

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA11-816
NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2012

PAMELA E. CAGLE,
Employee,
Plaintiff,

v.

North Carolina
Industrial Commission
I.C. No. WO7827

MARRIOTT/GUILFORD COLLEGE/
MARRIOTT CLAIMS,
Employer,

and

MARRIOTT CLAIMS SERVICES,
Carrier,
Defendants.

Appeal by plaintiff from opinion and award entered 21 March 2011 by North Carolina Industrial Commission. Heard in the Court of Appeals 13 December 2011.

Douglas S. Harris for plaintiff appellant.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Thomas W. Page and Anna M. Holloway, for defendant appellee.

McCULLOUGH, Judge.

Pamela Cagle ("plaintiff") appeals from the Industrial Commission's 21 March 2011 opinion and award dismissing her

claim for benefits due to sexual harassment against Marriott/Guilford College/Marriott Claims and Marriott Claims Services (collectively "defendants") based on lack of subject-matter jurisdiction. For the reasons stated herein, we affirm.

I. Background

Plaintiff began working in the cafeteria at Guilford College in 1988 after being hired by her current supervisor, Douglas Gilmore. A few years after plaintiff began working for defendants, Mr. Gilmore began to make inappropriate sexual comments towards plaintiff, which he allegedly also made to other employees. The sexual harassment escalated to Mr. Gilmore's touching of plaintiff's breasts several times a day over a two-year period. Plaintiff would tell Mr. Gilmore to stop, but he would just laugh and walk away.

On 2 November 1993, Mr. Gilmore instructed plaintiff to accompany him into a private back room, away from the main cafeteria. While in the back room, Mr. Gilmore allegedly ordered plaintiff to expose his penis and touch it. Plaintiff refused and immediately left the room. Plaintiff claims she has been sexually harassed by a fellow coworker in the past, but that it did not lead to a need for psychological help. However, due to the 2 November 1993 incident with Mr. Gilmore, plaintiff began

to experience escalating stress, depression, and post-traumatic stress disorder.

Plaintiff went to see her general physician, Dr. Jane L. Steiner, who opined that the sexual harassment by Mr. Gilmore caused plaintiff's psychological problems. Plaintiff also saw a psychologist, Dr. Margaret Barnes, who noted that Mr. Gilmore's supervisory role differed from those of regular coworkers and led to plaintiff's heightened psychological issues. Dr. Steiner agreed with Dr. Barnes' assessment. Nevertheless, plaintiff did not immediately report the incident, but upon finding out, plaintiff's husband informed her boss. On 30 March 1994, he wrote a letter to the cafeteria manager, Tim Tyree, stating that plaintiff would not take any further action against defendants or Mr. Gilmore provided that defendants pay for any of plaintiff's future needs for professional counseling. Defendants claim plaintiff did not present any testimony or documentation that defendants agreed in the letter to provide professional counseling, nor did the letter mention an agreement that they would treat the incident as a workers' compensation claim.

Nonetheless, defendants reached an agreement with plaintiff and her husband in which defendants agreed to take care of plaintiff's psychological treatment, medication, and any time

lost while out of work. Defendants elected to handle the case in the form of a workers' compensation claim. Defendants filed a Form 19, Employer's Report of Injury to Employee, on 30 March 1994. Plaintiff never filed a Form 18, Notice of Accident to Employer and Claim of Employee, Representative, or Dependent. Defendants paid plaintiff benefits for seventeen years, until 27 July 2010, at which point they stopped paying even though plaintiff's doctors recommended continued therapy due to the sexual harassment.

Defendants initiated the current action by filing a Form 33, Request for Hearing with the North Carolina Industrial Commission, on 10 September 2009. Plaintiff responded by filing a Form 33R along with a Form 33 on 28 January 2010. On 17 February 2010, Deputy Commissioner J. Brad Donovan held a hearing. Deputy Commissioner Donovan subsequently entered an opinion and award on 27 July 2010, dismissing the case for lack of subject-matter jurisdiction. Plaintiff appealed to the Full Commission on 6 August 2010 and filed a Form 44 on 29 September 2010. The Full Commission entered its opinion and award on 21 March 2011, affirming Deputy Commissioner Donovan's opinion and award. Plaintiff consequently appealed to our Court by filing her Notice of Appeal on 19 April 2011.

II. Analysis

A. Lack of Jurisdiction

Plaintiff raises three issues on appeal with her first argument being that the Industrial Commission erred in finding that it lacked jurisdiction to address the issue. Specifically, plaintiff contends the Industrial Commission erred by finding that sexual harassment by a supervisor is comparable to sexual harassment by a coworker and is a risk to which the employee is equally exposed to, both in and out of employment. We disagree.

