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Employment Law
Fall 2001
Professor Montoya

FINAL EXAM

INSTRUCTIONS

1. Please write your exam number on each Bluebook.

2. PLEASE WRITE LEGIBLY and write on every other line.

3. This is a closed book exam. Therefore, you should have not brought any additional materials with you to the exam room.

4. You will have four hours to complete this exam.

DAINA & ALEJANDRO, P.C.

Memorandum

To: **Employment Law Associates**
From: **Jamal Williams**

As you may know, our law firm provides legal counsel to Computers of NorthAmerica, Inc. ("CNA") in all its employment law matters. D&A has agreed to represent CNA in employee disputes which are to be resolved, when possible, without litigation. We also provide training and other services to help anticipate and prevent employment law problems for CNA.

CNA is a multi-national corporation with a production and sales facility in Albuquerque, New Mexico. CNA has won some government contracts but they are not defense related; most of its business is with private, non-defense firms.

Dr. Mohammed ("Mo") Abdullah has worked at CNA since December 3, 1998. He began as a computer programmer and has been promoted, most recently to design team manager. His evaluations have consistently been very good to excellent on all parameters. Dr. Abdullah and his family emigrated from Iran in the 1970's, and he is a permanent legal resident of the U.S. He is a devout Muslim but he has never been known to make any inappropriate religious or political comments to his co-workers. He is considered open and affable and is well liked by his co-workers.

After the attacks on the World Trade Center and the Pentagon on September 11, 2001, the section supervisor Richard Garcia ordered that a U.S. flag be hung in the CNA conference room and sent an email to the employees encouraging them to "show their patriotism by wearing red, white and blue." Mr. Garcia also began to make derogatory comments about Dr. Abdullah's ethnic background. On one occasion, he told a group of employees that "all the 'Arabs' like Mo over here should be rounded up and sent back." Another time he jokingly told Dr. Abdullah that he was firing him because "he and 'other Arabs' were a threat to the security of the U.S."

On November 20, 2001, Mr. Garcia called Dr. Abdullah into a meeting with two other employees. He told Dr. Abdullah that he planned to call the FBI and the INS to suggest that they investigate his background and his associations. He asked him why he wasn't a naturalized citizen and wanted to know when Dr. Abdullah had last traveled to the Middle East. Dr. Abdullah objected and said that he had been a loyal employee of the company and had the highest respect for this country. As Dr. Abdullah rose to leave, Mr. Garcia pushed him back into the chair and stepped in front of him. Mr. Garcia then directed one of the other employees to call the FBI but the employee objected and refused. Mr. Garcia

then moved towards the phone and Dr. Abdullah darted out of the office. Mr. Garcia yelled across several cubicles at Dr. Abdullah, "You're fired so get your 'Arab' ass out of this office. If you don't like it, tell it to the FBI." Mr. Garcia was unaware that in October the FBI had questioned and released Dr. Abdullah.

Dr. Abdullah was seen by his doctor in late September for a skin rash on his torso and arms and for insomnia. His symptoms were diagnosed as stress-related. He was given a prescription for sedatives. At the time, his doctor also advised him that he was suffering from hypertension. On November 21, 2001, Dr. Abdullah suffered an emotional breakdown and was hospitalized in the psychiatric hospital. Dr. Abdullah's wife called CNA and said that the doctor had stated that Dr. Abdullah is temporarily fully disabled but that the condition may become permanent.

Our firm has learned that Dr. Abdullah has hired Brown, Hall & Ruiz, P.C., a local firm, to represent him. Their attorneys have already talked with some CNA employees who may be feeling predisposed towards Dr. Abdullah.

This memo contains the information I have gathered from our initial interviews as well as the cases my law clerk has quickly located. I have a meeting with Ann Gilkey at CNA this afternoon at 2 p.m. so you won't have time for more research. Please prepare a memorandum analyzing the following issues: What claims are available to Dr. Abdullah? What defenses are available to CNA? What issues must still be researched? Include your ideas about how we should plan to investigate the case and structure our initial discovery in this case? Also can we do anything right away to minimize CNA's legal exposure?

Brown, Hall & Ruiz, P.C.
300 Tijeras, N.W.
Albuquerque, NM 87103
505-555-1234

December 10, 2001

Ms. Anne Gilkey
President and CEO
Computers of NorthAmerica, Inc.
9999 Pan American N.E.
Albuquerque, NM 87109

Dear Ms. Gilkey:

We have been retained by Dr. Mohammed Abdullah to investigate and pursue all legal claims against your firm arising out of the incidents leading to his termination by Mr. Richard Garcia on November 20, 2001. As you were informed by Dr. Abdullah's wife, he has been diagnosed with depression and is currently hospitalized. Therefore, we ask that you refrain from contacting him directly and instead address any communications to our firm.

We are also authorized to inform you that the Arab-American Legal Defense Fund and Anti-Defamation League ("AALDF") has agreed to assist with Dr. Abdullah's representation. The AALDF's organizational mission is to identify and assist with legal disputes involving persons of Middle Eastern ethnicity that may lead to useful legal precedents.

Thank you.

Sincerely,

Monica Ruiz

Monica Ruiz, Esq.

cc: Dr. and Mrs. Mohammed Abdullah

LEXSEE 105 nm 167

Robert Lee CANDELARIA, Plaintiff-Appellee, v. GENERAL ELECTRIC COMPANY, a corporation, Employer, and Electric Mutual Insurance Company, Insurer, Defendants-Appellants

No. 7841

COURT OF APPEALS OF NEW MEXICO

105 N.M. 167; 730 P.2d 470; 1986 N.M. App. LEXIS 676

February 13, 1986

OPINION BY:
ALARID

OPINION:

[*168] [**471] **OPINION**

Defendants appeal from the judgment of the district court in favor of Robert Lee Candelaria (plaintiff). This appeal raises issues of first impression: whether and under what circumstances psychological disability predicated upon psychological injury that arises from work-related stress is compensable under the New Mexico Workmen's Compensation Act (Act), NMSA 1978, Sections 52-1-1 to -69 (Orig.Pamp. and Cum.Supp.1985). Defendants also appeal the trial court's failure to grant postjudgment relief, the amount of attorneys' fees awarded, and the award of interest on the judgment. We affirm.

[*169] [**472] **FACTS**

Plaintiff is forty-three years old and has been married for seven years. He has a high school education and was [***2] in the service for three years. He testified that he had no problems in the service and was honorably discharged. He then began to work as a "plater." Eventually, he became a foreman supervising platers and later became a plant manager overseeing a substantial number of employees. He held this position for thirteen or fourteen years until, in 1977, the owner sold the plant, leaving plaintiff without a job. Plaintiff came to New Mexico to look for work and had to settle for a janitor job. Subsequently, plaintiff worked as a laborer and for a company making roof trusses. He testified that he had no problems with these jobs and had no clashes with his supervisors. Plaintiff then went to work for General Electric (G.E.), as a janitor, hoping that he could advance to a plating job.

Plaintiff first worked as a janitor at G.E., but soon became a forklift operator. Thereafter, he began to work as a "process varied" preparing jet engine parts for plating. According to plaintiff, he had no emotional difficulties with his supervisors during this period of time. At first, plaintiff worked during the night shift under Gianini for a period of between six months and a year. Plaintiff [***3] testified that except for one instance where he had refused to take a shortcut requested by Gianini, he had no problems while he worked the night shift.

Plaintiff described the process of his work. Basically, he prepared various components of jet engines for plating. The parts would be cleaned and then placed in acid, cleanser chemical or plating baths for various periods of time. A timer would go off when the part was to be removed from the bath. More than one part would be going through this process at any given time. Plaintiff testified that this was a full-time job.

Plaintiff's problems began when he was transferred to the day shift and began working under the supervision of Jewett. At first, plaintiff had basically the same job. After a few weeks, however, Jewett began to assign more duties to plaintiff. An employee with a different job classification quit, and plaintiff was required to perform this employee's job in addition to his own. Plaintiff testified that he received no help from other employees in performing these additional tasks. The performance of these additional tasks was complicated by the fact that parts were being timed while plaintiff was doing these [***4] tasks and by the fact that Jewett would tell

plaintiff to drop everything in order to work on the "hot" (priority) items.

Plaintiff complained to Jewett, but was told that he had to do the work assigned to him. Plaintiff then went to the union and various plant officials, but nothing was done. Plaintiff then went to the Labor Board, but was told to talk to the plant manager. Plaintiff did talk to the plant manager and was told a new worker would be hired in three weeks. Three weeks passed, and no new worker was hired.

On or about May 13, 1981, plaintiff again went to see the plant manager. The manager said he had been too busy and needed additional time. Plaintiff returned to his work station and was told to go outside to steam clean some parts. Plaintiff felt nervous. Jewett came outside and started giving plaintiff more orders. Plaintiff started shaking and felt like killing Jewett. Plaintiff formed an intent to kill Jewett but changed his mind. Plaintiff ran inside the building; he was crying, sweating and had chest pains. Plaintiff went home where he was later found by his wife still crying and shaking. His wife called the family doctor.

