

THE TORT OF INTENTIONAL INFLICTION OF  
EMOTIONAL DISTRESS IN THE PRIVATE  
EMPLOYMENT SECTOR

*Frank J. Cavico\**

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\* The author is a Professor of Business Law and Ethics at the H. Wayne Huizenga School of Business and Entrepreneurship of Nova Southeastern University, Ft. Lauderdale, Florida. He holds a J.D. from St. Mary's University School of Law (1976), a L.L.M. from the University of San Diego School of Law (1987), an M.A. from Drew University and a B.A. from Gettysburg College. The author is a member of the Texas and Florida Bar Associations. The author wishes to express his thanks and gratitude to Mrs. Stephanie Ferrari, MBA-Finance Candidate at the Huizenga School, for her assiduous and able assistance in the editing and legal research for this article.

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## I. INTRODUCTION

This article will examine the now-established common law tort cause of action for the intentional infliction of emotional distress in a modern employment context. Claims of intentional infliction of emotional distress have arisen in a wide variety of situations. One such situation is the private employment sector, specifically in cases where the employee believes he or she was treated or terminated in an unfair, abusive, coercive, or retaliatory manner. The article will thus examine the components of the tort and its applicability to the private employment sector. An important objective of this article will be to ascertain the efficacy of this tort in the private employment setting, especially considering the predominant at will nature of the employment relationship. Consequently, the article will also examine the efficacy of this tort as a means of regulating unjust conduct in the workplace and the potential “exception” to the employment-at-will doctrine for an independent tort of wrongful discharge. Similarly, the article will seek to determine the effectiveness of the tort as a distinct state common law legal “vehicle,” as well as a count of a larger statutory federal or state discrimination and harassment lawsuit. The types of damages that can be recovered for a violation of this tort will also be addressed, as will the various defenses to the tort, especially the possibility of the tort’s preemption by either state workers’ compensation law or federal and/or state civil rights or labor law. Finally, this article will discuss certain practical recommendations for pleading, maintaining and proving this tort in the private em-

ployment context. Before this cause of action can be examined in the private employment context, it is first necessary to understand the general background and historical information of the tort of intentional infliction of emotional distress.

## II. BACKGROUND AND CONTROLLING LAW

The tort of intentional infliction of emotional distress, as a stand-alone legal wrong, has had a difficult journey in the history of the common law. As one state supreme court related, “[a]t first, the courts refused to permit recovery for ‘mental pain and anxiety’ and adopted the view of Lord Wensleydale on the belief that ‘the law cannot value and does not pretend to redress, when the unlawful act complained of causes that alone.’”<sup>1</sup> In the “earlier law,” according to Dobbs’ treatise on torts, “damages could not be recovered for stand-alone emotional harm,” although this excepted the seemingly always “exceptional” common carriers, innkeepers and, later, telegraph companies because these groups have a duty to exercise civility toward customers.<sup>2</sup> *Prosser and Keeton* relate that in the old common law, “if some independent tort, such as assault, battery, false imprisonment, or seduction could be made out, the cause of action served as a peg upon which to hang the mental damages, and recovery was freely permitted.”<sup>3</sup> Furthermore, “[i]t has gradually become recognized that there is no magic inherent in the name given to a tort, or in any arbitrary classification, and that the infliction of mental injury may be a cause of action in itself.”<sup>4</sup> Nevertheless, “courts began to allow damages for mental anguish when the accompanying physical injury was slight or non-existent. Scholars chronicled the development of the law in this area and lamented over the hypocrisy of the legal standard.”<sup>5</sup> Nonetheless,

[n]otwithstanding early recognition of a cause of action in assault cases, the law has been slow to accept the interest in peace of mind as entitled to independent legal protection, even as against intentional invasions. Not until comparatively recent decades has the infliction of

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1. *Kroger Co. v. Willgruber*, 920 S.W.2d 61, 64 (Ky. 1996) (citing *Lynch v. Knight*, 9 H.L.C. 557, 598, 11 Eng. Rep. 854 (1861)).

2. DAN B. DOBBS, *THE LAW OF TORTS* § 303, at 824 (2000).

3. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* §12, at 57 (5th ed. 1984).

4. *Id.*

5. *Kroger*, 920 S.W.2d at 64.

mental distress served as the basis of an action, apart from any other tort. In this respect, the law is clearly in a process of growth, the ultimate limits of which cannot yet be determined.<sup>6</sup>

Around 1930, according to *Prosser and Keeton*, the wrong of intentional infliction of emotional distress by means of outrageous and extreme conduct began to be recognized as a separate and distinct cause of action.<sup>7</sup> According to one state supreme court, a critical factor in the development of the law was the publication of a 1939 article, "Intentional Infliction of Emotional Suffering: A New Tort," in the *Michigan Law Review*, by Dean William L. Prosser.<sup>8</sup> In that landmark publication, Dean Prosser "encouraged the courts to provide clarity and 'to jettison the entire cargo of technical torts with which the real cause of action has been burdened.'"<sup>9</sup> A milestone in the development of the law occurred in 1948, when in a supplement to the *Restatement of Torts*, the American Law Institute for the first time recognized a separate and independent tort for intentional infliction of emotional distress.<sup>10</sup> The principal impediment to the development of the tort had been the fear that the protection of interests in mental peace of mind would be "the 'wide door' which might be opened, not only to fictitious claims, but to litigation in the field of trivialities and mere bad manners."<sup>11</sup> However, "[r]ecognition of the tort by the drafters of the *Restatement* led to its acceptance by the courts, 'the elements of the tort as described in the *Restatement* being widely accepted and quoted.'"<sup>12</sup>

Extensive common law exists today to explicate the tort of intentional infliction of emotional distress, including employment tort case law.<sup>13</sup> However, most states set a very high legal and factual standard for the common law tort of intentional infliction of emotional distress.<sup>14</sup> As

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6. KEETON ET AL., *supra* note 3 § 12, at 54–55.

7. *See id.* at 60.

8. *Kroger*, 920 S.W.2d at 65.

9. *Id.*

10. DOBBS, *supra* note 2 § 303, at 825; *see also Kroger*, 920 S.W.2d at 65.

11. KEETON ET AL., *supra* note 3 § 12, at 56.

12. *Kroger*, 920 S.W.2d at 65; *see also* Dennis P. Duffy, *Intentional Infliction of Emotional Distress and Employment At Will: The Case Against 'Tortification' of Labor and Employment Law*, 74 B.U. L. REV. 387, 392 (1994) ("Only in recent decades has the tort of intentional infliction of emotional distress been recognized as an independent tort.")

13. Duffy, *supra* note 12, at 390 ("Recognized in virtually every state, there has been a wholesale attempt to apply the tort in the employment context as a way of challenging alleged workplace inequities and abuse by supervisors and managers.")

14. *See Hatley v. Hilton Hotels Corp.*, 308 F.3d 473, 476 (5th Cir. 2002) (explaining that, under Mississippi law, sexual harassment does not necessarily equate to intentional infliction even if malicious); *Briggs v. Aldi, Inc.*, 218 F. Supp. 2d 1260, 1263 (D. Kan. 2002) (noting that under Kan-

one court emphasized, “[t]he standard for successfully pursuing a claim of intentional infliction of emotional distress is high.”<sup>15</sup> *Prosser and Keeton* concurs that “[t]he requirements of the rule are rigorous, and difficult to satisfy.”<sup>16</sup> Many states use the *Restatement (Second) of Torts* formulations for the tort, especially to set the standard for sufficiently offending conduct.<sup>17</sup>

### III. ELEMENTS OF THE CAUSE OF ACTION

#### A. Introduction

Before examining the tort of intentional infliction of emotional distress in the private sector employment context, it is first necessary to state the standard four elements to the tort. In order to prevail in a lawsuit for intentional infliction of emotional distress, the plaintiff typically must show the following: (1) the defendant intended to inflict emotional distress; (2) the conduct of the defendant was extreme and outrageous; (3) the actions of the defendant were the cause of the plaintiff’s distress; and (4) the resulting emotional distress to the plaintiff was severe.<sup>18</sup> According to the *Restatement (Second) of Torts*, “[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.”<sup>19</sup> *Prosser and Keeton* explain that:

[s]o far as it is possible to generalize from the cases, the rule which seems to have emerged is that there is liability for conduct exceeding all bounds usually tolerated by decent society, of a nature which is es-

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sas law, even termination from employment based on “unlawful motive” of race discrimination is insufficient).

15. *Leavitt v. Wal-Mart Stores, Inc.*, 238 F. Supp. 2d 313, 316–17 (D. Me. 2003).

16. *KEETON ET AL.*, *supra* note 3 § 12, at 60–61.

17. *See, e.g.*, *Greenwood v. Delphi Auto. Sys.*, 257 F. Supp. 2d 1047, 1072 (S.D. Ohio 2003); *Jackson v. Blue Dolphin Communications of N.C., L.L.C.*, 226 F. Supp. 2d 785, 793–94 (W.D.N.C. 2002); *Kroger*, 920 S.W.2d at 67; *LaBrier v. Anheuser Ford, Inc.*, 612 S.W.2d 790, 793 (Mo. Ct. App. 1981); *see also* James L. Bleeke, Note, *Intentional Infliction of Emotional Distress in the Employment At Will Setting: Limiting the Employer’s Manner of Discharge*, 60 *IND. L.J.* 365, 366–67 (1985) (“The action, as defined in the 1965 *Restatement (Second) of Torts* has been adopted in most jurisdictions . . .”).

18. *DOBBS*, *supra* note 2 § 303, at 826 (“Almost all courts recognize the tort and apply these basic rules.”).

19. *RESTATEMENT (SECOND) OF TORTS* § 46(1) (1965).

pecially calculated to cause, and does cause, mental distress of a very serious kind.<sup>20</sup>

The standard and often repeated elements to the tort of intentional infliction of emotional distress are naturally required to sustain the tort in an employment context.<sup>21</sup> Yet, as one federal court noted, “North Carolina courts have been particularly hesitant in finding intentional infliction of emotional distress claims actionable within an employment claim.”<sup>22</sup> Similarly, the Texas Supreme Court has been emphatic in emphasizing the hurdle an employee confronts in sustaining his or her workplace intentional infliction of emotional distress claim.<sup>23</sup> “In the workplace, while an employer’s conduct might in some instances be unpleasant, the employer must have some discretion to ‘supervise, review, criticize, demote, transfer, and discipline’ its workers.” The court declined to recognize intentional infliction of emotional distress claims in ordinary employment disputes, but rather held that such claims can exist “only in the most unusual circumstances.”<sup>24</sup>

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20. KEETON ET AL., *supra* note 3 § 12, at 60.

21. See *Gradilla v. Ruskin Mfg.*, 320 F.3d 951, 959 (9th Cir. 2003) (applying California law); *Ford v. Gen. Motors Corp.*, 305 F.3d 545, 555 (6th Cir. 2002) (applying Kentucky law); *Humble v. Boeing Co.*, 305 F.3d 1004, 1012 (9th Cir. 2002) (applying Washington law); *Greenwood*, 257 F. Supp. 2d at 1072; *Darboe v. Staples, Inc.*, 243 F. Supp. 2d 5, 19 (S.D.N.Y. 2003) (applying New Jersey law); *Wait v. Beck’s N. Am., Inc.*, 241 F. Supp. 2d 172, 180–81 (N.D.N.Y. 2003); *Leavitt v. Wal-Mart Stores, Inc.*, 238 F. Supp. 2d 313, 316–17 (D. Me. 2003); *Martinez v. Cole Sewell Corp.*, 233 F. Supp. 2d 1097, 1137–38 (N.D. Iowa 2002); *Proctor v. Wackenhut Corrs. Corp.*, 232 F. Supp. 2d 709, 714 (N.D. Tex. 2002); *Jackson*, 226 F. Supp. 2d at 794; *McCleave v. R.R. Donnelley & Sons Co.*, 226 F. Supp. 2d 695, 702 (E.D. Pa. 2002); *Paraohoa v. Bankers Club, Inc.*, 225 F. Supp. 2d 1353, 1361 (S.D. Fla. 2002); *Briggs v. Aldi, Inc.*, 218 F. Supp. 2d 1260, 1263 (D. Kan. 2002); *Carnemolla v. Walsh*, 815 A.2d 1251, 1260 (Conn. App. Ct. 2003); *Bator v. Yale-New Haven Hosp.*, 808 A.2d 1149, 1151 (Conn. App. Ct. 2002); *Nicholson v. Windham*, 571 S.E.2d 466, 470 (Ga. Ct. App. 2002); *Graham v. Commonwealth Edison Co.*, 742 N.E.2d 858, 866 (Ill. App. Ct. 2000); *Powderteck, Inc. v. Joganic*, 776 N.E.2d 1251, 1264 (Ind. Ct. App. 2002); *Kroger*, 920 S.W.2d at 65; *LaBrier v. Anheuser Ford, Inc.*, 612 S.W.2d 790, 793 (Mo. Ct. App. 1981); *Rigby v. Fallsway Equip. Co.*, 779 N.E.2d 1056, 1064 (Ohio Ct. App. 2002); *Tex. Farm Bureau Mut. Ins. Cos. v. Sears*, 84 S.W.3d 604, 610 (Tex. 2002); *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 611 (Tex. 1999); *Jackson v. Creditwatch, Inc.*, 84 S.W.3d 397, 405 (Tex. App. 2002); *Robel v. Roundup Corp.*, 59 P.3d 611, 619 (Wash. 2002).

