Spring 1993

Stress in the Workplace: Judicial Developments and Legislative and Business Responses

Anthony Libertella

George Barbero

Follow this and additional works at: https://digitalcommons.fairfield.edu/nealsb

Recommended Citation
Available at: https://digitalcommons.fairfield.edu/nealsb/vol1/iss1/2

This Article is brought to you for free and open access by DigitalCommons@Fairfield. It has been accepted for inclusion in North East Journal of Legal Studies by an authorized administrator of DigitalCommons@Fairfield. For more information, please contact digitalcommons@fairfield.edu.
STRESS IN THE WORKPLACE: JUDICIAL DEVELOPMENTS AND LEGISLATIVE AND BUSINESS RESPONSES

by

Anthony Libertella *
and
George Barbero **

Introduction

In 1989 stress related workers' compensation cases accounted for 15% of all occupational disease claims. Although most stress claims are currently within the workers' compensation system, with average payments of $15,000, the dollar amount and volume of claims is projected to increase dramatically. Stress currently ranks as one of the top ten work-related problems. The Northwestern National Life Insurance Company study of 1991 indicates that the incidence of stress claims has doubled in the past ten years, and the number of employees experiencing stress also has doubled during the same time period. Currently seven out of ten employees surveyed claim to experience work-related stress symptoms.

The factors most commonly cited by employees as causing stress-related illnesses are: reduction of employee benefits, lack of personal control over one's job, mergers and acquisitions or change in business ownership resulting in termination, major departmental reorganizations causing job changes and frequent overtime. It appears that the corporate culture fosters unhealthy and too stressful environments, with unrealistic demands frequently burdening the employees. Of the population surveyed the Northwestern study found that 34% of employees expect burnout on the job and 72% of all workers experience three or more stress related illnesses on a frequent basis. If the number of stress-related illnesses continues to expand as projected by this study, stress claims are anticipated to lead all other workers' compensation claims in the 1990's.

Workers' Compensation Stress Claims

Under the great majority of workers' compensation statutes it is not any workplace injury that entitles an employee to compensation benefits, but only those that are determined to be accidental. Most statutes define "injury" and "personal injury" to mean "only accidental injuries arising out of and in the course of employment." Prior to recent statutory amendments in some states, the statutes typically did not specify any particular injury nor was any reference made to stress claims. From a historical point of view, whether a so-called stress or mental injury claim was compensable, depended upon case law within each state.

Workers' compensation claims involving mental stress are often classified as follows: mental-physical claims in which mental stress causes physical disability (anxiety induced coronary attack), physical-mental claims in which physical injury causes a mental disability (conversion hysteria following traumatic injury), and mental-mental claims in which mental stress causes mental disability (nervous breakdown caused by emotional stress).

Traditionally, the workers' compensation boards and courts are most likely to grant awards in the physical-mental and mental-physical cases; all fifty states regard such claims as compensable. However, in the new and somewhat uncharted territory of mental-mental cases, which is the focus of this paper, there are several difficult issues for determination by the courts. Since there is no physical corroboration for the disability, it is extremely difficult to prove that a mental disability was caused by work. The uncertainties inherent in psychiatry make it difficult to determine whether there was a pre-existing mental illness. Additionally, it is difficult to determine if work-related stress is an aggravating factor to a pre-existing condition, and if so, whether this should be compensable under workers' compensation. In the resolution of these
issues the state courts differ in the criteria to be applied as an examination of selected cases below will demonstrate.

The manner in which state courts have viewed the complex issue of mental-mental claims can be broken into four categories: (1) those denying recovery for mental-mental claims; (2) those allowing recovery where the mental stress involves sudden shock; (3) those allowing recovery when the mental stress is unusual; (4) those allowing recovery where the mental stress is not unusual.\(^{(14)}\)

**State Courts Denying Recovery for Mental-Mental Claims**

The states of Alabama, Florida, Georgia, Kansas, Minnesota, Montana, Nebraska, Ohio, Oklahoma, and South Dakota are among the minority, and do not permit compensation for mental-mental stress cases under any circumstances.\(^{(15)}\)

The following two cases exemplify this minority view. The Supreme Court of Oklahoma in 1990 addressed the issue of the compensability of a mental-mental claim in *Fenwich v. Oklahoma State Penitentiary*.\(^{(16)}\) In this case, a state penitentiary employee’s claim for mental disability resulting from an incident in which he was held hostage for a few hours was denied. The court concluded that mental injury caused by work-related stress without physical trauma is not compensable under the Oklahoma Workers’ Compensation Act.\(^{(17)}\)

In a fairly recent South Dakota Supreme Court case, *Lather v. Hsuon College*,\(^{(18)}\) the issue of mental-mental compensability was considered for the first time. Here, the employee left his position as a college basketball coach because of work-related stress. Subsequently, he was treated for a psychological disorder which ultimately led to his suicide. The court, in denying the claim, held that mental disability caused by a mental stimulus was not compensable.\(^{(19)}\)