A series of hospitalizations [***5] began for psychological problems. First, plaintiff was hospitalized for three months at Vista Sandia on a voluntary basis. He then returned to G.E., was again placed under Jewett and asked to perform the same tasks. Soon, plaintiff was suffering from nervousness, sweating and chest pain. He was again hospitalized at Vista Sandia for three months. Plaintiff returned to work at G.E., again was placed under Jewett and asked to perform the same tasks. According [*170] [**473] to plaintiff, "Jewett didn't slack off one bit." Plaintiff had a nervous breakdown and was again hospitalized at Vista Sandia. This happened again and again for a total of four times. Plaintiff told officials at G.E. that he would work as a janitor, if necessary, if they would not place him under Jewett again. After the fourth hospitalization, plaintiff was finally placed under another supervisor. However, after attending a deposition, plaintiff saw Jewett, got chest pains and began to hyperventilate. He was then hospitalized for the fifth time in January 1983.

Dr. Gerard S. Fredman, a psychiatrist, testified that plaintiff was suffering from anxiety and depression disorders, and from paranoid [***6] ideations. The symptoms of anxiety and depression were severe. Dr. Fredman concluded that events at work had triggered the symptom formation. Dr. Fredman believed that plaintiff's problems arose from the fact that he could not cope with work. The doctor testified that to a reasonable degree of medical probability, plaintiff's disability was stimulated by the conflict with Jewett and by plaintiff's interpretation of that conflict. Dr. Fredman stated that there were things in plaintiff's history that could have predisposed him to the breakdown.

Dr. Fredman attached critical significance to the conflict with Jewett because plaintiff had done well in other settings. Dr. Fredman also evaluated the possibility that plaintiff was malingering. He concluded that plaintiff was not malingering because the physical symptoms were too sophisticated to fake, because plaintiff had made a genuine (as opposed to an attention-getting) suicide attempt, and because plaintiff had made diligent attempts to return to work.

More medical testimony was provided by Dr. Stephen I. Sacks, another psychiatrist. Dr. Sacks' deposition was read into the record. Dr. Sacks diagnosed plaintiff as suffering [***7] from affective or mood disorders involving anxiety and depression. He believed that these disorders were a reaction to the stress at work. Dr. Sacks stated that he was unable to identify any source of plaintiff's disability other than the stress at work.

Dr. Paul Rodriguez, a clinical psychologist, testified for defendants. After administering psychological tests to plaintiff, Dr. Rodriguez concluded that plaintiff had a "schizotypical" personality. Dr. Rodriguez found it difficult to believe that plaintiff's problems were caused by the particular job situation at G.E. because a schizotypical personality is a long-standing problem. However, Dr. Rodriguez refused to say whether the work situation at G.E. aggravated any pre-existing problems because he had insufficient information as to plaintiff's history.

On cross-examination, Dr. Rodriguez was asked a long, hypothetical question in which he was asked to assume, among other things, that plaintiff had no prior difficulties in other settings, was under stress at work and had a nervous breakdown after a confrontation with his foreman. Dr. Rodriguez admitted that, if all the facts in the hypothetical were true, the work situation [***8] may have aggravated plaintiff's problems.

After trial, the court found plaintiff to be temporarily totally disabled from May 13, 1981 to January 28, 1983, and permanently partially (25%) disabled thereafter. The trial court found that an accidental injury took place on May 13, 1981, and before each subsequent hospitalization.

DISCUSSION

I. COMPENSABILITY OF PSYCHOLOGICAL INJURY CAUSED BY EMOTIONAL STRESS

A. Recognition of the Cause of Action

Defendants' arguments on appeal are related to the issue of whether a workman may recover compensation benefits where he has sustained disability predicated upon a psychological injury, caused by emotional stress, which is unrelated to any accompanying physical injury. Although this question has been raised previously in this jurisdiction, recovery has been denied based upon the facts of each particular case. *See* [*171] [**474] *Kern v. Ideal Basic Industries*, 101 N.M. 801, 689 P.2d 1272 (Ct.App.1984) (a mental breakdown suffered as a result of termination was not an injury "arising out of" employment because it was not related to the performance of the employee's employment duties). No case has [***9] held or suggested that a psychological injury caused by stress arising out of and in the course of employment would not be compensable.

There is a divergence of opinion as to whether workmen's compensation benefits are payable due to the disability or death of a workman caused by shock, excitement or emotional disturbance unaccompanied by physical impact or violence on the workman's body. *See e.g. State Compensation Fund v. Industrial Commission*, 24 Ariz.App. 31, 535 P.2d 623 (1975) (mental or emotional shock resulting in disability is compensable without physical injury); *Burlington Mills Corp. v. Hagood*, 177 Va. 204, 13 S.E.2d 291 (1941) (recognizing recovery without physical impact). *Contra In re Loague*, 450 P.2d 492 (Okla.1969); *In re Korsun's Case*, 354 Mass. 124, 235 N.E.2d 814 (1968); *Samolin v. Trans World Airlines, Inc.*, 20 App.Div.2d 160, 245 N.Y.S.2d 628 (1963); *Liscio v. S. Makransky & Sons*, 147 Pa.Super. 483, 24 A.2d 136 (1942).

A "distinct majority" of out-of-state courts have held that an emotional or mental stimulus can produce a compensable "nervous" injury. 1B A. Larson, *Workmen's Compensation Law*, § 42.23 (1985). *See e.g. American* [***10] *National Red Cross v. Hagen*, 327 F.2d 559 (7th Cir.1964); *Carter v. General Motors Corp.*, 361 Mich. 577, 106 N.W.2d 105 (1960); *Wolfe v. Sibley, Lindsay & Curr Co.*, 36 N.Y.2d 505, 369 N.Y.S.2d 637, 330 N.E.2d 603 (1975); *Bailey v. American General Insurance Co.*, 154 Tex. 430, 279 S.W.2d 315 (1955). *See also* Annot., 97 A.L.R.3d 161 (1980 & Supp.1985). A substantial number of courts, however, still deny recovery in these cases. *Id. See e.g. Jacobs v. Goodyear Tire & Rubber Co.*, 196 Kan. 613, 412 P.2d 986 (1966); *Johnson v. Hartford Accident & Indemnity Co.*, 196 So.2d 635 (La.App.1967); *Vernon v. Seven-Eleven Stores*, 547 P.2d 1300 (Okla.1976). The majority of courts that have dealt with the question have held that this emotional or mental stimulus may be gradual. Larson, *supra*, § 42.23(b). *See e.g. American National Red Cross; Carter.*

New Mexico law points us in the direction toward recognizing that an emotional or mental stimulus can produce a compensable psychological injury. In a series of cases involving physical injuries at the workplace, the supreme court has held that a resulting psychological disability is compensable. *Webb v. Hamilton* [***11] , 78 N.M. 647, 436 P.2d 507 (1968), *overruled on other grounds, American Tank & Steel Corp. v. Thompson*, 90 N.M. 513, 565 P.2d 1030 (1977); *Ross v. Sayers Well Servicing Co.*, 76 N.M. 321, 414 P.2d 679 (1966); *Jensen v. United Perlite Corp.*, 76 N.M. 384, 415 P.2d 356 (1966), *overruled on other grounds, American Tank & Steel Corp.; Gonzales v. Gackle Drilling Co.*, 70 N.M. 131, 371 P.2d 605 (1962). In a series of cases involving physical disabilities, both the supreme court and this court have held that an injury caused by emotional stress at work is compensable. *Salazar v. County of Bernalillo*, 69 N.M. 464, 368 P.2d 141 (1962) (cerebral hemorrhage caused by stressful events at work); *Little v. J. Korber & Co.*, 71 N.M. 294, 378 P.2d 119 (1963) (emotional upset at work caused heart attack); *Crane v. San Juan County, New Mexico*, 100 N.M. 600, 673 P.2d 1333 (Ct.App.1983) (work stress caused high blood pressure which caused hemorrhage in eye). Thus, existing case law has established that a psychological disability is a "disability" within the meaning of the Act, and that physical disabilities resulting from work-related emotional stress are compensable. If both [***12] physical trauma leading to psychological disability, and emotional stress, leading to physical disability are compensable, it follows that emotional stress leading to psychological disability comes within the Act. We hold that a psychological disability caused by stress arising out of and in the course of employment is compensable. *See Townsend v.* [*172] [**475] *Maine Bureau of Public Safety*, 404 A.2d 1014 (Me.1979).

Implicit in our holding is the recognition that a gradual, non-traumatic emotional condition arising from stress may be an accidental injury under Section 52-1-28 of the Act. This section makes "an accidental injury arising out of, and in the course of *** employment" a pre-condition to coverage. *Id.* The language makes no distinction between physical and mental injuries. An accidental injury is merely an unlooked-for mishap, or untoward event, that is not expected or designed. *Bufalino v. Safeway Stores, Inc.*, 98 N.M. 560, 650 P.2d 844 (Ct.App.1982). An accident is not limited to a sudden injury, nor is it limited to any time test. *Gilbert v. E.B. Law & Son, Inc.*, 60 N.M. 101, 287 P.2d 992 (1955). Such injury, moreover, may be produced [***13] gradually and progressively. *Webb v. New Mexico Publishing Co.*, 47 N.M. 279, 141 P.2d 333 (1943). The statutory language does not operate to bar an emotional condition arising from stress.