22. *Jackson*, 226 F. Supp. 2d at 794.

23. *Tex. Farm Bureau Mut. Ins. Cos.*, 84 S.W.3d at 611.

24. *Id.* This reasoning has been applied in a subsequent Texas appellate court case, which adopted a strict approach to emotional distress claims arising in the workplace, explaining that to manage a business properly, an employer must be able to supervise, review, criticize, demote, transfer, and discipline employees. The court pointed out that “[a]lthough many of these acts are necessarily unpleasant for the employee, an employer must have latitude to exercise these rights in a permissible way, even though emotional distress results.” *Jackson*, 84 S.W.3d at 405–06.

Similarly, one commentator has noted that “[i]n order to properly manage its business, every employer must on occasion review, criticize, demote, transfer and discipline employees.”<sup>25</sup> Therefore, employers are aware that such adverse personnel decisions may instill distress in their employees and that these employees “may consider any such adverse action to be improper and outrageous.”<sup>26</sup> Arguably, unfavorable employment decisions will likely cause some employees to suffer emotional distress.<sup>27</sup> Accordingly, federal district courts have noted, “[i]t is extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary to provide a basis for recovery for the tort of intentional infliction of emotional distress.”<sup>28</sup> Similarly, another federal district court noted that “[t]o say that Ohio courts narrowly define ‘extreme and outrageous conduct’ would be something of an understatement.”<sup>29</sup> Furthermore, Florida courts are generally reluctant to find that an employer’s actions rise to the level of outrageous conduct.<sup>30</sup>

However, there is some obverse authority for the proposition that if the allegedly outrageous and extreme conduct inflicted on an employee occurs at the workplace and in the vicinity of one’s fellow employees, the fact that the workplace is involved adds weight to the employee’s outrage claim.<sup>31</sup> The Texas Supreme Court, although adopting a very conservative approach to the tort in the employment context, has commented that

[i]n the employment context, some courts have held that a plaintiff’s status as an employee should entitle him to a greater degree of protection from insult and outrage by a supervisor with authority over him than if he were a stranger. . . . This approach is based partly on the rationale that, as opposed to most casual and temporary relationships, the

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25. Duffy, *supra* note 12, at 416.

26. *Id.*

27. *Id.*

28. Darboe v. Staples, Inc., 243 F. Supp. 2d 5, 19 (S.D.N.Y. 2003) (applying New Jersey law); Ogden v. Keystone Residence, 226 F. Supp. 2d 588, 604 (M.D. Pa. 2002) (applying Pennsylvania law).

29. Swanson v. Senior Res. Connection, 254 F. Supp. 2d 945, 962 (S.D. Ohio 2003) (quoting Baab v. AMR Servs. Corp., 811 F. Supp. 1246, 1269 (N.D. Ohio 1993)).

30. Paraohao v. Bankers Club, Inc., 225 F. Supp. 2d 1353, 1361 (S.D. Fla. 2002).

31. Robel v. Roundup Corp., 59 P.3d 611, 619 (Wash. 2002) (emphasizing that employee was called extremely vulgar names in her workplace); Pavilon v. Kaferly, 561 N.E.2d 1245, 1251 (Ill. App. Ct. 1990) (noting that “[t]he impact of such outrageous conduct is exacerbated where, as here, the offender was also the employer of the victim.”).

workplace environment provides a captive victim and the opportunity for prolonged abuse.<sup>32</sup>

Similarly, another court also explained that “[i]n an employment context, the coercive pressure upon an employee to accede to the unacceptable demands and insults of the employer is greatly intensified by the implied threat of job loss or job erosion in the event of non-compliance.”<sup>33</sup>

The tort of intentional infliction of emotional distress can stand alone as an independent intentional tort or can be a separate claim in an employee’s discrimination or sexual harassment suit.<sup>34</sup> The tort action for intentional infliction of emotional distress also survives the death of the aggrieved party.<sup>35</sup>

### *B. Extreme and Outrageous Conduct*

#### 1. Extreme Outrage v. Insults and Indignities

The key element to the tort of intentional infliction of emotional distress is the presence of extreme and outrageous conduct. The difficulty in establishing liability under this intentional tort is that the term “outrageousness, one of the tort’s key elements, lacks a specific definition. In fact, the Fifth Circuit has noted that, “[e]xtreme and outrageous conduct’ is an amorphous phrase that escapes precise definition.”<sup>36</sup> Similarly, one commentator has criticized the tort because liability is determined “almost exclusively on the basis of the outrageousness of the defendant’s conduct . . . [and] there is no clear definition of the prohibited conduct. Rather than describing an objective act or series of acts on which liability can be based, ‘outrageousness’ represents generalized evaluation of behavior.”<sup>37</sup>

Nevertheless, many definitions have been asserted.<sup>38</sup> According to

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32. GTE Southwest, Inc. v. Bruce, 998 S.W.2d 605, 612 (Tex. 1999).

33. Paviol, 561 N.E.2d at 1251 (discussing sexual harassment conduct).

34. Briggs v. Aldi, Inc., 218 F. Supp. 2d 1260, 1263 (D. Kan. 2002).

35. Harrison v. Loyal Protective Life Ins. Co., 396 N.E.2d 987, 989–90 (Mass. 1979) (explaining how the intentional infliction of emotional distress is treated the same as battery and assault pursuant to the state survivability statute).

36. Wilson v. Monarch Paper Co., 939 F.2d 1138, 1142 (5th Cir. 1991).

37. Duffy, *supra* note 12, at 394.

38. DOBBS, *supra* note 2 §§ 304–07, at 826–35; KEETON ET AL., *supra* note 3 § 12, at 60–65; RESTATEMENT (SECOND) OF TORTS § 46 (1965).

the *Restatement (Second) of Torts*, conduct is considered to be extreme and outrageous “only where the conduct has been so outrageous in character, and so extreme in degree, so as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”<sup>39</sup> Many courts refer explicitly to the *Restatement* when deciding the “outrage” issue.<sup>40</sup> The “outrage” formulation stated in *Prosser and Keeton* is similar to the *Restatement* stating, “[t]here is liability for conduct exceeding all bounds usually tolerated by decent society . . . .”<sup>41</sup> Dobbs posits the outrageousness standard as “utterly intolerable” conduct which “goes beyond all bounds of civilized society.”<sup>42</sup>

In several jurisdictions, the legal standard of extreme and outrageous conduct involves conduct that is “so outrageous in character, and so extreme in degree, as to go beyond the bounds of decency, and to be regarded as atrocious and utterly intolerable.”<sup>43</sup> The conduct, according to some courts, must be “atrocious,”<sup>44</sup> “go beyond all possible bounds of decency,”<sup>45</sup> and “exceed all bounds of that usually tolerated in a civilized society.”<sup>46</sup> Another court declared that the conduct must evoke “revulsion” to be deemed legally outrageous.<sup>47</sup> All these definitions and

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39. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

40. See, e.g., *Higgins v. Metro-North R.R. Co.*, 318 F.3d 422, 426 (2d Cir. 2003); *Moss v. Camp Pemigewassett, Inc.* 312 F.3d 503, 510–11 (1st Cir. 2002); *Darboe v. Staples, Inc.*, 243 F. Supp. 2d 5, 19 (S.D.N.Y. 2003) (citing *Buckley v. Trenton Sav. Fund Soc.*, 599 A.2d 857, 863 (N.J. 1988)); *Jackson v. Blue Dolphin Communications of N.C.*, 226 F. Supp. 2d 785, 794 (W.D.N.C. 2002); *Powdertech, Inc. v. Joganic*, 776 N.E.2d 1251, 1264 (Indiana Ct. App. 2002) (citing *Conwell v. Beatty*, 667 N.E.2d 768, 777 (Ind. Ct. App. 1996)); *Rigby v. Fallsway Equip. Co.*, 779 N.E.2d 1056, 1064–65 (Ohio Ct. App. 2002) (citing *Yeager v. Local Union 20*, 453 N.E.2d 666 (Ohio 1983)); *Texas Farm Bureau Mut. Ins. Co. v. Sears*, 84 S.W.3d 604, 610 (Tex. 2002) (citing *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993)).

41. KEETON ET AL., *supra* note 3 § 12, at 60.

42. DOBBS, *supra* note 2 § 304, at 827.

43. *Darboe v. Staples, Inc.*, 243 F. Supp. 2d 5, 19 (S.D.N.Y. 2003) (applying New Jersey law); *Proctor v. Wackenhut Corrs. Corp.*, 232 F. Supp. 2d 709, 714 (N.D. Tex. 2002); *Briggs*, 218 F. Supp. 2d at 1263; *Carnemolla v. Walsh*, 815 A.2d 1251, 1260 (Conn. App. Ct. 2003).

44. *Bush v. Am. Honda Motor Co.*, 227 F. Supp. 2d 780, 800 (S.D. Ohio 2002) (citing *Yeager v. Local Union 20*, 453 N.E.2d 666, 671 (Ohio 1983)); *Carnemolla*, 815 A.2d at 1260.

45. *Jackson v. Creditwatch, Inc.*, 84 S.W.3d 397, 405 (Tex. App. 2002). In *Jackson*, the court reversed summary judgment for the former employer. *Id.* The court found that there were general issues of material fact as to whether it was outrageous for the former employer to threaten the roommate of the former employee with termination so as to have the former employee evicted from the home they shared. *Id.* at 408.

46. *Proctor*, 232 F. Supp. 2d at 714 (citing *Ward v. Bechtel*, 102 F.3d 199, 203 (5th Cir. 1997)); *Johnston v. Davis Sec., Inc.*, 217 F. Supp. 2d 1224, 1232 (D. Utah 2002) (holding that the level of conduct would not have been sufficiently outrageous to “a reasonable person” pursuant to state law (citing *White v. Blackburn*, 787 P.2d 1315, 1317 (Utah Ct. App. 1990))).

47. *Hatley v. Hilton Hotels Corp.*, 308 F.3d 473, 476 (5th Cir. 2002) (applying Mississippi law and noting that sexual harassment alone was not sufficiently atrocious).

formulations provide some limited guidance as to the meaning of “extreme and outrageous” conduct, yet not enough clarity, according to one commentator, who worries that “[t]he tort carries with it the twin dangers of leaving the defendant to guess which conduct is prohibited while permitting the courts to ‘enforce laws in an arbitrary and discriminatory fashion.’”<sup>48</sup>

However, behavior on the part of the defendant which is an affront, that displays bad manners, petty oppressions or other trivialities or that is merely insensitive, rude, insulting, indignant or annoying, is insufficient to constitute the tort of intentional infliction of emotional distress.<sup>49</sup> For example, according to one federal district court, a male worker being given a brief massage by a female co-worker, having his hand measured, having female co-workers stand close to him, as well as making a number of sexual comments to him, although termed “clearly . . . inappropriate” conduct by the court, was deemed to be merely “‘insults, indignities, and annoyances,’” that did not rise to the level of extreme and outrageous conduct as a matter of law.<sup>50</sup> As to “trivialities and bad manners,” *Prosser and Keeton* states that “[i]t would be absurd for the law to seek to secure universal peace of mind, and many interferences with it must of necessity be left to other agencies of social control.”<sup>51</sup> Similarly, conduct which is regarded merely as “intemperate,” “rough,” “insensitive,” or “rude” will not meet the legal “outrage” standard.<sup>52</sup>

In a most illustrating “intemperate” case,<sup>53</sup> which clearly shows the difficulty of establishing this tort in an employment context, the employee contended that her employer and its top management asked her to sign a false affidavit, and when she refused, one defendant made a racially discriminatory statement to her.<sup>54</sup> Soon thereafter, she was dis-

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48. Duffy, *supra* note 12 at 394.

49. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d. (1965); KEETON ET AL., *supra* note 3 § 12, at 59–60; DOBBS, *supra* note 2 § 304, at 826–27; *see also* Proctor v. Wackenhut Corrs. Corp., 232 F. Supp. 2d 709, 714 (N.D. Tex. 2002); Carnemolla v. Walsh, 815 A.2d 1251, 1260 (Conn. App. Ct. 2003); Bator v. Yale-New Haven Hosp., 808 A.2d 1149, 1151 (Conn. App. Ct. 2002); *Rigby*, 779 N.E.2d at 1065; *Texas Farm Bureau Mut. Ins. Cos.*, 84 S.W.3d at 610; *Robel v. Roundup Corp.*, 59 P.3d 611, 620 (Wash. 2002).

50. *Greenwood v. Delphi Auto. Sys.*, 257 F. Supp. 2d 1047, 1074 (S.D. Ohio 2003) (applying Ohio law).

51. KEETON ET AL., *supra* note 3 § 12, at 56.

52. *Jackson v. Blue Dolphin Communications of N.C.*, 226 F. Supp. 2d 785, 795 (W.D.N.C. 2002) (applying North Carolina law); *Robel*, 59 P.3d at 620 (holding that conduct considered merely “rough” by appellate court could be construed as outrageous and severe by supreme court); *Williams v. First Tenn. Nat’l Corp.*, 97 S.W.3d 798, 805 (Tex. App. 2003).

53. *Jackson*, 226 F. Supp. 2d at 794.

54. *Id.*

missed from her position, but the court ruled that “[w]hile such actions may seem ‘intemperate,’ they do not rise to the level of extreme and outrageous conduct, as these terms have been defined by the courts.”<sup>55</sup> In declaring that liability does not extend to such “trivialities,” the *Restatement* explains that “[t]he rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind . . . .”<sup>56</sup> The *Restatement* further states that “[t]here must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam.”<sup>57</sup>

Similarly, *Prosser and Keeton* declare that there is “virtually unanimous agreement” for neither imposing liability nor affording a remedy in cases involving “mere insult, indignity, annoyance, or even threats,” without circumstances of aggravation.<sup>58</sup> “Liability of course cannot be extended to every trivial indignity. . . .”<sup>59</sup>

Furthermore, “[t]he plaintiff must necessarily be expected and required to be hardened to a certain amount of rough language, and to acts that are definitely inconsiderate and unkind.”<sup>60</sup> The seminal issue as to whether the defendant’s conduct is extreme and outrageous is judged pursuant to an objective, reasonable person standard based on all the facts and circumstances of the case.<sup>61</sup>

Moreover, conduct which is tortious, illegal or prompted by an unlawful or malicious motive does not in and of itself rise to the level of “extreme and outrageous” for the tort of intentional infliction of emotional distress.<sup>62</sup> Even if motive or intent is deemed to be criminal, “pu-

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55. *Id.*

56. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

57. *Id.*

58. KEETON ET AL., *supra* note 3 § 12, at 59.

59. *Id.*

60. *Id.*

61. *Darboe v. Staples, Inc.*, 243 F. Supp. 2d 5, 19 (S.D.N.Y. 2003) (applying New Jersey law and the “reasonable jury” standard); *Johnston v. Davis Sec., Inc.*, 217 F. Supp. 2d 1224, 1232 (D. Utah 2002); *Proctor v. Wackenhut Corrs. Corp.*, 232 F. Supp. 2d 709, 714 (N.D. Tex. 2002) (applying a reasonable person standard); *Carnemolla v. Walsh*, 815 A.2d 1251, 1260 (Conn. App. Ct. 2003) (applying the “average member of the community” test); *Robel v. Roundup Corp.*, 59 P.3d 611, 620 (Wash. 2002) (holding that the “reasonable minds” test was met as to outrage and severity).

62. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d. (1965); *see also Briggs v. Aldi, Inc.*, 218 F. Supp. 2d 1260, 1263 (D. Kan. 2002) (“Even if defendant’s decision to terminate plaintiff was driven by an unlawful motive such as plaintiff’s race, defendant’s conduct is not so extreme and

nitive” or a “personal vendetta,” that frame of mind has been deemed insufficient for tort liability.<sup>63</sup> For example, in *Texas Farm Bureau Mutual Insurance Co. v. Sears*,<sup>64</sup> the at will plaintiff employee, an independent insurance agent, was discharged after he “blew the whistle” on a local adjuster and other agents he claimed were part of a kickback scheme.<sup>65</sup> The defendant insurance agency had hired a private investigator to investigate the kickback scheme, and although the investigator uncovered no direct evidence that the plaintiff was involved, he still pointed to two “suspicious dealings” and branded the plaintiff as a suspect.<sup>66</sup> Consequently, the defendant company fired the plaintiff, attempted to get the plaintiff’s insurance license revoked, and alerted several federal and state government agencies as to the kickback scheme, to the kickback scheme.<sup>67</sup> In denying tort liability for intentional infliction of emotional distress, the Texas Supreme Court emphasized that wrongful conduct must be “extreme and outrageous”<sup>68</sup> and “[a]ccordingly, any punitive intent or personal vendetta underlying [defendant’s] post-termination acts will not, standing alone, support an extreme and outrageous finding.”<sup>69</sup> The court further explained that “[t]he only evidence about [defendant’s] interpretation of the investigation’s findings is that it had a reasonable belief that [plaintiff] was involved in very suspicious dealings . . . .”<sup>70</sup> The defendant’s action to make the authorities aware of its allegedly negligent investigation or its attempt to insure that any suspected illegal payments were reported to the Internal Revenue Service was not found to be extreme and outrageous conduct.<sup>71</sup>

In some jurisdictions, the scope of what is considered extreme and outrageous conduct has been narrowed considerably in light of discretion reserved for employers. Texas courts have held that in an employ-

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outrageous as those terms are construed by Kansas courts for purposes of assessing the tort of intentional infliction of emotional distress.”); *Jackson v. Blue Dolphin Communications of N.C.*, 226 F. Supp. 2d 785, 792, 795 (W.D.N.C. 2002) (holding that the fact that plaintiff’s discharge was sufficient for wrongful discharge claim pursuant to public policy doctrine was insufficient alone to prove the tort of emotional distress tort); *Rigby v. Fallsway Equip. Co.*, 779 N.E.2d 1056, 1064–65 (Ohio Ct. App. 2002); *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 616 (Tex. 1999).

63. *Rigby*, 779 N.E.2d at 1064; *Tex. Farm Bureau Mut. Ins. Cos. v. Sears*, 84 S.W.3d 604, 612 (Tex. 2002).

64. 84 S.W.3d 604 (Tex. 2002).

65. *Id.* at 606.

66. *Id.*

67. *Id.* at 606–07.

68. *Id.* at 610.

69. *Id.* at 612.

70. *Id.*

71. *Id.*

ment dispute case, extreme and outrageous conduct “exists only in the most unusual circumstances.”<sup>72</sup> As one Texas appellate court further elaborated, “[i]n the workplace, even though the employer’s conduct might be unpleasant for the employee, the employer has the discretion to supervise, review, criticize, demote, transfer, and discipline its workers.”<sup>73</sup> Moreover, if a workplace dispute is deemed to be an “ordinary employment dispute,” it will be exceedingly difficult for an employee to sustain an intentional infliction of emotional distress lawsuit.<sup>74</sup> For example, the Texas Supreme Court found that a defendant insurance company’s “conduct was within the bounds of its discretion to supervise, review, discipline, and ultimately terminate, its independent agents in light of allegations regarding an ongoing kickback scheme.”<sup>75</sup> The court further reasoned that even if the company’s conduct may have seemed “insensitive, stressful, or even unnecessary,” they should be granted “some latitude to discover and eliminate alleged insurance fraud and employee misconduct.”<sup>76</sup>

In *Williams v. First Tennessee National Corp.*,<sup>77</sup> the defendant employer terminated the plaintiff after questioning the plaintiff in front of two other employees about the plaintiff’s use of the company credit card.<sup>78</sup> As the plaintiff was being escorted out of the building, one of the plaintiff’s co-workers told the plaintiff in front of other employees that the plaintiff had been terminated and would not be rehired.<sup>79</sup> The court affirmed the trial court’s dismissal of the case on summary judgment, terming the matter an “ordinary employment dispute,” and ruled that the plaintiff had failed to sustain his burden on the “extreme and outrageous conduct” requirement.<sup>80</sup>

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72. *Id.* at 611; *see also* *Proctor v. Wackenhut Corrs. Corp.*, 232 F. Supp. 2d 709, 714 (N.D. Tex. 2002) (“Incidents in which a Texas court has determined the conduct of an employer with regard to an employee to be extreme and outrageous are few.”); *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 613 (Tex. 1999); *Williams v. First Tenn. Nat’l Corp.*, 97 S.W.3d 798, 805 (Tex. App. 2003) (“Only in the most unusual circumstances does an employer’s conduct rise to that level.”).

73. *Williams*, 97 S.W.3d at 805.

74. *Proctor*, 232 F. Supp. 2d at 714 (stating investigation, reclassification, and demotion of an employee deemed to be an “ordinary employment dispute” and thus did not rise to level of extreme and outrageous conduct); *Tex. Farm Bureau Mut. Ins. Cos.*, 84 S.W.3d at 611; *Williams*, 97 S.W.3d at 805.

75. *Tex. Farm Bureau Mut. Ins. Cos.*, 84 S.W.3d at 606, 611.

76. *Id.* at 612.

77. 97 S.W.3d 798 (Tex. App. 2003).

78. *Id.* at 802.

79. *Id.*

80. *Id.* at 805.

According to the Texas Supreme Court, in order “to establish a cause of action for intentional infliction of emotional distress in the workplace, an employee must prove the existence of some conduct that brings the dispute outside the scope of an ordinary employment dispute and into the realm of extreme and outrageous conduct.”<sup>81</sup> Despite this heavy burden, there are employment scenarios where the egregiousness of the conduct was sufficient for intentional infliction of emotional distress liability.<sup>82</sup> In *GTE Southwest, Inc. v. Bruce*, the Texas Supreme Court found that while employers have broad discretion in how they supervise and discipline employees, “terrorizing them is simply not acceptable.”<sup>83</sup> The court in turn ruled that an employer who is unhappy with an employee’s performance can terminate them, discipline them, or take some approach to the problem that is more appropriate than “fostering . . . abuse, humiliation, and intimidation . . . .”<sup>84</sup>

There are many cases that clearly illustrate the difficulty of demonstrating extreme and outrageous conduct in an employment setting.<sup>85</sup> For example, four incidents of work-related yelling, even if laced with profanity directed at the employee, did not “approach the ‘extreme and outrageous’ conduct required to prove intentional infliction of emotional distress.”<sup>86</sup> Ordinarily, a workplace investigation, such as the questioning of an employee about a wrongdoing, is insufficient to support a claim for intentional infliction of emotional distress.<sup>87</sup> Demoting an employee in part for poor attendance, even though similarly situated employees with similar or worse attendance records were not demoted, is not outrageous enough to meet the legal outrage standard.<sup>88</sup> Similarly,

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81. *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 613 (Tex. 1999).

82. *Id.* at 616–17 (holding that supervisor’s conduct was extreme and outrageous where supervisor regularly threatened, intimidated, and assaulted employees, creating a “den of terror” by means of a pattern of ongoing harassment and abuse); see also *Tex. Farm Bureau Mut. Ins. Cos.*, 84 S.W.3d at 611 (citing the *GTE Southwest* decision favorably).

83. *GTE Southwest, Inc.*, 998 S.W.2d at 617.

84. *Id.*

85. Duffy, *supra* note 12, at 402 (“Despite the expansive view of the tort exemplified by these earlier cases, courts in a number of jurisdictions subsequently have held that adverse treatment by an employer was not outrageous.”).

86. *Higgins v. Metro-North R.R. Co.*, 318 F.3d 422, 426 (2d Cir. 2003).

