supp. 522, 524 (D. Conn. 1996) (explaining that Connecticut's workers' compensation law covers emotional injuries resulting from physical harm).

52. *See, e.g.*, WIS. STAT. § 102.01(2)(c) (2005).

53. *See, e.g.*, W. VA. CODE § 23-4-2(d)(2) (2005).

54. *Compare* *American Smelting & Refining Co. v. Workers' Comp. Appeals Board*, 144 Cal. Rptr. 898, 900-01 (Cal. Ct. App. 1978) (holding that an injury is not accidental under California's workers' compensation statute when an employer engages in serious or willful conduct with a wanton disregard for the consequences), *with* *Orzechowski v. Warner-Lambert, Co.*, 92 A.D.2d 110, 113 (N.Y. App. Div. 1983) (finding that workers' compensation coverage extends to all accidental injuries, including those arising from employer's deliberate or wanton conduct).

55. *See, e.g.*, *Coates v. Wal-Mart Stores*, 976 P.2d 999, 1006 (N.M. 1999) (ruling that sexual harassment against an employee, which occurred for over a year, was not the result of a sudden or unexpected accidental event).

56. *See, e.g.*, *Ford v. Revlon, Inc.*, 734 P.2d 580, 589 (Ariz. 1987) (explaining that the intentional exception to the workers' compensation law does not apply unless an employer purposefully or knowingly acts with the direct objective of injuring an employee).

57. *Cf.* *Grover C. Dils Med. Ctr. v. Menditto*, 112 P.3d 1093, 1102 (Nev. 2005) (per curium) (ruling that the claimant could not recover under Nevada's workers' compensation statutes for a work-related car accident because exacerbation of preexisting symptoms did not constitute "sudden or unforeseen injuries").

58. *See, e.g.*, *Rinke v. Bank of America*, 121 P.2d 472, 476 (Kan. Ct. App. 2005); *see*

requisite causal connections for recovery under workers' compensation exist.⁵⁹ Most state trial courts allow juries to determine whether an injury arises out of the employment as a factual matter.⁶⁰

Most jurisdictions apply an increased-risk test in determining causation, which is satisfied when employment conditions expose the employee to a quantitatively greater degree of risk of harm than the general public.⁶¹ Many jurisdictions have modified the increased-risk test and applied an actual-risk test, where the workers' compensation laws apply when employers show that the injury was an actual risk of the employment, even if the hazards were common to both its employees and the general public.⁶² A growing number of jurisdictions look to the total facts and circumstances surrounding an employee's injuries as a part of the positional-risk test, applying but-for or factual causation in relating employee injuries to an employer's conduct.⁶³ In positional-risk jurisdictions, an employer shields tort liability through the exclusivity doctrine if an employee's injuries would not have happened but-for the fact that the employment conditions, duties, or obligations put the claimant in a hazardous position, exposing her to a "neutral force."⁶⁴

B. State Courts Generally Limit Claimants' Common Law Actions

Legislators in most states drafted workers' compensation laws to limit common law causes of action against employers to instances where employers engaged in intentional or deliberate conduct and the employee

also 82 AM JUR. 2d *Workers' Compensation* § 238 (2006).

59. Compare *Cleveland v. Rotman*, 297 F.3d 569, 572 (7th Cir. 2002) (acknowledging in dictum that because Illinois' workers' compensation statutes were designed to replace common law claims, the claimant does not need to show legal or proximate causation, but must show factual or but-for causation), with *Sutter v. First Union Nat'l Bank of Va.*, 932 F. Supp. 753, 758-59 (E.D. Va. 1996) (concluding that under Virginia workers' compensation statute, an injury arises out of or is caused by employment conditions when an injury can "fairly" be traced to the employment as a contributing proximate cause). But see 82 AM JUR. 2d *Workers' Compensation* § 238 (inferring that an injury compensable under workers' compensation law arises when employment obligations or conditions put employees in a position or place where an accident occurs, the accident has its origins in a risk connected to employment, and the injury flows from the natural and rational consequences of that employment risk).

60. See, e.g., *Knox v. Combined Ins. Co. of Am.*, 543 A.2d 363, 365 (Me. 1988).

61. See, e.g., *Flanner v. Tulsa Pub. Schs.*, 41 P.3d 972, 976 (Okla. 2002) (Hodges, J., dissenting) (acknowledging that Oklahoma's legislature rejected the positional-risk and peculiar-risk doctrines and relied on the increased-risk doctrine to determine whether an injury arose out of employment).

62. See, e.g., *Lipsev v. Case*, 445 S.E.2d 105, 106-07 (Va. 1994).

63. See, e.g., *Cremen v. Harrah's Marina Hotel Casino*, 680 F. Supp. 150, 154-55 (D.N.J. 1988).

64. Cf. *Deffenbaugh Indus. v. Angus*, 832 S.W.2d 869, 872-73 (Ark. Ct. App. 1992), *aff'd*, 852 S.W.2d 804 (Ark. 1993).

suffered physical harm.⁶⁵ As a result, in the absence of an employer's exclusivity defense, many state courts apply an alternative action theory which compels an employee to choose between remedies provided by workers' compensation laws or state common law causes of action.⁶⁶ A minority of states apply a cumulative action approach, where the sexual harassment claimant can recover under both common law and workers' compensation laws.⁶⁷ Under the cumulative action approach, no-fault benefits offset damages awarded in tort judgments after the claims are settled to prevent excessive recovery.⁶⁸ The remaining state courts apply the cumulative remedy theory, which allows employees to bring separate tort and contract causes of action against employers for injuries that are not covered by workers' compensation laws.⁶⁹

V. STATE COMMON LAW TORT AND CONTRACT CAUSES OF ACTION

State courts that reject the alternative action and cumulative action theories and instead provide for cumulative remedies, ground their decisions on the public policy of shielding employees from sexual harassment related evils such as sexual assault, emotional distress, and invasions of privacy.⁷⁰ As a result, courts have permitted employees' IIED,⁷¹ tortious breach of public policy,⁷² assault and battery,⁷³ and

65. See W. VA. CODE § 23-4-2(c) (1985) (providing that an employee can recover punitive and compensatory damages under common law for compensation in excess of the statutory cap for injuries resulting from an employer's deliberate actions).

66. See Jean C. Love, *Actions for Nonphysical Harm: Relationship Between Tort System and No-Fault Compensation (With an Emphasis on Workers' Compensation)*, 73 CAL. L. REV. 857, 860 (1985) (explaining that under an alternative action theory some jurisdictions allow employees to choose between tort actions or no-fault recovery, but in most jurisdictions the courts or the administrative agency directing the no-fault system determines employee recovery based on legislative guidelines).

67. See, e.g., OR. REV. STAT. ANN. §656.156(2) (2006).

68. See, e.g., W. VA. CODE § 23-4-2(c) (1985) (articulating that when employers deliberately injure employees, employees or their survivors have a common law cause of action against employers for any damages exceeding the compensation law's relief).

69. See, e.g., *McCalla v. Ellis*, 341 N.W.2d 525, 529-30 (Mich. Ct. App. 1983).

70. See PALUDI, *supra* note 27, at 151 (documenting that the courts have been the most apt forums for combating sexual harassment injuries, including emotional, psychological, and physical harms, because courts are best situated to remedy disparities between an aggressor and a victim).

71. See LINDEMANN & KADUE, *supra* note 28, at 352 (discussing that an IIED claim involves extreme and outrageous conduct with intent to cause or with deliberate disregard of the probability of causing emotional distress, which causes severe emotional distress).

72. Cf. *Rojo v. Kliger*, 52 Cal. 3d 65, 71 (Cal. 1990) (ruling that the plaintiffs, who alleged that their employer's sexually harassing remarks and requests for sexual favors forced them to leave their employment, could seek judicial relief for a tortious discharge in contravention of public policy supported by employment sex discrimination).

73. See LINDEMANN & KADUE, *supra* note 28, at 356 (explaining that as companion causes of action in sexual harassment cases, assault requires that an actor intended to cause harmful physical contact and that the claimant was put in apprehension of such contact,

invasion of privacy⁷⁴ tort claims against employers for injuries deriving from hostile work environments. A number of state courts also address bad faith dealings in “at-will”⁷⁵ employment relationships by allowing employees separate common law contract causes of action against employers who make employment decisions based on employees’ refusals to submit to sexual advances.⁷⁶ These state courts allow employees contractual causes of action based on an implied employment contract, particularly when the parties agreed to abide by specific employment terms.⁷⁷ Under implied contract principles, state courts allow claimants to bring breach of covenant of good faith and fair dealings⁷⁸ and contractual interference causes of actions against employers.⁷⁹

ANALYSIS

Most workers’ compensation coverage disputes arise from the causation requirements of the laws’ coverage formula.⁸⁰ Therefore, the dual-capacity doctrine can serve as a crucial rebuttal to employers’ exclusivity defense because an employee can assert that the employer acted outside the employment relationship by creating or tolerating conditions that resulted in sexually offensive conduct.⁸¹ When an employee can assert that the

while battery requires harmful contact with a person resulting from an act intended to cause claimant to suffer the contact).