The language serves as a reflection of the basic purpose of the Act, which is to ensure that industry carry the burden of personal injuries suffered by workmen in the course of their employment. *Gonzales v. Chino Copper Co.*, 29 N.M. 228, 222 P. 903 (1924); *Casillas v. S.W.I.G.*, 96 N.M. 84, 628 P.2d 329 (Ct.App.1981). Our inclusion of a gradual, non-traumatic emotional injury does no more than track that purpose. In *Royal State National Insurance Co. v. Labor and Industrial Relations Appeal Board*, 53 Haw. 32, 487 P.2d 278 (1971), the Hawaii Supreme Court eloquently articulated why this is so. That court interpreted "accidental injury" in a statutory provision similar to Section 52-1-28, and concluded:

HRS [Hawaii Revised Statutes] § 386-3 makes no differentiation between organic and psychic injuries arising out of the employment relationship and we do not believe this court should impose such a distinction. The legislature has chosen to treat work-related injuries as a [***14] cost of production to be borne by industry and, ultimately, through the consumption process, by the community in general. (Citation omitted). In today's highly competitive world it cannot be doubted that people often succumb to mental pressures resulting from their employment. These disabilities are as much a cost of the production process as physical injuries. The humanitarian purposes of the Workmen's Compensation Law require that indemnification be predicated not upon the label assigned to the injury received, but upon the employee's inability to work because of impairments flowing from the conditions of his employment.

Id. at 38, 487 P.2d at 282 (citation omitted). *See also* Annot., 97 A.L.R.3d at 168-69.

Defendants are in error, therefore, when they assert that plaintiff suffered no accidental injury. Substantial evidence supported the trial court in finding that an accidental injury took place on May 13, 1981 (the first hospitalization), and before each subsequent hospitalization.

B. "Arising Out of" Employment

Our holding, however, raises other issues argued on appeal. We must, in recognizing a new basis for recovery, determine what is required [***15] for the psychological injury to "arise out of" the particular employment. Section 52-1-28. We first discuss the "arising out of" component in New Mexico and its relationship to the present case. We next discuss the approach of other jurisdictions, and the approach we will adopt.

It is unnecessary that a workman be subjected to an unusual or extraordinary condition for an injury to be compensable. *See, e.g., Lyon v. Catron County Commissioners*, 81 N.M. 120, 464 P.2d 410 (Ct.App.1969); *Webb v. New Mexico Publishing Co.; Alspaugh v. Mountain States Mutual Casualty Co.*, 66 N.M. 126, 343 P.2d 697 (1959). In order to arise out of employment, an injury need only be causally related to the performance of the job duties. *See Wilson v. Richardson Ford Sales, Inc.*, 97 N.M. 226, 638 P.2d 1071 [*173] [**476] (1981). In New Mexico, however, it is not sufficient that the injury occurs at work; the disability must have resulted from a "risk incident to work itself" or "increased by the circumstances of the employment." *Kern*, 101 N.M. at 802, 684 P.2d at 1273.

To the extent, therefore, that plaintiff's disability was due to stress associated with the performance of his [***16] work duties, it "arose out of" his employment. *Salazar v. County of Bernalillo; Little v. J. Korber & Co.; Crane v. San Juan County.* Whether plaintiff's stress, resulting from the conflicts with Jewett, arose out of the employment depends upon whether the conflicts were related to work. *Cf. Perez v. Fred Harvey, Inc.*, 54 N.M. 339, 224 P.2d 524 (1950) (jury question whether shooting by fellow employee was personally motivated or motivated by work-related quarrel). Jewett denied any conflict with plaintiff. Plaintiff's testimony, set forth above, was that the conflict arose from Jewett's assignment of work duties. Plaintiff's testimony was substantial evidence that the stresses identified by Drs. Fredman and Sacks as the cause of the disability did arise from plaintiff's employment.

Certain jurisdictions have expressed concern over applying the normal interpretation of "arising out of" to cases involving gradual psychological injury. This concern grows out of the traditional reluctance of courts to allow recovery for any mental suffering unaccompanied by physical impact or injury. The reluctance is based on a fear of fraudulent claims and the lack of judicial expertise [***17] for evaluating injury unaccompanied by observable physical manifestations. *See Townsend.* Where a psychological injury "occurs rapidly and can be readily traced to a specific event *** there is a sufficient badge of reliability to assuage [any] Court's apprehension. Where, however, a mental injury develops gradually and is linked to no particular incident, the risk of groundless claims looms large indeed." *Id.*, 404 A.2d at 1018.

As a response to the difficulties inherent in the evaluation of psychological injury, the Supreme Court of Wisconsin, in *School District # 1 v. Department of Industry, Labor & Human Relations*, 62 Wis.2d 370, 377, 215 N.W.2d 373, 377 (1974), enunciated the following interpretation of "arise out of" employment:

[I]t is the opinion of this court that mental injury non-traumatically caused must have resulted from a situation of greater dimensions than the day-to-day emotional strain and tension which all employees must experience. Only if the "fortuitous event unexpected and unforeseen" can be said to be so out of the ordinary from the countless emotional strains and differences that employees encounter daily without serious mental [***18] injury will liability *** be found.

The plaintiff in *School District* was employed as a school guidance counselor. She received a list of recommendations from high school students that asked for the removal of several staff members, including herself. The Department of Industry found that receipt of this list, and conversations with students concerning the list, constituted the accident "arising out of" plaintiff's employment which caused subsequent "acute anxiety reaction" and resulting disability. *Id.* at 372-373, 215 N.W.2d at 374-375. The court, however, after formulating its interpretation of "arise out of", concluded that the receipt of the list "could not be deemed to be so out of the ordinary from the countless emotional strains and differences that employees encounter daily without serious mental injury." 60 Wis.2d at 378, 215 N.W.2d at 377. Her application for compensation was dismissed.

Arkansas, Rhode Island and Wyoming have adopted the *School District* interpretation of "arising out of". *See Owens v. National Health Laboratories*, 8 Ark.App. 92, 648 S.W.2d 829 (1983); *Seitz v. L & R Industries, Inc., etc.*, 437 A.2d 1345 (R.I.1981); *Consolidated* [***19] *Freightways v. Drake*, 678 P.2d 874 (Wyo.1984). Defendants ask this court to adopt *School District* and overrule the trial court on that basis.

In *Townsend*, the Supreme Court of Maine modified *School District* because it perceived a problem with its application. [*174] [**477] The *Townsend* court announced the following standard:

While this rule [in *School District*] would be appropriate in the vast majority of gradual mental injury cases, it would not compensate an individual who, for example, developed a psychological disability resulting from the simple day-to-day stresses of an assembly line * * *. Our Act, however, is not merely objective covering the average person; it is also subjective and protects even the eggshell. With adequate safeguards to shield the employer, even those predisposed to mental injury should be able to recover for ordinary work-related stress to which others would not succumb. We conclude that ordinary work-related stress and strain could be compensable if it were shown by clear and convincing evidence that the trauma generated by the employment predominated in producing the resulting injury. [Footnote omitted.] Any [***20] less showing, however, would be insufficient adequately to protect an employer.

404 A.2d at 1019-20.

Townsend recognized the higher level of stress required under *School District* for most cases but, at the same time, permitted a subjective standard for the measurement of stress designed to protect those workers predisposed to mental injury.

Another group of jurisdictions allow compensation based on a gradual mental injury resulting from day-to-day work-related stress without the higher standard of proof imposed in *Townsend*. *Baker v. Workmen's Compensation Appeals Board*, 18 Cal.App.3d 852, 96 Cal.Rptr. 279 (1971); *Royal State; Carter*. This approach is premised on the view that the basic purpose of a worker's compensation system mandates that a worker disabled as a result of work-related stress receive treatment identical to a worker disabled by a work-related physical injury. *Carter*.

We realize the competing interests involved with any approach. On the one hand, there is the goal of maintaining a progressive worker's compensation system. *Carter*. On the other, there is the goal of reducing fraudulent claims in order to financially preserve [***21] the system. *Townsend*. It is, however, the province of the legislature to make changes in the provisions of coverage under the Act. *Varos v. Union Oil Co. of California*, 101 N.M. 713, 688 P.2d 31 (Ct.App.1984).

Section 52-1-28 does not distinguish between a physical and mental injury, nor does any provision of the Act condition compensation on an injury resulting from unusual or extraordinary working conditions. *Webb; Lyon*. The application of the *School District* rule would mean that a mental injury, to be compensable, must result from an extraordinary working condition, whereas a physical injury, to be compensable, need only result from the usual conditions of employment. Application of the higher standard of proof in *Townsend* would also differentiate between physical and mental injury. To establish disability, a worker with a pre-existing physical condition that makes him more susceptible to physical injury is not subjected to a higher standard of proof than a worker not so disposed. *Salazar v. County of Bernalillo*. However, a worker predisposed to mental injury from day-to-day stress would have to establish, by clear and convincing evidence, the causal [***22] connection between the trauma generated by the employment and the resulting disability. The basis for such differentiation is not present in our Act. We must defer to the legislature. *Varos; see McGarrah v. State*

Accident Insurance Fund Corp., 296 Or. 145, 675 P.2d 159 (1983).

We conclude that a psychological injury resulting from a sudden or gradual emotional stimulus "arises out of" employment when it is causally related to the performance of job duties. This standard is in keeping with the letter, and purpose, of the Act. This standard also makes no distinction between those workers predisposed to mental injury and those not so disposed. Plaintiff, through the recited testimony, has met this standard.

