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INTRODUCTION

More and more employees who believe that they have been wronged in the workplace are aware of their legal options. As a result, employees are bringing an ever-increasing number and wider variety of administrative and civil claims against their employers. Many employers now facing the prospect of such liability question the extent to which their workers' compensation and general liability insurance will shield them from exposure. Even employers that are experienced in defending employee claims are uncertain whether insurance will cover newer, more novel claims.

This Article is intended to provide practitioners and employers with a general overview of insurance coverage for employment-related claims under Massachusetts law. It also sets forth issues that employers should consider when they receive such a claim. Section I discusses Massachusetts Workers' Compensation law, which is the first place an employer should look for coverage upon receiving an employee's claim. Because not all claims are covered under workers' compensation insurance, the remaining sections discuss general liability insurance that may protect employers from claims. Specifically, Section II discusses a general liability insurance company's duty to defend an employer against employee claims. Section III discusses both public policy and general insurance practices that exclude certain claims from coverage. The Article concludes that Massachusetts law on insurance coverage of employment disputes is developing slowly and suggests that employers should consider al-

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ternative insurance coverage to protect against claims arising out of the employment relationship.

I. COVERAGE FOR EMPLOYMENT CLAIMS UNDER WORKERS' COMPENSATION

Most employment-related claims fall within the scope of the Workers' Compensation Act (the "Act").[1] The broad language of the Act allows employees to receive compensation from the workers' compensation insurer or self-insured employer,[2] without proving that the employer was negligent, if the employee suffers a "personal injury"[3] arising out of and in the course of employment.[4] Thus, the Workers' Compensation Act is an employee's exclusive remedy against the employer for actions based on negligence,[5]

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1. MASS. GEN. L. ch. 152, §§ 1-86 (1994).

2. For detailed information about an employer's duty to obtain workers' compensation insurance and related matters, see 29 LAURENCE S. LOCKE, MASSACHUSETTS PRACTICE, WORKMEN'S COMPENSATION (2d ed. 1981).

3. The Workers' Compensation Act defines personal injury as follows:

> "Personal injury" includes infectious or contagious diseases if the nature of the employment is such that the hazard of contracting such diseases by an employee is inherent in the employment. "Personal injury" shall not include any injury resulting from an employee's purely voluntary participation in any recreational activity, including but not limited to athletic events, parties, and picnics, even though the employer pays some or ali of the cost thereof. Personal injuries shall include mental or emotional disabilities only where the predominant contributing cause of such disability is an event or series of events occurring within any employment. . . . 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.

MASS. GEN. L. ch. 152, § 1(7A) (1994).

4. Ch. 152, § 26. There are, however, two general exceptions to this rule. First, an employee may bring a common-law action arising out of personal injury in the workplace against an employer if the employee, at the time of hire, gave written notice to the employer stating that the employee was reserving all common-law rights of action. § 24. Second, an employee may sue an employer in tort if the employer fails to obtain proper workers' compensation coverage. §§ 66-67. *See, e.g.*, Thorson v. Mandell, 402 Mass. 744, 525 N.E.2d 375 (1988). In such a case, an employee also may sue the corporate officers who negligently failed to provide workers' compensation coverage. LaClair v. Silberline Mfg. Co., 379 Mass. 21, 393 N.E.2d 867 (1979).

In addition to barring civil actions against employers, the Act also bars an employee from suing a co-employee for personal injuries caused by the co-employee in the course of and within the scope of the co-employee's employment. *See, e.g.*, Mendes v. Tin Kee Ng, 400 Mass. 131, 132, 507 N.E.2d 1048, 1050 (1987).

5. *See, e.g.*, Bagley's Case, 256 Mass. 593, 152 N.E. 882 (1926).

products liability,[6] and intentional torts.[7] Certain torts, however, are not "personal injuries" within the meaning of the Act and may subject an employer to civil liability. For example, non-physical torts such as defamation,[8] malicious prosecution,[9] false imprisonment,[10] and slander[11] are not "personal injuries" within the meaning of the Workers' Compensation Act. These torts do not constitute "personal injuries" because they are intended to protect against harm other than injury to an employee's mind or body.[12] Violation of an employee's civil rights is also not a personal injury arising out of and in the course of employment.[13]

In addition, psychological illness has long been recognized as a compensable personal injury under the Workers' Compensation Act.[14] According to the statutory language, emotional injuries that result from bona fide personnel actions, with the exception of injuries arising from the intentional infliction of emotional distress,[15]

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6. *See, e.g.*, Rizzuto v. Joy Mfg. Co., 834 F.2d 7, 9 (1st Cir. 1987); Longever v. Revere Copper & Brass, Inc., 381 Mass. 221, 224, 408 N.E.2d 857, 859 (1980).