74. See RESTATEMENT (SECOND) OF TORTS § 652B (1977) (articulating that an individual who intentionally intrudes upon another’s solitude, seclusion, or private affairs is liable if that intrusion would highly offend a reasonable person).

75. RICHARD A. LORD, 19 WILLISTON ON CONTRACTS § 54:39 (4th ed. 2005) (stating that an employment relationship, which is indefinite in duration, is terminable at the will of either party and does not create any executory obligations).

76. See *Fortune v. Nat’l Cash Register Co.*, 364 N.E.2d 1251, 1255-57 (Mass. 1977) (finding an implied covenant of good faith in at-will employment contracts because good faith and fair dealing are pervasive requirements of Massachusetts state law).

77. See *Romero v. Mason & Hanger-Silas Mason Co.*, 739 F. Supp. 1472, 1478-79 (D.N.M. 1990) (reasoning that the employee’s contractual interference claim was actionable under an implied contract based on the company’s personnel practices and written procedures).

78. See *Murillo v. Rite Stuff Foods, Inc.*, 77 Cal. Rptr. 2d 12, 15 (Cal. Ct. App. 1998) (reversing the lower court’s summary judgment of plaintiff’s contractual covenant of good faith claims, where plaintiff asserted that she complained of coworker sexual harassment to her supervisor and the supervisor took retaliatory action by isolating the claimant from other workers and eventually suspending her for a week).

79. See LINDEMANN & KADUE, *supra* note 28, at 364 (discussing that a claimant can prevail under contractual interference by showing either that the harasser interfered with the complainant’s contractual performance by inducing the employer to discharge her or in some other manner, but proof of unlawful motive is necessary).

80. See 2 ARTHUR LARSON & LEX K. LARSON, LARSON’S WORKER’S COMPENSATION LAWS § 6.10 (1997).

81. Cf. *Cole v. Fair Oaks Fire Prot. Dist.*, 729 P.2d 743, 750 (Cal. 1987) (finding that the employee could not recover for common law emotional damages ultimately resulting from employer’s disciplinary actions because the demotion, disciplinary proceedings, and

employer abrogated the primary employment relationship by creating or tolerating a work environment causing third-party sexual harassment, the employee can subsequently argue that the injury cannot be construed to “arise out” of employment under any of the modern causation tests applied to workers’ compensation claims.⁸² Consequently, the employee can establish that her claim can take the form of a common law torts and contracts cause of action.⁸³

I. WORKERS’ COMPENSATION FORMULAS ARE INAPPLICABLE TO THIRD-PARTY SEXUAL HARASSMENT CLAIMS WHERE EMPLOYEES CAN ESTABLISH THAT THE HARASSMENT DID NOT “ARISE FROM” THE EMPLOYMENT RELATIONSHIP

A. Workers’ Compensation Laws Cannot Cover Third-Party Sexual Harassment Injuries in Increased-Risk Jurisdictions Where the Injuries Are Not Exclusive to the Claimant’s Workplace

The exclusivity doctrine should not apply to employee third-party sexual harassment suits against employers in increased-risk jurisdictions where the harassment-related injuries pose a threat to the general public.⁸⁴ To illustrate, when an employer creates or tolerates a hostile work environment that ultimately results in third-party sexual misconduct, the threat of sexual harassment-related injuries will likely proliferate beyond the individual employee to patrons and other bystanders.⁸⁵ Moreover, when employee injuries result from the employer thrusting a hazard upon the general public by tolerating or creating a sexually hostile work environment, the dual-capacity doctrine should void the employer’s exclusivity defense because the employer stands as a third party in relation to the injured employee.⁸⁶

attempted forced retirement arose from the employment relationship).

82. See LARSON & LARSON, *supra* note 80, at § 6.10 (noting that jurisdictions use either the increased-risk doctrine, actual-risk doctrine, or the positional-risk doctrine to interpret “arising out of employment”).

83. *Cf.* Guy v. Arthur H. Thomas Co., 378 N.E.2d 488, 492 (Ohio 1978) (concluding that a nurse who had become her employer’s patient as a result of mercury poisoning contracted at work could sue to recover tort damages for medical malpractice under the dual-capacity doctrine when the hospital failed to properly diagnose her ailment).

84. *Cf.* Kemp v. Indus. Comm’n, 636 N.E.2d 1237, 1239 (Ill. App. Ct. 1994) (determining that workers’ compensation coverage under the increased-risk test applied because the claimant’s job duties required him to bend and stoop extensively on uneven ground, which would not be expected among the general public).

85. See *Navy Investigating Alleged Misconduct at Latest Tailhook Convention*, CNN.COM, Aug. 25, 2000, <http://archives.cnn.com/2000/US/08/25/tailhook.allegations.02/index.html> (documenting the widespread misconduct during the Tailhook Association Convention where lack of oversight allowed naval aviators to drink excessively, expose themselves to females, and grope dozens of female officers and hotel employees).

86. *Cf.* Bell v. Indus. Vangas, Inc., 637 P.2d 266, 280 (Cal. 1981) (ruling that a manufacturer could not escape product liability as to its employees when it would be liable

Specifically, the employer acts in a dual capacity because the abrogated employment relationship is separate from and incidental to the duties the employer breached in its relationship with the general public.⁸⁷ Finally, sexual harassment is not an increased risk of employment when the third party extends its sexually offensive conduct outside of the employee's workplace.⁸⁸

Additionally, public policy mandates that an employer who fosters a sexually hostile work environment and violates separate relationships with its employees and the general public in promoting pervasively detrimental conduct must be denied no-fault legislation's benefits.⁸⁹ Employers who tolerate or perpetuate third-party sexual harassment must be held fully liable because they intentionally create or are deliberately indifferent towards hazardous conditions that are likely to cause widespread harm to the general public, in addition to its employees.⁹⁰ Further, an employer's detrimental conduct, which affects individuals involved in independent relationships with that employer, can most effectively be shown through the dual-capacity doctrine.⁹¹ In piercing the employer's exclusivity defense, an employee is given an opportunity to demonstrate harms the employer caused in each of its distinct relationships.⁹²

B. The Dual-Capacity Doctrine Will Bar Employers' Exclusivity Defense in Actual-Risk Jurisdictions

In jurisdictions applying the actual-risk test, the dual-capacity doctrine

to other injured parties because the manufacturer assumed a dual persona with separate obligations to its employees and to its clients).

87. *Cf.* Murcia v. Textron Inc., 795 N.E.2d 773, 778 (Ill. App. Ct. 2003) (stating that the employee failed to allege facts necessary to avail himself of the dual-capacity doctrine because he did not show that his employer assumed an independent legal obligation when it changed or modified the machinery that injured him).

88. *See, e.g.*, Anderson v. Save-A-Lot Ltd., 989 S.W.2d 277, 287-88 (Tenn. 1999).

89. *Cf.* Abbott v. Jarrett Reclamation Serv., Inc., 726 N.E.2d 511, 520-22 (Ohio Ct. App. 1999) (arguing that employers cannot cower behind no-fault legislation and escape common law liability when they know that employees' chances of injury are more probable because they allowed detrimental conduct to continue).

90. *See, e.g.*, Peterson v. Arlington Hospitality Staffing, Inc., 689 N.W.2d 61, 66 (Wis. Ct. App. 2004) (asserting that employer actions are not covered by workers' compensation when the employer intentionally injures its employees in sexual harassment suits because the burden of compensating the employee should not fall on the public and the employee should be allowed broad common law recovery).

91. *See* 40 AM. JUR. *Proof Of Facts* 2d § 603, at § 2.0 (2005) (asserting that when an employee claims that the employer acted in a dual-capacity, the employee can demonstrate during trial how the employer behaved in its different capacities).

92. *Cf.* Longever v. Revere Copper and Brass, Inc., 408 N.E.2d 857, 858-59 (Mass. 1980) (determining that, in asserting the dual-capacity doctrine, the injured employee was able to show that the employer failed to provide its employees with safe equipment, but this did not suffice to establish dual capacity because manufacturing the equipment to be used by employees does not create a separate legal identity for the employer).

should also void employers' exclusivity defenses to third-party sexual harassment claims where the injury arises from a breach of duty the employer owes to the employee in the context of a separate and independent relationship.⁹³ For example, when an employer engages in unrelated business transactions with independent contractors but maintains a hostile work environment in the employee's workplace where the contractor has an opportunity to engage in third-party sexual harassment, the dual-capacity doctrine should apply because the threat cannot be classified as an actual risk of employment.⁹⁴ More precisely, an employer may contract with outside agencies or workers with the intention of confining the newly formed independent relationship to an employee's workplace, thus eliminating the possibility that the independent contractors' sexual harassment will affect the general public.⁹⁵

Common law liability in actual-risk jurisdictions is also appropriate when employers assume separate roles as managers or shareholders and as a distinct corporate entity in the context of corporations.⁹⁶ If employees are injured by third-party sexual harassment resulting from a shareholder or management created hostile work environment, workers' compensation exclusivity should not bar common law remedies against the management or shareholders in their individual capacities because those particular hazards are likely limited to employees.⁹⁷ In fact, applying the dual-capacity doctrine to impute common law liability on employers assuming various distinctive legal identities for business advantages is particularly important given the sharp rise in the creation and utilization of legally

93. See 40 AM. JUR. 2D *Proof of Facts*, *supra* note 16, at § 1.2 (advancing that the dual-capacity doctrine applies when the employer, in its alternate capacity, owes the employee obligations that are unrelated to those obligations imposed as a result of its primary status as an employer).