[*175] [**478] Our conclusion presupposes the existence of an actual job condition which causes the stress (actual stress), rather than a perceived condition that does not exist (imagined stress). Actual stress is that stress traceable to real working conditions; imagined stress exists when a worker honestly perceives that some event, or events, occurred during the course of his employment to cause injury when, in fact, no such event or events occurred. *See* [***23] *McGarrah*. In this case, defendants contend that plaintiff testified about occurrences existing only in his mind. They base their contention on testimony that plaintiff's disorders could cause him to distort reality. They challenge the trial court's finding of actual stress.

Substantial evidence supports this finding. *Garcia v. Genuine Parts Co.*, 90 N.M. 124, 560 P.2d 545 (Ct.App.1977). First, there was no evidence that plaintiff had trouble coping with other situations. Logically, this supports an inference of actual stress at work. Second, there was a flare-up in plaintiff's symptoms each time he returned to work. Third, Jewett had a reputation as the type of foreman who would "ride on a person." Fourth, Dr. Fredman testified that even paranoid ideations have some basis in reality. Fifth, Dr. Sacks testified that there was no condition suffered by plaintiff that would cause him to misperceive reality. The trial court's finding of actual stress will not be overturned.

We do not, at this time, address the complex issue of whether the effect of the *perceived* work environment on the worker, i.e., imaginary stress, is sufficient to establish an injury "arising out [***24] of" the employment. Such a discussion is not necessary in the present case because there is evidence of the effect of the *actual* work environment. *See McGarrah* and *Williams v. Western Electric Co.*, 178 N.J.Super. 571, 429 A.2d 1063 (1981), for a discussion of actual versus imaginary stress.

Any plaintiff must still demonstrate that, as a medical probability, any disability is a natural and direct result of the accidental injury. Section 52-1-28. Expert medical testimony is required to establish this causal connection. *Id.* The testimony of Drs. Fredman and Sacks provided substantial evidence on causation for plaintiff in this case.

. . .

The judgment of the district court is affirmed.

IT IS SO ORDERED.

101 N.M. 801, *; 689 P.2d 1272, **;
1984 N.M. App. LEXIS 712, ***

Paul Dean KERN, Plaintiff-Appellee, v. IDEAL BASIC INDUSTRIES, and its wholly owned subsidiary, Potash Company of America, Employer and Self-Insurer, Defendants-Appellants

No. 7912
COURT OF APPEALS OF NEW MEXICO
101 N.M. 801; 689 P.2d 1272; 1984 N.M. App. LEXIS 712

September 25, 1984

OPINION BY:
WOOD

OPINION:

[*801] [**1272] OPINION

Defendants moved to dismiss the complaint seeking worker's compensation benefits for failure to state a claim upon which relief could be granted. Depositions were considered at the hearing on the motion; thus the motion is to be treated as a motion for summary judgment. NMSA 1978, Civ.P.R. 12(b) (Repl.Pamp.1980). The trial court denied the motion. This court granted an interlocutory appeal. The issue, as stated in the trial court's order, is whether plaintiff may recover worker's compensation benefits "because Plaintiff suffered a mental breakdown from being terminated from Defendants [sic] employ." The uncontradicted showing in the depositions is that plaintiff suffered a major reactive depression, had psychotic episodes, attempted [***2] suicide and was disabled.

Plaintiff had worked for defendants for fifteen years. At the time of termination, plaintiff was employed as a safety engineer. On December 1, 1982, plaintiff reported to and was answerable to Frank Miller. On December 1, 1982, plaintiff, while at work, was called to Miller's office and notified that he was terminated. The effective date of termination was January 15, 1983; plaintiff's last day on the job was January 10, 1983. However, the uncontradicted showing was that plaintiff's mental health began deteriorating shortly after December 1, 1982.

A physician deposed: "It was the loss of the job in my opinion that precipitated and caused the depression and the psychosis .... I think his [plaintiff's] symptoms and his illness was caused ... by the trauma that he suffered at the loss of the job, not based on the job itself." The physician also deposed that loss of a job "is something everybody has to face" and agreed that loss of a job is not peculiar to employees in the potash industry, nor peculiar to safety engineers, but encompasses almost every type of occupational pursuit.

In order to obtain compensation benefits, plaintiff must have sustained [***3] an accidental injury. NMSA 1978, § § 52-1-9 and 52-1-28. Defendants contend that the mental breakdown plaintiff suffered as a result of his employment being terminated did not [*802] [**1273] amount to an accidental injury. Plaintiff contends that his mental breakdown comes literally within the definition of accidental injury stated in *Gilbert v. E.B. Law & Son, Inc.*, 60 N.M. 101, 287 P.2d 992 (1955). We do not decide this appeal on the basis of the "accidental injury" requirement. However, see the special concurrence in *Hernandez v. Home Education Livelihood Program, Inc.*, 98 N.M. 125, 645 P.2d 1381 (Ct.App.1982); *In re Korsun's Case*, 354 Mass. 124, 235 N.E.2d 814 (1968). We assume, but do not decide, that plaintiff suffered an accidental injury.

For an accidental injury to be compensable, the accidental injury must arise out of the employment and the accident must be reasonably incident to the employment. Section 52-1-28. As stated in Section 52-1-9(B), "at the time of the accident, the employee is performing service arising out of ... his employment[.]" The "arising out of" and "incident to" employment requirements have been repeatedly defined. Plaintiff [***4] relies on the definition in *Adamchek v. Gemm Enterprises, Inc.*, 96 N.M. 24, 627 P.2d 866 (1981), emphasizing that "arising out of" is concerned with a "cause." He points out that the injury must be caused by a risk to which the worker was subjected by his employment. While this is an accurate general statement, *see Velkovitz v. Penasco Independent School District*, 96 N.M. 577, 633 P.2d 685 (1981), it fails to consider that a "risk to which the worker was subjected by his employment" has been more precisely defined.

Adamchek, upon which plaintiff relies, points out that the causal connection of "arising out of" involves the connection between the conditions under which the work is required to be performed and the resulting injury. *Wilson v. Richardson Ford Sales, Inc.*, 97 N.M. 226, 228, 638 P.2d 1071 (1981), refers to a "'risk incident to the work itself.'" *Berry v. J.C. Penney Co.*, 74 N.M. 484, 485-86, 394 P.2d 996 (1964), explains "risk incident to

the work" as a "risk peculiar to the employment" and states that the employment must contribute to the risk. *Williams v. City of Gallup*, 77 N.M. 286, 421 P.2d 804 (1966), states that the employment must contribute [***5] something to the hazard. *Gilbert v. E.B. Law & Son, Inc.*, 60 N.M. 101, 287 P.2d 992 and *Barton v. Skelly Oil Co.*, 47 N.M. 127, 138 P.2d 263 (1943), refer to a risk increased by the circumstances of the employment. *See Luvaul v. A. Ray Barker Motor Co.*, 72 N.M. 447, 384 P.2d 885 (1963).

As *McDaniel v. City of Albuquerque*, 99 N.M. 54, 55, 653 P.2d 885 (Ct.App.1982), states: "The 'arising out of' requirement excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause; the causative danger must be peculiar to the work ...." *See also Schober v. Mountain Bell Telephone*, 96 N.M. 376, 630 P.2d 1231 (Ct.App.1980); *Gutierrez v. Artesia Public Schools*, 92 N.M. 112, 583 P.2d 476 (Ct.App.1978). *Cf. Martinez v. University of California*, 93 N.M. 455, 601 P.2d 425 (1979).

Plaintiff's answer brief states: "It is clear that the possibility of being fired is a risk to which Paul Kern was subjected by his employment. He would not be at such risk if he were not employed." This argument fails to consider that the risk that the employment might be terminated was not a risk incident to the performance of plaintiff's work, and was [***6] not peculiar to plaintiff's employment.

In re Korsun's Case states:

> Apprehension over the prospect of losing one's job does not arise "out of the nature, conditions, obligations or incidents of the employment." ... Rather it is a state of mind which arises from the common necessity of working for a living. Social legislation designed to relieve the consequences of losing one's job is found elsewhere.

235 N.E.2d at 816 (citations omitted).

Chapman v. Aetna Casualty & Surety Co., 221 Tenn. 376, 426 S.W.2d 760, 762 (1968), states:

> [T]he stress mentioned in this record as contributing in any sense to deterioration of Mr. Chapman's condition to the point [*803] [**1274] of fatality is not referable to the employment ... but rather, and only, to the inevitable termination of such employment ....
>
> ....This record is devoid of any material evidence to support the finding ... that the deceased's death arose out of his employment.

City of Austin v. Johnson, 525 S.W.2d 220, 221 (Tex.Civ.App.1975), pointed out that a risk incidental to employment must be connected with what a worker has to do in performing a contract of service, [***7] and held: "To hold that worry and anxiety over job loss is 'connected with what a workman has to do in performing his contract of service' would in our opinion not be reasonable."