**State Courts that Permit Recovery in Mental Injury Caused by Sudden Shock**

The second category is composed of states that permit compensation if the source of the mental stress is caused by a sudden or shocking event. These states are: Illinois, Maryland, Mississippi, Tennessee, Texas and Virginia.\(^{(20)}\)

An example where the courts applied this somewhat stringent criterion is found in *Transportation Insurance Company v. Maksyn*,\(^{(21)}\) where the Supreme Court of Texas held that *gradual* mental stress is not compensable, and that recovery for mental injury was limited to those claimants who had suffered sudden injury. In this particular case the claimant, an employee of a publishing company, was subjected to an excessive work load that required constant and excessive overtime, and therefore, because of the ongoing nature of the injury it was not deemed compensable.\(^{(22)}\)

Other courts, however, have not only allowed recovery for mental-mental claims caused by sudden or shocking stimuli, but also allowed recovery for mental injuries stemming from gradual and extraordinary stress as well, as shown in the recent Mississippi Supreme Court case of *Borden v. Eskridge*,\(^{(23)}\) where the court upheld the disability claim based upon severe depression. Here, the claimant alleged maltreatment by his supervisor causing him to live in a state of anxiety and depression. The court held that a worker seeking benefits for psychological injury must show extraordinary causes, not those usually associated with the workplace.\(^{(24)}\)

**State Courts that Permit Recovery in Cases of Unusual Mental Stress**

The third category of states includes Arizona, Arkansas, Maine, Massachusetts, New Mexico, New York, Rhode Island, South Carolina, Colorado, Delaware, Indiana, Louisiana, Washington, Wisconsin and Wyoming, all of which allow compensation for mental-mental claims if the source of the mental stress is considered to be unusual and in excess of the amount of stress normally associated with everyday employment.\(^{(25)}\)

New York is one state that has adopted the majority view, after its highest court resisted ruling on mental-mental claims for years. In 1975, in the landmark case of *Wolfe v. Sibley, Lindsay & Curt Co.*,\(^{(26)}\) the New York Court of Appeals for the first time considered the question of whether psychic trauma is a readily identifiable cause of psychological or nervous injury. Having earlier decided in *Klimas v. Trans Caribbean Airways*,\(^{(27)}\) that an injury caused by emotional stress or shock may be accidental within the purview of the compensation law, and having uniformly sustained awards previously where physical impact resulted in nervous or psychological disorders,\(^{(28)}\) the court in *Wolfe*, by a four to two decision, and despite a vigorous dissent, reversed the Appellate Division’s denial of the award, and held that the psychological or nervous injury precipitated by psychic trauma is compensable to the same extent as physical injury.\(^{(29)}\) The claimant, employed as a secretary, worked for a department store security director who was suffering from a nervous condition. The supervisor relied heavily on the claimant who not only assumed some of her supervisor’s duties, but because his confidante on the subject of his increasing anxiety and nervous condition. After calling the police in response to her supervisor’s request and failing to reach him on the intercom, she entered his office and found him lying in a pool of blood caused by a self-inflicted gunshot wound in the head. She became extremely upset, lost time from work, and received psychiatric care with hospitalization. Her condition was diagnosed as acute depressive disorder.\(^{(30)}\)

The court, in reinstating the compensation award, noted that, having recognized the reliability of identifying psychic trauma as a cause of physical injury in some cases (mental-physical), and psychological injury as a resultant factor in other cases (physical-mental), it saw no reason for limiting recovery in the latter instance to cases involving physical impact.\(^{(31)}\) Citing *Battalia v. State of New York*,\(^{(32)}\) which eliminated the "impact" doctrine in the field of torts, the court stated: "There is nothing
talismanic about physical impact."(25) In passing, the court also noted that its analysis reflected the majority of decisions in this country.46

Apparently, in an effort to restrict the application of its holding and to distinguish the instant case from its holding in Tobin v. Grossman,47 which refused to extend to third parties a cause of action for psychic injury incurred without impact, the court pointed out that the claimant here was not a third party merely witnessing an injury to another, but was an active participant in being involved in her supervisor’s nervous condition.(26) In addition, not only did she consider his suicide a personal failure, but she was an integral part of the tragedy by virtue of his last communication and her discovery of his lifeless body.47

Following Wolfe, the appellate courts in New York have affirmed a number of awards to claimants where psychological injury was attributable to psychiatric trauma. In Gamble v. New York State Narcotics Addict Control Commission,48 an award for death benefits was affirmed where the claimant suffered psychic trauma resulting from a job change. The court held that the claimant’s resulting psychosis and mental derangement caused his suicide and thereby constituted an accidental injury.49