"Appellate review of an award from the Industrial Commission is generally limited to two issues: (i) whether the findings of fact are supported by competent evidence, and (ii) whether the conclusions of law are justified by the findings of fact." *Chambers v. Transit Mgmt.*, 360 N.C. 609, 611, 636 S.E.2d 553, 555 (2006). "The facts found by the Commission are conclusive upon appeal to this Court when they are supported by competent evidence, even where there is evidence to support contrary findings." *Pittman v. International Paper Co.*, 132 N.C. App. 151, 156, 510 S.E.2d 705, 709, *aff'd*, 351 N.C. 42, 519 S.E.2d 524 (1999). "The Industrial Commission's conclusions of law are reviewable *de novo* by this Court." *Lewis v. Sonoco Prods. Co.*, 137 N.C. App. 61, 68, 526 S.E.2d 671, 675 (2000). A

determination of jurisdiction by the Industrial Commission is not binding upon our Court and "any reviewing court, including the Supreme Court, has the duty to make its own independent findings of jurisdictional facts from its consideration of the entire record." *Dowdy v. Fieldcrest Mills*, 308 N.C. 701, 705, 304 S.E.2d 215, 218 (1983).

Plaintiff first notes that the Industrial Commission does not distinguish between sexual harassment by a supervisor and a coworker, but that the United States Supreme Court does. Plaintiff contends that situations involving sexual harassment by a supervisor are less likely to be reported than those situations involving a coworker, due to the amount of control the supervisor has over the employee. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 801, 141 L. Ed. 2d 662, 685 (1998). However, distinguishing between a supervisor and coworker relationship is irrelevant to the case at hand. The more important issue is whether plaintiff's injury arose out of and was in the scope of her employment as required by N.C. Gen. Stat. § 97-2(6) (2011). The claiming party "must establish both the 'arising out of' and 'in the course of' requirements to be entitled to compensation." *Culpepper v. Fairfield Sapphire Valley*, 93 N.C. App. 242, 247, 377 S.E.2d 777, 780, *aff'd*, 325

N.C. 702, 386 S.E.2d 174 (1989). Furthermore, these are "two separate and distinct elements[.]" *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977).

Plaintiff contends defendants' ratification of Mr. Gilmore's actions, by keeping him employed as plaintiff's supervisor, is one way for her to prove Mr. Gilmore's actions were in the service of defendants. However, defendants correctly note that ratification is only applicable in situations to which the doctrine of *respondeat superior* applies, which is not the case here because defendants did not expressly authorize Mr. Gilmore's actions and his actions were not in furtherance of defendants' business. See *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 491-92, 340 S.E.2d 116, 121-22 (1986). Plaintiff also cites to a few cases for her contention that her injury arose out of her employment, as well as in the scope of her employment. "An injury occurring 'in the course of' employment happens when an employee is injured doing something reasonably expected of him or her at the time, place, and under the circumstances of the employment." *Sisk v. Tar Heel Capital Corp.*, 166 N.C. App. 631, 635, 603 S.E.2d 564, 567 (2004). Plaintiff first cites to *Culpepper*, 93 N.C. App. 242, 377 S.E.2d 777, where a waitress employed by a resort filed a workers'

compensation claim for an injury sustained while trying to escape from a guest of the resort who kidnapped and sexually assaulted her. The attack occurred as the waitress was leaving work and had pulled over to help a guest with his car problems, as her employer would have expected. *Id.* In *Culpepper*, our Court reasoned

[t]he words "arising out of . . . the employment" refer to the origin or cause of the accidental injury. *Roberts*, 321 N.C. at 354, 364 S.E.2d at 420. Thus, our first inquiry "is whether the employment was a *contributing cause* of the injury." *Id.* at 355, 364 S.E.2d at 421 (emphasis added). Second, a contributing proximate cause of the injury must be a *risk* inherent or incidental to the employment, and must be one to which the employee would not have been equally exposed apart from the employment. *Gallimore*, 292 N.C. at 404, 233 S.E.2d at 533. Under this "increased risk" analysis, the "causative danger must be *peculiar to the work and not common to the neighborhood.*" *Id.* at 404, 233 S.E.2d at 532 (citations omitted) (emphasis added).

Id. at 248, 377 S.E.2d at 781. However, this case can be distinguished in that the only reason the waitress pulled over was because it was related to her employment in helping a guest and because her employer generally expected employees to help guests at every opportunity.