87. *Proctor v. Wackenhut Corrs. Corp.*, 232 F. Supp. 2d 709, 714 (N.D. Tex. 2002) (noting that the investigation, reclassification, and demotion of employee was not actionable as intentional infliction of emotional distress); *Abeles v. Mellon Bank Corp.*, 747 N.Y.S.2d 372, 373 (N.Y. App. Div. 2002) (discussing how plaintiff was questioned about forgeries of her supervisor’s signature); *Tex. Farm Bureau Mut. Ins. Cos.*, 84 S.W.3d at 611 (citing *Randall’s Food Mkt., Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995) (noting “severe” questioning of employee is insufficient)).

88. *Bush v. Am. Honda Motor Co.*, 227 F. Supp. 2d 780, 800–01 (S.D. Ohio 2002).

criticizing an employee's work three times and calling the employee a "nothing" and a "nobody" was not "extreme and outrageous" behavior as a matter of law.<sup>89</sup> Demoting and then temporarily reassigning an employee to another position is not extreme and outrageous conduct.<sup>90</sup> An increased workload and heightened scrutiny of an employee was not sufficiently outrageous, even if it culminated in the constructive discharge of the employee.<sup>91</sup> Allegations that a co-worker "frequently and unnecessarily" interrupted the employee as she worked, "falsely maligned" the plaintiff's work performance, and made inappropriate comments to the plaintiff about her clothing and the defendant's feelings toward the plaintiff did not demonstrate conduct sufficiently outrageous and extreme to state a cause of action for intentional infliction of emotional distress.<sup>92</sup>

Investigating, verbally reprimanding, and then discharging an employee for violating a firm's disciplinary policy, which forbids fighting or attempting bodily harm, has also been deemed inadequate.<sup>93</sup> Terminating an employee after an investigation, and then escorting the terminated employee off the premises will also be insufficient for a claim of intentional infliction tort liability.<sup>94</sup> Terminating an employee, while treating other similarly situated employees differently because of their race, has been held to be insufficiently outrageous.<sup>95</sup> Not renewing the contract of an employee because of unverified or unfounded complaints of "inappropriate contact" with young male campers, was deemed "offensive" by the First Circuit,<sup>96</sup> but not "outrageous" because "[t]he standard for making a claim of intentional infliction of emotional distress is very high."<sup>97</sup> Furthermore, striking an employee on the leg with a cane for not doing a task promptly, and then firing that employee, has not been deemed to be sufficiently outrageous for liability.<sup>98</sup> The wrongful

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89. *Darboe v. Staples, Inc.*, 243 F. Supp. 2d 5, 19 (S.D.N.Y. 2003).

90. *Graham v. Commonwealth Edison Co.*, 742 N.E.2d 858, 868 (Ill. App. Ct. 2000).

91. *Ford v. Gen. Motors Corp.*, 305 F.3d 545, 555 (6th Cir. 2002).

92. *Zephir v. Inemer*, 757 N.Y.S.2d 851, 852 (N.Y. App. Div. 2003).

93. *Powdertech, Inc. v. Joganic*, 776 N.E.2d 1251, 1255, 1264 (Ind. Ct. App. 2002).

94. *Tex. Farm Bureau Mut. Ins. Cos. v. Sears*, 84 S.W.3d 604, 611 (Tex. 2002) (citing *Wornick Co. v. Casas*, 856 S.W.2d 732, 735 (Tex. 1993); *Abeles v. Mellon Bank Corp.*, 747 N.Y.S.2d 372, 373 (N.Y. App. Div. 2002)).

95. *Briggs v. Aldi, Inc.*, 218 F. Supp. 2d 1260, 1263 (D. Kan. 2002).

96. *Moss v. Camp Pemigewassett, Inc.*, 312 F.3d 503, 506 (1st Cir. 2002).

97. *Id.* at 511.

98. *Thomas Hyll Funeral Home v. Bradford*, 233 F. Supp. 2d 704, 714 (D.V.I. 2002).

and bad faith refusal to pay or the termination of workers' compensation benefits was also deemed insufficiently outrageous.<sup>99</sup>

In *Carnemolla v. Walsh*,<sup>100</sup> the defendant firm's accountant suggested a scheme whereby the employee would list more hours on her timesheet than she actually worked in order to defray the costs of increased health care insurance premiums.<sup>101</sup> The plaintiff claimed that the owner of the firm was aware of the arrangement and that she was assured by the accountant that she was not misappropriating funds.<sup>102</sup> However, when the owner of the firm presumably discovered the discrepancies in the plaintiff's time card, he accused her of embezzlement, threatened criminal action and forced her to resign.<sup>103</sup> The plaintiff sued for intentional infliction of emotional distress, but the state appellate court, although noting that the "conduct alleged in this case may have been distressful or hurtful to the plaintiff," agreed with the trial judge that as a matter of law it was not sufficiently outrageous or extreme to withstand dismissal on summary judgment.<sup>104</sup>

In *Pottenger v. Potlatch Corp.*,<sup>105</sup> the plaintiff argued that his company's conduct was extreme and outrageous because it fired him after thirty-two years of service without giving him an opportunity to "save face," and that people might infer he was terminated for misconduct or that he was "deadwood."<sup>106</sup> Furthermore, the plaintiff also argued that the company incorrectly stated that he "elected" early retirement.<sup>107</sup> The Ninth Circuit Court of Appeals disagreed, noting that the Idaho Supreme Court required "very extreme conduct" before finding intentional infliction of emotional distress from discharge.<sup>108</sup>

Finally, termination of an employee with eight years of service, who recently returned to work from being hospitalized with assurance that he would be "taken care of," was not deemed to be sufficiently extreme and outrageous conduct, even though the employer's representatives taped the termination notice on the door to his home when the employee's wife was present.<sup>109</sup> The Fifth Circuit Court of Appeals has also

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99. *Wright v. DaimlerChrysler Corp.*, 220 F. Supp. 2d 832, 845 (E.D. Mich. 2002).

100. 815 A.2d 1251 (Conn. App. Ct. 2003).

101. *Id.* at 1254.

102. *Id.*

103. *Id.*

104. *Id.* at 1261.

105. 329 F.3d 740 (9th Cir. 2003).

106. *Id.* at 750.

107. *Id.*

108. *Id.*

109. *EEOC v. Voss Elec. Co.*, 257 F. Supp. 2d 1354, 1356, 1357, 1362, 1363 (W.D. Okla.

noted that even a constructive discharge in and of itself will be insufficient for a finding of “extreme and outrageous conduct.”<sup>110</sup> The court explained its reasoning, stating that it is not unusual for an employer to constructively discharge an employee by creating unpleasant and onerous working conditions effectuated to force the employee to quit, but such behavior does not constitute extreme and outrageous conduct.<sup>111</sup>

Nevertheless, there are “outrage” employment cases where the employee has prevailed, at least in some stage in the legal proceedings.<sup>112</sup> For example, conducting a “sham investigation” for the “sole purpose of retaliating” against a whistleblowing employee was deemed to be sufficiently extreme and outrageous for one state appellate court.<sup>113</sup> In another state appellate case, a “whistleblowing” employee claimed that she was fired for refusing to participate in what she alleged was a RICO “real estate transaction closing mill” run by her employer.<sup>114</sup> The plaintiff asserted that her employer’s conduct was sufficiently outrageous and extreme to state a valid claim, but her suit was dismissed by the trial court.<sup>115</sup> The appellate court reversed in part stating that “it is possible that [plaintiff] would be entitled to recover for intentional infliction of emotional distress.”<sup>116</sup> In yet another case, a plaintiff, who had hurt her back and was given a light-duty assignment was stared at, ridiculed, mocked, laughed at, yelled at, and mimicked because of her disability by her co-workers.<sup>117</sup> These co-workers called the plaintiff the most vulgar sexual names and also told customers that the plaintiff had lied about her back injury.<sup>118</sup> Although the state appellate court deemed the conduct to be merely “insulting” and “rough,” the Washington Supreme Court disagreed and branded the conduct outrageous and severe, and thus actionable as intentional infliction of emotional distress.<sup>119</sup>

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110. *Wilson v. Monarch Paper Co.*, 939 F.2d 1138, 1143 (5th Cir. 1991).

111. *Robel v. Roundup Corp.*, 59 P.3d 611, 620 (Wash. 2002). *But see* Duffy, *supra* note 12, at 389 (“Until recently, there was no question that a supervisor who gave an employee a less than satisfactory evaluation, or who criticized the employee’s work, was free from liability for this action, provided the supervisor had not discriminated in violation of a statutory mandate.”).

112. Duffy, *supra* note 12, at 400 (“Some courts have gone to great lengths to stretch the concept of outrageousness to provide relief to employees who were treated in ways the court found distasteful, unfair, or in bad faith.”).

113. *Graham v. Commonwealth Edison Co.*, 742 N.E.2d 858, 868 (Ill. App. Ct. 2000).

114. *Nicholson v. Windham*, 571 S.E.2d 466, 468 (Ga. Ct. App. 2002).

115. *Id.* at 468, 470.

116. *Id.* at 470.

117. *Robel v. Roundup Corp.*, 59 P.3d 611, 614 (Wash. 2002).

118. *Id.*

119. *Id.* at 620.

In *Rigby v. Fallsway Equipment Co.*,<sup>120</sup> the employee incurred a severe head injury while at work, but was eventually authorized to return to work to perform light duties.<sup>121</sup> However, when he did not return to work, the plaintiff's employer sent several letters to him requesting that he return to work and informing him that his continued wages in lieu of worker's compensation benefits would expire.<sup>122</sup> When the plaintiff did not return to work, he was terminated.<sup>123</sup> During the course of ascertaining whether and when the plaintiff was ready to return to work, the defendant employer made several inquiries to the plaintiff's health-care providers, who stated that they did not feel harassed by the employer's actions.<sup>124</sup> However, the plaintiff's emotional distress claim was not limited, as the state appellate court underscored, to the defendant employer's contacts with the health-care providers.<sup>125</sup> The plaintiff's complaint was also based on the fact that the defendant employer allegedly had contacted the plaintiff and his wife at home.<sup>126</sup> Such an allegation was sufficient to preclude the dismissal of the intentional infliction of emotional distress claim on the defendant's motion for summary judgment.<sup>127</sup>

In *Wilson v. Monarch Paper Co.*,<sup>128</sup> the court went to great lengths to characterize the situation as way beyond the typical ordinary employment dispute or constructive discharge situation.<sup>129</sup> The employee, in this case was an executive vice-president with a college education and thirty years experience, but was stripped of his duties and demoted to an entry level warehouse supervisor, and given the most menial and demeaning duties, including janitorial and cleaning duties.<sup>130</sup> At trial the jury determined that the employer was "unwilling to fire [plaintiff] outright, *intentionally and systematically* set out to humiliate him in the hopes he would quit," and accordingly found in favor of the plaintiff on the outrage claim.<sup>131</sup> The Fifth Circuit agreed, condemning the employer's conduct as "degrading and humiliating," "intentional and mean

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120. 779 N.E.2d 1056 (Ohio Ct. App. 2002).

121. *Id.* at 1058.

122. *Id.* at 1058-59.

123. *Id.* at 1059.

124. *Id.* at 1063.

125. *Id.* at 1066.

126. *Id.*

127. *Id.* 1065-66.

128. 939 F.2d 1138 (5th Cir. 1991).

129. *Id.* at 1145.

130. *Id.*

131. *Id.*

spirited,” and “a steep downhill push to total humiliation,” and thus came to the conclusion that the “conduct was, indeed, so outrageous that civilized society should not tolerate it.”<sup>132</sup> Similarly, in *LaBrier v. Anheuser Ford, Inc.*,<sup>133</sup> a case involving the use by the employee of an auto dealership’s demonstrator car, the court agreed with a jury finding

that the action of the employees of [defendant company] in appearing at plaintiff’s residence in the presence of two neighbors and in a loud and threatening voice attempting to harass and humiliate plaintiff by repeatedly questioning her as to the whereabouts of her husband and the demonstrator automobile and threatening to have her husband arrested by the issuance of an ‘all-points bulletin’ to the police could be characterized as ‘extreme and outrageous.’<sup>134</sup>

Despite the very rigorous “outrage” standard, the cases do reveal that the tort of intentional infliction of emotional distress does have some usefulness to protect employees from extreme and outrageous conduct in the workplace. The problem, of course, as the examination of the current case law reveals, is that this key “extreme and outrageous” conduct is not precisely defined and is extremely fact-specific. Thus, the application of this critical legal standard varies from state to state and from court to court.<sup>135</sup> This element presents an almost insurmountable hurdle for the plaintiff to prevail at the various stages of the case.<sup>136</sup>

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132. *Id.*

133. 612 S.W.2d 790 (Mo. Ct. App. 1981).