94. *Cf. Bell v. Indus. Vangas, Inc.*, 637 P.2d 266, 280 (Cal. 1981) (finding that a "coincidental employment relationship" did not preclude an employer's common law liability when a simultaneous cause of injury could be attributed to a distinct relationship of an employer with an employee).

95. See, e.g., *Otis v. Wyse*, No. 93-2349-KHV, 1994 WL 566943, at *1-2, 7 (D.Kan. Aug. 24, 1994) (holding that the plaintiff, employed by one of the independent doctors under contract with her hospital employer, could bring a third-party sexual harassment suit against the hospital after the doctor left sex-related articles on her desk because the hospital had a legal responsibility over the independent contractor's actions and had permitted the harassment to continue unabated).

96. *Cf. Hagan v. Terry Corp., Inc.*, No. 2002-CA-001000-MR, 2003 WL 22271514, at 3 (Ky. Ct. App. Oct. 3, 2003) (rationalizing that corporations are distinct entities from their shareholders and officers, but that shareholders may be held liable in their individual capacities under the dual-capacity doctrine).

97. *Cf. Cole v. Golemi*, 271 So. 2d 65, 67-68 (La. Ct. App. 1973) (concluding that the defendant who was a corporate shareholder and officer was distinct from the actual corporate entity and could be liable under tort law because his actions were entitled to tort immunity, but the corporation, and not the defendant, would be liable as a principal under worker's compensation laws).

fictitious entities to shield individuals' liability.⁹⁸ Distinguishing partners' or shareholders' individual roles from the legal entity via the dual-capacity doctrine will likely allow courts to ascertain through a factual inquiry whether the individual sought to simultaneously exercise "control"⁹⁹ over the legal entity while duplicitously shielding himself from personal liability by misusing the legal veil against individual liability provided to the fictitious business entity.¹⁰⁰ Furthermore, disallowing individual partners, shareholders, or managers from usurping an entity's liability veil will likely stymie the individual from abusing corporate or partnership indemnification systems, which provide business entities vital insurance coverage to cover the business entity's costs of litigation and damages.¹⁰¹

C. Workers' Compensation Exclusivity Will Not Apply in Positional-Risk Jurisdictions Where Specific Employee Characteristics or Workplace Conditions Trigger Third-Party Sexual Harassment

Third-party sexual harassment claims present unique challenges to employers attempting to invoke the exclusivity doctrine in jurisdictions applying the positional-risk test.¹⁰² In these jurisdictions employers must show that, although they knew or should have known of the third party's sexual harassment, they had insufficient control over the third party's behavior, and thus they should not face common law liability.¹⁰³ Given

98. See, e.g., DEL. CODE ANN. tit. 6, § 17-303(a) (2005); see also Notes, *Risk-Preference Asymmetries in Class Action Litigation*, 119 HARV. L. REV. 587, 592-93 (2005) (opining that firms as legal fictions are more likely to engage in risky behavior because stakeholder pressure for results and liability insurance eschew managerial caution towards uncertainties, "including those posed by civil litigation"); AM JUR. *Partnership* § 851, 866 (2005) (stating that state law allows for the formation of limited partnerships where individuals, upon compliance with statutory requirements, may contribute certain amounts of capital to the partnership and limit their liability to those sums, but the partnership must have at least one general partner with unlimited liability).

99. See BLACK'S LAW DICTIONARY, *supra* note 45, at 143 (defining legal control as the power to directly or indirectly commandeer an entity's management or policies through the ownership of voting securities, by contract, or otherwise).

100. See, e.g., *Hommel v. Micco*, 602 N.E.2d 1259, 1263 (Ohio Ct. App. 1991) (acknowledging that statutory limitations on individual liability allow corporate officers to misrepresent their role in their corporations, so courts have held that a corporate officer will be liable in his individual capacity where he fails to clearly identify the capacity in which he is engaging a party).

101. See TEX. REV. CIV. STAT. ANN. art. 6132b, § 3.08(d) (A) & (B) (2006) (mandating that a registered Limited Liability Partnership must carry at least \$100,000 of liability insurance designed to cover the partnership's liability from its negligence, malfeasance, errors, incompetence, or omissions, and the partnership must designate and segregate \$100,000 for the specific purpose of satisfying judgments against it).

102. See, e.g., *Mintiks v. Metro. Opera Ass'n*, 550 N.Y.S.2d 143, 145-46 (N.Y. App. Div. 1990).

103. See 29 C.F.R. § 1604.11(e) (1999) (permitting employer liability where employers know or should know of third-party sexual harassment but fail to terminate the sexual harassment by taking prompt corrective action).

that the burden of proof in most jurisdictions is on the employer to show by a preponderance of the evidence that the exclusivity doctrine applies, employers will have difficulty showing that they did not have control over third-party conduct in instances where employers invite customers and independent contractors into the workplace as a part of routine commercial activities.¹⁰⁴ In addition, an employer will have difficulty asserting that a third party's harassing conduct was a "neutral force" that was not personal to the claimant nor causally connected with employment conditions when the employee's personal characteristics or the particular work environment specifically triggered the third-party sexual harassment.¹⁰⁵

II. WORKERS' COMPENSATION EXCLUSIVITY SHOULD NOT APPLY WHERE WORKPLACE INJURIES ARE NOT ACCIDENTAL

The exclusivity doctrine should not apply in jurisdictions that condition workers' compensation recovery on whether the employer-designed events leading to injury were foreseeable.¹⁰⁶ A claimant will likely foresee and expect sexual harassment in instances where the employer creates a hostile work environment because claimants will likely expect sexually offensive conduct under sexually oppressive conditions.¹⁰⁷ Specifically, an employer will face significant difficulty asserting that an employee could not have foreseen or expected events when the employer designs personnel policies that encourage abusive relationships between its employees and clients or when the employer designs business strategies that will likely expose its employees to the perverse whims of unsavory third parties.¹⁰⁸

Jurisdictions requiring an employer to demonstrate that worker injuries occurred from usual exposure to employment conditions should not permit employers to assert that an employee's injuries occurred from usual exposure to job duties when the worker is subjected to the dangers of hostile work environment sexual harassment.¹⁰⁹ Moreover, a defendant will likely have difficulty showing by a preponderance of the evidence that workers' compensation statutes preclude all common law actions when the

104. See, e.g., *Lentz v. Young*, 536 N.W.2d 451, 456-58 (Wis. Ct. App. 1995).

105. See *Chaparral Boats, Inc. v. Heath*, 606 S.E.2d 567, 571 (Ga. Ct. App. 2004); see also *LARSON & LARSON*, *supra* note 80, at § 3.05.

106. See *De Arman v. Ingalls Iron Works Co.*, 61 So. 2d 764, 767 (Ala. 1952).

107. See *Motorist Mutual Ins. Co. v. Merrick*, Nos. 98-T-0188, 98-T-0189, 1999 WL 1073666, at *3 (Ohio Ct. App. Nov. 5, 1999).

108. See, e.g., *Schmidt v. Smith*, 684 A.2d 66, 75-76 (N.J. Super. Ct. App. Div. 1996) (determining that an injury is not accidental and is expected where the court can infer employer intent to injure from repetitive actions); see also 99 C.J.S. *Workers' Compensation* § 295 (2005) (finding that workers' compensation only applies when other individuals design an injury causing event and the worker does not expect the event).

