Cullen | Dykman

Australia's High Court Denies Employee Worker's Compensation Claim for Sex Injury

November 12, 2013

Ruling in a 4-2 decision [1], the Australian High Court denied a government employee worker's compensation claim for an injury the employee sustained while having sex in a motel room during a business trip.

The female employee bringing the action was employed as a federal servant. The events leading up to the cause of action date back to 2007. The female employee sustained an injury while having sex in a motel room when the glass light fixture affixed above the bed fell onto her face. As a result, the employee sustained injuries to her nose and mouth. The employee has also alleged that the incident caused her to suffer from depression and eventually led to her inability to continue her government employment.

When the employee initially filed her worker's compensation claim with the federal insurance provider, Comcare, the insurance company approved the claim. However, after the insurance company conducted further investigation on the matter, the employee's claim was denied.

The Administrative Appeals Tribunal ("The Tribunal") held that the employee's injuries were not related to her employment because sexual activity was distinguishable from other "ordinary incident[s] of [] overnight stay[s]" such as eating, sleeping or bathing.

On appeal to the Federal Court of Australia, Judge John Nicholas set aside The Tribunal's findings and held that the employee was eligible for worker's compensation for her injury. The Federal Court Judge held, "If the applicant had been injured while playing a game of cards in her motel room, she would be entitled to compensation even though it could not be said that her employer induced her to engage in such activity."

The Full Court of the Federal Court of Australia ("the Full Court") upheld the Federal Court's decision and found that because the employee's injuries occurred during the "interval or interlude" of a business trip, the injury did arise during the course of her employment. The Full Court reasoned that the employee was sent by her employer to spend the night that the particular motel where her injury arose.

By special leave, Comcare appealed to the High Court. In its reversal of the Federal Court's decision, the High Court stated that case precedent did not support the notion that "the employer is to be liable for an injury which occurs when an employee undertakes a particular activity, if the employer has not in any way encouraged the employee to undertake that activity, but has merely required the employee to be present at the place where the activity is undertaken." In reaching its decision, the majority wrote that employee's decision to have sex was a private act that was not encouraged or induced by the employer. Accordingly, the employer was not liable for the

employee's sex injury.

Dissenting, Justice Gageleer wrote that the 100 mile distance between the woman's home and the motel was "sufficient to conclude that the injury the respondent sustained during that interval, and when at that place, was sustained in the course of her employment."

The Australian Employment Minister, Eric Abetz, classified the decision as an employer victory. Abetz later commented, "Instances such as this, where an employee seeks to stretch the boundaries of entitlements, are of great concern and the High Court's intervention is welcome."

As for the federal insurance provider, Comcare declined to comment on how the High Court's ruling will impact other pending worker compensation claims.

If you or your company would like more information on employment law, contact James G. Ryan at j ryan@cullenanddykman.com or via his direct line at 516-357-3750.

A special thanks to Melissa Cefalu, a law clerk at Cullen and Dykman, for help with this post.

[1] Comcare v. PVYW [2013] HCA 41 (30 October 2013), *available at* http://www.austlii.edu.au/au/cases/cth/HCA/2013/41.html.