134. *Id.* at 793.

135. Duffy, *supra* note 12, at 409 (asserting that the definition of outrageous “depend[s] on the descriptive powers of the judge writing the opinion”).

136. *See id.* at 394. Duffy sees a danger in the lack of “objective guidelines” for outrageousness because “[i]t is likely that defendants will be selected based on their ability to pay damages rather than on what they have done and fact finders may confuse outrageous acts with unpopular ones, causing fear of tort judgments to chill socially valuable behavior.” *Id.* Moreover, certain cases “properly give even the most conscientious employer pause. . . [A]n employer would be left in a quandary as to the circumstances under which a demotion or other change in the terms or conditions of at will employment would subject it to damages for intentional infliction of emotional distress.” *Id.* at 410.

### C. Intent

#### 1. Requisite Intention

For a viable cause of action, the defendant must have intended to inflict the emotional distress on the plaintiff; or conversely, that the defendant knew or should have known to a probable or substantial certainty that emotional distress would be the likely result of the defendant's conduct.<sup>137</sup> As one court concisely noted, "[i]t is the intent to harm one emotionally that constitutes the basis for the tort of an intentional infliction of emotional distress."<sup>138</sup> According to the *Restatement (Second) of Torts*, the "intent" element will be satisfied if the defendant "desires to inflict severe emotional distress, and also where he knows that such distress is certain, or substantially certain, to result from his conduct."<sup>139</sup> According to *Prosser and Keeton*, the "intent" requirement is satisfied if the mental distress is inflicted by "the defendant either desiring to cause it or knowing that it was substantially certain to follow from the conduct."<sup>140</sup> The employer's or co-workers' objectionable conduct must be shown to have been intended or calculated to cause or probably would cause severe emotional distress.<sup>141</sup>

#### 2. Recklessness v. Negligence

The reckless infliction of emotional distress shares the same legal standards and consequences as the intentional infliction of emotional distress.<sup>142</sup> Therefore, acting with a deliberate disregard or a reckless indifference of a high degree of probability that emotional distress will en-

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137. *Brunson v. Bayer Corp.*, 237 F. Supp. 2d 192, 207 (D. Conn. 2002); *Bator v. Yale New Haven Hosp.*, 808 A.2d 1149, 1151 (Conn. App. Ct. 2002); *LaBrier*, 612 S.W.2d at 794; *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 611 (Tex. 1999).

138. *Powdertech, Inc. v. Joganic*, 776 N.E.2d 1251, 1264 (Ind. Ct. App. 2002) (citing *Cullison v. Medley*, 570 N.E.2d 27, 31 (Ind. 1991)).

139. RESTATEMENT (SECOND) OF TORTS § 46 cmt. i (1965).

140. KEETON ET AL., *supra* note 3 § 12, at 64.

141. *Wilson v. Monarch Paper Co.*, 939 F.2d 1138, 1145 (5th Cir. 1991); *Pavilon v. Kaferly*, 561 N.E.2d 1245, 1252 (Ill. App. Ct. 1990) (defining intent as whether "there was a high probability that [defendant's] conduct would inflict severe emotional distress"); *LaBrier*, 612 S.W.2d at 794.

142. RESTATEMENT (SECOND) OF TORTS § 46(1) cmt. a (1965); *see also* *Brunson v. Bayer Corp.*, 237 F. Supp. 2d 192, 207 (D. Conn. 2002); *Thomas Hyll Funeral Home v. Bradford*, 233 F. Supp. 2d 704, 714 (D.V.I. 2002) (recognizing claim for "reckless infliction of emotional distress"); *LaBrier*, 612 S.W.2d at 794.

sue is sufficient to satisfy the “recklessness” standard.<sup>143</sup> Similarly, acting in conscious or deliberate disregard that mental distress will follow from the conduct in question, as well as acting in a willful and wanton manner, has been held to be the equivalent of the recklessness necessary to satisfy the tort’s intent requirement.<sup>144</sup> Moreover, if the defendant is aware that the plaintiff is having emotional problems and thus is particularly susceptible to emotional distress, the plaintiff will more readily be able to establish “recklessness” and thus show causation as well as intent.<sup>145</sup>

However, even if the resulting emotional distress was severe, the employee’s claim will be denied if the distress was negligently caused.<sup>146</sup> As one federal district court noted, citing to the *Restatement* and pertinent state law, “[t]here is no basis for concluding that the Connecticut Supreme Court intended to engraft a simple negligence standard onto this intentional tort.”<sup>147</sup> Similarly, in several cases, the employer allegedly failed to investigate complaints and incidents of racial discrimination and/or sexual harassment as well as warn employees about the offending employee.<sup>148</sup> However, the courts have deemed the employer’s inaction to be merely negligent and neither intentional nor reckless, and thus liability for emotional distress was denied.<sup>149</sup>

*Yanowitz v. L’Oreal USA, Inc.*<sup>150</sup> vividly illustrates the perceived demanding nature of the outrage standard. The plaintiff attempted to circumvent the rigors of the intentional tort by contending that her supervisor’s criticisms and poor evaluations, which ultimately resulted in her termination, were grounds for the tort of negligent infliction of emotional distress.<sup>151</sup> However, the court rejected the plaintiff’s negligence claim, noting that “[a]n employer’s supervisory conduct is inherently ‘intentional,’” thus precluding the negligent version of the distress tort.<sup>152</sup> Consequently, an employee will not be permitted to avoid the rigors of the intentional emotional distress tort by relying on supervisory

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143. RESTATEMENT (SECOND) OF TORTS § 46 cmt. i (1965); KEETON ET AL., *supra* note 3 § 12, at 64; *see also Brunson*, 237 F. Supp. 2d at 208; *LaBrier*, 612 S.W.2d at 794.

144. KEETON ET AL., *supra* note 3 § 12, at 64–65; *see also LaBrier*, 612 S.W.2d at 794.

145. *LaBrier*, 612 S.W.2d at 794.

146. *Brunson*, 237 F. Supp. 2d at 207.

147. *Id.*

148. *See, e.g., Hatley v. Hilton Hotels Corp.*, 308 F.3d 473, 475–76 (5th Cir. 2002)

149. *Id.* at 476; *Brunson*, 237 F. Supp. 2d at 207–08.

150. 131 Cal. Rptr. 2d 575 (Cal. Ct. App. 2003).

151. *Id.* at 584, 601.

152. *Id.* at 601 (citing *Semore v. Pool*, 217 Cal. App. 3d 1087, 1105 (1990)).

conduct as the basis for a negligence tort claim, which has a relatively lower standard.

### 3. Transferred Intent

Theoretically, it is possible that the common law intentional tort doctrine of transferred intent, found principally in the assault and battery cases, could be used to support a recovery in an intentional infliction of emotional distress case.<sup>153</sup> Regarding transferred intent, *Prosser and Keeton* asserts that “[t]here seems to be little reason to apply it when the plaintiff suffers physical harm, and to reject it where there is mental damage.”<sup>154</sup> Nevertheless, according to *Prosser and Keeton*, “rarely” has a transferred intent “fright” case arose, even in a battery context.<sup>155</sup> Similarly, the employment cases analyzed for this article did not reveal any use of the transferred intent doctrine.

#### D. Distress

##### 1. Actual Severe Distress

The plaintiff can assert that emotional distress was caused by the defendant’s action; yet certainly not all emotional agitation, even if intentionally inflicted, is redressed as tortious emotional distress.<sup>156</sup> Furthermore, as the *Restatement* notes, “[c]omplete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people.”<sup>157</sup> Therefore, in order to be actionable the emotional distress must be in fact severe to the reasonable person or person of ordinary sensibilities.<sup>158</sup> Thus, conduct by the employer or co-workers of the complaining em-

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153. DOBBS, *supra* note 2 § 307, at 833–34.

154. KEETON ET AL., *supra* note 3 § 12, at 65.

155. *Id.*

156. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965); KEETON ET AL., *supra* note 3 § 12, at 63; *see also* Leavitt v. Wal-Mart Stores, Inc. 238 F. Supp. 2d 313, 317 (D. Me. 2003) (holding that frustration and humiliation were insufficient to satisfy the severe distress requirement); Williams v. First Tenn. Nat’l Corp., 97 S.W.3d 798, 805 (Tex. App. 2003).

157. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965).

158. *Id.*; DOBBS, *supra* note 2 § 306, at 832; *see also* Leavitt, 238 F. Supp. 2d at 316–17; GTE Southwest, Inc. v. Bruce, 998 S.W.2d 605, 618–19 (Tex. 1999); Williams, 97 S.W.3d at 805; Robel v. Roundup Corp., 59 P.3d 611, 619 (Wash. 2002).

ployee must cause actual, severe emotional distress,<sup>159</sup> and not merely some lesser, though genuine, emotional reaction such as fright, embarrassment, humiliation, hurt feelings, worry, anxiety, upset, irritation, vexation, minor psychic shocks, annoyance or anger.<sup>160</sup>

In *Robel v. Roundup Corp.*,<sup>161</sup> the plaintiff, who was given a light-duty assignment as a result of her back injury, was stared at, ridiculed, mocked, laughed at, yelled at, and mimicked because of her disability by her co-workers.<sup>162</sup> These same co-workers told customers that the plaintiff had lied about her back injury, and additionally called the plaintiff vulgar sexual names.<sup>163</sup> Although the appellate court, using a “reasonable minds” standard, deemed the conduct to be merely “insulting” and “rough,” the Washington Supreme Court disagreed, and branded the conduct outrageous and severe, and thus actionable as intentional infliction of emotional distress.<sup>164</sup>

In *Leavitt v. Wal-Mart Stores, Inc.*<sup>165</sup> the employee initiated a claim of intentional infliction of emotional distress because her employer did not accommodate her disability, assigned her to an evening shift against her expressed wishes, and did not facilitate her transfer to another facility.<sup>166</sup> The court, however, dismissed her claim in part due to lack of severe emotional distress.<sup>167</sup> The court took note of precedent which held that the “severe” requirement “means something more than minor and psychic and emotional shocks, something more than the usual and insignificant emotional traumas of daily life in modern society.”<sup>168</sup> Consequently, although noting that the employer’s conduct frustrated the employee and caused her to feel humiliated, the court ruled that “the distress [did] not rise beyond the usual emotional traumas of daily life in a modern society.”<sup>169</sup>

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159. *Nicholson v. Windham*, 571 S.E.2d 466, 470 (Ga. Ct. App. 2002); *Pavilon v. Kaferly*, 561 N.E.2d 1245, 1252 (Ill. App. Ct. 1990); *GTE Southwest, Inc.*, 998 S.W.2d at 618–19; *Williams*, 97 S.W.3d at 804–05; *Robel*, 59 P.3d at 619–20.

160. *Leavitt*, 238 F. Supp. 2d at 317; *Bator v. Yale-New Haven Hosp.*, 808 A.2d 1149, 1151 (Conn. App. Ct. 2002).

161. 59 P.3d 611 (Wash. 2002).

162. *Id.* at 614.

163. *Id.*

164. *Id.* at 620.

165. 238 F. Supp. 2d 313 (D. Me. 2003).

166. *Id.* at 315–16.

167. *Id.* at 317.