109. See *Coates v. Wal-Mart Stores*, 976 P.2d 999, 1005-06 (N.M. 1999); see also *Vance*, *supra* note 10, at 166 (positing that courts have found that an intentional tort severs an employment relationship at the moment the employer commits the intentional tort).

third party's sexually harassing conduct occurs over a period of time, making it impossible to determine a definite time, place, or cause of an employee's injuries.¹¹⁰ Finally, an employer will have difficulty asserting that a third party's conduct resulted in an accidental injury in deliberate indifference jurisdictions, where courts view an employer's failure to promptly terminate the hostile work environment as a deliberate action, because most compensation statutes do not cover employer's deliberate indifference.¹¹¹

III. JURISDICTIONS LIMITING WORKERS' COMPENSATION RECOVERY TO PHYSICAL INJURIES SHOULD PROVIDE CLAIMANTS COMMON LAW RELIEF FOR NONPHYSICAL INJURIES

A. State Courts Should Consider Workers' Compensation Laws' And Common Laws' Underlying Policies When Determining Workers' Compensation Exclusivity

Workers' compensation laws that prohibit recovery for nonphysical injuries are inadequate as the claimant's sole means for recovery in third-party sexual harassment situations because these narrow statutes will likely preclude all relief when the claimant suffers strictly nonphysical injuries.¹¹² This is especially troublesome when an employer intentionally creates a hostile work environment that exposes an employee to nonphysical harms, and the employee must prove a specific intent to injure in order to recover common law damages.¹¹³ In these situations, courts will effectively deny any recovery when the employee cannot show employer intent to create a hostile work environment because the employer will be able to assert that injuries related to derivative liability, a negligence theory, are exclusively covered by workers' compensation laws.¹¹⁴ Courts will then apply the state workers' compensation laws as the sole remedy for the perceived

110. *Ford v. Revlon, Inc.*, 734 P.2d 580, 584-85 (Ariz. 1987); *see also* IDAHO CODE ANN. § 72-102(18)(b) (2006) (stating that an "accident" is an unexpected or undesigned event that can reasonably be located as to the time and place where it occurred).

111. *See* CAL. LABOR CODE § 3602(a) & (b)(1) (2005); *see also Ford*, 734 P.2d at 584-85.

112. *See* LARSON & LARSON, *supra* note 80, at § 68.34(a) (positing that workers' compensation should not constitute the exclusive remedy when the injury's essence is nonphysical because most state legislatures crafted compensation laws during the industrial revolution, and thus intended to confine relief to purely physical injuries).

113. *See, e.g., Fitzgerald v. Pratt*, 585 N.E.2d 1222, 1225 (Ill. App. Ct. 1992) (announcing that employers cannot successfully assert workers' compensation exclusivity when employee injuries result from intentional activities during the course of business); *see also* 76 AM. JUR. 3D *Proof of Facts*, *supra* note 16, at § 21 (observing that many third-party sexual harassment cases result from employer dress codes requiring female employees to wear revealing outfits that provoke clients' sexual aggression).

114. *See, e.g., Bailey v. Unocal Corp.*, 700 F. Supp. 396, 400 (N.D. Ill. 1998) (recognizing that derivative claims are precluded by Illinois workers' compensation laws).

unintentional acts.¹¹⁵ Ultimately, the applicable workers' compensation laws will categorically deny employees' remedies for nonphysical injuries, thus denying the employee any recovery.¹¹⁶

State courts should look beyond technicalities regarding the physical or nonphysical nature of a claimant's injuries.¹¹⁷ Instead, courts should focus on workers' compensation laws' and common law regimes' purposes.¹¹⁸ Otherwise, claimants must allege physical injuries resulting from mental and emotional trauma in jurisdictions that do not permit common law recoveries for purely nonphysical harm.¹¹⁹ Subsequently, the plaintiff's allegation of physical injuries will bar common law recovery because an employer will be able to assert that workers' compensation laws constitute the exclusive remedy.¹²⁰ Finally, where common law recovery for nonphysical injuries is categorically proscribed, employees forced to allege physical injuries as a means of recovery under workers' compensation laws will likely fail in their compensation claims.¹²¹ Employees' physical injury claims will likely be viewed as tenuous and inadequately supported, and they will probably not stand the scrutiny of the employer's medical experts.¹²²

*B. Courts Also Should Consider Employer Intent when Determining
Whether Employees Can Recover Cumulative Remedies*

Jurisdictions limiting workers' compensation recovery strictly to physical injuries should instead focus on employer intent regarding the sexual harassment, in conjunction with the public policy purposes

115. See Vance, *supra* note 10, at 193 (asserting that derivative liability claims, such as respondeat superior and negligent hiring, constitute negligent torts covered by workers' compensation laws).

116. See Juarez v. American Mobile Commc'n, 746 F. Supp. 798, 806 (N.D. Ill. 1990).

117. See Vance, *supra* note 10, at 186 (maintaining that more state courts should adopt the Michigan and Florida courts' practice of looking to the state's torts and compensation policies, instead of making physical-nonphysical distinctions).

118. Cf. Moll v. Parkside Livonia Credit Union, 525 F. Supp. 786, 791-92 (E.D. Mich. 1981).

119. See Watson v. Melman, Inc., 106 So. 2d 433, 434-35 (Fla. Dist. Ct. App. 1958) (ruling that a seamstress could recover for the neurosis resulting from her skin bruise because she had an actual physical injury upon which to base compensation for her mental harms).

120. See MONT. CODE. ANN. § 39-71-119(1)(a) (2005).

121. See, e.g., FLA. STAT. ANN. § 440.093(1) (2003) (stating that workers' compensation only covers claimants' mental injuries that result from physical trauma). *But see Watson*, 106 So. 2d at 435 (ruling that under Florida's workers' compensation laws, the physical injury requirement should be expanded to allow compensation for mental injuries caused by physical trauma that result in negligible physical consequences).

122. See Jones v. Traylor, 636 So. 2d 1112, 1117-18, 1120 (La. Ct. App. 1994) (holding that an employee could not recover under workers' compensation law for past medical expenses because she failed to provide adequate physician testimony in response to her employer's denials).

supporting state workers' compensation laws, to determine whether the exclusivity doctrine applies.¹²³ This approach will allow third-party sexual harassment injuries resulting from employer's intentional actions to shift from an inapt no-fault forum to a distinct and more appropriate common law forum.¹²⁴ Shifting employees' causes of action to a common law forum will ensure that employers deservedly incur fault for their intentionally tortious or deliberately indifferent conduct.¹²⁵

States with workers' compensation statutes that limit claimants' common law recovery to physical injuries should broaden their interpretation of intentional torts within the sexual harassment context to permit a common law recovery with a showing of wanton, willful, or malicious negligence.¹²⁶ This approach best adheres to hostile work environment's imputed knowledge standard because an employer who "should have known" of sexual harassment is deemed to have willfully, maliciously, or wantonly allowed third-party sexual harassment to continue without having the specific intent required in intentional tort claims.¹²⁷ Finally, an employee injury loses its accidental character when an employer willfully, maliciously, or wantonly injures that employee.¹²⁸

IV. WORKERS' COMPENSATION STATUTES' LEGISLATIVE INTENT IS IRRECONCILABLE WITH THE LEGISLATIVE IMPETUS DRIVING SEX DISCRIMINATION JURISPRUDENCE

A. Workers' Compensation Laws Are Incapable of Achieving Title VII's Purposes of Combating Sex-Based Employment Discrimination

State workers' compensation laws were formulated as social insurance mechanisms that imputed strict liability to employers in response to rising

123. See Vance, *supra* note 10, at 186 (arguing that courts should look at the employer's underlying conduct to determine whether the injurious acts were intentional or deliberate instead of applying the traditional "nature of injury" test).

124. See Byrd v. Richardson-Greenshields Sec. Inc., 552 So. 2d 1099, 1102-04 (Fla. 1989).

125. See *id.* at 1102-04.

126. See, e.g., Mayles v. Shoney's Inc., 405 S.E.2d 15, 18-19 (W. Va. 1990) (establishing that under West Virginia's "deliberate intent" standard, an employer loses immunity from common law suits when its actions constitute an intentional tort or wanton, willful, or deliberate misconduct).

127. See Joel L. Finger, *Controlling the Costs of Litigation*, 464 P.L.I. LIT. 89, 97 (1993) (finding that most liability policies expressly exclude willful conduct and other intentional acts from coverage). But see LARSON & LARSON, *supra* note 80, at § 68.00 (rejecting that common law liability should be stretched to include accidental injuries by gross, wanton, willful, deliberate, culpable, or malicious negligence of an employer).

128. Cf. Mayer v. Valentine Sugars, Inc., 444 So. 2d 618, 619-21 (La. 1984) (ruling that employees can recover under common law by showing that the employer knew to substantial certainty that its acts, which violated safety regulations, were likely to cause the injury-inducing explosion).

industrial accidents in the early twentieth century and are fundamentally incapable of covering modern day third-party sexual harassment disputes.¹²⁹ Clearly, legislators did not intend to include civil rights-type litigation within the context of compensation laws' social insurance schemes.¹³⁰ Accordingly, legislative history favoring elimination of sexual harassment as a means of eviscerating workplace sex-based discrimination is vastly different from the legislative considerations underlying workers' compensation laws.¹³¹ For instance, state legislatures passed compensation laws with the intent of ensuring that employees received monetary compensation for diminished earning power, medical expenses, and vocational rehabilitation, where workplace technological developments and evolving commercial interests rendered common law remedies impractical or undesirable.¹³² Contrastingly, Title VII was passed out of discontent with deeply embedded social inequalities and structural discrimination against minorities and women.¹³³ These disparate legislative motives are manifested in workers' compensation laws' no-fault nature.¹³⁴ For example, no-fault legislation narrows relief for negligent infliction of physical injury without considering employees' nonphysical injuries or employers' actions specifically intended to expose an insular group to disparate treatment and adverse work conditions.¹³⁵

B. Society Should Reject that Sexual Harassment Injuries Are an Expected Fact of the Modern Workplace

Courts should exempt third-party sexual harassment injuries from the

129. See *Freeman v. Kelvinator, Inc.*, 469 F.Supp. 999, 1000 (E.D. Mich. 1979).

130. See *Anderson v. Save-A-Lot, Ltd.*, 989 S.W.2d 277, 283 (Tenn. 1999) (“[T]he concerns addressed by [Civil Rights Statutes] are quite different from those addressed by the workers’ compensation laws and . . . 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.”).