Seals v. City of Baton Rouge, 94 So.2d 478, 484-85 (La.Ct.App.1957), states:

> [T]he notice of forced retirement or acceptance of disability benefits and resulting thrombosis had nothing whatsoever to do with the services being performed or to be performed, which he was employed to do, for his employer .... [T]he letter [recommending that the employee request a disability pension with the alternative that his disability would be brought to the attention of the Civil Service Board] ... had nothing whatsoever to do with services to be performed by Captain Seals for and on behalf of the City of Baton Rouge, but only had something to do with his retirement and had no connection whatsoever with work to be performed .... [T]he accident must have some causal connection with the employment, that is to say, with the service being performed or to be performed in the furtherance of the work of the employment or growing out of said employment ....
>
> ..... If we followed plaintiff's [***8] contention and theory in this case, every employer in this state would be in a quandry and stalemate as to the discharge or forced retirement of any of its employees who it may know or not know of having coronary complications. If the employer was forced to discharge an employee due to economic reasons, said discharge may cause mental worry and agitation, and as a result, cause coronary thrombosis. The same is likewise true with reference to informing an employee of his forced retirement or for his disability retirement. In either event, if, as a result of the discharge or notice to the employee of forced retirement or disability retirement (such as what took place in the case at bar), the employee develops a thrombosis and dies as a result, the employer would be liable for compensation. We do not believe the legislature ever intended that situation to exist.

Plaintiff did not suffer an accidental injury arising out of his employment. The trial court's order is reversed. The cause is remanded with instructions to grant defendants' motion for summary judgment.

This being an appeal by the employer in a worker's compensation case, no appellate costs are awarded.

IT IS SO [*9] ORDERED.**

97 N.M. 211, *; 638 P.2d 423, **;
1981 N.M. App. LEXIS 817, ***; 36 Fair Empl. Prac. Cas. (BNA) 1655

Maria C. DOMINGUEZ, Plaintiff-Appellant, v. Benjamin Hatchett STONE, as an individual and as Trustee for the Village of Central, Defendant-Appellee
No. 5250
COURT OF APPEALS OF NEW MEXICO

December 8, 1981

OPINION BY:
LOPEZ

OPINION:

[*212] [**424] OPINION

The plaintiff appeals summary judgment granted in favor of the defendant on her complaint against the defendant for personal damages. We reverse.

The sole issue on appeal is whether the trial court erred in granting summary judgment.

We review and discuss four causes of action which constitute the basis of plaintiff's complaint and which the trial court dismissed in its summary judgment. The four causes of action will be discussed seriatim. 1. Defamation of reputation. 2. Intentional infliction of emotional distress, 3. Violation of 42 U.S.C. § 1983, 4. Unlawful discriminatory practices under the New Mexico Human Rights Act, § 28-1-1 et seq. N.M.S.A. 1978.

Plaintiff's complaint had its genesis in events which occurred on or about September 16, 1980, in Grant County, New Mexico. The plaintiff is a 22 year-old Mexican National [***2] having been born in Mexico. She has been legally residing in the United States since she was 3 years of age and now is living in Grants, New Mexico. In 1976 she graduated from high school. Plaintiff was the director of the Senior Citizens Program in the Village of Central, New Mexico on September 16, 1980. Defendant Stone was a member of the Board of Trustees of Central which is its governing body. On September 16, 1980, during a public meeting of the Village Trustees and later during a closed meeting, or executive session of the Village Trustees, the defendant made certain statements concerning plaintiff which referred to her alienage and ethnicity. The statements were to the effect that plaintiff was not suited for her employment with the Village of Central because she was a Mexican. Defendant's statements included a statement to the effect that the person performing the duties of program director of the Village of Central Senior Citizens Program should not be a Mexican, part of his reason being that the program is funded with American tax dollars. The defendant interrogated the plaintiff at the meeting concerning payment of income and property taxes and whether she possessed [***3] a green card, whether she applied for United States citizenship, and whether she had registered to vote in the United States. On September 17, 1980, the defendant personally went to the office of the Grant County clerk to determine whether plaintiff was a registered voter. He was told she was not.

. . . .

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

In paragraph 16 and 18 of plaintiff's complaint she alleges:
Paragraph 16:

As a direct and proximate result of the Defendant's wrongful acts alleged herein the Plaintiff was caused great grievous mental suffering, anguish and anxiety and suffered severe shock to her nerves and nervous system and suffered other injuries, the exact nature and extent of which are yet unknown.
Paragraph 18:

The defendant's misconduct was done with malice and with reckless disregard for the harm it would do to the Plaintiff; the defendant should be ordered to pay to the plaintiff exemplary or punitive damages in an amount to be determined at trial, and her reasonable attorney fees.

The trial court dismissed this cause of action. We have reviewed and previously incorporated in this opinion excerpts from the depositions of plaintiff and defendant which pertain to this cause of action and which we refer to at this time.

This court recognized the tort of intentional infliction of emotional distress, called the law of outrage, by the plaintiff in *Mantz v. Follingstad*, 84 N.M. 473, 505 P.2d 68 (Ct.App. 1972). The [***8] court quoted

the pertinent section from Restatement (Second) of Torts § 46 (1965) as follows:

(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

(2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress
(a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or
(b) to any other person who is present at the time, if such distress results in bodily harm.
Under Comment (c), it is stated that "the law is still in a stage of development, and the ultimate limits of this tort are not yet determined."
Comment (d), entitled "Extreme and outrageous conduct" reads in part as follows:

The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended [***9] to inflict emotional distress, or even that his conduct has been characterized by "malice", or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

Comment j of Restatement (Second) of Torts, § 46 (1965), reads as follows:
Severe emotional distress. The rule stated in this Section applies only where the emotional distress has in fact resulted, and where it is severe. Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, [*215] [**427] disappointment, worry, and nausea. It is only where [***10] it is extreme that the liability arises. Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it. The intensity and the duration of the distress are factors to be considered in determining its severity. Severe distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed. For example, the mere recital of the facts in Illustration 1 above goes far to prove that the claim is not fictitious.

The distress must be reasonable and justified under the circumstances, and there is no liability where the plaintiff has suffered exaggerated and unreasonable emotional distress, unless it results from a peculiar susceptibility to such distress of which the actor has knowledge. See Comment f.

It is for the court to determine whether on the evidence severe emotional distress can be found; it is for the jury to determine whether, on the evidence it has [***11] in fact existed.

We discuss here an identical case to the case at bar:

The court in *Contreras v. Crown Zellerbach Corp.*, 88 Wash.2d 735, 565 P.2d 1173 (1977), held that the Plaintiff had sufficiently stated a cause of action under the tort of outrage as defined by the Washington courts and the Restatement (Second) of Torts, § 46 (1965), where it was alleged that the plaintiff, while in the employ of the defendant corporation, was subjected to intentional or reckless conduct on the part of the defendant's agents and employees *which was beyond all reasonable bounds of decency and which caused him severe emotional distress* by reason of acts of intimidation, demotions, humiliation in public, and exposure to scorn and ridicule, when the defendant's agents knew or should have known that by reason of the *plaintiff's Mexican nationality and background he was particularly susceptible to emotional distress as a result of the conduct.* Noting that liability under the tort of outrage has been recognized in Washington when premised upon outrageous conduct such as alleged in the present case; the Court pointed out that *when one in a position of authority over another allegedly* [***12] *made racial slurs and jokes and comments, this abusive conduct gives added impetus to the claim of outrageous behavior, the relationship between the parties being a significant factor in determining whether liability should be imposed.* The Court stated that *where a person is not free to leave* but must remain in physical proximity to others who continually make racial slurs and comments, it is for the jury to determine whether this is a factor in making the claim one of extreme outrage and *the extent to which the employer was or should have been aware of these conditions through its supervisory personnel or by other means.* The Court further observed that as to the various slang epithets that may have once been in

common usage regarding Mexican-Americans, *it was for the trier of fact to determine, taking into account changing social conditions and the plaintiff's own susceptibility, whether the particular conduct was sufficient to constitute extreme outrage.* (Emphasis added.)

We believe and hold, that the testimony of the plaintiff and the defendant which we have quoted in this opinion heretofore and all the evidence in the record do establish that an issue of fact [***13] does exist as to this cause of action. The trial court erred in granting summary judgment based on this cause of action.

. . .

The judgment of the trial court is reversed and the cause is remanded for proceedings consistent with this opinion.

Appellate costs are to be paid by the appellee.

IT IS SO ORDERED.

APPENDIX D

Excerpts from defendant's deposition:

Q. Where are you employed, Mr. Stone?

A. Self-employed.

[*217] [**429] Q. What's the name of your company.

A. Stone Construction.

Q. Your a contractor?

A. That's right

Q. So I take it you wouldn't disagree with me, would you, if I suggested that, based upon your previous answers, you appear to be fairly conscious of ethnic differences between you and other Council members; is that right?

A. Yes, I do.

Q. And you think of the other Council members as being Spanish American in your own mind. When you think of their ethnicity, it's Spanish American?

A. Yes.

Q. And that's what you thought Maria Dominguez was prior to the meeting on September 16, 1980; isn't it?

A. Yes.

Q. You didn't realize she was Mexican?

A. No.

Q. And that day, September 16, was the first day you had learned that she was Mexican?

A. Yes.

Q. How long before the meeting, itself, did you read the form that we've [***17] now been referring to and noticed that she was Mexican?

A. I read it that night. It was handed to me.

Q. At the meeting?

A. Yes.

Q. And so your reaction at that time was, included among other things, one of surprise?

A. Yes.

Q. How else did you feel besides surprised at reading that or learning that information.

A. I don't know what you're talking about.

Q. What other emotions did you experience when you read that besides one of surprise?

A. I felt disturbed. I felt like that we had five Spanish persons there, and they were working under an alien. And I felt hurt.

Q. Why did you feel hurt by that information, or disturbed?

A. I feel like this is the United States of America. And the jobs here are for our citizens. That's the way I feel about it.