Plaintiff also cites to *Hauser v. Advanced Plastiform, Inc.*, 133 N.C. App. 378, 514 S.E.2d 545 (1999), for the argument

that her injury arose out of her employment. In *Hauser*, the employee's estate brought a workers' compensation claim where the employee was kidnapped and killed by a laid-off coworker outside of work. *Id.* Our Court affirmed the Industrial Commission's awarding of benefits in finding that the employee's kidnapping and death arose out of her employment because her coworker committed the murder after the employee gave him a memorandum regarding unemployment benefits subsequent to the coworker's termination. *Id.* "Where any reasonable relationship to employment exists or employment is a contributory cause, the Court is justified in upholding the award as 'arising out of employment.'" *Kiger v. Service Co.*, 260 N.C. 760, 762, 133 S.E.2d 702, 704 (1963) (internal quotation marks and citation omitted). The employee's kidnapping and death clearly arose out of her employment because the evidence allowed "a reasonable inference that the nature of the [plaintiff's decedent's] employment, rather than some personal relationship, created the risk of [her] attack." *Hauser*, 133 N.C. App. at 384, 514 S.E.2d at 550 (quoting *Culpepper*, 93 N.C. App. at 249, 377 S.E.2d at 781-82). However, we do not see that *Hauser* is particularly similar to the case at hand.

Defendants first argue that the parties did not confer jurisdiction on the Industrial Commission by initially deciding to treat the case as a workers' compensation case. "The Industrial Commission is not a court of general jurisdiction. It is an administrative board with quasi-judicial functions and has a special or limited jurisdiction created by statute and confined to its terms. Its jurisdiction may not be enlarged or extended by act or consent of parties, nor may jurisdiction be conferred by agreement or waiver." *Letterlough v. Atkins*, 258 N.C. 166, 168, 128 S.E.2d 215, 217 (1962). Defendants concede that plaintiff's injury occurred within the course and scope of her employment. "An accident occurring during the course of an employment, however, does not *ipso facto* arise out of it." *Robbins v. Nicholson*, 281 N.C. 234, 238, 188 S.E.2d 350, 354 (1972). We agree with defendants in holding that plaintiff's reliance on *Culpepper* and *Hauser* is misplaced because in those cases the plaintiffs' injuries were clearly related to their particular positions and duties. When interpreting the phrase "arising out of employment" it

"excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the [employee] would have been equally exposed apart from the employment. The causative danger must be

peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.'" *Id.* at 735, 155 S.E. at 729-30. *Accord, Guest v. Iron & Metal Co.*, 241 N.C. 448, 85 S.E. 2d 596 (1954); *Bryan v. T. A. Loving Co.*, 222 N.C. 724, 24 S.E. 2d 751 (1943).

Robbins, 281 N.C. at 239, 188 S.E.2d at 353. The situation in the case at hand could have just as easily occurred outside of plaintiff's employment as it did in her employment.

Defendant relies on the cases of *Hogan* and *Sisk* for its argument that plaintiff's job did not expose her to an increased possibility of sexual harassment as to that of being harassed outside of work. Defendants even note plaintiff's own life experiences of having been sexually harassed by her grandfather, a female teacher, a boy at school, her first husband, and former coworkers. In *Hogan*, our Court held the plaintiff's alleged sexual harassment, consisting of her boss making inappropriate sexual advances and sexually derogatory remarks, was not covered by the Workers' Compensation Act (the "Act") because the sexual harassment did not amount to a compensable offense under the Act. See *Hogan*, 79 N.C. App. at 488-96, 340 S.E.2d at 120-24.

Our Court held that sexual harassment did not arise out of the employment because "[s]exual harassment is not a risk to which an employee is exposed because of the nature of the employment but is a risk to which the employee could be equally exposed outside the employment." *Id.* at 496, 240 S.E.2d at 124. Furthermore,

[t]his Court determined emotional injuries resulting from sexual harassment were not a "natural and probable consequence or incident of the employment." We held that sexual harassment is a risk the public generally is exposed to and is "neither covered nor barred by the Act."