131. See *Vance*, *supra* note 10, at 190-91 (observing that sexual harassment injuries must be viewed differently from workers’ compensation injuries because workers’ compensation recovery will not give effect to the compelling Title VII policies against employment discrimination and most sexual harassment does not result in “compensable disabilities”).

132. See, e.g., *Freeman*, 469 F. Supp. at 1000 (conceding that Michigan’s workers’ compensation statutes were only meant to redress industrial injuries and to replace antiquated common law remedies).

133. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 63-64 (1986).

134. See Symposium, *Ideological and Cultural Influences on Work and Benefits Law*, 67 TUL. L. REV. 1357, 1358 (1993) (arguing that workers’ compensation should not be the exclusive remedy for sexual harassment because sexual harassment is an unacceptable byproduct of the workplace, where compensation laws’ dispute resolution mechanisms trivialize fault, and, consequently, sexual harassment is not deterred or eliminated).

135. See *Love*, *supra* note 66, at 857-58 (observing that legislative bodies fashioning workers’ compensation statutes did not consider whether no-fault legislation would apply to purely nonphysical injuries because the plans were silent on the subject).

exclusivity doctrine in states that seek to limit workers' compensation to injuries that are "a fact of life of industrial employment."¹³⁶ Sexual harassment laws' aggressive attempts at terminating workplace gender inequality manifestly demonstrate that society should reject the notion that sexual harassment-related injuries are an acceptable occurrence in employment relationships.¹³⁷ Sexual harassment law is judge-made case law interpreting and applying Title VII's ban on sex-based discrimination.¹³⁸ Therefore, limiting all third-party sexual harassment claims to the workers' compensation realm undermines the civil rights impetus and equal opportunity justifications for sexual harassment jurisprudence.¹³⁹ Ultimately, accepting sexual harassment as an expected fact of employment would undermine the legitimacy of the courts' arduous development of sexual harassment case law since Title VII's passage and retard further efforts to ensure workplace equality because the absence of clear policy objectives and congressional purposes behind judicial decisions is more likely to propagate the perception of an unrestrained and activist judiciary.¹⁴⁰

V. CLAIMANT'S STATE COMMON LAW TORTS AND CONTRACTS CAUSES OF ACTION

A. States Should Adopt the Cumulative Remedy Theory so Third-Party Sexual Harassment Claimants Have Access to Common Law Tort Recovery for Claims that Workers' Compensation Laws Do Not Adequately Cover

State tort law should apply to employers that intentionally create or remain indifferent towards third-party sexual harassment, which ultimately results in employees' physical, mental, and dignitary injuries that workers' compensation laws may not fully cover.¹⁴¹ Allowing claimants cumulative

136. See *Millison v. E.I. du Pont de Nemours & Co.*, 501 A.2d 505, 514 (N.J. 1985).

137. See *Cremen v. Harrah's Marina Hotel Casino*, 680 F. Supp. 150, 159 (D.N.J. 1988).

138. See 76 AM. JUR. 3D *Proof of Facts* § 331, *supra* note 16, at § 1 (positing that courts came to understand that an employer that permits severe or pervasive harassment because of employee gender is discriminating against the employee in violation of Title VII).

139. See Ronald Turner, *Making Title VII Law and Policy: The Supreme Court's Sexual Harassment Jurisprudence*, 22 HOFSTRA LAB. & EMP. L.J. 575, 578 (2005) (acknowledging that courts have created a fundamental public value opposing workplace harassment by using Title VII's ban on sex discrimination to craft a body of sexual harassment case law as a form of "Quasi-legislative judicial gap-filling").

140. See Ronald J. Krotoszynski, Jr., *Constitutional Flares on Judges, Legislatures, and Dialogue*, 83 MINN. L. REV. 1, 51 (1998) (asserting that questions of judicial legitimacy remain even if judges possess the technical knowledge to make value judgments because traditional separation of powers theory holds that the judiciary must interpret and not make law, and a democratic citizenry will reject "unfettered and subjective judicial activism").

141. See *McCalla v. Ellis*, 341 N.W.2d 525, 529-30 (Mich. Ct. App. 1983) (stating that the claimant had a cognizable civil action for IIED resulting from workplace discrimination because compensation laws do not cover emotional and dignitary harms).

remedies most closely comports with the exclusivity doctrine's purposes because workers' compensation exclusivity depends on whether the employee can fully recover under a state's compensation statute, rendering common law remedies obsolete.¹⁴² Sexual harassment injuries often fall outside the scope of workers' compensation statutes, particularly when employees suffer nonphysical injuries in addition to physical harms.¹⁴³ Furthermore, the cumulative remedy theory adheres to the no-fault values embedded in workers' compensation laws because it limits workers' compensation recoveries solely to legitimate employment related injuries while allowing common law damages for claims that have traditionally been addressed under common law theories.¹⁴⁴

As a policy matter, employers must be held liable under state common law torts for the wrongs committed against those with whom it voluntarily transacts business.¹⁴⁵ Imputed liability is appropriate where the employer knows or should have known that the risk of harm to its employees was significant in light of the third party's characteristics vis-à-vis the employees' work conditions.¹⁴⁶ In fact, lawmakers and courts have prudently recognized that employers are in the best position to protect their employees from third-party misconduct.¹⁴⁷ Accordingly, courts justifiably impute common law liability to employers involved in joint enterprises with third parties or employers who profit from third-party patronage.¹⁴⁸

142. See, e.g., *Slayton v. Michigan Host, Inc.*, 332 N.W.2d 498, 500 (Mich. Ct. App. 1983) (arguing that workers' compensation exclusivity is not contingent on the characteristics of the cause of action but is based on whether the compensation laws give the employee a right to recover benefits).

143. See *id.* (noting that mental anguish such as humiliation, embarrassment, and outrage that flow from discrimination induced injuries fall outside compensation laws' scope).

144. See *Love*, *supra* note 135, at 878-79 (positing that the cumulative remedy theory permits sexual harassment claimants recovery for work-related disabilities under workers' compensation laws and provides tort damages for mental anguish and other unrelated dignitary harms).

145. See 2 CAL. GOVT. CODE ANN. § 12940 (j)(1) (2004) ("An employer may also be responsible for the acts of third parties, with respect to sexual harassment of employees, applicants, or persons providing services pursuant to a contract in the workplace, where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action."); see also W. PAGE KEETON ET AL., *PROSSER AND KEETON ON TORTS* 509 (1984) (observing that commentators have called for employers' vicarious liability for independent contractors' torts because employers primarily benefit from the relationship, they can demand indemnity from the independent contractors, and the employer usually initiates the commercial transaction).

146. See Restatement (Second) of Torts § 411(a) & (b) (1965) (stating that an employer who fails to exercise reasonable care in employing a careful and competent contractor will be subject to liability to others for that third-party contractor's misconduct).

147. See *Western Stock Center, Inc. v. Sevit, Inc.*, 578 P.2d 1045, 1048-50 (Colo. 1978).

148. See, e.g., *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599, 611 (S.D.N.Y. 1981) (finding that a building manager and his contracted cleaning agency faced joint liability for requiring the claimant to wear an attractive uniform, which due to its revealing nature, subjected the claimant to customer sexual harassment).

1. State Courts Should Permit Tort Causes of Action Against Employers when Third-Party Sexual Harassment Inflicts Emotional Distress on Employees

Claimants seeking to recover damages for emotional injuries from third-party sexual harassment should be allowed a tort cause of action against their employers for an IIED claim.¹⁴⁹ An employer that encourages or fails to terminate conditions resulting in third-party sexual harassment often exposes an employee to emotionally damaging abusive language or behavior.¹⁵⁰ More precisely, access to common law emotional distress claims is appropriate in sexual harassment cases where third parties' abusive language or behavior is sufficiently outrageous to an employee of ordinary sensibilities.¹⁵¹ In such actions, a trier of fact must determine whether an employee of ordinary sensibilities would have found the third-party sexual harassment sufficiently outrageous.¹⁵² This standard is particularly appropriate given that one determines the existence and extent of emotional injuries from the facts and circumstances of each individual case.¹⁵³

Moreover, employees claiming emotional injuries from third-party sexual harassment will justly benefit from a tort action because a factual inquiry into whether the harassment constituted sufficiently outrageous conduct would make it difficult for employers to achieve a motion for summary judgment.¹⁵⁴ Consequently, an employee will likely receive a trial.¹⁵⁵ An employer facing the prospects of a protracted trial will be more amenable to settling the claimant's third-party sexual harassment suit

149. See *Crihfield v. Monsanto Co.*, 844 F. Supp. 371, 374-78 (S.D. Ohio 1994) (concluding that the IIED claims were not barred by Ohio's workers' compensation laws because the employer failed to stop repeated acts of unwelcome sexual advances).