7. *See, e.g.*, Foley v. Polaroid Corp., 381 Mass. 545, 550, 413 N.E.2d 711, 715 (1980) (holding that the Workers' Compensation Act is the exclusive remedy for intentional infliction of emotional distress), *appeal after remand*, 400 Mass. 82, 508 N.W.2d 72 (1987). However, damages for emotional distress suffered by an employee as the result of sexual harassment are not precluded by the Workers' Compensation Act. *See, e.g.*, College-Town, Div. of Interco, Inc. v. Massachusetts Comm'n Against Discrimination, 400 Mass. 156, 508 N.E.2d 587 (1987); Franklin Publishing Co., Inc. v. Massachusetts Comm'n Against Discrimination, 25 Mass. App. Ct. 974, 519 N.E.2d 798 (1988).

Although the Act provides the exclusive remedy for intentional torts, the amount of compensation payable to the employee is doubled when the employee's injury results from the employer's "serious and willful misconduct." MASS. GEN. L. ch. 152, § 28 (1994). *See, e.g.*, Armstrong's Case, 19 Mass. App. Ct. 147, 472 N.E.2d 669 (1984).

8. *See, e.g.*, Foley v. Polaroid Corp., 381 Mass. 545, 413 N.E.2d 711 (1980).

9. *See, e.g.*, *id.*

10. *See, e.g.*, Zygmuntowicz v. American Steel & Wire Co., 240 Mass. 421, 134 N.E. 385 (1922).

11. *See, e.g.*, Ezekiel v. Jones Motor Co., 374 Mass. 382, 372 N.E.2d 1281 (1978).

12. Milner v. Stepan Chem. Co., 599 F. Supp. 358, 360 (D. Mass 1984).

13. *See, e.g.*, O'Connell v. Chasdi, 400 Mass. 686, 511 N.E.2d 349 (1987).

14. *See, e.g.*, Ann Marie Robinson's Case, 416 Mass. 454, 623 N.E.2d 478 (1993); Kelly's Case, 394 Mass. 684, 477 N.E.2d 582 (1985).

15. There are four elements to a cause of action for intentional infliction of emotional distress: (1) the defendant intended to inflict emotional distress or knew or should have known that emotional distress was the likely result of his or her conduct; (2) the conduct at issue was "extreme and outrageous" and "beyond all possible bounds of decency" and was "utterly intolerable in a civilized community"; (3) the defendant's actions caused the plaintiff's distress; and (4) the plaintiff's distress was "severe" and of a nature that "no reasonable man could be expected to endure it." Agis v. Howard Johnson Co., 371 Mass. 140, 144-45, 355 N.E.2d 315, 318-19 (1976).

are excluded from the Act's coverage.[16] Nonetheless, it appears that actions alleging negligent infliction of emotional distress based on bona fide personnel actions may be preempted by the Act; however, the Massachusetts Supreme Judicial Court (the "SJC") has not decided the issue.[17]

Employers should also be aware that many general liability policies exclude coverage for injuries that fall within the Act. In *Hanover Insurance Co. v. Ramsey*,[18] the SJC concluded that such a general liability policy exclusion barred coverage of an employee's injuries because the employee was eligible for workers' compensation coverage,[19] but the employer had failed to maintain proper workers' compensation insurance.[20] Thus, an employer who fails to

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16. The relevant statutory definition of "personal injury" contains the following conditions and exclusions:

> Personal injuries shall include mental or emotional disabilities only where the predominant contributing cause of such disability is an event or series of events occurring within any employment . . . . 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.

MASS. GEN. L. ch. 152, § 1(7A) (1994).

The bona fide personnel action exclusion was added by the legislature in response to the Supreme Judicial Court's decision in *Kelly's Case*, 394 Mass. at 689, 477 N.E.2d at 585. In *Kelly's Case*, the court expanded compensability to psychological injuries resulting from a transfer from one department to another. *Id.* Chief Justice Hennessey writing for the dissent, however, noted that the stress causing emotional injury in *Kelly's Case* was the type that arises "'from the common necessity of working for a living'" and should not, therefore, be compensable. *Id.* at 692, 477 N.E.2d at 587 (Hennessey, C.J. dissenting) (quoting Korsun's Case, 354 Mass. 124, 128, 235 N.E.2d 814, 816 (1968)).

17. Several courts have held that the Act's exclusivity provision bars claims for negligent infliction of emotional distress. *See, e.g.*, Clarke v. Kentucky Fried Chicken, 57 F.3d 21 (1st Cir. 1995); Catalano v. First Essex Savings Bank, 37 Mass. App. Ct. 377, 639 N.E.2d 1113 (1994). The Appellate Division of the Massachusetts Superior Court, however, has held that an employee may bring a common-law complaint against an employer alleging negligent infliction of emotional distress arising out of employment because such claim is not barred by the exclusivity provisions of the Workers' Compensation Act. Seeley v. Prime Computer, Inc., 1990 Mass. App. Div. 132, 136 (1990).