168. *Id.*

169. *Id.*

Finally, in *Williams v. Tennessee National Corp.*,<sup>170</sup> the employee was questioned in front of other employees about his personal use of the company's credit card.<sup>171</sup> Plaintiff was however allowed to retrieve his belongings, but was then escorted off the premises into a "bull pen area," where a co-worker told him in front of other employees that he was being terminated and would not be eligible for rehire.<sup>172</sup> The record indicated that the plaintiff had experienced "general feelings of anxiety" in accepting a position with the company, and when he was terminated, he "sat there in a daze and in shock for awhile."<sup>173</sup> The plaintiff also indicated that being escorted out of the building was "kind of all a blur," and that he was "emotionally reeling from being fired."<sup>174</sup> Moreover, the record also indicated that he was "cranky" and "despondent" after his termination and lost his appetite, but that he was able to "bounce back," was in a good state of mental health, never took any sick time from other work and did not seek medical or psychiatric advice.<sup>175</sup> The court first pointed out the applicable legal standard of "severe emotional distress," which "means that no reasonable person could be expected to endure it without undergoing unreasonable suffering."<sup>176</sup> The court also noted that "[t]he plaintiff must show more than mere worry, anxiety, vexation, embarrassment, or anger."<sup>177</sup> Consequently, the court ruled that "[t]he facts here . . . [did] not demonstrate 'severe' emotional distress because they [did] not rise to the level of emotional distress such that no reasonable person could be expected to endure it without undergoing unreasonable suffering."<sup>178</sup> Yet in another case, constructive discharge conduct that was deemed to be intentional, mean spirited, systematic, degrading, and demeaning was more than sufficient for the court to affirm a jury finding of severe distress, particularly when the distress was so severe it "resulted in institutional confinement and treatment for someone with no history of mental problems."<sup>179</sup>

The fact that the alleged outrageous conduct giving rise to the distress is deemed to be merely trivial, indignant, insulting, or annoying reveals the lack of "any convincing assurance that the asserted mental dis-

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170. 97 S.W.3d 798 (Tex. App. 2003).

171. *Id.* at 805.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Wilson v. Monarch Paper Co.*, 939 F.2d 1138, 1145 (5th Cir. 1991).

tress is genuine, or that if genuine it is serious and reasonable.”<sup>180</sup> However, the fact that the mental distress is evidenced by “physical illness of a serious character” is an important factor in allowing recovery.<sup>181</sup> Yet, according to *Prosser and Keeton*, “there are numerous decisions which have found liability for mere mental disturbance without any evidence of physical consequences.”<sup>182</sup> Similarly, Dobbs relates that “medical testimony is not ordinarily required to demonstrate either the severity of the distress or its cause.”<sup>183</sup> Of course, the fact that the aggrieved employee is seeking medical, psychiatric, or psychological care is evidence of the presence and genuineness of severe distress.<sup>184</sup> Such care is not alone controlling on the “severity” issue<sup>185</sup> or “outrage” issue.<sup>186</sup> The fact that the misconduct by the defendant was so extreme and outrageous should

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180. KEETON ET AL., *supra* note 3 § 12, at 59.

181. *Id.* at 64; *see also Wilson*, 939 F.2d at 1141 (stating that employee with no history of mental illness was hospitalized with a psychotic manic episode); *Alcorn v. Anbro Eng'g, Inc.*, 468 P.2d 216, 217–18 (Cal. 1970) (permitting the case to go to the jury because the employee was ill for several weeks, unable to work, and sustained shock, nausea, and insomnia, in permitting case to go to jury); *Graham v. Commonwealth Edison Co.*, 742 N.E.2d 858, 869 (Ill. App. Ct. 2000) (pointing out that plaintiff “suffered physical manifestations of the distress”); *Kroger Co. v. Willgruber*, 920 S.W.2d 61, 66 (Ky. 1996) (considering that the employee “experienced real and disabling depression”); *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 618–19 (Tex. 1999) (noting that employees victimized by supervisor experienced “nausea, stomach disorders, headaches, difficulty in sleeping and eating, stress, anxiety and depression”).

182. KEETON ET AL., *supra* note 3 § 12, at 64.

183. DOBBS, *supra* note 2 § 306, at 832.

184. *Ford v. GMC*, 305 F.3d 545, 555 (6th Cir. 2002) (stating that the fact that employee needed “counseling or other treatment” would be evidence that emotional distress was severe); *Kroger*, 920 S.W.2d at 66 (noting that employee’s psychotherapist recommended that plaintiff be placed on total disability); *compare Williams v. First Tenn. Nat’l Corp.*, 97 S.W.3d 798, 805 (Tex. App. 2003) (pointing out that the employee “never sought psychiatric or medical help as a result of his termination”) with *Wilson*, 939 F.2d at 1145 (upholding the jury’s finding of severity, the court emphasized that distress caused to employee was so severe it resulted in institutional confinement and treatment); *Graham*, 742 N.E.2d at 869 (stating that the plaintiff saw a therapist as well as a dermatologist for stress-related acne); *GTE Southwest, Inc.*, 998 S.W.2d at 617 (noting that “[e]ach employee sought medical treatment for these problems, and all three plaintiffs were prescribed medication to alleviate the problems”), and *Pavilon v. Kaferly*, 561 N.E.2d 1245, 1252 (Ill. App. Ct. 1990) (stating that the plaintiff was being treated by a psychotherapist and that “the duration of this continuing therapy provide[d] added support for the severity of the distress”).

185. *EEOC v. Voss Elec. Co.*, 257 F. Supp. 2d 1354, 1363 (W.D. Okla. 2003) (holding that the level of distress suffered by plaintiff, which was produced by the defendant’s termination actions, caused a recurrence of medical malady and hospitalization that was insufficient to meet the “severity” requirement); *Bush v. Am. Honda Motor Co.*, 227 F. Supp. 2d 780, 801 (S.D. Ohio 2002) (noting that the fact that the plaintiff continued seeing a psychologist did not create “genuine issues of material fact” with respect to the severity of the emotional distress).

186. *Carnemolla v. Walsh*, 815 A.2d 1251, 1260–61 (Conn. App. Ct. 2003) (holding that receiving medical treatment and counseling for conduct that “may have been distressful or hurtful” was not sufficient to support a finding of “extreme or outrageous” conduct).

help the plaintiff establish the presence of severe emotional distress, as such emotional harm might be construed as a logical or reasonable inference due to the severity of the misconduct.<sup>187</sup> Of course, having an expert witness testify as to the severity of the resulting distress helps.<sup>188</sup> The more “sufficiently pleaded detailed facts” the plaintiff introduces to show resulting distress, the more likely the plaintiff will be able to establish that the defendant’s conduct actually caused severe emotional distress.<sup>189</sup>

## 2. Reasonableness of Aggrieved Party’s Distress

Closely related, but not identical, to the actual severe distress necessity is the reasonableness requirement. The plaintiff may be able to establish with relative ease that emotional distress, or even severe distress, was produced. Yet, even if the distress caused was severe, the plaintiff also must demonstrate that his or her actual, severe distress was in fact reasonable.<sup>190</sup> Typically, the plaintiff must show that a reasonable person, confronted with the same or similar circumstances, would have at least suffered the same distress as suffered by the plaintiff.<sup>191</sup> Thus, the employee must show that the distress suffered was more than a reasonable employee could be expected to endure in the workplace without undergoing unreasonable suffering.<sup>192</sup> In *Bator v. Yale New Haven Hospital*,<sup>193</sup> the court noted that “the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, ‘Outrageous!’”<sup>194</sup> In that case, the plaintiff, a respiratory therapist, was recommended for discipline by his supervisor for not reporting for duty.<sup>195</sup> The plaintiff was also allegedly paid

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187. *GTE Southwest, Inc.*, 998 S.W.2d at 618–19 (stating that the employer’s outrageous conduct was “legally sufficient to support the jury’s finding that the employees suffered severe emotional distress”); *Pavilon*, 561 N.E.2d at 1252 (noting that the jury was permitted to make a reasonable inference from the evidence).

188. *GTE Southwest, Inc.*, 998 S.W.2d at 618–19 (finding that expert witness testimony supported the employee’s contentions that they suffered from severe emotional distress).

189. *Graham*, 742 N.E.2d at 869.

190. KEETON ET AL., *supra* note 3 § 12, at 63 (applying “reasonable person ‘of ordinary sensibilities’” test); DOBBS, *supra* note 2 § 306, at 832 (applying reasonable person test); *see also* *Briggs v. Aldi, Inc.*, 218 F. Supp. 2d 1260, 1263 (D. Kan. 2002); *Williams*, 97 S.W.3d at 805.

191. DOBBS, *supra* note 2 § 306, at 832; *see also* *Briggs*, 218 F. Supp. 2d at 1263.

192. *Williams*, 97 S.W.3d at 805; *Johnston v. Davis Sec., Inc.*, 217 F. Supp. 2d 1224, 1232 (D. Utah 2002); *Briggs*, 218 F. Supp. 2d at 1263.

193. 808 A.2d 1149 (Conn. App. Ct. 2002).

194. *Id.* at 1151.

195. *Id.*

less than other less qualified employees, was falsely accused by a supervisor of endangering a patient's life, and was told to seek psychiatric help after he complained to another supervisor about his schedule and assignments.<sup>196</sup> Furthermore, the employer also recommended that the plaintiff enroll in anger management classes after the plaintiff had a confrontation with a nurse.<sup>197</sup> The court, however, held that the facts, taken together or in isolation, neither satisfied the "reasonableness" nor "outrageous" standard.<sup>198</sup>

The *Restatement* similarly declares that the circumstances must be such that "the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'"<sup>199</sup> According to *Prosser and Keeton*, when the underlying conduct is deemed merely trivial, annoying, insulting or indignant, the genuineness, seriousness and reasonableness of the claimed distress becomes questionable.<sup>200</sup>

Proving the requisite level of unreasonableness also may emerge as a difficult task for the plaintiff in the employment context. For example, in *Johnston v. Davis Securities, Inc.*,<sup>201</sup> the plaintiff's former employer called her new employer, stated that plaintiff was suing the former employer, related that plaintiff was improperly collecting workers' compensation benefits when she was not, and that the former employer was going to call the new employer's corporate headquarters and tell them that plaintiff was suing the former employer for back wages.<sup>202</sup> The plaintiff then brought an emotional distress claim against her former employer, but it was dismissed as a matter of law because the level of conduct would not have been sufficiently outrageous to a reasonable person pursuant to state law.<sup>203</sup> The case law therefore shows that if the employee asserts a particular sensitivity or susceptibility, then the employee will be required to demonstrate that the distress was reasonably based on that special vulnerability.

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196. *Id.*

197. *Id.*

198. *Id.* at 1151.

199. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

200. KEETON ET AL., *supra* note 3 § 12, at 59, 63.

201. 217 F. Supp. 2d 1224 (D. Utah 2002).

202. *Id.* at 1232.

203. *Id.*

### 3. Physical or Bodily Harm or Impact

As opposed to claims for the negligent infliction of emotional distress, the courts as well as the *Restatement* have uniformly rejected a physical impact or bodily harm requirement in cases where the plaintiff demonstrates either the intent to cause emotional distress or reckless disregard for the likelihood the defendant's conduct will produce such distress.<sup>204</sup> Pennsylvania, however, has an interesting approach to the physical harm requirement. Pennsylvania courts have held that physical harm must accompany the emotional harm, but that physical harm is deemed to include continued mental and emotional harm.<sup>205</sup> According to Dobbs, "most of the cases" do not "require proof of physical symptoms . . . much less proof of physical harm or impact."<sup>206</sup> Consequently, the employee should not be required to demonstrate that he or she suffered a physical impact or harm in order to sustain a claim for intentional infliction of emotional distress, as the mental harm would be regarded as the equivalent of the physical injury.<sup>207</sup> The rationale is that when the plaintiff has evidence of severe distress, then the plaintiff is not required to show evidence of other physical harm.<sup>208</sup> Of course, actual severe distress is easier to prove with evidence of objective manifestations of physical harm stemming from the emotional distress, such as shock, illness or other bodily harm.<sup>209</sup> In the absence of bodily harm, however, the *Restatement* counsels that the courts may consider "outrage as a guarantee that the claim is genuine; but if the enormity of the outrage carries conviction that there has in fact been severe emotional distress, bodily harm is not required."<sup>210</sup> Dobbs concurs with the *Restatement* view by

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204. RESTATEMENT (SECOND) OF TORTS § 46 cmt. k (1965); see also *Agis v. Howard Johnson Co.*, 355 N.E.2d 315, 318–19 (Mass. 1976).

205. *McCleave v. R.R. Donnelley & Sons Co.*, 226 F. Supp. 2d 695, 702–03 (E.D. Pa. 2002); see also *Alcorn v. Anbro Eng'g, Inc.*, 486 P.2d 216, 218 (Cal. 1970) (stating that physical injury was required, but "[t]he physical consequences of shock or other disturbance to the nervous system are sufficient to satisfy the requirement that plaintiff has suffered physical injury from defendant's conduct").

206. DOBBS, *supra* note 2 § 306, at 832.

207. KEETON ET AL., *supra* note 3 § 12, at 56 ("[M]edical science has recognized long since that not only fright and shock, but also grief, anxiety, rage and shame, are in themselves 'physical' injuries, in the sense that they produce well marked changes in the body, and symptoms that are readily visible to the professional eye.")

