

## **Objection, Your Honor-The Double Standards**

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The law is supposed to be neutral; from whispers in the wind to outright printed discrimination, sex bias remains an unwelcome co-counsel in today's legal world. In workers' compensation in Indiana, it is written into the statute itself. Take Indiana Code § 22-3-3-9 for example: "...a weekly compensation equal to sixty-six and two-thirds per cent (66 2/3%) of the difference between *his* average weekly wages and the weekly wages at which *he* is actually employed after the injury..." [Emphasis added.] If a closer read is done of the Indiana Worker's Compensation Act, every referral to the injured worker is gendered as male. The injury schedule includes male reproductive organs, but not female. The loss of a man's sexual drive due to an injury is given more value than a woman with the same loss. Indiana is not the only workers' compensation system that is primarily focused towards men, it has ranked in the bottom third of states for discrimination and civil right issues specifically experienced by female workers. (Indiana Lags Behind Most States When It Comes to Women in the Workplace, 2025) With the regression of diversity, equity, and inclusion initiatives across the country, this systemic sex discrimination is likely to increase in frequency and impact.

Under the Indiana Civil Rights Act § 22-9-1-2, "It is the public policy of the state to provide all of its citizens equal opportunity and to eliminate segregation or separation based solely on race, religion, color, sex, disability, national origin, or ancestry, since such segregation is an impediment to equal opportunity. Equal education and employment opportunities and equal access to and use of public accommodations and equal opportunity for acquisition of real property are hereby declared to be civil rights. The practice of denying these rights by reason of the sex of such person is contrary to the principles of freedom and equality of opportunity and is a burden to the objectives of the public policy of this state and shall be considered as discriminatory practices." This is like the requirements nationally under the 14<sup>th</sup> Amendment. A discriminatory practice includes a system that excludes individuals from equal opportunity based on sex. If the state worker's compensation system is formulated with built-in, written exclusion and segregation of the basis of sex, it is discriminatory. Indiana can be the prime example - the injury schedule in the Indiana Worker's Compensation Act explicitly gives degrees of impairment for the loss of one (10) or both testicles (30); but is silent upon loss of ovary(ies), uterus, or breast(s). I.C. § 22-3-3-10.

The written bias continues beyond just the state statutes. Every worker's compensation system uses a different reference group for analyzing an injury and its permanency. This heavily influences the continuation of such sex bias against female injured workers, as each reference

guide addresses it differently. If the reference is biased, the system continues the bias. The Veteran's Administration states that a woman who underwent a full mastectomy may be disabled as high as 80%, while the American Medical Association states that a woman who had a full mastectomy is not disabled at all. (Law, 2016) In contrast, the American Medical Association (AMA) also says that a man who has a prostate removed is partially disabled. *Id.* The AMA Guides 5<sup>th</sup> Edition for Permanent Impairment Ratings scales the value of a reproductive injury and diseases for women depending on whether the woman is "child-bearing age," "menopausal," or "post-menopausal" age, lowering in impairment as the older the female worker is. This is not the case for male reproductive injury or diseases in the same Edition.

In practice, sex discrimination becomes devastatingly obvious. An injured worker in Indiana experienced one-sided breast trauma from catching a patient at work, resulting in a burst breast implant. The employer attempted to argue that such an injury was irrelevant and unrelated to the worker's compensation benefits, because this worker was left to deal with a high unexpected repair cost and an uneven chest was purely "aesthetical in nature." In California, a class action lawsuit was filed in 2016 against the state system for systemic discrimination by overt gender bias in permanent disability benefit reductions. (Wire, 2016) The suit alleged multiple types of reductions based on sex-bias, which included work-induced breast cancer resulting in double full mastectomy as no permanent disability and award reduction of severe work-related carpal tunnel due to female gender and post-menopausal status, while prostate cancer is assigned a substantially higher disability rating. *Id.* A man who sustained a pelvic fracture at work no longer has a sex drive as high as before the injury; the functional capacity examiner took this into account in analyzing his permanency. A woman who injured her knees at work and can no longer participate in sexual activity as before the injury is ignored by her directed care doctor and the defense independent medical examiner. When a complete hysterectomy was necessary for an injured worker, a non-treating expert doctor who could provide an opinion and report based upon both the workers' compensation system and medical evidence could not be located. Even the state board could not name an expert, showing that the lack of knowledge and bias is prevalent even when it is unintentional.

California's lawsuit against the state system stated that "they essentially treat being a woman as a pre-existing condition." (Newswire, 2016) Under the Equal Protection clause of the United States Constitution and the Civil Rights Act of every state, a system that is segregating and excluding on the basis of sex is discriminatory. In Indiana, it can be shown by statute alone that it is pervasive and omni-present. The reference that is most used within the state systems outright place less value on a female's injury than a male's injury. In practice, the advocates are left to fight impossible life impacts with little to no recourse, and an exceptional lack in resources. Without actively working to rectify the imbalance, there will continue to be female

workers left behind. Our grand bargain system is already unfair, but the sexism makes it unattainable. Many may want to believe that sex discrimination is the product of a by-gone era; to argue that Lady Justice does wear a blindfold, but still too often, she's only watching for the men in the room.

## References

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