18. 405 Mass. 1101, 539 N.E.2d 537 (1989).

19. *Id.* at 1102, 539 N.E.2d at 537 (the exclusion barred coverage for "any employee of the insured who is entitled to payments or benefits under the provisions of the Massachusetts Workers' Compensation Act . . . ."). *Id.*

20. The *Hanover* employee was injured in an automobile owned and operated by his employer during the course and scope of his employment. The employer, however, failed to maintain workers' compensation insurance; therefore, the employee sued the employer in state court. After winning the action, the employer attempted to collect from the employer's automobile insurance carrier. The court, however, concluded that the employer, who had failed to fulfill his obligation under the Act, was not entitled to indemnification by his automobile insurance carrier. *Id.* at 1102, 539 N.E.2d at 538.

obtain the proper workers' compensation coverage may also be denied coverage under its general liability policy.[21]

II. An Insurer's Duty to Defend

At the initial stages of litigation and long before the court or a jury determines liability, insured employers often become concerned with the high costs of defending legal actions brought against them. Depending on the nature of the allegedly improper actions and the complexity of the lawsuit, defense costs could be as high or higher than the final award of damages. Thus, to an insured employer, the insurer's duty to defend is often as important, if not more important, than the insurer's duty to indemnify.[22]

The insurer's duty to provide a defense is defined by the terms of the insurance policy. Accordingly, if the insurance policy has no provision requiring an insurer to defend the insured, the insurer has no duty to defend.[23] The typical duty-to-defend provision in a general liability policy requires that an insurer: "shall have the right and duty to defend any suit against the insured seeking damages on account of such personal injury even if any of the allegations of the suit are groundless, false or fraudulent."[24] Most insurance policies have similar language.[25]

Under Massachusetts law, the duty to defend is construed

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21. In addition, an employer who fails to maintain proper workers' compensation coverage for its employees is subject to criminal prosecution, a stop work order, and may be barred from contracting with the Commonwealth or any of its political subdivisions. Mass. Gen. L. ch. 152, § 25C (1994). An injured employee, however, may file a claim for compensation against the Workers' Compensation Special Fund, in addition to filing a suit for tort damages against an employer. Ch. 152, § 65.

22. For a detailed discussion of the duty to indemnify, see Nicholas P. Alexander, *Developments in Indemnity Law: Express, Implied Contractual, Tort-Based and Statutory*, 79 Mass. L. Rev. 50 (1994).

23. In general, Massachusetts courts construe ambiguous language in an insurance policy against the insurer. Liquor Liability Joint Underwriting Ass'n of Mass. v. Hermitage Ins. Co., 419 Mass. 316, 644 N.E.2d 964 (1995); Pinheiro v. The Medical Malpractice Joint Underwriting Ass'n of Mass., 406 Mass. 288, 547 N.E.2d 49 (1989); Biathrow v. Continental Casualty Co., 371 Mass. 249, 356 N.E.2d 451 (1976). Therefore, if the existence of a duty to defend is questionable, a Massachusetts court likely would conclude that it exists.

24. *See* Boston Symphony Orchestra, Inc. v. Commercial Union Ins. Co., 406 Mass. 7, 10 n.3, 545 N.E.2d 1156, 1157-58 n.3 (1989).

25. Some duty-to-defend clauses set forth specific exclusions from an insurer's duty to defend. *See, e.g.*, Lumberman's Mut. Casualty Co. v. Hanover Ins. Co., 38 Mass. App. Ct. 53, 55, 645 N.E.2d 35, 36 (1995) ("We have the right and duty to defend any suit asking for these damages. However, we have no duty to defend suits for bodily injury or property damage . . . .").

broadly[26] and is triggered by the allegations in the complaint.[27] If those allegations are *reasonably susceptible* of falling within the policy's coverage, the insurer must defend the action.[28] Further, if the complaint is ambiguous as to whether the duty to defend is triggered, the insurer is required to defend the action.

To determine whether the duty to defend has been triggered, Massachusetts courts look to the conduct and injury alleged in the complaint. The plaintiff's description of the cause of action is unimportant.[29] For example, in *Boston Symphony Orchestra v. Commercial Union*,[30] the plaintiff alleged breach of contract against the insured. The factual basis for the breach of contract claim was an allegation that the defendant's alleged breach of an employment contract led to the plaintiff's inability to find work elsewhere.[31] The insurance company argued that the plaintiff had alleged breach of contract, which was excluded from policy coverage. However, the court stated that the allegations were "fairly susceptible" to a defamation claim, which the policy did cover.[32] In reaching that conclusion, the court set forth the test for determining whether the complaint triggers a duty to defend. According to the court, "[t]he process is not one of looking at the legal theory enunciated by the pleader but of 'envisaging what kinds of losses may be proved as lying within the range of the allegations of the complaint, and then seeing whether any such loss fits the expectation of protective insurance reasonably generated by the terms of the policy.'"[33] Accordingly, a cause of action that involves conduct covered by the policy, such as defamation, does not absolve the insurer of its duty to defend simply because the complaint calls the cause of action something that is not covered by the policy.