150. See *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993) (determining that psychological injury can be as severe and debilitating as physical harm, so courts must recognize employees' cause of action against an employer who inflicts such pain).

151. See Michael A. DiSabatino, Annotation, *Civil Liability for Insulting or Abusive Language-Modern Status*, 20 A.L.R.4th 773 (2004) (recognizing that a great weight of authority supports a cause of action for abusive language if it is sufficiently outrageous to cause emotional trauma to a person with normal sensibilities, which in turn produces physical injury).

152. See, e.g., *Kanzler v. Renner*, 937 P.2 1337, 1343 (Wyo. 1997).

153. See RESTATEMENT (SECOND) TORTS § 283(c) (1965) (stating that the reasonable person standard enables a trier of fact to look to community standards, which constitutes a flexible formula that takes into account individual differences and the particular facts and circumstances of each case).

154. See, e.g., *GTE Sw., Inc. v. Bruce*, 998 S.W.2d 605, 616 (Tex. 1999) (stressing that a court must determine whether a defendant's conduct may be regarded as so extreme and outrageous as to permit recovery, but where reasonable minds may differ, a jury must determine if the conduct is sufficiently outrageous and extreme).

155. See FED. R. CIV. P. 56(c) (establishing that the moving party has the burden of showing no genuine issues as to material fact and that reviewing courts must examine the record in a light most favorable to the nonmovant).

outside of court.¹⁵⁶ Thus, the employee will have bargaining leverage that can be utilized to obtain a more satisfactory settlement than he or she would have otherwise received under the workers' compensation law.¹⁵⁷

Moreover, an employer unwilling to settle a third-party sexual harassment suit outside of court faces significant obstacles at trial because hostile work environments make IIED claims' traditionally difficult "outrageous" element easier to prove.¹⁵⁸ Employees will likely succeed in imputing liability to employers for repetitive third-party sexual harassment because state courts are more likely to find that persistent harassment constitutes sufficiently "outrageous" conduct.¹⁵⁹ For example, state trial courts have readily found employers liable for claimants' third-party sexual harassment-related emotional injuries when employers failed to promulgate grievance procedures that would enable employees to report third-party sexual misconduct.¹⁶⁰

State courts also should not require a simultaneous physical manifestation of emotional trauma for claimants to assert a prima facie IIED claim.¹⁶¹ A contemporaneous showing of bodily injury with emotional harm is excessively burdensome for claimants alleging emotional harm from third-party sexual harassment because subsequent physical ailments may not appear until the statute of limitations has expired.¹⁶² Given that emotional injuries are sometimes the sole result of third-party sexual harassment, requiring claimants to demonstrate physical injuries has the same deleterious effect on employees' nonphysical claims as the requirements of past workers' compensation statutes.¹⁶³

156. See JAY E. GRENIG, ALTERNATIVE DISPUTE RESOLUTION APPENDIX P § A(1)(a) (3d ed. 2005) (articulating that mediation and neutral evaluations in alternative dispute resolution probe beyond legal issues, positions, and rights and help identify positions that give rise to solutions more satisfactory to both parties).

157. See Randy A. Decker, *Economics and Litigation: View from the Inside Looking Out*, 24. 4 LITIG. 36, 38 (1998) (finding that once parties determine that the facts and existing law warrant a settlement, attorneys can develop a settlement at a lesser cost during a dispute's early stages as compared to after parties devote substantial financial resources towards litigation).

158. See *Dias v. Sky Chefs Inc.*, 919 F.2d 1370, 1374 (9th Cir. 1990) (affirming that the jury correctly considered the employment context in which the alleged sexual harassment was committed in determining the conduct's outrageousness), *vacated on other grounds* 501 U.S. 1201 (1999).

159. See *Howard Univ. v. Best*, 484 A.2d 958, 986 (D.C. 1984) (ruling that the claimant made a prima facie IIED claim by demonstrating repeated sexual harassment and that evidence exhibiting repeated harassment was sufficient for a jury to find that the employer intentionally or deliberately created a hostile work environment).

160. See, e.g., *Payton v. New Jersey Tpk. Auth.*, 678 A.2d 279, 284 (N.J. Super. Ct. App. Div. 1996).

161. See, e.g., *Versland v. Caron Transp.*, 671 P.2d 583, 587 (Mont. 1983).

162. See *West Bend Mut. Ins. Co.*, 531 N.W.2d 636, 640 (Wis. Ct. App. 1995).

163. Cf. *Seto v. Willits*, 638 A.2d 258, 352-53 (Pa. Super. Ct. 1994) (holding that the claimant who mentally blocked out the sexual assaults could not toll the statute of

2. *State Courts Should Allow Third-Party Sexual Harassment
Claimants to Bring Invasion of Privacy Causes of Action*

State courts should permit claimants a common law invasion of privacy claim against an employer who knows or should have known of third-party sexual harassment leading to the invasion of privacy, but who failed to promptly terminate the hostile work conditions fostering the conduct.¹⁶⁴ An employee's common law invasion of privacy claim will particularly apply in jurisdictions where courts have broadly construed the term to include physical intrusions and verbal overtures, such as sexual touching and sexual propositions, in addition to the traditionally recognized property and other intangible intrusions.¹⁶⁵ An employee should also have a common law invasion of privacy claim against an employer when the hostile work environment leads to revelations about an employee's private parts or intimate information to third parties.¹⁶⁶

The United States Supreme Court's decision in *Griswold v. Connecticut*,¹⁶⁷ which first recognized a right to privacy from particular government intrusions, provides a compelling justification for a common law tort invasion of privacy claim in the third-party sexual harassment context.¹⁶⁸ In essence, the *Griswold* Court recognized a right to sexual privacy, establishing judicially-fashioned social policy that renders unconstitutional unwelcomed intrusions into individuals' private sex lives, both inside and outside the home.¹⁶⁹

limitations for her nonphysical harms because Pennsylvania's reasonable diligence requirement is an objective standard and the time it took the claimant to recognize her injuries was unreasonable). *But see* *Osland v. Osland*, 442 N.W.2d 907, 909 (N.D. 1989) (concluding that claimants suffering emotional trauma can toll the statute of limitations when they knew of the abuse but did not understand its connection to later emotional and physical difficulties).

164. *See* LINDEMANN & KADUE, *supra* note 28, at 357.

165. *See, e.g.*, *Pease v. Alford Photo Indus.*, 667 F. Supp. 1188, 1203 (W.D. Tenn. 1987) (concluding that touching a female employee's breasts, legs, and buttocks clearly supported an invasion of privacy claim).

166. *See* *Phillips v. Smalley Maintenance Services, Inc.*, 435 So. 2d 705, 711 (Ala. 1983); *see also* RESTATEMENT (SECOND) OF TORTS § 652(d) (1977) (explaining that one who publicizes the private life of another should be liable for invasion of privacy if the publicized matter would be highly offensive to a reasonable person and is not the public's legitimate concern).

167. 381 U.S. 479 (1965).

168. *See id.* at 485-86 (recognizing that the right to use contraception is a fundamental right protected by the Fourteenth Amendment's right to privacy, and this right of privacy is found in the "penumbras" of the Constitution's Bill of Rights).

169. *See id.* at 495; *see also* *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) ("To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior."); Bryan M. Tallevi, *Protected*

Although the *Griswold* Court's judicially-created right to sexual privacy has been limited to governmental actions, the decision's fundamental principles should nonetheless guide state courts determining whether an employee can assert a common law invasion of privacy claim.¹⁷⁰ For instance, an employer who creates a hostile work environment facilitates a third party's sexual intrusion into an employee's sexual sanctity, undermining the employee's liberty to determine her own sexual fate.¹⁷¹ In light of the *Griswold* decision showing immense respect toward reproductive autonomy and sexual privacy, state courts should hold employers who expose employees to third-party sexual harassment liable for invasion of privacy because the revelations are not the public's concern, and such disclosures are very likely to be highly offensive to a reasonable person.¹⁷²

*3. State Courts Should Impute Common Law Assault and Battery
Claims to Employers Who Intentionally or Deliberately Create or
Tolerate a Hostile Work Environment*

An employee's common law assault and battery claims against an employer for physical injuries suffered from third-party sexual harassment are most vulnerable to the exclusivity doctrine, but these claims should succeed under certain circumstances.¹⁷³ As a matter of prudent policy, courts should hold employers strictly liable for common law assault and battery claims when employers intentionally create or deliberately tolerate a hostile work environment that subjects employees to sexually offensive physical harm.¹⁷⁴ Applying strict liability to employers for third-party assault and battery, where the intentionally created employment conditions

Conduct and Visual Pleasure: A Discursive Analysis of Lawrence and Barnes, 7 U. PA. J. CONST. L. 1131, 1141-42 (2005) (positing that the *Griswold* Court recognized that a fundamental right to sexual privacy deserves protection outside of the residential confines and within the home).