208. DOBBS, *supra* note 2 § 303, at 826.

209. RESTATEMENT (SECOND) OF TORTS § 46 cmt. k (1965); see also *Alcorn*, 486 P.2d at 217–18.

210. RESTATEMENT (SECOND) OF TORTS § 46 cmt. k (1965).

emphasizing that “[w]hen the defendant’s conduct is extreme enough, that fact tends to prove severe distress.”<sup>211</sup>

#### 4. Intensity and Duration of Distress: Single or Isolated Acts v. Regularity or Patterns of Distress

In evaluating the plaintiff’s infliction of emotional distress cause of action, the courts will assess not only the outrageousness of the defendant’s conduct, but will also weigh the cumulative effect of any allegedly repeated, regular and ongoing objectionable behavior.<sup>212</sup> As the Texas Supreme Court noted, “[w]e agree with the overwhelming weight of authority in this state and around the country that when repeated or ongoing severe harassment is shown, the conduct should be evaluated as a whole in determining whether it is extreme and outrageous.”<sup>213</sup> This “totality of the circumstances” rule has the practical consequence of lessening the severity of the “extreme outrage” standard from the employee’s vantage point, especially if the repeated objectionable conduct is inflicted by the employee’s manager or supervisor.<sup>214</sup> Accordingly, the courts have found that conduct, standing alone or as an isolated incident, could not be considered sufficiently “extreme” or “outrageous,” but could rise to the tortious level when the actions are repeated, longer in duration, or form part of a larger, regular pattern of offensive behavior.<sup>215</sup>

For instance, in *GTE Southwest Inc. v. Bruce*,<sup>216</sup> a supervisor, who was a former United States Army supply sergeant, regularly yelled, screamed and cursed at the employees in a flagrantly obscene and vulgar manner.<sup>217</sup> The supervisor also repeatedly lunged and charged at the employees with his head down, and was also reported to have called the

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211. DOBBS, *supra* note 2 § 306, at 832.

212. *Id.* at 827 (noting that “repeating or continuing acts” are one of “four markers of outrage”); *see also* Wait v. Beck’s N. Am., Inc., 241 F. Supp. 2d 172, 181 (N.D.N.Y. 2003); McCleave v. R.R. Donnelley & Sons Co., 226 F. Supp. 2d 695, 703 (E.D. Pa. 2002); Paviion v. Kaferly, 561 N.E.2d 1245, 1251 (Ill. App. Ct. 1990); *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 617 (Tex. 1999); *Jackson v. Creditwatch, Inc.*, 84 S.W.3d 397, 406 (Tex. App. 2002).

213. *GTE Southwest, Inc.*, 998 S.W.2d at 616.

214. *McCleave*, 226 F. Supp. 2d at 698, 703 (denying defendant’s motion to dismiss plaintiff’s intentional infliction of emotional distress claim based on plaintiff’s allegations of “unceasing farrago of racial epithets,” discriminatory actions against a black employee, and collusion with another manager to terminate plaintiff and other black employees); *see also Jackson*, 84 S.W.3d at 406 (noting the Supreme Court of Texas may find liability for those in a position of power).

215. *GTE Southwest, Inc.*, 998 S.W.2d at 617.

216. 998 S.W.2d 605 (Tex. 1999).

217. *Id.* at 613–14.

employees into his office everyday to make them stand in front of him while he simply stared at them.<sup>218</sup> In upholding the jury's finding that the supervisor intentionally inflicted emotional distress and that the employer was therefore vicariously liable, the Texas Supreme Court underscored the "pattern" of abuse factor, stating:

[b]eing purposefully humiliated and intimidated, and being repeatedly put in fear of one's physical well-being at the hands of a supervisor is more than a mere triviality or annoyance. Occasional malicious and abusive incidents should not be condoned, but must often be tolerated in society. But once the conduct such as that shown here becomes a regular pattern of behavior and continues despite the victim's objection and attempts to remedy the situation, it can no longer be tolerated. It is the severity and regularity of [a supervisor's] abusive and threatening conduct that brings his behavior into the realm of extreme and outrageous conduct.<sup>219</sup>

If, however, one particular act of the defendant is so flagrantly extreme and outrageous, this single egregious incident may be adequate grounds for the tort.<sup>220</sup> Yet the plaintiff will have a much stronger case if he or she can show a pattern of intentional wrongful behavior, since the outrageousness of the distressing conduct and the plaintiff's subsequent severe emotional reaction will be easier to establish.<sup>221</sup>

##### 5. Particularly Sensitive or Susceptible Plaintiffs

An important factor in assessing the outrageousness of the defendant's conduct as well as the plaintiff's resulting emotional reaction, is the particular vulnerability of the plaintiff. As one recalls from their first year of law school, a long-established maxim of the common law of torts is that "the defendant takes the plaintiff as he finds him."<sup>222</sup> Consequently, in the case of intentional infliction of emotional distress, the

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218. *Id.*

219. *Id.* at 617.

220. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965) (noting that "intensity" of distress is a factor in determining "severity"); see also Bleeke, *supra* note 17, at 366 (discussing "single incident" employment cases).

221. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965) (noting that "duration" of distress is a factor in determining "severity"); see also *GTE Southwest, Inc.*, 998 S.W.2d at 617.

222. See DAN B. DOBBS & PAUL T. HAYDEN, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 231 (4th ed. 2001) (explaining the proposition that the defendant is liable for the extra damages the plaintiff suffers due to a fragile psyche).

courts will allow the employee to demonstrate that he or she possesses an “eggshell psyche” or is in a “fragile state.”<sup>223</sup> That is, the plaintiff can show that he or she is particularly sensitive or peculiarly susceptible or vulnerable, due to a physical or mental condition, to the distress inflicted by the defendant under the facts of the case presented, even though the acts complained of ordinarily would not necessarily rise to the tortious level.<sup>224</sup> The fact that a plaintiff was particularly or peculiarly sensitive to or susceptible to emotional distress may emerge as an important factor in substantiating the plaintiff’s case, especially in a discharge situation.<sup>225</sup> For example, in *Jackson v. Creditwatch, Inc.*,<sup>226</sup> the plaintiff, a former employee, was deemed to be in a “fragile state” when she was terminated.<sup>227</sup> The plaintiff was also said to be “extremely anxious, stressed, and sleep-deprived” in the same month as her termination.<sup>228</sup> Within this same time period, the defendant employer’s supervisor threatened the roommate of the plaintiff with termination unless she evicted the plaintiff, which she subsequently did, thereby forcing the plaintiff to find a new home.<sup>229</sup> The court held that there was enough evidence for the jury to assess damages as an issue of fact.<sup>230</sup>

In *Alcorn v. Anbro Engineering*,<sup>231</sup> the plaintiff, an African-American truck driver, was fired after questioning his supervisor about another employee driving a particular truck.<sup>232</sup> The court noted that the discharge was “without just cause or provocation,” and included humili-

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223. DOBBS, *supra* note 2 § 313, at 851–52 (explaining that a defendant is liable for actual damages suffered by the plaintiff, even if they exceed those damages that would have been suffered by a normally constituted person).

224. RESTATEMENT (SECOND) OF TORTS § 46, cmt. f (1965); DOBBS, *supra* note 2 § 304, at 827; KEETON ET AL., *supra* note 3 § 12, at 62; *see also* *Graham v. Commonwealth Edison Co.*, 742 N.E.2d 858, 867 (Ill. App. Ct. 2000); *LaBrier v. Anheuser Ford, Inc.*, 612 S.W.2d 790, 793 (Mo. Ct. App. 1981) (noting that defendant’s representatives knew that plaintiff was “a highly emotional and easily distraught individual who had suffered severe emotional problems before this episode that had caused her to be hospitalized”).

225. *See Kroger Co. v. Willgruber*, 920 S.W.2d 61, 67 (Ky. 1996) (holding that the “jury was justified in concluding that despite this knowledge of susceptibility, or perhaps because of it, [employer] continued its course of conduct calculated to exert more pressure on [employee] in order to make him acquiesce to [employer’s] demand of signing the release papers”); *Alcorn v. Anbro Eng’g, Inc.*, 468 P.2d 216, 219 (Cal. 1970) (involving the discharge of employee “without just cause or provocation,” including humiliating and racially insulting language and conduct).

226. 84 S.W.3d 397 (Tex. App. 2002).

227. *Id.* at 408.

228. *Id.*

229. *Id.* at 408–09.

230. *Id.*

231. 216 P.2d 216 (Cal. 1970).

232. *Id.* at 217.

ating and racially insulting language and conduct on the part of the supervisor.<sup>233</sup> The court specifically pointed to the fact that the supervisor was aware of the employee's "particular susceptibility" to emotional distress as an "outrage" factor in permitting the case to go to the jury.<sup>234</sup> What makes the case interesting, however, is that the California Supreme Court noted the plaintiff's allegation that "[n]egroes such as plaintiff are particularly susceptible to emotional and physical distress from conduct such as committed by the defendants."<sup>235</sup>

One commentator has emphasized that in the context of the termination of an at will employee, this susceptibility factor judicially "should be given more emphasis in light of the employer's knowledge that the employee already has sustained the emotional trauma of a discharge."<sup>236</sup> It is important to note, however, that the *Restatement (Second) of Torts* adds a knowledge requirement to this "susceptibility" rule; that is, the defendant must have possessed knowledge that the plaintiff was peculiarly susceptible to the distress.<sup>237</sup> Yet, even in those jurisdictions that do not require prior knowledge of susceptibility, if the defendant is aware of the plaintiff's special vulnerability, then the susceptibility factor should loom even larger in the outrageousness and severity analysis.<sup>238</sup> As one court emphasized, "[c]onduct which might not ordinarily be actionable may be considered outrageous if the defendant knows that a plaintiff was particularly susceptible to emotional distress."<sup>239</sup> However, the *Restatement* warns that "major outrage is essential to the tort; and the mere fact that the actor knows that the other will regard the conduct as insulting, or will have his feelings hurt, is not enough."<sup>240</sup>

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233. *Id.* at 219.

234. *Id.* at 218-19.

235. *Id.* at 217-18.

236. Bleeke, *supra* note 17, at 372.

237. RESTATEMENT (SECOND) OF TORTS § 46 cmt. f, j (1965).

238. *Pavilon v. Kaferly*, 561 N.E.2d 1245, 1252 (Ill. App. Ct. 1990) ("This [outrageous] characterization of [defendant's harassing] conduct throughout this time period is further supported by the fact that it was directed at a person whom he clearly knew to be susceptible to emotional distress.")

239. *Id.* (noting defendant knew that plaintiff was undergoing emotional distress treatment by a psychotherapist).

240. RESTATEMENT (SECOND) OF TORTS § 46 cmt. f (1965).

## 6. Abuse of Relation or Position v. Assertion of Legal Rights or Legitimate Interest

The extreme and outrageous nature of the conduct necessary to establish a cause of action for intentional infliction of emotional distress can arise from the abuse of a position or from a relationship with the aggrieved party that affords the actor actual or apparent authority over the aggrieved party.<sup>241</sup> As one court has noted, “the more power and control that a defendant has over a plaintiff, the more likely defendant’s conduct should be deemed to be outrageous” and the plaintiff’s emotional reaction to be deemed severe.<sup>242</sup> Furthermore, according to one commentator, “[s]ome courts have seized upon this [abuse of position factor] as a basis for applying the tort of intentional infliction of emotional distress in the employment context, reasoning that the imbalance in bargaining power between employer and employee requires application of the tort.”<sup>243</sup>

In the private employment sector, particularly when the offending party is the plaintiff’s supervisor or manager, the outrageousness of the actions and the severity of the emotional response may be exacerbated.<sup>244</sup> According to Dobbs, “[e]mployers may place many demands upon employees, but the employer is not free to threaten the employee . . . .”<sup>245</sup> When one is in a position of power, “the abuse itself may show that the conduct is outrageous.”<sup>246</sup> In *Robel v. Roundup Corp.*,<sup>247</sup> the court noted that the relationship between the parties, especially if the wrongdoer is in a position of authority, provides an “added impetus” to an outrage claim.<sup>248</sup> The plaintiff in *Robel* was recovering from an injury

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241. RESTATEMENT (SECOND) OF TORTS § 46 cmt. e (1965); DOBBS, *supra* note 2 § 304, at 827 (defining one of the “four markers of outrage” as “abusing . . . power or position . . . by using a position of dominance”); KEETON ET AL., *supra* note 3 § 12, at 61.