Massachusetts courts have also suggested that the duty to de-

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26. *See Boston Symphony Orchestra*, 406 Mass. at 10, 545 N.E.2d at 1158.

27. *See* Mingo Corp. v. Essex Ins. Co., 1995 Mass. App. Div. 66 ("[A] legal duty to defend . . . exists if the allegations of the complaint . . . against the insured are reasonably susceptible of an interpretation that they state or adumbrate a claim covered by the policy terms.") (citing Sterilite Corp. v. Continental Casualty Co., 17 Mass. App. Ct. 316, 318, 458 N.E.2d 338, 340 (1983)).

28. *See* Vappi & Co., Inc. v. Aetna Casualty & Sur. Co., 348 Mass. 427, 430, 204 N.E.2d 273, 275 (1965); *Sterilite Corp.*, 17 Mass. App. Ct. at 318, 458 N.E.2d at 340.

29. *See Mingo Corp.*, 1995 Mass. App. Div. at 68 (stating that the appropriate focus in making such a determination is the "factual core" of the complaint).

30. 406 Mass. 7, 545 N.E.2d 1156 (1989).

31. *Id.* at 11, 545 N.E.2d at 1158.

32. *Id.* at 11-13, 545 N.E.2d at 1158-59.

33. *Id.* at 11-12, 545 N.E.2d at 1159 (quoting Sterilite Corp. v. Continental Casualty Co., 17 Mass. App. Ct. 316, 318, 458 N.E.2d 338, 341 (1983)).

fend may be triggered by facts that were not contained in the original complaint. For example, in *Terrio v. McDonough*,[34] the plaintiff alleged that the defendant/insured intentionally pushed her down a flight of stairs. The defendant's insurance policy excluded coverage for intentional acts. Consequently, the defendant's insurer refused to defend the action.[35] The defendant denied that he intentionally pushed plaintiff down the stairs and claimed that any responsibility for her fall was due to his negligence. The defendant filed a third party complaint on the ground that negligent acts were within the policy's coverage. However, plaintiff's attorney waived plaintiff's right to amend her complaint to include a claim for negligence. As a result, the court concluded that the insurer had no duty to defend the action as the complaint did not, and would not in the future, implicate coverage.[36] In dicta, however, the court noted that if the plaintiff had not unambiguously waived her right to bring a negligence action against the defendant, its conclusion might have been different. For example, according to the court, had the plaintiff's theory of liability changed during the trial and an amendment to the complaint been allowed, the insurer might have been bound to indemnify the insured and pay his defense costs.[37]

Once a duty to defend has been established, the general rule is that the duty extends to the entire lawsuit. On two occasions, the SJC has suggested that this rule holds in Massachusetts as well, so that once an insurer's duty to defend is triggered, the insurer is obligated to pay the reasonable costs of defending the entire action and not just the causes of action that the policy may cover.[38]

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34. 16 Mass. App. Ct. 163, 165, 450 N.E.2d 190, 192 (1983).

35. *Id.* at 166, 450 N.E.2d at 193. For a general discussion of damages recoverable for a breach of the duty to defend, see Lynn Haggerty King & Heidi Loken Benas, *The Duty to Defend: When Does It Exist and What Damages Are Recoverable for Its Breach*, 7 U.S.F. MAR. L.J. 245 (1994).

36. *Terrio*, 16 Mass. App. Ct. at 167, 450 N.E.2d at 193.

37. *Id.* at 168-69, 450 N.E.2d at 194; *see also* Lumbermen's Mut. Casualty Co. v. Belleville Indus., Inc., 407 Mass. 675, 686, 555 N.E.2d 568, 575 (1990); Desrosiers v. Royal Ins. Co. of Am., 393 Mass. 37, 40, 468 N.E.2d 625, 627-28 (1984); Peerless Ins. Co. v. Hartford Ins. Co., 34 Mass. App. Ct. 534, 536, 613 N.E.2d 125, 127 (1993). To the contrary, in at least one case the SJC concluded that an unpleaded allegation relieved the insurer of its duty to defend. *See Desrosiers*, 393 Mass. at 40, 468 N.E.2d at 627-28 (concluding that an insurer did not have a duty to defend an action where the complaint did not allege that the named insured or any of its employees was involved in the incident resulting in plaintiffs' injuries).