170. See *Lawrence*, 539 U.S. at 562 (articulating that liberty presumes autonomy of the self, which includes freedom to engage in certain intimate conduct, and this personal liberty can be spatial or it can transcend physical dimensions).

171. Cf. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (noting that matters involving the most important and personal choices a person may make, which are central to personal dignity and autonomy, are protected by the Fourteenth Amendment's liberty interest).

172. See Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087, 2097 (2001) (asserting that privacy torts limit individual liberty of action in the interest of enforcing common social norms and protecting claimant's dignity).

173. See, e.g., *Brown v. Winn-Dixie Montgomery, Inc.*, 469 So. 2d 155, 159 (Fla. Dist. Ct. App. 1985) (finding that workers' compensation laws exclusively covered employee's injuries from a supervisor who assaulted her by grabbing her breast).

174. See *Byrd v. Richardson-Greenshields Sec., Inc.*, 552 So. 2d 1099, 1102 (Fla. 1989) (noting that applying workers' compensation exclusivity to assault and battery within a sexual harassment context violates worker's compensation laws' legislative intent and abrogates policies underlying tort law).

provide third parties an opportunity to engage in sexually offensive conduct, adheres to current trends recognizing an employment agreement as a unique relationship with special obligations.¹⁷⁵ In addition, strict liability for employers in cases of third-party sexual assault and battery is especially important because an employee's physical constitution, health, and safety are under heightened danger in instances of sexual misconduct, constituting inherent dangerousness.¹⁷⁶ This argument is based on the tort axiom that demands an elevated standard of care or conduct for those who maintain a dangerous agency involving a high degree of risk that can reasonably be foreseen under the circumstances.¹⁷⁷ Even in jurisdictions that do not apply the strict liability doctrine, an employer who intentionally maintains sexually hostile work conditions should foresee a high risk of sexual misconduct by his or her guests against respective employees.¹⁷⁸ Therefore, employers should be held to a higher standard of care in the jurisdictions that do not apply strict liability.¹⁷⁹

4. Employees' Tortious Breach of Public Policy Claims for Third-Party Sexual Harassment Are Appropriate when Employers Take Adversarial Employment Actions for Employees' Resistance to Third-Party Sexual Harassment

State courts should allow common law tortious breach of public policy causes of action against employers who maliciously or in bad faith dismiss employees for not succumbing to third-party sexual harassment.¹⁸⁰ In fact,

175. Cf. *Mangeris v. Gordon*, 580 P.2d 481, 483 (Nev. 1978) (per curiam) (holding that a defendant has a duty to warn foreseeable claimants of foreseeable harms in cases where the defendant bears a special relationship to the claimants or to the dangerous persons). *But see* 1 J.D. LEE & BARRY A. LINDHALL, *MODERN TORT LAW LIABILITY AND LITIGATION* §3.10 (Supp. 1996) (assessing that courts are sharply split on imputing common law liability to reasonable people with a duty to foresee that others might violate the law and with a duty to take precautions against such violations).

176. See RESTATEMENT OF (SECOND) TORTS § 520(e) & (f) (1965); see also Beth A. Quinn, *The Paradox of Complaining, Law, Humor, and Harassment in the Everyday Work World*, 25 LAW & SOC. INQUIRY 1151, 1154 (2000) (finding that sexual harassment claimants suffer from severe health effects such as anxiety, nervousness, sleeplessness, depression, and lowered satisfaction with life).

177. See LEE & LINDENHALL, *supra* note 175, at § 3.15. *But see* Sasha Ransom, *How Far is Too Far? Balancing Sexual Harassment Policies and Reasonableness in the Primary and Secondary Classrooms*, 27 SW. U. L. REV. 265, 276 (1997) (maintaining that imputing any liability for a third-party's sexual misconduct to an employer who creates a hostile atmosphere constitutes an extremely expansive and inapt assignment of liability).

178. See, e.g., *Little v. Windemere Relocation*, 301 F.3d 958, 967 (9th Cir. 2002) (denying the defendant's motion for summary judgment because he reduced the claimant's salary and fired her after she reported rape by a customer, constituting a reaction that arguably reinforced future harassment).

179. See LEE & LINDENHALL, *supra* note 175, at § 3.15 (positing that a higher degree of care is expected from persons creating situations involving an unusually high risk of harm).

180. See, e.g., *Monge v. Beebe Rubber Co.*, 316 A.2d 549, 551-52 (N.H. 1974) (concluding that termination of an employment at will contract is not in the best interest of

numerous state courts have found a common law breach for retaliatory discharge by examining the public policy and economic efficiencies of terminating employment based on an employee's refusal to submit to other employees' sexual harassment.¹⁸¹ Courts aptly weigh employers' interests in running a business as they see fit against employees' interest in justly maintaining employment.¹⁸² More precisely, state courts recognize that retaliatory firing for refusing third-party sexual advances simply is not economically efficient nor sound public policy because highly qualified employees are too often removed from the workplace for inefficient reasons.¹⁸³ Further, courts are cognizant of the manifest injustice of employees succumbing to sexual aggression as a means of maintaining employment benefits.¹⁸⁴

The line of state cases permitting a common law breach of public policy action against employers for co-employee sexual harassment should serve as a model for jurisdictions seeking to extend similar tort liability to third-party sexual harassment claims, for such allegations carry similar public policy and economic efficiency implications.¹⁸⁵ After all, the public policy and economic rationales for rejecting workplace gender disparity serve as the thrust for the EEOC guidelines, as well as the development of sexual harassment case law finding employer liability for third-party sexual harassment in cases where the employer knew or should of have known of the hostile work environment.¹⁸⁶

the economic system or public good when termination is based on bad faith or malice in retaliation for an employee's refusal to submit to sexual harassment); *see also* Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 *YALE L.J.* 763, 766 (1983) (reasoning that implied contractual protections are paternalistic, but that courts should apply such protections in order to promote economic efficiency and distributive justice).

181. *See, e.g.*, *Harrison v. Edison Bros. Apparel Stores*, 924 F.2d 530, 532-33 (4th Cir. 1991) (asserting that retaliatory discharge falls under the public policy exception to an at-will contract, for the employee's rejection of the manager's sexual advances amounted to a refusal to engage in prostitution under North Carolina law).

182. *See Monge*, 316 A.2d at 551.

183. *See* Congresswoman Sheila Jackson Lee, *Introduction*, 23 *T. MARSHALL L. REV.* 279, 280 (1998).

184. *See, e.g.*, *Foster v. Albertsons, Inc.*, 835 P.2d 720, 723-24 (Mont. 1992) (asserting that sexual harassment is a violation of public policy in light of Montana's constitution, which seeks to preserve human dignity and extend equal protection of the laws).

185. *See* *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986); *see also* University of Minnesota Aurora Center, *Effects of Sexual Harassment*, <http://www1.umn.edu/aurora/effectsofsexualharassment.pdf#search='economic%20effects%20of%20sexual%20harassment'> (last visited Mar. 20, 2007) (finding that sexual harassment reduces worker productivity, increases absenteeism and benefits claims, creates job search expenses, and augments turnover and employee replacement costs).

186. *See* 42 U.S.C. § 2000e-2(a)1 (2006).

B. State Courts Should Recognize Employees' Common Law Contract Causes of Action Against Employers for Third-Party Sexual Harassment when Employers Engage in Bad Faith Conduct or Interfere with Employees' Freedom to Contract

1. State Courts Should Enforce Employees' Breach of Covenant of Good Faith and Fair Dealings Against Employers

Although employees facing third-party sexual harassment may be in an at-will employment agreement with their employers, state courts should nonetheless enforce a common law action for breach of the covenant of good faith when employers terminate an at-will employment for reasons, such as resistance to third-party sexual harassment.¹⁸⁷ Furthermore, courts should infer an implied employment contract in cases where an employer issues specific sexual harassment guidelines without clearly reserving the right to terminate the employment at will.¹⁸⁸ In these cases, employees who remain with their employers for long periods can convincingly assert that they were in a constructive contractual employment agreement and that the employer's failure to adhere to its own sexual harassment guidelines constitutes a breach of an implied contractual agreement.¹⁸⁹ Additionally, courts can more readily ascertain the parties' reasonable expectations and their course of dealings during the employment relationship in order to determine whether a termination, ostensibly for unsatisfactory performance, actually involves employer bad faith.¹⁹⁰

2. State Courts Should Recognize Employees' Common Law Contract Interference Claims Against Employers Who Encourage Third-Party Sexual Harassment

State courts should allow employees to bring state common law claims of contractual interference against employers who intentionally interfere with their employees' contractual performance by inducing or remaining deliberately indifferent towards third-party sexual harassment.¹⁹¹ Although

187. See STEVEN J. BURTON & ERIC G. ANDERSON, CONTRACTUAL GOOD FAITH: FORMATION, PERFORMANCE, BREACH, ENFORCEMENT 94 (1995) (recognizing that where state law requires good faith termination, courts look to the normal course of events to determine whether the reasons for termination were within the parties' reasonable expectations).