In another very recent New York case, Friedman v. NBC, Inc.50 the court held that a widow of an NBC-TV employee was entitled to compensation due to her husband’s work-related suicide. The court unanimously ruled that although the deceased suffered from undiagnosed depression for twenty years prior to his suicide, that his suicide was a result of the depressed condition that was related to stress in his employment. A reorganization of NBC in 1978 led to deceased’s being forced to carry a beeper, and work extensive overtime during the nights and weekends. In 1980, he was given a new title and additional responsibilities as manager of the company’s video tape library, an area that had long suffered from operational problems. In his final letters to his wife and supervisor, he stated that he could no longer face what he saw as his inevitable failure in this newly assigned capacity. The court held that workers’ compensation death benefits may be awarded if work-related stress causes insanity or a pattern of mental deterioration.41 It further noted that the "casual relationship" between an industrial accident and a resulting mental condition need not be direct and immediate rather, "it is sufficient that the work related stress be a contributing cause of the psychic injury."42

In some cases the New York appellate courts have denied awards to claimants in mental injury claims. In Everett v. A.S. Steel Rule Die Corporation,43 the court held the claimant did not sustain an industrial accident within the meaning of the Workers’ Compensation Act where he became incapacitated due to a mental condition causally related to his observation of a bloody bandage on the hand of a coworker. Relying on the holding in Wolfe, where the claimant was an active participant, the court stated that it does not extend compensability to mental-mental injury sustained by a claimant who merely observes an injured coworker.44

An example of how the appellate courts in New York have differed in the application of Wolfe is seen in Wood v. Laidlaw Transit, Inc.55 where the claimant, a school bus driver, came upon the scene of a gruesome automobile accident in which two young children, known to her, died. She thereafter developed symptoms of a psychological nature requiring hospitalization and treatment for a condition diagnosed as a post-traumatic stress disorder. Relying on the "active participant" criterion in Wolfe, the Appellate Division reversed the decision of the Workers’ Compensation Board awarding benefits. On further appeal, the Court of Appeals, also relying on Wolfe, reversed the Appellate Division and affirmed the decision of the Board on the grounds that the claimant was "an active participant in the tragedy."(26)

Subsequent to Wolfe, other states in responding to the increase in workplace stress have placed themselves in the mainstream of workers’ compensation jurisprudence by accepting mental-mental claims. Stokes v. First National Bank,56 a South Carolina case is just such an example. Here, a bank employee suffered a nervous breakdown as a result of a greatly increased work load and job responsibility, a by-product of a corporate merger.48 The South Carolina Court of Appeals, in accepting mental-mental claims for the first time, held that the claimants prolonged increase in work hours, combined with additional job duties constituted "unusual and extraordinary conditions of employment" which resulted in a compensable accidental injury.49

In Candelandia v. General Electric Co.,50 a New Mexico case, the claimant suffered anxiety attacks with several hospitalizations resulting from personality conflicts with his supervisor. The court held that psychological injury resulting from a sudden or gradual emotional stimulus "arises out of" employment when it is causally related to job performance.51

Until Sparks v. Tulane Medical Center Hospital & Clinic,52 the Supreme Court of Louisiana had never considered the issue of the compensability of a mental-mental claim. Here, the employee claimed that she had been continually harassed and threatened by co-workers causing her to suffer a disabling mental condition.53 The court noted that mental health is an intrinsic component of the physical structure of the body and that the circumstances here satisfied the requirement of an accidental injury.54

State Courts that Permit Recovery if the Source of the Mental Stress is Not Unusual

The final category of states, which have accepted mental-mental compensation claims, includes Alaska, California, Hawaii, Kentucky, Michigan, New Jersey, Oregon, Pennsylvania and West Virginia, all of which have allowed such claims even if the cause of the mental stress is not deemed to be unusual or excessive.55

Carter v. General Motors,56 was one of the earliest cases to recognize the compensability of claims where mental injury results in the absence of physical impact
or physical stimulus. Here, the claimant developed a paranoid schizophrenia condition and required hospitalization after being unable to keep up with the pace of work demanded by his supervisor, although such work was shown not to be unusual. The Supreme Court of Michigan held that "emotional disabilities are compensable under the Workers' Compensation Act regardless of whether the cause was a direct physical injury or mental shock."[57]

Following Carter, the Michigan courts affirmed awards in mental-mental cases, including those based upon workers' subjective perceptions of stress.[68] However, following a 1980 amendment to the Michigan Compensation Law,[69] in 1991 the Court of Appeals in Iliyan v. General Motors Corp.[70] clearly rejected the subjective standard test applied in earlier cases. Here, the plaintiff alleged having "major depression" with the onset of emotional disorder occurring in relationship to the stress he allegedly experienced in his workplace, where he described himself as "feeling mistreated, pressurized and demeaned."[61] In reversing an award by the Workers' Compensation Board, the court held that the Board mistakenly applied the invalidated Deziel subjective standard and that the correct legal standard to be applied was that of an actual, precipitating, work-related trauma, event, or events and not just an unfounded perception thereof.[65]