Q. And that's the way you felt about it as of September 16, 1980?

A. I felt like that all of my life, on any jobs, I feel this way. I feel like if somebody wants to live here, become a citizen. That's great. But I feel like if they're here to receive our benefits in our great country, and they don't want to become a citizen, I think they should go to their own country. That's my feeling.

Q. So, I take it you, in effect, [***18] then, disagree with certain immigration laws that grant aliens the right to be here under certain circumstances; is that right?

A. Not necessarily.

Q. Assuming, for the sake of this next question, that it is lawful for Ms. Dominguez to be in the country and working, I take it you disagree with the spirit of such a law, if there were such a law; is that right?

A. Yes. I feel like, if we have a government here in our little town to run, I don't think aliens should be supervisors or running it. I feel like this is the United

States of America and citizens of our country should run it. If you'll look around we have quite a problem with aliens right now.

Q. What do you mean by that?

A. Cuba, Mexico, Thailand, Iran; I can just keep on going.

Q. When you say, "We have problems with those" -- with what? I realize we have certain international problems with different countries. But as it pertains to people from those countries being here, you're saying we're experiencing problems with those people?

A. Yes, sir.

[*218] [**430] Q. And you lump Ms. Dominguez along with those other people we are having problems with.

A. She's an alien, she's an alien. I can't change it. [***19]

Q. All aliens, from your point of view, then, we have this sort of problem with them being here; is that right?

A. I don't know about the others. All I can do is refer to her. Like for instance, what's bothering bad is, like the Cuban crisis. We've got people in Albuquerque right now that can't speak English and they're stealing from their next door neighbor. It's on national TV.

We've people in Florida that are paying taxes and having to support all of these people. And I don't think this right, for taxpayers to support people that are over here --

I think that our money should be used for a better purpose.

I have nothing against Maria Domingues. I feel like, just like I said before, it there's a supervisory capacity job in Central, New Mexico, it should be held by a citizen of the United States of America.

Q. Do you think she should be removed from her position becaus of citizenship, her present citizenship?

A. I feel that way, yes, sir. I feel that this is the good old United States of America, and the people that citizens should be running it. Yes, sir. I feel this way.

Q. Would you agree with me that its fair to say that, at some point in the meeting on September [***20] 16, 1980, that you -- whatever words you actually used -- that you, in effect, conveyed your idea to the Council conveying your feelings about aliens working in a position such as Maria Dominguez was working in? Is that right?

A. That's right.

Q. You did that publicly, right?

A. If it's a closed meeting, I don't think it's any of your business. That's not on the record. That's a closed meeting. We discussed it in there, and that's all I'll tell you about it.

Q. In that case, if you will be so kind as to tell me what you remember, I'll be grateful.

A. I asked the question what it meant.

Q. Right.

A. And then, when I went from there, I said, "I feel like that anybody that works for the City of Central should be a citizen and especially if she's over five American citizens. I think one of them should be the director. And if there is any jobs left, she might be one of the lower on the totem pole, but not the director.

Q. What else do you remember having said at that meeting?

A. I asked her if she could vote. I asked if she had a green card. I asked her working status, is what I asked her first. I said, "May I ask you, what is your working status and do you have a green [***21] card?

Q. What do you mean by "working status", Mr. Stone?

A. Always, I have understood, that you have to have some kind of working permit from the federal government to be in here if you are not a citizen, to work. In other words, a card that you had the right to be here and be able to be a gainful employee.

Q. What was the purpose of your asking that question?

A. I was curious to the fact whether or not she had a card. I felt if she did not meet the United States standards, she shouldn't have the job.

Q. What else did you ask at that meeting?

A. I asked her if she was a property owner.

Q. Why did you ask her that?

A. I felt like it had some reference to the situation, due to the fact that I said that I thought tax dollars from the United States citizens were paying these bills. And I felt like -- did she own property? Did she pay taxes? That was the object of asking her. I really didn't know if she owned property or not, and I still don't know. I really don't know.

[*219] [**431] I think a citizen's rights, he has all the rights and all the privileges of the United States of America. And I don't figure that an alien, if he's not of

this country -- he doesn't [***22] have any rights over here.

Q. No rights at all?

A. No. I think he ought to go home.

Q. So you don't think Maria Dominguez has any rights in this country, because she's an alien?

A. That's right. I sure don't.

Q. After the meeting on September 6, did you make any efforts whatsoever to gain any more information at all pertaining to Maria Dominguez?

A. Yes, sir.

Q. What efforts did you make?

A. I went to the Courthouse, and I asked if she was a bona fide voter. And they looked it up and said no.

APPENDIX P

Excerpts from Plaintiff's Deposition:

. . .

Q. What comments did Mr. Stone direct to you or make about you at the meeting of September 16, 1980?

A. What I just said was what he directed to me. And [***26] there was also an Executive Session, which I heard a lot of what was going on, because Mr. Stone's voice was extremely loud. The meeting started. And when they broke into Executive Session, we were asked to leave the meeting room, which is right here next door. So we got up, and went in to City Hall.

Q. Did you take notes of what was being said?

A. Yes, I did. (Emphasis ours at the Executive meeting) The witness was outside.

Q. Then, why don't you tell us what they contain.

A. It was, "She's a Mexican, You see her? She's a Mexican." And he was loud. He kept saying, "That is not fair. There's no way. Why should she be employed? She's a Mexican. She's a Mexican."

He kept on and on and on. And I could hear the trustees in in there saying, "That's discrimination." To the best of my recollection now, that is what kept going on and on and on. And I kept hearing, "She's a Mexican. She's a Mexican."

In fact, I was ready to be called in to the Executive Session.

Q. What do you mean you were ready?

A. Because I thought they going to call me in there, because Mr. Stone was really upset over the fact that I was a Mexican.

Q. Were you called in to the meeting?

A. No, I wasn't [***27] not in to the Executive Session. But like I say, I was just waiting.

Q. Now, we have discussed comments that you overheard from the Executive Session of September 16, 1980, and we discussed comments that were made during the regular meeting of the council on 9/16/80. Now, I would like you to tell us if you heard any comments after the 9/16/80 meeting made about you or to you from Mr. Stone?

A. Yes.

That following Wednesday, which was the 17th of September I was told by --

Q. By who?

A. By the clerk and assistant clerk.

Q. That would have been Ms. Baca and Ms. Chavez?

A. Yes. That Mr. Stone had commented that he still believed that I should not be director, because I was Mexican.

Q. Did they tell you that this comment had been made by Mr. Stone to the two of them?

[*221] [**433] A. Yes.

Q. Could you tell us once more what those comments were that he allegedly made to them?

A. That he still felt he was right, and he wasn't going to go back on his word, that he didn't think I should be director.

Q. The question was any comments that were allegedly made by Mr. Stone concerning you which some third person would have told you about later. Do you understand the question? [***28]

A. Yes. I had been told so much.

Q. Could you explain what, if anything, happened to you after this 9/16/80 meeting in relationship to your job? Did you miss any days at work?

A. No.

Q. Did you feel ill?

A. Very ill. Very nervous. Very uptight. Going to the chiropractor.

Q. And when did you go see him?

A. I see him very, very often, to today.

Q. How many times did you see Dr. Lehman?

A. Just once.

Q. His diagnosis was muscle tension, is that correct?

A. Muscle tension.

Q. Did he suggest any further treatments?

A. He prescribed to me a painkiller.

Q. Do you remember exactly what Mr. Stone said about property taxes.

A. It was when he said that I should not be director, because I was Mexican and they were American tax dollars. When I went on to tell him that I also pay taxes, and I told him that I would like to get my check in a lump sum with no deductions. And he told, "You don't pay property taxes." And I told him, "Yes, I do."

Q. Were there any other statements that Mr. Stone made that falsely stated anything concerning you?

A. Other than what he was saying was that the fact that I was Mexican, just the fact that I was Mexican, that I was not capable of carrying [***29] on my job.

Q. What exactly did he say.?

A. When he kept saying that I was Mexican, and that there was five other employees, and I should not be the director, because I was Mexican. In other words, he felt --

Q. Is there anything else?

A. This is from what he was directing to me. This isn't at the Executive Session. This is what I said was what he told me. At the Executive Session, he said I should not be director, because I was Mexican. In other words, he felt I couldn't do the work, because I was Mexican. He felt I should let the custodian replace me, because she was American and I should be cleaning.

Q. How much have you paid your attorney in this lawsuit?

A. $ 1,045.

Q. Have you received the funds to pay him from anyone besides yourself?

A. I paid every penny of it.

127 N.M. 47, *; 1999 NMSC 13, **;
976 P.2d 999, ***; 1999 N.M. LEXIS 199

CATHY JEAN COATES and MADELINE DURAN, Plaintiffs-Appellees and Cross-Appellants, v. WAL-MART STORES, INC., d/b/a SAM'S CLUB, Defendant-Appellant and Cross-Appellee.
Docket No. 24,717
SUPREME COURT OF NEW MEXICO
February 22, 1999, Filed

OPINION BY:
JOSEPH F. BACA

OPINION:

[*49] [***1001] **OPINION**

BACA, Justice.