38. *See* Merrimack Mut. Fire Ins. Co. v. Nonaka, 414 Mass. 187, 191, 606 N.E.2d 904, 907 (1993) ("Because there were negligence counts in each successive complaint, it was reasonable for Merrimack to conclude that it had a duty to defend all aspects of the case."); Aetna Casualty & Sur. Co. v. Continental Casualty Co., 413 Mass. 730, 732 n.1,

An insurer's obligation to pay defense costs arises when the duty to defend is triggered, as long as the insured has notified the insurer of the lawsuit implicating coverage. If the insured fails to notify the insurer of the original complaint, even though that complaint triggered coverage,[39] or if the complaint is later amended in a manner that triggers coverage, the insured cannot recover its defense costs back to the initiation of the lawsuit.[40]

Once an insurer begins to defend or "takes control" of a lawsuit against an insured it cannot thereafter claim that the policy does not cover the liability claimed.[41] In order to retain the ability to ultimately deny coverage, an insurer may enter into a "reservation of rights" or "non-waiver" agreement with the insured.[42] However, if the insurer does so, it must give the insured the option of taking over control of the defense.[43] Thus, if an insurer attempts to enter into a reservation of rights or non-waiver agreement with the insured but insists upon retaining control of the defense, such reservation of rights or non-waiver agreement would be ineffective.[44] If, however, the insured takes over control of the defense, the insurer may be liable for the insured's defense costs if the policy covers the claim.[45]

In summary, the language of the insurance policy and the complaint determine whether an insurer has a duty to defend an action brought against an employer. Prior to purchasing an insurance policy that provides coverage for employment-related disputes, an employer should give careful attention to the policy language to ensure that it contains provisions that require the insurer to defend lawsuits, administrative actions, and other proceedings brought against the employer. Although the language of the complaint generally is within the control of the plaintiff, the employer could, through ap-

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604 N.E.2d 30, 32 n.1 (1992) (stating that the weight of authority required an insurer who had a duty to defend one count to defend the entire complaint).

39. Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 123, 571 N.E.2d 357, 361 (1991) (holding insurer not liable for environmental clean-up costs that the insured voluntarily assumed as the result of lawsuit brought by the state).

40. Hoppy's Oil Serv., Inc. v. Insurance Co. of N. Am., 783 F. Supp. 1505 (D. Mass. 1992).

41. Lunt v. Aetna Life Ins. Co., 261 Mass. 469, 472-73, 159 N.E. 461, 463 (1928).

42. *See* Liddell v. Standard Accident Ins. Co., 283 Mass. 340, 343-44, 187 N.E. 39, 41 (1933).

43. Salonen v. Paanenen, 320 Mass. 568, 574, 71 N.E.2d 227, 231 (1947).

44. *Id.* at 574, 71 N.E.2d at 232; Three Sons, Inc. v. Phoenix Ins. Co., 357 Mass. 271, 277, 257 N.E.2d 774, 777 (1970).

45. Magoun v. Liberty Mut. Ins. Co., 346 Mass. 677, 685, 195 N.E.2d 514, 519 (1964).

propriate responsive pleadings such as a motion for a more definite statement, request the plaintiff to further clarify any allegations that may implicate policy coverage. In addition, an employer could depose the plaintiff as soon as practicable to determine whether a sketchy complaint actually implicates the insurer's duty to defend. Nonetheless, an employer who receives notice of an action against it should notify its insurance carrier immediately if there is any possibility that its insurance policy would require the insured to defend the action. Only the employer's prompt notification can protect the employer and allow the insurer to determine whether to deny coverage, take control of the defense, or relinquish control pursuant to a reservation of rights agreement.

III. EXTENT OF INSURANCE COVERAGE FOR EMPLOYMENT CLAIMS

An employer's worries do not cease once the insurer assumes the employer's defense. The next hurdle is to estimate potential liability and determine whether any damages awarded will be covered by insurance. Public policy prohibits coverage of certain types of employment claims, such as intentional discrimination actions. An employer's nightmare arises if the court awards punitive damages, especially since the defendant's net worth is a prime measure of the appropriate level of such damages.[46] Since punitive damages are discretionary, the employer is hard-pressed to assess the probable severity of the award prior to the verdict. Consequently, the employer is anxious to know the extent to which its punitive damages will be covered under its insurance policies.

Whether punitive damages are entitled to insurance coverage turns on two questions. First, is such coverage contrary to public policy? Second, if coverage is arguably permissible, are punitive damages within the scope of coverage under the employer's insurance policy?

A. *Coverage in Contravention of Public Policy*

Chapter 175, section 47 of the Massachusetts General Laws expressly provides, inter alia, that no company may insure "against legal liability for causing injury other than bodily injury by his de-

46. Paul Holtzman, *The Emergence of Punitive Damages in Bias Cases*, MASSACHUSETTS LAWYERS WEEKLY, December 12, 1994, § A col. 1 (citing City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 270 (1981)).

liberate or intentional crime or wrongdoing."[47] Of course, almost all personnel decisions involve at least some element of employer volition. The question is whether the statute's "deliberate or intentional" exclusion bars insurance coverage of all such personnel actions.

