

STEWART, GREENBLATT, MANNING & BAEZ

ATTORNEYS AT LAW

6800 JERICHO TURNPIKE

SUITE 100W

SYOSSET, NY 11791

516-433-6677

FAX 516-433-4342

DONALD R. STEWART (RET.)
MADGE E. GREENBLATT
ROBERT W. MANNING
RICARDO A. BAEZ
DAVID J. GOLDSMITH
PETER MICHAEL DeCURTIS
LAURETTA L. CONNORS
JOHN K. HAMBERGER

LISA LEVINE
ANDREA L. De SALVIO
KRISTY L. BEHR
DAVID S. FOODEN
LUKE R. TARANTINO
THOMAS A. LUMPKIN
JILLIAN A. SMITH

KAFI WILFORD (2003-2010)
MICHAEL H. RUINA (1992-2016)

RAYMOND J. SULLIVAN
MONICA M. O'BRIEN

OF COUNSEL

Supreme Court, Appellate Division, Third Department, New York

In the Matter of LESLEY SHINER, Appellant,

v.

SUNY AT BUFFALO et al., Respondents.

WORKERS' COMPENSATION BOARD, Respondent.

November 17, 2016

Facts: One of claimant's supervisors, an associate dean, reportedly sexually harassed and groped her at an office holiday party in December 2010. Claimant filed a claim for workers' compensation benefits which was established for a post-traumatic stress disorder and neck injury. Claimant commenced action in Federal court against employer and associate dean alleging hostile work environment, discrimination, battery and assault. The action settled in August 2013 for \$255,000 with both defendants contributing funds to the settlement and \$65,000 for "back and front pay." State Insurance Fund argues claimant should be barred from further workers' compensation benefits because she neither sought nor obtained consent to settlement as required by Workers' Compensation Law Section 29(5). Claimant argued carrier consent not required as the action was a Federal action rather than a third-party action within the meaning of the statute. WCLJ determined Federal action was a third-party action which claimant had settled without consent of carrier and accordingly forfeited further benefits as of the August 2013 settlement date. The Workers Compensation Board affirmed and the claimant appeals.

Holding: *Affirmed.*

Discussion: Workers' Compensation Law Section 29(5), requires either consent from the carrier or a compromise order from the court in which the third-party action is pending for a claimant to settle a third-party action is pending for a claimant to settle a third-party action and continuing receiving compensation benefits. Claimant argues her federal lawsuit was not a third-party action since the statute addresses "the negligence or wrong of another not in the same employ" (Workers' Compensation Law Section 29(1)) as the associate dean

who harassed the claimant had the same employer. Recently, the Court of Appeals held Workers' Compensation Law Section 29 reveals a legislative design to provide for reimbursement of the compensation carrier whenever a recovery is obtained in tort for the same injury that was a predicate for the payment of compensation benefits. The court reasoned "it would be unreasonable to read the statute as mandating a different result merely because the recovery came out of the pockets of a coworker." Intentional conduct by a coworker in a Federal action does not compel conclusion that it was not a third-party action. The court noted an exception to this rule exists where intentional act was by company/employer president tantamount to furtherance of employer's business.

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