**Human Rights Cases and Job-Related Stress**

While the greater number of job-related stress claims are made under workers' compensation, in some instances, employees have been able to successfully pursue such claims outside the workers' compensation area. In New York City Transit Authority v. State Division of Human Rights (Adrienne Nasb)[71] the New York State Court of Appeals reversed an appellate court ordered reduction of a $450,000 award for mental anguish in a sex discrimination case, and remitted the matter to the Appellate Division for reconsideration. The high court noted that, "Mental suffering is not only compensable, but also a frequent sometimes sole, consequence of unlawful discriminatory condition."[64]

Another recent case from New York's highest court, exemplifying its willingness to compensate employees for mental anguish and humiliation in discrimination cases, is Consolidated Edison Company of New York, Inc. v. New York State Division of Human Rights (Pamela Easton).[72] The court held that there was substantial evidence supporting the finding of the State Commissioner of Human Rights, that Consolidated Edison discriminated against Pamela Easton, a black woman, on the basis of sex and race, by promoting two white males to supervisory positions, both of whom lacked her experience level. In upholding the Commissioner's award of $10,000 for hurt, humiliation, and mental anguish suffered, the court noted "the effects of discrimination were perceived everyday when the complainant reported to white males, petitioners had promoted over her."[66]

**Tort Cases and Job-Related Stress**

Workers' compensation acts typically provide the sole or exclusive means for injured workers to receive compensation benefits, with recovery unaffected by any negligence on the part of the employer. Yet because workers' compensation limits the recovery, attorneys frequently search for alternatives to employer's exclusivity of remedy protection. In recent years we have seen instances in which appellate courts have carved exceptions to these exclusive remedy provisions of workers' compensation law, particularly with respect to non-physical employee tortious acts, such as intentional infliction of emotional distress, sexual harassment, and discrimination.

In some work-related mental stress claims pursued under state discrimination statutes, employers have raised the issue of the "exclusive remedy" provisions of the state workers' compensation laws. This issue was squarely faced in Boscaula v. Michigan Bell Telephone Co.,[73] where the claimant brought an action for damages alleging violation of her civil rights and sought recovery for physical and mental injury. Here, the court held that the exclusive remedy provision of the Workers' Compensation Act did not bar such an action where the employee was alleging a violation of the Fair Employment Practice Act or the Michigan Civil Rights Act.[68]

In Rojo v. Kliger,[74] where an employee brought an action against her employer and co-employees for sexual harassment under the Fair Employment and Housing Acts and intentional infliction of emotional distress, the California Supreme Court held that an employee need not seek remedy through the Fair Employment and Housing Acts before filing suit on common law grounds of sexual discrimination. This decision lends support to the argument that civil and workers' compensation remedies should be cumulative rather than mutually exclusive. The California Labor Code allows tort damages to be awarded against co-workers guilty of sexual harassment, without a reduction of workers' compensation benefit awards.[70]

In Levinson v. Prentice Hall, Inc.[71] the United States District Court permitted a handicapped employee to first prove that the employer violated state fair employment practice and then to receive back pay, compensation damages and reimbursement. The court then permitted the employee to apply common law principles to seek punitive damages. This case demonstrated how common law employment rights can be used to obtain large punitive awards on top of those awards already granted by state and federal civil rights law. Levinson claimed he had been denied several promotions and had been repeatedly subjected to ridicule and mimicked for his uneven walk. Levinson claimed that the ridicule emotionally hurt, resulting in his crying in bed to his wife, apologizing for not getting the promotion and for being less of a man for not receiving a promotion. Levinson, who suffered from multiple sclerosis, sued for punitive and
compensatory damages for emotional distress. The court awarded him $100,000 for mental suffering due to discrimination and 2.3 million dollars in punitive damages. In Pikop v. Burlington Northern Railroad Company, a railroad employee filed suit for intentional infliction of emotional distress alleging that she was constantly insulted by her supervisor, forced to observe as her coworkers tortured and killed rats and birds, and the company refused to listen to her complaints. The Supreme Court of Minnesota held that claims of employees against the railroad for intentional infliction of emotional distress did not necessitate the showing of physical injury under state tort law and, thereby, were not preempted by either the Railway Labor Act or the Federal Employers Liability Act, which limit recovery to intentional torts that cause physical injury.

**Legislative Responses to Stress-Related Claims**

State legislative bodies have responded to the flood of stress-related claims and to the liberal and expansive judicial interpretation of compensation statutes, which has broadened the application of the concepts of "accident" and "injury" to include mental-mental claims. Some legislative amendments to workers' compensation statutes narrowly redefine "accident" and "injury" to expressly prohibit mental stress claims. Other amendments establish new criteria in the determination of mental injury claims, and some create more demanding standards of proof.

It appears that Montana has taken an extreme position in excluding all mental stress claims when it amended its definition of "injury" under its compensation act by excluding physical and mental conditions arising from emotional or mental stress or non-physical stimulus or activity. Thus, workers who suffer heart attacks from job-related stress are no longer covered (mental-physical claims), nor are workers who suffer a disabling nervous breakdown or any psychological disorder resulting from emotional or mental stress (mental-mental claims).