In *Andover Newton Theological School, Inc. v. Continental Casualty Co.*,[48] the SJC considered whether an act of willful discrimination under the Age Discrimination in Employment Act ("ADEA"), if based on a finding of "reckless disregard," constitutes "deliberate or intentional . . . wrongdoing" so as to preclude indemnification by an insurer under Massachusetts General Laws chapter 175, section 47.[49] The court relied upon its decision in *J. D'Amico, Inc. v. Boston*,[50] where a contractor had cut down certain trees without the authorization of the landowner. The court concluded that if the contractor had cut down the trees by mistake, his act may not be a deliberate or intentional crime or wrongdoing within the meaning of Massachusetts General Laws chapter 175, section 47, although his actions may have been willful or reckless.[51] The court held that a finding of willfulness does not necessarily constitute deliberate or intentional wrongdoing.[52] The *Andover* court thus distinguished between conduct that was "deliberate or intentional" and conduct that was undertaken with reckless disregard as to whether it was lawful. Consequently, willfulness will bar insurance coverage only if an intentionally committed wrongful act was also done deliberately or intentionally in the sense that the actor knew the act was wrongful.

The *Andover Newton* court's distinction between "reckless disregard" and "deliberate or intentional" should alert practitioners to give special attention to jury instructions. The *Andover Newton* jury had never been instructed to, and thus did not, decide whether the employer had acted with reckless disregard or with full knowledge of the ADEA.[53] Similar problems will arise in defamation and emotional distress claims. In the event of defamation liability, the fact-finder should decide whether the employer or its agent published false information about the employee with knowledge, or

47. MASS. GEN. L. ch. 175, § 47 (1994).
48. 409 Mass. 350, 566 N.E.2d 1117 (1991).
49. *Id.* at 351-352, 566 N.E.2d at 1118.
50. 345 Mass. 218, 186 N.E.2d 716 (1962).
51. *Id.* at 225-26, 186 N.E.2d at 721.
52. *Andover Newton*, 409 Mass. at 352-53, 566 N.E.2d at 118-19.
53. *Id.* at 351, 566 N.E.2d at 1118.

simply with reckless disregard, of its falsity.[54] Counsel should likewise consider requiring the fact-finder to decide whether emotional distress, if suffered, resulted from reckless[55] or intentional[56] acts.

B. *Policy Exclusions of Punitive Damages and Other Intentional Harms*

The standard Commercial General Liability ("CGL") policy limits insurance coverage to acts that are neither "expected" nor "intended" by the insured.[57] Consequently, the general principle is that damages, including punitive damages, awarded because of an intentionally caused harm, do not constitute an "accident" or "occurrence" and, therefore, are denied coverage.[58] Similarly, both the standard automobile insurance and homeowner's policies expressly exclude coverage for damage intentionally caused by the insured.[59]

In an attempt to define "intentional" or "unexpected," Massachusetts courts have distinguished between "intentional means" and "intentional results." The courts have concluded that an intentional act by the insured that causes an *unintended* injury is an accident, and thus punitive damages, if awarded, may be coverable by an insurance policy. For example, in *Quincy Mutual Fire Insurance Co. v. Abernathy*,[60] an insured hurled a piece of black top from a bridge. The object hit a car and injured one of the passengers. The SJC acknowledged the insured's intent to cause some harm, but found that the insured did not intend or expect the extent of harm that resulted.[61] Therefore, punitive damages were coverable. In a somewhat contrary decision, however, the SJC in *City of Newton v. Krasnigor*[62] held that where the insureds set a small fire in a school but did not expect or intend the extent of damage that ultimately resulted, punitive damages were *not* within the scope of the policy's coverage.[63] The SJC reasoned that the actor did not need to intend

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54. *See, e.g.*, Jolin v. Howley, 1992 Mass. App. Div. 51 (1992).

55. *See, e.g.*, Bowman v. Heller, 420 Mass. 517, 651 N.E.2d 369 (1995), *cert. denied*, No. 95-393, 1995 WL 555488 (Dec 11, 1995).

56. *See, e.g.*, Agis v. Howard Johnson Co., 371 Mass. 140, 141, 355 N.E.2d 315, 316 (1976) (recognizing "intentional or reckless infliction of severe emotional distress").

57. John D. Boyle & Michael R. O'Malley, *Insurance Coverage for Punitive Damages and Intentional Conduct in Massachusetts*, 25 NEW ENG. L. REV. 827 (Spring 1991).

58. *Id.*; *see also*, Rideout v. Crum & Forster Commercial Ins., 417 Mass. 757, 633 N.E.2d 376 (1994).