188. See, e.g., *Hew-Len v. F.W. Woolworth*, 737 F. Supp. 1104, 1108 (D. Haw. 1990).

189. See, e.g., *Noye v. Hoffman-LaRoche Inc.*, 570 A.2d 12, 15-16 (N.J. Super. Ct. App. Div. 1990) (Bilder, J., dictum) (noting that employees can recover for breach of contract when employers fail to follow their articulated sexual harassment procedures).

190. See BURTON & ANDERSON, *supra* note 187, at 94-95; see also *Kree Inst. of Electrolysis v. Fageros*, 478 S.W.2d 569, 571 (Tex. Civ. App. 1972) (examining the contractual employment relationship and course of dealings in deciding that the employer terminated the employment relationship for bad faith reasons, even though the employer alleged poor performance).

191. Cf. *Newsome v. Cooper-Wiss, Inc.*, 347 S.E.2d 619, 622 (Ga. Ct. App. 1986)

most jurisdictions require that an enforceable employment contract exist as a precondition to applying the contractual interference doctrine, more state courts should recognize that an employee in an at-will relationship can assert a contractual interference claim against an employer who intentionally creates or remains deliberately indifferent towards a hostile work environment leading to third-party sexual harassment.¹⁹² This particular course of action is logical because, in determining whether to impute common law contractual interference liability to an employer, courts also look to the employer's conduct to discern if the employer acted outside the scope of its authority.¹⁹³ Clearly, an employer who intentionally creates or deliberately tolerates a hostile work environment that exposes its employees to third-party sexual harassment acts outside the scope of his or her authority by intentionally endangering its employees' health and welfare.¹⁹⁴ Courts should not accept this behavior as part of an employer's power.¹⁹⁵ Rather, courts should look to determine whether an employer acted outside the scope of authority in determining contractual interference applicability because it would be inequitable if an employer can intentionally interfere with employees' faithful execution of their duties for personal pecuniary benefit.¹⁹⁶

C. State Courts Should Award Employees Punitive Damages in Particularly Reprehensible Third-Party Sexual Harassment Suits

State courts should impose punitive damages in addition to compensatory damages against employers for the common law wrong of

(explaining that at-will employment relationships retain a contractual right, which may not be unlawfully interfered with by a third person).

192. *See, e.g.,* Cummings v. Walsh Const. Co., 561 F. Supp. 872, 833 (S.D. Ga. 1983) (rejecting that an employee, who was a laborer at a construction site alleging that she was relegated to hard labor after rejecting a coworker's sexual advances, could assert a contractual interference claim because her employment was at-will and the employer fired her because she refused to perform her new job duties). *But see* Fields v. Cummins Employees Fed. Credit Union, 540 N.E.2d 631, 639-40 (Ind. Ct. App. 1990) (stressing that at-will employees can assert a contractual interference claim when the hostile environment compels employees to accept demotion).

193. *See, e.g.,* Favors v. Alco Mfg. Co., 367 S.E.2d 328, 331-32 (Ga. Ct. App. 1988).

194. *Cf.* O'Connell v. Chasdi, 511 N.E.2d 349, 351-52 (Mass. 1987) (observing that the right to commit intentional torts was not part of workers' compensation's general compromise because intentional torts are not a part of employment or necessary for conducting business).

195. *Cf.* Jablonski v. Multack, 380 N.E.2d 924, 927 (Ill. App. Ct. 1978) (clarifying that an employer cannot claim no-fault immunity for intentionally injurious conduct because legislatures did not recognize employers' intentional misconduct as a part of an employer's authority under Illinois' workers' compensation laws).

196. *See* Schoenheider, *supra* note 3, at 1480 (explaining that courts recognize an interference with contractual relationship claim when there is an actual interference with an employment relationship by someone with a malicious mind).

subjecting their employees to third-party sexual harassment.¹⁹⁷ Certainly, the more reprehensible an employer's conduct in acquiescing to or facilitating the third-party sexual harassment, the larger the punitive damages should be in proportion to the compensatory damages.¹⁹⁸ In accordance with the Court's definition of reprehensibility, state courts should find that employer conduct is extremely reprehensible and thus justifies a significant punitive award when the employer deliberately exposes his or her employees to third-party sexual harassment,¹⁹⁹ or engages in deceit and manipulation by wrongfully terminating an employee resisting the third-party sexual harassment.²⁰⁰ Such egregious employer conduct blatantly and recklessly jeopardizes the physical safety of the employee, in addition to undermining the fundamental fairness of the employment relationship. Therefore, state courts are correct to impose substantial punitive awards, which also serve as exemplary damages²⁰¹ intended to punish employers' intentional conduct and deter similarly reprehensible actions by other employers.²⁰²

CONCLUSION

The purpose of state workers' compensation laws is to provide expedient and equitable relief for employees who suffer primarily work-related physical injuries, while shielding employers from fault.²⁰³ Unfortunately, some employers continue to usurp exclusivity and no-fault provisions to deny employees supplemental common law causes of action for third-party sexual harassment wrongs.²⁰⁴ State courts need to confine workers'

197. *See Madeja v. MPB Corp.*, 821 A.2d 1034, 1050-51 (N.H. 2003) (ruling that a thirty-five to one punitive to compensatory ratio was appropriate against an employer for sexual harassment because of the difficulty of measuring the damages to the victim's personal dignity and the employer showed reckless indifference to the employee's rights not to be sexually harassed or retaliated against).

198. *See Thoreson v. Penthouse Int'l, Ltd.*, 583 N.Y.S.2d 213, 218 (N.Y. App. Div. 1993) (Kassal, J., concurring) ("As the trial court observed, 'Sexual slavery was not a part of plaintiff's job description,' despite the fact that her employment involved the commercial exploitation of her physical appearance. . . . The sexual exploitation and harassment found to have occurred by the trier of fact, which took the form of coercive sexual relationships designed to further . . . financial interests, subjected plaintiff to levels of humiliation and degradation that no civilized society should tolerate.").

199. *See, e.g., Henderson v. Simmons Foods, Inc.*, 217 F.3d 612, 618-19 (8th Cir. 2000).

200. *See Rustad, supra* note 36, at 37.

201. *See* RESTATEMENT (SECOND) OF TORTS § 903 (1979) (explaining that punitive damages serve as exemplary damages because they are intended to discourage the tortfeasor and similarly situated individuals from similar future conduct).

202. *See Van Horn v. Specialized Services, Inc.* 241 F. Supp. 2d 994, 1013 (S.D. Iowa 2003).

203. *See, e.g., Grammatico v. Indus. Comm'n*, 90 P.3d 211, 218-19 (Ariz. Ct. App. 2004).

204. *See Harrison v. Franklin County Sheriff's Dept.*, No. 00AP-240, 2000 WL 1808303, at *1 (Ohio Ct. App. Dec. 12, 2000) (emphasizing that claimants are denied all

compensation statutes to their originally intended purposes in order to provide employees cumulative remedies where the workers' compensation laws provide insufficient recovery or where the statutes are simply inapplicable.²⁰⁵

Unless state courts reject the exclusivity doctrine for employees' third-party sexual harassment suits, employers will retain an incentive to prioritize monetary gain at the expense of employees' health and safety. Moreover, without cumulative remedies, claimants will continue to receive inadequate compensation for third-party sexual harassment injuries when their claims will not satisfy workers' compensation laws' requirements.²⁰⁶ On the other hand, a cumulative remedy approach will better comport with Title VII's gender equality purposes because it will appropriately impute fault to employers who subject their employees to third-party sexual harassment, while ensuring employees a full recovery for their physical, mental, and economic losses.²⁰⁷

relief when workers' compensation laws serve as the exclusive remedy for sexual harassment injuries because employees with nonphysical injuries incur minimal economic losses and are therefore ineligible for compensation).

205. *See Brooke v. Rest. Servs. Inc.*, 906 P.2d 66, 68-70 (Colo. 1995).

206. *See, e.g., Sisk v. Tar Heel Capital Corp.*, 603 S.E.2d 564, 568 (N.C. Ct. App. 2004).

207. *See, e.g., Byrd v. Richardson-Greenshields Sec., Inc.*, 552 So. 2d 1099, 1104 (Fla. 1989).