On the other hand, Massachusetts and New York have taken a more modest position in excluding job-related mental stress claims that arise out of bona fide personnel actions. The Massachusetts legislature amended its compensation laws, and in effect overruled the decision in Kelly's Case by adding the following: "No mental or emotional disability arising principally out of a bona fide personnel action including a transfer, promotion, demotion, or termination except such action which is the intentional infliction of emotional harm shall be deemed to be a personal injury within the meaning of this chapter." Strikingly similar language is found in the New York amendment which states that the "terms 'injury' and 'personal injury' shall not include an injury that is solely mental and is based on work-related stress, if such mental injury is a direct consequence of a lawful personnel decision, involving a disciplinary action, work evaluation, job transfer, demotion, or termination taken in good faith by the employer." It appears that this amendment in effect reverses the holding in Gamble. The recent legislative enactments regarding mental-mental claims in other states vary in the degree of complexity. The amendments in Louisiana, Oregon, Michigan, Colorado, California and New Mexico are good examples.

Appreciated, in a direct response to Sparks, Louisiana's Workers' Compensation Act was amended to provide a new definition of "injury" as follows: "Mental injury or illness resulting from work-related stress shall not be considered a personal injury by accident arising out of and in the course of employment and is not compensable ... unless the mental injury was the result of a sudden, unexpected, and extraordinary stress related to employment and is demonstrated by clear and convincing evidence." Furthermore, a new subsection for mental injury or illness requires a diagnosis by a licensed psychiatrist or psychologist and the diagnosis must meet the criteria of the American Psychiatric Association. This would appear to rule out an employee's subjective allegation as to the appearance of symptoms of mental injury such as anxiety, and that the mental injury must be precipitated by an "accident". In addition, the requirement of "clear and convincing evidence" creates a new element of proof, more demanding than previously required. Oregon, similar to Louisiana in complexity, and in establishing new criteria for mental injury claims, amended its statute providing for a strict set of standards for the compensability of such claims. First, the claimant must now establish that the work conditions creating the mental disorder exist in an objective sense; second, the employment conditions establishing the mental disorder are not conditions inherent in everyday work situations, such as disciplinary actions, job performance evaluations, and termination of employment; third, the diagnosis of the emotional disorder must be acceptable in the medical community; finally, the claimant must present clear and convincing evidence that the mental disorder arose out of and in the course of employment.

Michigan's legislature limited mental injury claims by amending its compensation statute to read that "mental disabilities and conditions of the aging process, including but not limited to heart and cardiovascular conditions shall be compensable if contributed to or aggravated or accelerated by the employment in a significant manner. Mental disabilities shall be compensable when arising out of actual events of employment, not unfounded perceptions thereof. It involves the overall context of employment. In requiring that the mental disability be related to employment in a significant manner creates a stricter standard than that found in Carter. Moreover, this amendment clearly invalidates the subjective "honest perception" test found in Deziel. Colorado's amendment now defines "accident", "injury", and "occupational disease" as not including "disability or death caused by or resulting from mental or emotional stress unless it is shown by competent evidence that such mental or emotional stress is proximately caused solely by hazards to which the worker would not have been equally exposed outside the employment." California by amendment has established a new and higher threshold of compensability for psychiatric injury by requiring a diagnosis of mental injury or
disorder meeting the criteria of the American Psychiatry Association or criteria generally approved and accepted nationally by practitioners in the field of psychiatric medicine. Additionally, the employee must demonstrate by a preponderance of evidence that actual events of employment were responsible for at least 10% of the total causation from all sources contributing to the psychiatric injury.

Governor Pete Wilson proposed an amendment that would require workers to prove that their mental disability came from their employment, not their families or personal lives. Although, the legislature did not agree to this reform, they did enact a requirement that workers must be employed six months prior to their claim.

Finally, the New Mexico legislature, in response to Candelaria amended its compensation act by redefining primary mental impairment to mean a mental illness arising from an accidental injury involving not physical injury and consists of a psychologically traumatic event that is generally outside of a worker's usual experience but is not an event in connection with disciplinary, corrective or job evaluation action or cessation of the worker's employment.

**Business Responses to Stress-Related Claims**

A variety of actions have been undertaken by employers to prevent the sources of stress that are precipitating mental stress claims, such as making use of diagnostic stress systems, providing individual counseling, and creating stress-reduction and control programs. Employees from companies that offer stress reduction programs are 50% less likely to miss work or quit their jobs due to stress, according to the Northwestern Life Insurance survey. Researchers calculated the average cost of rehabilitating stress disabled employees at $1925 and, if not rehabilitated, the cost would be an average of $73,270. The survey also showed that the employers who offered stress-reduction programs have more healthful employees, with higher rates of productivity, lower turnover and less absenteeism. Due to the increase of mental-claims, and the frequently ensuing likelihood of litigation, it has become essential for employers to learn to protect themselves.