59. Boyle & O'Malley, *supra* note 57 at 830.

60. 393 Mass. 81, 469 N.E.2d 797 (1984).

61. *Id.* at 87-88, 469 N.E.2d at 801-02.

62. 404 Mass. 682, 536 N.E.2d 1078 (1989).

63. *Id.* at 688, 536 N.E.2d at 1082.

to cause the *exact extent of injury* for the exclusion provision to apply.[64]

The SJC took this reasoning one step further in deciding *Worcester Insurance Co. v. Fells Acres Day School, Inc.*[65] There, the court focused on a day care facility's general liability policy after several of its employees were convicted of sexually abusing minors. The general liability policy in question afforded coverage in the event of occurrences, including accidents, resulting in bodily injury neither expected nor intended by the insured.[66] The non-employee plaintiffs brought assault and battery claims, yet contended such intentional torts might nonetheless constitute occurrences under the policy.[67] The SJC rejected the argument outright. "[T]he nature of [forceful sexual molestation and rape] is such that we must conclude, as a matter of law, that the insureds intended to cause at least some injury to the tort plaintiffs."[68] The court concluded that "intent to injure may be inferred from the commission of an inherently injurious act such as forcible sexual abuse"[69] and that, in fact, "'[r]eason mandates that from the very nature of the act, harm to the injured party must have been intended.'"[70] The court emphasized that the motive of the tortfeasor is not dispositive of the intent issue in the context of sexual assault. In other words, the court disregarded the defendants' *intentions* and focused instead on the *results*. In effect, the court's decision mandated that because sexual assault is an intentional act, punitive damages are excluded from coverage.

Similarly, the SJC in *Rideout v. Crum & Forster Commercial Insurance*[71] concluded that where the defendant was substantially certain that the plaintiffs would suffer the types of harm they did in fact suffer, the defendant's actions were intentional and thus could not be characterized as an "occurrence."[72] In *Rideout*, two sexual discrimination plaintiffs had won a $90,000 judgment against their former employer for back pay, emotional distress damages, interest, and costs. The employer had denied the women promotions and

64. *Id.* at 684, 536 N.E.2d at 1080.
65. 408 Mass. 393, 558 N.E.2d 958 (1990).
66. *Id.* at 398 n.6, 558 N.E.2d at 964 n.6.
67. *Id.* at 399, 558 N.E.2d at 964.
68. *Id.* at 400, 558 N.E.2d at 964.
69. *Id.* at 402, 558 N.E.2d at 966.
70. *Id.* at 400, 558 N.E.2d at 965 (quoting United States Fidelity & Guar. Co. v. American Employers' Ins. Co., 159 Cal. App. 3d 277, 291 n.9 (1984)).
71. 417 Mass. 757, 633 N.E.2d 376 (1994).
72. *Id.* at 764, 633 N.E.2d at 380.

overtime because of their sex and retaliated against them for bringing discrimination claims. The plaintiffs appealed the lower court's dismissal of their action to reach and apply insurance proceeds. Because such acts were obviously intentional, they were not covered under the terms of the employer's liability insurance, and the SJC refused to bring the claims within the ambit of the policy.[73]

In trying to reconcile the decisions in *Abernathy*, *Krasnigor*, and *Fells Acres*, the court acknowledged in *Fells Acres* that their rulings were based on a consideration of the *nature of the acts*.[74] The court espoused a litmus test whereby those acts of a "direct and forcible nature . . . of the inherently injurious kind"[75] are deemed not coverable. The court cited rape, assault and battery, and sexual assault as examples meeting that test.[76]

Consider *Sanderson v. Wellfleet Fire Department*,[77] where the Massachusetts Commission Against Discrimination ("MCAD")

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73. *Id.*

74. *Fells Acres*, 408 Mass. at 400, 558 N.E.2d at 963.

75. *Id.* at 400, 558 N.E.2d at 965.

76. But how do these decisions, which clearly concern physical injury, relate to situations that do *not* manifest a bodily injury, such as in a case of sexual harassment or wrongful termination with discriminatory animus? In fact, what if a sexual harasser commits no bodily touching but rather taunts the employee by words or gestures? Would such behavior be coverable? In Allstate Insurance Co. v. Diamant, 401 Mass. 654, 518 N.E.2d 1154 (1988), the court held that "bodily injury" does not include claims for emotional distress or mental anguish in the absence of accompanying physical harm. *Id.* at 659, 518 N.E.2d at 1157. This case concerned a homeowner's insurance policy, which provided coverage only where there was bodily injury. The plaintiff, an algebra teacher, had given the Diamants' daughter a failing grade. The Diamants responded by sending a letter to the school principal, complaining that the teacher was "psychologically damaged" and had treated their daughter unfairly. *Id.* at 655, 518 N.E.2d at 1155. The teacher brought an action against the Diamants, alleging defamation and intentional infliction of emotional distress. *Id.* at 655, 518 N.E.2d at 1155. The defendants demanded that its insurance company, Allstate, defend them in this suit. Allstate refused, stating that because there was no bodily injury, the policy did not afford coverage. The SJC upheld the insurance company's position. The court emphasized that the policy covered only "bodily injury" and distinguished that term from "personal injury." "The term 'personal injury' is broader and includes not only physical injury, but also any affront or insult to the reputation or sensibilities of a person. 'Bodily injury,' by comparison, is a narrow term and encompasses only physical injuries to the body and the consequences thereof." *Id.* at 656, 518 N.E.2d at 1156.