Sisk, 166 N.C. App. at 636, 603 S.E.2d at 568 (quoting *Hogan*, 79 N.C. App. at 496, 340 S.E.2d at 124). Moreover, *Sisk* involved a similar situation to the case at hand in that a Wendy's employee argued her case differed from *Hogan* because she was harassed by her supervisor rather than just a coworker. *See id.* Our Court rejected this argument in holding

plaintiff fails to offer and the record is devoid of evidence indicating the assaults resulted from dangers particular to this job and should be imputed to the employer. There is no indication [the supervisor's] conduct resulted from a dispute over employment issues or differed from harassment experienced in everyday life. Instead, the evidence suggests his motive and actions were entirely personal in nature. Johnson's actions were foul behavior against plaintiff, but it was separate from their

common employment interests.

Id. at 637, 603 S.E.2d at 568. The case at bar is substantially similar to both *Hogan* and *Sisk*, and thus we must follow their reasoning in holding plaintiff's claim is not covered by the Act, as we are bound by prior decisions of this Court. See *Hogan*, 79 N.C. App. at 636, 603 S.E.2d at 568; *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989).

B. The Doctrine of Laches

Plaintiff's next argument is that the Industrial Commission erred in failing to recognize the doctrine of laches when defendant failed to raise the argument of lack of jurisdiction over a seventeen-year period. We disagree.

Plaintiff contends that "[b]ased on the . . . precedent set by the North Carolina Supreme Court, [our Court has held] that the equitable law of laches applies in workers' compensation proceedings as in all other cases." *Daugherty v. Cherry Hosp.*, 195 N.C. App. 97, 102, 670 S.E.2d 915, 919 (2009). Under the doctrine of laches there must be "a showing (1) that the petitioner negligently failed to assert an enforceable right within a reasonable period of time, . . . and (2) that the propounder of the doctrine was prejudiced by the delay in bringing the action[.]" *Costin v. Shell*, 53 N.C. App. 117, 120,

280 S.E.2d 42, 44 (1981). However, an argument for laches is misplaced in the case at hand as "[a] challenge to the jurisdiction may be made at any time, since a judgment entered without jurisdiction is a void judgment without legal effect and may be treated as a nullity." *Letterlough*, 258 N.C. at 168, 128 S.E.2d at 217.

Plaintiff further argues that defendants consented to treating the case as a workers' compensation claim. However, an agreement to cover a claim under the Act cannot confer jurisdiction on the Industrial Commission. *See In re Custody of Sauls*, 270 N.C. 180, 187, 154 S.E.2d 327, 333 (1967). Consequently, this argument is without merit.

Finally, plaintiff claims defendants waived any right to contest the compensability of the claim in arguing defendants are bound by N.C. Gen. Stat. § 97-18 (2011), which states that if "the employer or insurer does not contest the compensability of the claim or its liability therefor within ninety days from the date it first has written or actual notice of the injury or death . . . it waives the right to contest the compensability of and its liability for the claim under this Article." *Id.* Plaintiff attempts to draw a parallel between N.C. Gen. Stat. § 97-18 and a Form 21, Agreement for Compensation for Disability,

by noting "that, once approved, a Form 21 'becomes an award enforceable, if necessary, by a court decree.'" *Caple v. Bullard Restaurants, Inc.*, 152 N.C. App. 421, 424, 567 S.E.2d 828, 831 (2002) (citation omitted). Nevertheless, in the case at hand, neither party filed a Form 21 and plaintiff failed to file a Form 18, which triggers the 90-day period under N.C. Gen. Stat. § 97-18. Moreover, the payment of medical expenses is not an acceptance of compensability. See *Biddix v. Rex Mills*, 237 N.C. 660, 75 S.E.2d 777 (1953). Thus, defendants did not waive their right to raise their argument regarding jurisdiction.

C. Arising Out of Employment

Plaintiff's final argument is that the Industrial Commission erred in not finding that the sexual harassment arose out of her employment. This issue is the exact same argument as plaintiff's first argument, except that plaintiff now relies on *Daniels v. Swofford*, 55 N.C. App. 555, 286 S.E.2d 582 (1982). However, *Daniels* involved an intentional assault tort after the plaintiff and her supervisor had been discussing the plaintiff's job and other business matters. See *id.* We already noted above that the sexual harassment suffered by plaintiff was not business related. As a result, this contention does not change

our holding in plaintiff's first argument that plaintiff's injury did not arise out of her employment.

III. Conclusion

Based on the foregoing, we affirm the decision of the Industrial Commission in finding that it lacked jurisdiction to hear plaintiff's claim due to plaintiff's injury not having arisen out of her employment. Furthermore, defendants did not waive their right to raise their argument regarding jurisdiction after seventeen years because issues regarding jurisdiction may be raised at any time.

Affirmed.

Judges McGEE and STEELMAN concur.

Report per Rule 30(e).