The optimal strategy appears to be one of teaching employees to effectively handle the pressure of their jobs, and thus reduce the occurrence of work-related stress injuries. For example, Texas Instruments Inc. has initiated a holistic stress management philosophy that encompasses a wide range of programs. The National Employee Services and Records Association, a non-profit organization with over 15 million members nation-wide, cited Texas Instruments Inc. as the Employer of the Year in 1991, based largely on their employee services and recognition programs along with their organizational structure that places a high value on people. Texas Instruments sees stress as a useful and positive force in the workplace and attempts to educate employees through their wellness program, Lifetrack. This program is available at three major United States facilities, and includes health assessments and recommendations for participation in company-sponsored wellness programs.

Lifetrack materials cover a wide range of topics and provide explanations of the mechanism of stress in the workplace; the materials are family-oriented and promote a balanced life style for employees. Within the past three years, employees participating in Lifetrack health assessments have shown a 7% improvement in how they cope with stress.

In companies throughout the United States increasing numbers of professionals and managers are rejecting grueling work loads, much of which leads to stress despite the frequent high salaries that accompany these positions. Employees are reconsidering their priorities and are seemingly willing to accept salary reductions in exchange for time they need for their personal lives. John P. Robinson, Director of Americans Use of Time Project for the University of Maryland, claims that leisure time not money, will be the status symbol of the 1990's. In a study Robinson conducted for the Hilton Hotel Corporation, 50% of all workers surveyed were willing to forego one day's pay per week for the additional day of rest time. Over three quarters of the respondents place "more time to spend with friends and family" as their top priority, whereas only 61% chose "making more money" as their primary goal. Similar concerns for a balanced lifestyle in reducing stress have been addressed by Texas Instruments, Inc. which has established part-time work-pilot programs.

**Developing Trends in Job-Related Stress**

The number of stress claims in the 1990's is expected to increase as a result of a changing work environment, namely, work-place technology becoming more sophisticated (the use of VDT terminals, computers, and electronic monitoring), the increased presence of workers with AIDS and HIV positive, the employment of disabled persons, and the perceptions of workers being sexually harassed and discriminated.

In *Illinois Data Device v. County of Suffolk* a New York appellate court recently heard arguments in an attempt to resurrect a 1988 law regarding the use of video display terminals in companies with over 20 terminal users. The law was voided in late 1989 by the New York State Supreme Court, which ruled the county was barred by the State Home Rule law from enacting laws affecting employeeemployer relations. The 1988 law required employers with more than 20 video display terminal users to provide equipment meeting standards for stress reduction, specified lighting and noise reduction devices, as well as 15-minute breaks for every three hours of employee work time. A similar law was struck down in California as being overriden by the State's Occupational Safety and Health law; the issues being raised challenge whether these statutes directed at workplace stress conflict with the federal OSHA Act of 1970.

At the 1991 annual meeting of the Human Factors Society commentators indicated that the effect of technostress was in an area that required increased research. Thomas Sheridan, a professor of Man-Machines Laboratory at MIT, asserted that
computers and automation have alienated workers, and the use of computer networks has led to a blurring of the lines of work responsibility and accountability.\(^{(116)}\)

Lawrence Schleiter, a research psychologist with the Stress Reduction Laboratory at the National Institute for Occupational Safety and Health, is concerned by the findings of his investigation regarding electronic performance monitoring.\(^{(115)}\) Although Schleiter believes technology can contribute to positive changes in the workplace, he fears that it also brings with it an interference into the dynamics of interaction in the workplace.\(^{(116)}\)

Researchers have found that employees who are electronically monitored by their supervisors report higher levels of stress and repetitive strain illnesses. Dr. Michael Smith, head of Industrial Energy Department of the University of Wisconsin, in his study of seven regional telephone companies,\(^{(117)}\) found that monitored workers reported greater work load dissatisfaction, and a perception of less control over their jobs and greater levels of anxiety and tension. Smith’s study concluded that electronic monitoring had a negative effect on employee perceptions of their work.\(^{(118)}\)

Another area of growing concern for potential increase of stress claims is the increase of AIDS in the workplace.\(^{(119)}\) William Donnelly, Public Education Coordinator for the AIDS Foundation, citing statistics on the impact of AIDS in the workplace, projected that at least one million HIV positive employees are currently in the workplace and forecasts a dramatic increase in stress-related claims from employees working closely with HIV positive coworkers.\(^{(120)}\) The stresses related to those working in high risk professions (public health, medical, public safety) have shown the need to minimize the risk and stress through educational programs. Work-related stress can also become a contributing factor in accelerating the HIV virus for an HIV positive employee. It is believed that stress hastens the disease’s progress and companies might eventually have to deal with claims based on this factor.\(^{(121)}\)

For example, in a recent New York decision, *Castro v. New Life Insurance Company*,\(^{(122)}\) the court upheld a claim for negligent infliction of distress in an AIDS phobia case. Here, the claimant, a cleaning woman, developed AIDS phobia after being stuck by a negligently disposed hypodermic needle.