The court concluded that emotional distress and injury to reputation did not fall within the rubric of the "bodily injury" requirement of the Diamants' insurance policy. *Id.* at 659, 518 N.E.2d at 1157. Thus, in the usual case, liability insurance that covers "bodily injury" will only cover emotional distress and like claims if they result from actual physical harm. *Id.* at 658, 518 N.E.2d at 1157; *see also Fells Acres*, 408 Mass. at 415, 558 N.E.2d at 972 (in broad liability policy, "[c]onsortium injuries are covered, however, as 'damages *because of* bodily injury'").

77. 16 MDLR 1341 (1994).

awarded damages to the employee whose employer had failed to respond seriously to the employee's complaint of sexual harassment. The issue of whether the company's inadequate response was or was not coverable under liability insurance did not arise here. However, the decisions discussed above indicate that coverage depends upon an interpretation of the employer's intent. If the employer's attempt to handle the matter was simply sloppy and irresponsible, liability insurance would most likely cover the employer's damages. If, however, it could be shown that the company's attempt was not in good faith but rather deliberately inexhaustive and ineffective, then arguably such failure to thoroughly investigate a claim of sexual harassment would *not* be coverable.

To the extent that a wrongful personnel practice is the result of recklessness or negligence, a policy may cover an injury under the "occurrence" language.[78] "Generally, injuries resulting from reckless conduct do not fall into the category of 'expected or intended' injuries, but are considered 'accidental' and thus are covered under insurance policies."[79] Thus, depending on the type of injury covered, a general liability policy might insure against claims of, among others, reckless infliction of emotional distress, negligent hiring, supervision, or retention, negligent infliction of emotional distress, or negligent misrepresentation.

Clearly, employers facing a discrimination suit must carefully examine the nature of the discrimination to determine if punitive damages would be covered. If the discrimination is characterized by a disparate impact theory, then punitive damages may result from unintentional actions and thus would probably be covered.[80] If, however, the discriminatory conduct mirrors the facts in *Rideout*,[81] and the employee is specifically targeted because of her sex or disability, for example, then this conduct may be characterized as deliberate and intentional and therefore may be excludable from coverage either by the insurance policy's own terms or pursuant to Massachusetts General Laws chapter 175, section 47.

Again, ascertaining coverage in the realm of sexual harassment is more problematic. The *Fells Acres* decision suggests that sexual

78. *See, e.g.*, *Fells Acres*, 408 Mass. at 410-11, 558 N.E.2d at 972.

79. *Id.* at 411, 558 N.E.2d at 970.

80. *See* Save Mart Supermarkets v. Underwriters at Lloyd's London, 843 F. Supp. 597 (N.D. Cal. 1994) (where the court held, inter alia, that disparate impact claims are not precluded from coverage).

81. See *supra* notes 71-73 and accompanying text for a discussion of Rideout v. Crum & Forster Commercial Ins., 417 Mass. 757, 633 N.E.2d 376 (1994).

assault is intentional and deliberate and thus punitive damages would not be covered by the insurer. Whether coverage exists where a male employee makes rude and suggestive gestures to a female co-worker is not so easily determined. As discussed above, it appears that coverage would depend upon whether the terms of the insurance policy covered bodily injury or personal injury and whether coverage was prohibited under Massachusetts General Laws chapter 175, section 47.

IV. CONCLUSION

Massachusetts, like many other jurisdictions, does not have a plethora of case law concerning insurance coverage for employment disputes. With this in mind, employers should be aware of general coverage disputes that might arise and consider how they can protect themselves. First, employers must realize that not all types of claims are covered by their insurance policies. Rather than rely upon general liability policies, an employer seeking insurance coverage for employment-related practices liability should secure such coverage in the surplus lines market.

In addition, employers should be aware that not all claims give rise to a duty to defend on the part of the insurer. Given the high cost of litigation in employment disputes, this can be an important issue for employers. Further, employers must know that even if an insured does have a duty to defend in a particular case, certain elements of damages for the claim may not be recoverable under the employer's policies. Until Massachusetts develops more precedent that clearly defines the relative rights of the employer and the insured, employers must take note of these issues and act accordingly.