[**1] Wal-Mart Stores, Inc. (Wal-Mart) appeals the district court's judgment in favor [*50] [***1002] of former employees, Appellees Cathy Jean Coates (Coates) and Madeline Duran (Duran). On cross-appeal, Coates and Duran appeal the court's denial of prejudgment interest on punitive damage awards. On certification from the Court of Appeals, pursuant to NMSA 1978, § 34-5-14 (1972), this Court now considers the following issues: 1) whether the exclusivity provision in the New Mexico Workers' Compensation Act, NMSA 1978, § § 52-1-1 to -70 (1929, as amended through 1993), bars a common law sexual harassment tort; 2) whether the district court erred in several evidentiary rulings; 3) whether the district court erred in not including an "intervening cause" jury instruction; 4) whether there was cumulative error requiring reversal; 5) whether substantial evidence exists to support an intentional infliction of emotional distress claim and the award of punitive damages; 6) whether the district court erred in not remitting the damage award; and 7) whether the district court erred or abused its discretion in not awarding prejudgment interest on the punitive damages award. After careful review, we affirm the district court's rulings and judgment.

I.

[**2] This case stems from supervisor Toby Alire's (Alire) alleged sexual harassment of Coates and Duran while all three were employees at Sam's Club, a division of Wal-Mart. Coates and Duran claim that Alire physically and verbally sexually harassed them on several occasions between 1993 and 1994. Appellees further contend that Wal-Mart knew of this sexual harassment, yet failed to protect them or reprimand Alire.

[**3] Between the spring of 1993 and 1994, Coates and Duran reported several incidents of sexual harassment to management. Several other women who claimed Alire had also sexually harassed them, or who had witnessed Alire harassing Coates and Duran, also reported several incidents to management.

[**4] Sam's Club manager, Tom Romero, personally witnessed one incident of Alire's sexual harassment. Romero reported the incident, and several others that had been reported to him, to Alire's immediate supervisor. In turn, Alire's immediate supervisor reported the incidents to Sam's Club's assistant manager. Romero requested that the assistant manager give Alire a written reprimand. The assistant manager never reprimanded Alire.

[**5] Besides Romero, an assistant manager and general manger also observed Alire's behavior. In August 1993, both the assistant manager and general manager watched and laughed as Alire made lewd and vulgar suggestions to Duran. Neither manager initiated disciplinary action against Alire.

[**6] In December of 1993, Duran claimed that Alire approached her while she was on a forklift and grabbed her breasts from behind. Duran reported the incident to the assistant and general manager along with other on-going harassment. Again, Wal-Mart did not investigate or reprimand Alire.

[**7] A week after this incident, Wal-Mart informed Duran that it had decided to make Alire her supervisor. Duran claimed that Wal-Mart told her that the decision was final and that if she objected her only alternative was to quit. Duran quit her job near the end of December 1993. However, before she left, Duran again told the assistant manager of the many incidents of sexual harassment and assault that had occurred since the spring of 1993. The assistant manager reported each incident to the general manager. Wal-Mart still did not take any action against Alire.

[**8] After Duran quit, Coates and other female employees continued to complain about Alire's continued sexually harassing behavior. In February 1994, Coates and Kim Martinez (Martinez), another female employee,

reported to the store's manager that Alire had allegedly pulled Martinez' blouse open to look at her breasts. Wal-Mart took no action either to investigate or to reprimand Alire regarding the incident. Incidents of sexual harassment continued into the spring of 1994, and despite many complaints, Wal-Mart never disciplined Alire.

[**9] In March 1994, a supervisor saw Alire make an obscene gesture to Coates and heard Coates scream. Wal-Mart again did [***1003] [*51] not respond to Alire's actions and permitted Alire to remain a supervisor.

[**10] Later in March 1994, Wal-Mart held a management meeting and permitted Coates and Martinez to describe the incidents of Alire's sexually harassing behavior. After the meeting, Wal-Mart transferred Alire to a different department. However, Alire still remained a supervisor and was not otherwise disciplined.

[**11] Wal-Mart then transferred Alire to a department immediately adjacent to Coates' workstation, Coates still had contact with Alire and reported to management that his angry manner frightened her. Wal-Mart took no action in this regard and in May 1994, Coates quit.

[**12] A month after Coates left Wal-Mart, the Rio Grande Sun published a newspaper article reporting Alire's arrest for the assault, kidnapping, and rape of his girlfriend. Wal-Mart's general manager read the article and reported it to national headquarters. Wal-Mart continued to employ Alire, even after his conviction. However, Wal-Mart did terminate Alire while in jail, after his continued absence violated Wal-Mart's leave policies.

[**13] After leaving Wal-Mart's employment, Coates and Duran filed a claim against Wal-Mart alleging negligent supervision and intentional infliction of emotional distress. Coates and Duran also filed a claim against Alire individually.

[**14] Before trial, Wal-Mart filed a motion for summary judgment claiming that the Workers' Compensation Act's (WCA) exclusivity provision barred Coates and Duran from raising a claim outside the WCA. The court denied the motion and the matter then proceeded to trial.

[**15] Wal-Mart also filed a motion in limine to exclude the newspaper article and any other evidence regarding Alire's arrest. Wal-Mart argued that the acts for which Alire was arrested and convicted occurred after Coates and Duran left Wal-Mart. The court granted the motion. However, after Coates and Duran announced that they had settled with Alire, the court reversed its ruling on the motion in limine and allowed the facts of Alire's arrest into evidence.

[**16] The court also admitted the testimony of an expert specializing in preventing and responding to workplace sexual harassment. Coates and Duran introduced the expert's testimony in response to Wal-Mart's claim that it had adopted model corporate policies concerning sexual harassment.

[**17] The court, however, excluded evidence of Coates' ex-husband's incarceration and inability to provide child support. The court also excluded evidence of Duran's own incarceration and background. Wal-Mart claimed that such evidence would have contradicted the claim that Alire's actions caused them severe emotional distress. The court also excluded from evidence photographs of a forklift that would allegedly show the impossibility of Duran's claim that Alire had jumped on a forklift and performed lewd acts behind her, although the court allowed the photographs to be used for demonstrative purposes.

[**18] Wal-Mart moved for a directed verdict at the close of Appellees' case and at the close of all evidence. The court denied both motions.

[**19] The jury found in favor of Duran and Coates on both the negligent supervision and intentional infliction of emotional distress claims. The jury awarded Duran $ 84,000 in compensatory damages for the negligent supervision claim, $ 30,000 in compensatory damages for the intentional infliction of emotional distress claim, and $ 1,200,000 in punitive damages. Coates received $ 48,000 in compensatory damages for the negligent supervision claim, $ 15,000 for the intentional infliction of emotional distress claim, and $ 555,000 in punitive damages. The court also awarded ten percent prejudgment interest on the compensatory damages but did not award prejudgment interest on the punitive damage awards.

[**20] Wal-Mart filed a motion for judgment notwithstanding the verdict or, in the alternative, for remittitur. The district court subsequently denied this motion. Wal-Mart then appealed the verdict and judgment to the Court of Appeals. Coates and Duran, in [***1004] [*52] a cross-appeal, also appealed the denial of prejudgment interest on the punitive damage awards. The Court of Appeals then certified the matter to this Court for our review.

II.

[**21] The question whether the WCA covers an injury that occurred in the workplace is a question of law, which we review de novo. See Cox v. Chino Mines/Phelps Dodge, 115 N.M. 335, 337, 850 P.2d 1038, 1040 (Ct. App. 1993). We also review the court's ruling on a motion for summary judgment under a de novo standard of review, while determining whether any genuine issues of material fact exist and whether the movant was entitled to judgment as a matter of law. See Rule 1-056(C) NMRA 1999; Gallegos v. State Bd. of Educ., 1997 NMCA 40, P12, 123 N.M. 362, 940 P.2d 468.

[**22] The WCA was created to offset the lost wages of a worker injured by a work-related accident, while promoting a policy in which workers would not become dependant on state welfare programs. See Casias v. Zia Co., 93 N.M. 78, 80, 596 P.2d 521, 523 (Ct. App. 1979). The WCA was the result of a bargain struck between employers and employees. In return for the loss of a common law tort claim for accidents arising out of the scope of employment, the WCA ensures that workers are provided some compensation during recovery to keep their family off welfare. See Aranda v. Mississippi Chem. Corp., 93 N.M. 412, 416, 600 P.2d 1202, 1206 (Ct. App. 1979). Likewise, while the employer gives up any common law defenses, the WCA assures the employer limited and determinate liability. See Sanchez v. Hill Lines, Inc., 123 F. Supp. 42, 43 (D.N.M. 1954).

[**23] Wal-Mart contends that Appellees are barred from raising a tort claim because the WCA provides the exclusive remedy for work-related injuries. Relying on NMSA 1978, § 52-1-9 (1973), otherwise known as the "exclusivity provision," Wal-Mart argues that the WCA provides employees with the exclusive remedy for any personal injury in the workplace in lieu of any other liability. We disagree.