The employment of disabled persons poses another area of concern for employers. California workers’ compensation attorney, Richard H. Jordan, recommended that congress should amend the Americans with Disabilities Act (ADA), or the EEO Commission should issue new regulations to avoid the difficulties employers are now facing from employees claiming emotional stress caused by personnel actions.\(^{(123)}\) In many states, employees currently have the right to seek workers’ compensation benefits and ADA remedies when they are suffering from emotional disorders and are denied employment opportunities by the employer they worked for at the time of their injury.\(^{(124)}\) Jordan recommends eliminating job stress claims based on personnel actions from workers’ compensation, establishing a new grievance system, and prohibiting employees from using decisions from workers compensation tribunals to support claims of mental impairments under the ADA; he believes these changes would free employers from a fear of unlimited and unrestricted liability for mental injuries and would further the intention of the workers’ compensation law and the ADA.\(^{(125)}\)

Another developing trend relating to job stress is found in the area of sex discrimination and sexual harassment, where victims report difficulty in sleeping, listlessness, depression, deep feelings of worthlessness and self-blame.\(^{(126)}\) Some estimate the stress-related sexual harassment claims cost American companies a staggering $11 billion annually.\(^{(127)}\) Under a 1986 Supreme Court decision sexual harassment was determined to be a form of discrimination, for which the employer is held liable.\(^{(128)}\) Studies show 90% of the women in the work force see sexual harassment as a major problem.\(^{(129)}\) Companies with stringent sexual harassment policies report improved productivity and morale.\(^{(130)}\) According to a survey conducted by Training magazine 74% of all companies have sexual harassment policies.\(^{(131)}\) The key to a successful sexual harassment prohibition policy appears to be a combination of commitment by management, education and intervention. Companies who choose not to deal effectively with this problem, may one day find themselves paying vast sums in discrimination suits.

**Conclusion**

Stress induced psychological disorders are becoming the fastest developing segment of occupational ills, with the number of mental-mental claims continuing to grow each year. This growth can be attributed to a number of economic, psychological, and sociological reasons, including technological advances in society and overall work environment situations. In addition, the courts liberal interpretation of workers’ compensation laws, human rights law and common law torts, to embrace work-related stress claims, have contributed to the growth of such claims. There can be little doubt that mental claims caused by workplace stress will continue to increase with more litigation in the workers’ compensation and state court systems, with the resultant high cost to employers, employees and society at large.

While employers have in some measure met with success in lobbying state legislatures for changes in workers’ compensation laws in order to reduce mental-mental claims, it is questionable whether this will be an effective solution to the emerging crisis in society engendered by stress related disability claims. While the legislatures, and to a lesser degree, the courts, are faced with the difficult and delicate task of balancing the interest of employers, workers, and society at large, the pervasive nature of work place stress and its resultant disability cannot be ignored. As one court noted, “undue anxiety, strain and mental stress from work are frequently more devastating than a mere physical injury...”.\(^{(132)}\)

Perhaps a better solution would be for employers to adopt a holistic stress management philosophy which would focus more on the value of workers as persons and take into account critical human needs.\(^{(133)}\) Employers might develop programs promoting a balanced life style and allowing time for their employees’ personal and
family lives. Other stress reduction and stress control programs could be instituted by employers. These might include educating employees to effectively handle stress, providing individual and group counseling, and adopting new policies designed to foster better work environments and better relationships between employers and employees. These initiatives will go a long way toward the resolution of this emerging crisis.

Footnotes

2. Id.
5. Id.
6. Id.
7. Id.; see also, Why Workplace Stress Claims are Increasing, STRESS MANAGEMENT ADVISOR, May 1992, 1-2.
8. Id.
11. See generally, IB A. Larson, supra note 9, §42.21-42.23.
12. Id.
13. La Van, supra note 1, at 62.
14. See generally, IB A. Larson, supra note 9, §42.25 (c).
15. Id.
17. Id., at 63.
18. 413 N.W.2d 369 (S.D. 1987).
19. Id.
20. See generally, IB A. Larson, supra note 9, §42.25 (e).
21. 580 S.W. 2d 334 (Texas 1979).
22. Id., at 338-39.
24. Id.
25. IB A. Larson, supra note 9, §42-25 (f).
26. 36 N.Y. 2d 505, 330 N.E. 2d 603, 369 N.Y.S. 2d 637 (1975); See commentary, Compensability of Mental Injury, 21 N.Y.L.F. 465-76 (1976); Workmen's Compensation - New York Court of Appeals Holds Mental Injury