[**24] While it is true that the basic essence of the exclusivity provision is that the WCA's remedy is exclusive to all other remedies against the employer for the same injury, the exclusivity provision is not an absolute bar. "The exclusivity provided for by the New Mexico Workmen's Compensation Act is the product of a legislative balancing of the employer's assumption of liability without fault with the compensation benefits to the employee. ..." Dickson v. Mountain States Mut. Cas. Co., 98 N.M. 479, 480, 650 P.2d 1, 2 (1982). However, the WCA will preclude other claims only if the injury falls within the scope of the WCA. See Coleman v. Eddy Potash, Inc., 120 N.M. 645, 652, 905 P.2d 185, 192 (1995). The WCA only covers work-related accidents and only injuries that fall within the act's coverage. A claim falls outside the WCA for work-related injuries if: 1) the injuries do not arise out of employment, see Cox, 115 N.M. at 337-38, 850 P.2d at 1040-41; 2) substantial evidence exists that the employer intended to injure the employee, see Johnson Controls World Servs., Inc. v. Barnes, 115 N.M. 116, 118, 847 P.2d 761, 763 (Ct. App. 1993); or 3) the injuries are not those compensable under the WCA, see Sabella v. Manor Care, Inc., 121 N.M. 596, 599, 915 P.2d 901, 904 (1996). Although any one of the preceding exceptions removes the claim from the coverage of the WCA, all three exceptions exist here.

A.

[**25] Injuries caused by sexual harassment do not arise out of employment. See Cox, 115 N.M. at 338, 850 P.2d at 1041. Accordingly, Appellees' claims are not compensable under the WCA. In Cox, a claimant appealed a Workers' Compensation Administration decision which denied her compensation benefits and dismissed her claim with prejudice. The Court of Appeals considered whether the claimant had sustained an injury "arising out of" her employment as defined under the WCA as a result of incidents of sexual harassment. The claimant argued that her injuries arose out of the workplace and were thus compensable under WCA. She also contended that she should be compensated under the WCA as a matter of public policy. Pointing [***1005] [*53] to the New Mexico Human Rights Act, NMSA 1978, § § 28-1-1 to -7, 28-1-9 to -14 (1969, as amended through 1991), and the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 (1988), as examples, she claimed that the law, as a matter of public policy, provides remedies for sexual harassment in the workplace. Thus, she argued, providing similar remedies under the WCA would be consistent with such public policy.

[**26] The Court of Appeals held that although the claimant's injury may have been causally related to her employment, sexual harassment does not amount to an accident "arising out of her employment" under the WCA. Cox, 115 N.M. at 338, 850 P.2d at 1041. The Court of Appeals also noted that while the Human Rights Act and the Civil Rights Act of 1964 also provide remedies for sexual harassment, these acts address concerns that are quite different from those that the WCA addresses. See id. The Court of Appeals stated that "the way to maintain public policies against sexual harassment on the job is to pursue the common-law or statutory remedies available to promote these policies and not to engraft those policies onto a very different legislative scheme such as the Workers' Compensation Act." Cox, 115 N.M. at 338-39, 850 P.2d at 1041-42; see also Byrd v. Richardson-Greenshields Sec., Inc., 552 So.

2d 1099, 1104 n.7 (Fla. 1989) (stating that "as a matter of public policy, sexual harassment should and cannot be recognized as a 'risk' inherent in any work environment.").

[**27] We agree with the Court of Appeals and hold that injuries caused by sexual harassment do not arise from employment and are thus not compensable under the WCA. The WCA only covers accidental injuries that occur in the workplace. See Coleman, 120 N.M. at 652-53, 905 P.2d at 192-93. This Court will not adopt a rationale that would catagorize sexual harassment as an accident.

[**28] Sexual harassment is not an "accident" that invokes WCA coverage. See Ortiz v. Ortiz & Torres Dri-Wall Co., 83 N.M. 452, 453, 493 P.2d 418, 419 (Ct. App. 1972) (stating that "'in the sense of the statute, 'accidental injury' or 'accident' is an unlooked for mishap, or untoward event which is not expected or designed.'")(quoting Lyon v. Catron County Comm'rs, 81 N.M. 120, 125, 464 P.2d 410, 415 (Ct. App. 1969))). Sexual harassment is not an accident but rather is a form of discrimination, which as matter of public policy is not accepted in society. Employers must be responsible for maintaining a workplace free from sexual harassment. See Sabella,121 N.M. at 601, 915 P.2d at 906 (holding that "under the alleged facts of [that] case, a claim of [sexual harassment] under the [Human Rights Act] is not barred by the WCA."). Allowing a worker subjected to sexual harassment to seek civil damages "not only vindicates the state's interest in enforcing public policy but also adequately redresses the harm to the individual naturally flowing from the violation of public policy." Michaels v. Anglo Am. Auto Auctions, Inc., 117 N.M. 91, 93, 869 P.2d 279, 281 (1994). Therefore, we hold that the WCA's exclusivity provision does not preclude an employee from seeking a remedy outside the WCA for injuries caused by sexual harassment.

B.

[**29] The exclusivity provision also does not bar Appellees' claims because sufficient evidence exists to show that Wal-Mart acted intentionally. See Beavers v. Johnson Controls World Servs., Inc., 120 N.M. 343, 347, 901 P.2d 761, 765 (Ct. App. 1995) (citing Barnes, 115 N.M. at 118, 847 P.2d at 763). If an employer intended to injure an employee, the employer may be subject to a common-law tort action outside the exclusivity provision of the WCA. See Gallegos v. Chastain, 95 N.M. 551, 553-54, 624 P.2d 60, 62-63 (Ct. App. 1981).

[**30] In Beavers, an employee testified, among other things, that her supervisor belittled and denigrated her in front of co-workers and that his conduct resulted in her becoming extremely depressed, suffering acute mental distress necessitating hospitalization. The employee also presented evidence that despite her supervisor's knowledge of her work-related stress and hospitalization, the supervisor continued to ridicule and disparage her in front of other company employees. The company asserted that the employee's claim for mental distress [***1006] [*54] was barred by the exclusivity provision. The Court of Appeals held that the employee had both alleged and presented sufficient evidence in her complaint that her supervisor acted intentionally. See Beavers, 120 N.M. at 348, 901 P.2d at 766. The court also concluded that the exclusivity provision did not bar her cause of action outside the WCA. See id.

[**31] In this case, like Beavers, the Appellees have alleged and presented sufficient evidence at trial that Wal-Mart's supervisors acted intentionally. Appellees presented evidence that despite Wal-Mart's knowledge of Alire's conduct, it failed to take any actions to protect Appellees or discipline Alire. Appellees complained to several managers about Alire's conduct on several different occasions. Two managers personally observed Alire's conduct, yet took no action to either protect Appellees, or to discipline Alire. Under these circumstances, we conclude that sufficient evidence exists for a jury to conclude that Wal-Mart's actions were intentional and thus, the exclusivity provision does not bar Appellees' claims.

C.

[**32] The exclusivity provision also does not prohibit Appellees from raising a claim outside the WCA because their injuries are not those compensable under the WCA. "When an injury does not fall within the coverage formula of the WCA, the exclusivity provisions of the WCA do not preclude recovery other than [that provided] under the WCA." Sabella, 121 N.M. at 599, 915 P.2d at 904. Psychological injuries are not compensable under the WCA if they are not "primary mental impairment" or "secondary mental impairment" as set forth in the WCA. Primary mental impairment is limited "to sudden, emotion-provoking events of a catastrophic nature ... as opposed to gradual, progressive stress-producing causes such as ... harassment ... over [a] period of time." Jensen v. New Mexico State Police, 109 N.M. 626, 629, 788 P.2d 382, 385 (Ct. App. 1990); see also § 52-1-24 (B) (defining "primary mental impairment "). Secondary mental impairment results from a physical impairment caused by an accidental injury. See NMSA 1978, § 52-1-24 (C) (defining "secondary mental impairment").

[**33] Here, Duran testified that she experienced severe emotional distress because of Alire's actions and Wal-Mart's failure to respond to her complaints. She testified that she gained excessive weight and could not leave her house for three months because she was humiliated, embarrassed, afraid, and claustrophobic. Duran testified that she experienced these feelings from the time of the sexual harassment up until the trial. Coates testified that she too suffered from severe emotional distress, insomnia, and fear. Coates also claims that her fear was more intense after Alire was arrested.

[**34] Psychological injuries occurring over a period of time, as happened here, are not compensable under the WCA. See Jensen, 109 N.M. at 629, 788 P.2d at 385. Appellees' alleged injuries started from the time of the sexual harassment, which occurred for over a year, up to the time of trial. Appellees' alleged injuries were the result of neither a sudden event nor an accidental injury, and thus were neither primary nor secondary injuries under the WCA. Since Appellees' psychological injuries do not fall within the WCA's coverage, they are not compensable under the WCA and thus, the exclusivity provision does not bar Appellees' claim. See Beavers, 120 N.M. at 347, 901 P.2d at 765.

D.

[**35] In short, the WCA exclusivity provision does not bar Appellees' tort claims because injuries caused by sexual harassment do not arise out of employment. Also, the exclusivity provision does not bar Appellees' tort claims because substantial evidence exists from which a jury could conclude that Wal-Mart's actions were intentional. Finally, the exclusivity provision does not bar Appellees' tort claims because Appellees' prolonged psychological injuries do not fall within the WCA's coverage. Thus, for all of the foregoing reasons, the exclusivity provision does not bar Appellees' claims.

[***1007] [*55] **III.**

[**59] **IT IS SO ORDERED.**

JOSEPH F. BACA, Justice

WE CONCUR:

PAMELA B. MINZNER, Chief Justice

PATRICIO M. SERNA, Justice

PETRA JIMENEZ MAES, Justice

GENE E. FRANCHINI, Justice (Concurring in part, dissenting in part)

CONCURBY:
GENE E. FRANCHINI (In Part)

DISSENTBY:
GENE E. FRANCHINI (In Part)