31. Id.
36. Supra note 26, 36 N.Y. 2d at 511, 330 N.E. 2d at 607, 369 N.Y.S. 2d at 642.
37. Id.
39. Id., 400 N.Y.S. 2d at 600.
40. 577 N.Y.S. 2d 517 (A.D.3 Dept.1991), _____ A.D. 2d _____.
41. Id., at 518.
42. Id., at 519.
44. Id., at 183, 484 N.Y.S. 2d at 973.
46. 77 N.Y. 2d at 85, 565 N.E. 2d at 1258, 564 N.Y.S. 2d at 707.
47. 298 S.C. 13, 377 S.E. 2d 922 (S.C. App. 1988); see note, Mental Injuries Held Compensable Under Workers' Compensation Act, 41 SOUTH CAROLINA L. REV. 234, 237 (1989) where the commentator concludes Stokes is a 'sensible extention of existing South Carolina law.'
48. Id., at 15-16, 377 S.E. 2d at 923.
49. Id., at 21-22, 377 S.E. 2d at 926-27.
51. Id., at 174, 730 P. 2d at 477.
52. 546 So. 2d 138 (La.1989); see Sparks v. Tulane Medical Center: An Expansive Interpretation of Louisiana's Workers' Compensation Law, 64 TUL. L. REV. 970-76 (1990) where one commentator felt that the court in Sparks incorrectly construed the term of the Workers' Compensation Act as not covering such injuries.
53. Id., at 141.
54. Id., at 149.
55. IB A. Larson, supra note 25, §42.25 (c).
57. Id., at 581, 106 N.W. 2d at 109.
59. see infra, note 87.
61. Id., at 600, 468 N.W. 2d at 305.
62. Id., at 601-2, 468 N.W. 2d at 304-305.
64. Id., at 217, 577 N.E. 2d at 44, 573 N.Y.S. 2d at 53.
66. Id., at 421, 570 N.E. 2d 222, 568 N.Y.S. 2d at 574.
68. Id., at 309, 362 N.W. 2d at 643.
69. 52 Cal. 3d 65, 801 P. 2d 373, 276 Cal. Rptr. 130 (1990).
71. 868 F. 2d 558 (3rd. Cir. 1989).
72. Id., at 565.
73. 390 N.W. 743 (Minn. 1986).
74. Id., at 747.
75. Id., at 745.
77. Id.
78. 394 MASS. 684, 477 N.E. 2d 582 (Mass 1985). In Kelley, the claimant was told she would be laid off, and later told she could transfer to another department; this caused depression and emotional disability. By a 4-3 decision the Supreme Court ruled for the first time that mental disability resulting from a termination notice was compensable.
82. 546 So. 2d 138 (La. 1989).
83. LA. REV. STAT. ANN. §23.1021 (7) (b) (1990); see commentary in Workers’ Compensation Act: The Legislatures’ Attempt to Reintiate – or Reip - the Careful Balance of Interests Upset By Judicial Interpretation, 36 LOY. L. REV. 158, (1990) where it is suggested that the enlarged definition of “injury” under Louisiana’s amendment may not have altered the Sparks holding.
84. Id., (7) (d).
85. Id., (7) (b) (c).
86. OR. REV. STAT. §656.802 (2) (3) (a) (b) (c) (d) (1991).
87. MICH. COMP. L. ANN., §418.301 (2) (1980).
90. COLO. REV. STAT. §8-41-108 (2.2) (1986).
91. WEST’S ANN. CAL. LABOR CODE, §3208.3 (a) (1990).
92. Id., at §3208.3 (b).
97. Supra, note 4.
98. Id.,
100. Supra, note 4, for a discussion of IBM "Wellness Programs", developed to meet the needs of employee stress, see A Plan For Life: How IBMers Handle Stress, STRESS MANAGEMENT ADVISOR, May, 1992, 4-5.
102. Id.,
103. Id.,
104. Id.,
105. Id., at 5.
107. Id.,
108. Id.,
109. Supra, note 101, at 5.
111. Id.; the N.Y. Supreme Court decision was recently unanimously affirmed by the Appellate Division (2d Dept.) 208 New York Law Journal I, col. 4, (September 18, 1992).
112. Id.,
113. Id., at 2, col. 6.
115. Id., at 2.
116. Id.,
118. Id.
120. Id.
121. Id., at 1, 2.
124. Id.
125. Id.
129. Supra, note 127, 1-2.
130. Id.
131. Id.

COMPARATIVE ASPECTS OF ANTITRUST LAW BETWEEN JAPAN AND THE UNITED STATES

By
Roy J. Girasa* Pace University

Antitrust law in the Unites States and in Japan are fundamentally similar. There are, however, significant and minor differences. Both aspects will be explored in this paper. We will first summarily examine the nature of antitrust law in the United States and then compare its common and dissimilar characteristics with that of Japan.

There are three basic statutes which together with their amendments define antitrust prohibitions and sanctions in the United States. They are: the Sherman Antitrust Act of 1890, the Clayton Act of 1914 and the Federal Trade Commission Act to 1914.

The Sherman Antitrust Act of 1890

The act as amended states:

**Section 1** "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be guilty of a felony...

**Section 2** "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony."

**Jurisdiction** The constitutional basis for Congressional intervention in antitrust activities is

*J.D., Ph.D., Professor of Law, Lubin School of Business, Pace University, Pleasantville, New York.*