242. *Graham v. Commonwealth Edison Co.*, 742 N.E.2d 858, 866–68 (Ill. App. Ct. 2000).

243. *Duffy*, *supra* note 12, at 397.

244. *McCleave v. R.R. Donnelley & Sons Co.*, 226 F. Supp. 2d 695, 698, 703 (E.D. Pa. 2002) (noting racial comments and racial epithets made by black employee’s managers); *Alcorn v. Anbro Eng’g, Inc.*, 468 P.2d 216, 218–19 (Cal. 1970) (finding discharge by foreman/superintendent “without just cause or provocation” and with humiliating and racially insulting language and conduct, exacerbated the response because defendant was “in a position or relation of authority over plaintiff”).

245. DOBBS, *supra* note 2 § 304, at 828 (noting that “repeating or continuing acts” are one of the “four markers of outrage”).

246. *Id.*

247. 59 P.3d 611 (Wash. 2002).

248. *Id.* at 620.

and thus given light duty.<sup>249</sup> As a result, the plaintiff was mocked, ridiculed, and yelled at, not only by her co-workers, but also by an assistant manager.<sup>250</sup> The state appellate court did not deem the conduct to be sufficiently outrageous or severe.<sup>251</sup> However, the state supreme court, pointing specifically to the additional fact that a manager was involved in the misconduct, ruled that the conduct was actionable as intentional infliction of emotional distress.<sup>252</sup> Therefore, the abuse of the employee by the employer or its managerial representatives, in a notoriously unequal employment-at-will relationship can provide the foundation for the intentional infliction of emotional distress claim.

Moreover, when the employee's manager or supervisor threatens to exercise his or her authority to the severe detriment of the employee, and the supervisor is in a position to carry out such threats, the conduct can likely be construed as outrageous; especially if the employee is coerced into doing something he or she ordinarily would not do.<sup>253</sup> Nevertheless, one state appellate court has warned that "[e]ven when a supervisor abuses a position of power over an employee, the employer will not be liable for mere insults, indignities, or annoyances that are not extreme or dangerous."<sup>254</sup> Therefore, the abuse of an employer's position and its relation to the employee may emerge as very important factors for the employee who is suing his or her employer for intentional infliction of emotional distress based on supervisory or managerial misconduct. As one commentator has emphasized, "the employee's entire case may hinge on a judge's willingness to consider the immense power that the employer holds over the employee's livelihood and the stressful impact on the employee when the employer wields that power as a weapon of coercion."<sup>255</sup>

In opposition to the "abuse of relationship" factor, it is also important to consider whether the defendant reasonably believed the pursued

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249. *Id.*

250. *Id.* at 614, 620.

251. *Id.* at 620.

252. *Id.* ("[P]laintiff's status as an employee may entitle him to a greater degree of protection from insult and outrage by a supervisor with authority over him than if he were a stranger.") (citing *White v. Monsanto Co.*, 585 So.2d 1205, 1210 (La. 1991)).

253. *McCleave v. R.R. Donnelley & Sons Co.*, 226 F. Supp. 2d 695, 698, 703 (E.D. Pa. 2002) (alleging that managers not only made racist comments and racial epithets, but colluded to eliminate plaintiff and other black employees from employment); *Graham v. Commonwealth Edison Co.*, 742 N.E.2d 858, 867-68 (Ill. App. Ct. 2000).

254. *Jackson v. Creditwatch, Inc.*, 84 S.W.3d 397, 406 (Tex. App. 2002).

255. *Bleeke*, *supra* note 17, at 372.

objective or interest was legitimate.<sup>256</sup> Accordingly, if the defendant employer successfully asserts legitimate legal rights or interests, the defendant may not be liable for the distress produced, even if the defendant knows that such conduct would likely cause distress to the employee.<sup>257</sup> The fact that the defendant employer believes the objective was legitimate and merely an assertion of a legal right does not automatically permit outrageous conduct.<sup>258</sup> For example, a court indicated that an investigation by the employer into workplace misconduct is typically a legitimate employer objective, and thus would not be construed as extreme and outrageous.<sup>259</sup> However, a “sham” investigation was deemed to be extreme and outrageous conduct when it was instituted for the “sole purpose of retaliating against” a whistle-blowing employee with safety concerns.<sup>260</sup> The investigation included the interview of one hundred employees, the making of several defamatory statements about the employee, including the falsification of documents, the planting of radioactive material outside a posted area and the allegation that the employee was the “leader of a gang.”<sup>261</sup>

### 7. Acts or Conduct Directed at Third Persons

According to the *Restatement (Second) of Torts*, when the offending

conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress

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256. *Graham*, 742 N.E.2d at 866–67; *LaBrier v. Anheuser Ford, Inc.*, 612 S.W.2d 790, 793 (Mo. Ct. App. 1981); *see also* *Duffy*, *supra* note 12, at 396 (“In such a situation, the employer is arguably doing nothing more than exercising his legal rights in a way permitted by the at will rule—discharge for any reason deemed sufficient by the employer.”); *Bleeke* *supra* note 17, at 372 (discussing the assertion of the legal rights factor in the discharge of at will employees).

257. *LaBrier*, 612 S.W.2d at 793 (stating employer questioning an employee and spouse as to whereabouts of missing property was arguably a “legitimate interest”); *Trabing v. Kinko’s, Inc.*, 57 P.3d 1248, 1256 (Wyo. 2002) (stating employee’s discharge of at will employee was “within its legal rights”); *see also* *Bleeke*, *supra* note 17, at 372 (indicating that the assertion of legal rights factor “has led some courts to conclude that the employer could not be liable for intentional infliction of emotional distress unless he was also liable for wrongful discharge, since by firing the employee the employer did no more than exercise his legal rights.”).

258. *Graham*, 742 N.E.2d at 867; *LaBrier*, 612 S.W.2d at 793–94 (noting that defendant employer’s assertion of legitimate interest was superseded by its knowledge that the plaintiff was “a highly emotional and easily distraught individual who had suffered severe emotional problems before this episode”); *see also* *Bleeke*, *supra* note 17, at 372.

259. *Graham*, 742 N.E.2d at 868.

260. *Id.*

261. *Id.*

- (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or
- (b) to any other person who is present at the time, *if such distress results in bodily harm.*<sup>262</sup>

Consequently, the *Restatement* has engrafted a “bodily harm” requirement for non-family, third party intentional infliction situations, which is reminiscent of the traditional “impact” rule for the tort of negligent infliction of emotional distress.<sup>263</sup> The *Restatement* also notes that “[t]he cases thus far decided, however, have limited such liability to plaintiffs who were present at the time, as distinguished from those who discover later what has occurred.”<sup>264</sup> As the *Restatement* explains, “[t]he limitation may be justified by the practical necessity of drawing the line somewhere, since the number of persons who may suffer emotional distress at the news of an assassination of the President is virtually unlimited . . . .”<sup>265</sup> Finally, the *Restatement* notes that the cases in which third party recovery has been allowed have been either by “near relatives” or “at least close associates,”<sup>266</sup> though the latter arguably would encompass one’s co-workers. Nonetheless, no “third party” cases were found in the research for this article.

*Prosser and Keeton* also supports the proposition that recovery can lie for intentional infliction of emotional distress when the offending conduct is not directed at the plaintiff but at a third party.<sup>267</sup> The key element, according to *Prosser and Keeton*, is whether the conduct directed at the third party was “substantially certain” or had a “very high degree of probability” to cause emotional distress to the plaintiff,<sup>268</sup> though lesser causation standards have been used.<sup>269</sup> *Prosser and Keeton*, however, offer two cautionary comments. First, “[o]rdinarily recovery in such cases is limited to plaintiffs who are not only present at the time, but are known by the defendant to be present” because such knowledge bolsters the causation element.<sup>270</sup> Second, “[t]here is the further question of whether the recovery should be limited to near relatives

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262. RESTATEMENT (SECOND) OF TORTS § 46(2) (1965) (emphasis added).

263. *Id.*; see also *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 534 (1994).

264. RESTATEMENT (SECOND) OF TORTS § 46 cmt. 1 (1965).

265. *Id.*

266. *Id.*

267. KEETON ET AL., *supra* note 3, § 12 at 65–66.

268. *Id.* at 65.

269. *Id.* (stating that there was a notion of “foreseeability” and that it “could reasonably have been anticipated”).

270. *Id.*

of the person attacked, or at least to close associates, where there is some additional guarantee that the mental disturbance is real and extreme.”<sup>271</sup> Dobbs, in his treatise on torts, addresses the “third party” category as one of “four markers of outrage.”<sup>272</sup> Accordingly, when a defendant inflicts physical violence or threatens serious economic harm to a person or property in which the employee is known to have a “special interest,” such an “important marker” will “tend to support a finding of outrage.”<sup>273</sup> As to the “presence” issue, Dobbs further elaborates that “[i]f the defendant’s conduct is sufficiently outrageous and intended to inflict severe emotional harm upon a person who is not present, no essential reason of logic or policy prevents liability.”<sup>274</sup> Nonetheless, Dobbs counsels that “[i]n a good many cases, courts find it convenient to draw the line against recovery by excluding those who are not present and who have not had an immediate or nearly immediate sensory perception of the primary injury.”<sup>275</sup>

### E. Causation

A causal connection is required between the defendant’s intentional actions and the plaintiff’s subsequent emotional reaction and distress.<sup>276</sup> Actual causation is required,<sup>277</sup> as is proximate causation, where the typical proximate causation test is the venerable “foreseeability” doctrine.<sup>278</sup> According to one court, “[f]oreseeability is inherent in the finding that [defendant] intentionally inflicted the emotional distress.”<sup>279</sup> Other courts have held that causation can be found where the emotional distress was either the intended or the “primary consequence” of the defendant’s conduct,<sup>280</sup> or where there is a “high probability that the [de-

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271. *Id.* at 66 (stating that “[n]early all the cases allowing recovery have involved members of the immediate family”).

272. DOBBS, *supra* note 2 § 304, at 827 (“repeating or continuing acts” are one of “four markers of outrage”).

273. *Id.*

274. *Id.* at 834.

275. *Id.*

276. *GTE Southwest Inc. v. Bruce*, 956 S.W.2d 636, 642–43 (Tex. App. 1997), *aff’d*, 998 S.W.2d 605 (Tex. 1999); *Agarwal v. Johnson*, 603 P.2d 58, 71 (Cal. 1979) (approving jury instruction “which provides that damages for the intentional infliction of emotional distress may include ‘Reasonable compensation for any financial loss suffered by the plaintiff which was proximately caused by [the] emotional distress’”).

277. *Pavilon v. Kaferly*, 561 N.E.2d 1245, 1252 (Ill. App. Ct. 1990).

278. *Alcorn v. Anbro Eng’g, Inc.*, 468 P.2d 216, 218 (Cal. 1970).

279. *GTE Southwest Inc.*, 956 S.W.2d at 642–43.

280. *GTE Southwest Inc. v. Bruce*, 998 S.W.2d 605, 611 (Tex. 1999).

fendant's] conduct would inflict severe emotional distress."<sup>281</sup> Yet, if the plaintiff's emotional distress is the primary consequence of circumstances or events other than the defendant's behavior, regardless of how deliberate or reprehensible, the defendant should not be liable for the tort of intentional infliction of emotional distress.<sup>282</sup>

## F. Damages

### 1. Compensatory Damages

The difficulty of proving and measuring damages for mental injuries has been advanced as a major reason for the courts' reluctance to redress the harm caused by this tort.<sup>283</sup> Nonetheless, "mental suffering is scarcely more difficult of proof, and certainly no harder to estimate in terms of money, than the physical pain of a broken leg, which never has been denied compensation. . . ."<sup>284</sup> Furthermore, "[m]edical science has recognized long since that not only fright and shock, but also grief, anxiety, rage and shame, are in themselves 'physical injuries, in the sense that they produce well marked changes in the body, and symptoms that are readily visible to the professional eye.'<sup>285</sup> Accordingly, as one court noted, "[s]uch harm, though less susceptible of precise measurement than more tangible pecuniary losses or physical injuries would be, is no less real or worthy of compensation."<sup>286</sup>

Today, a plaintiff who prevails on a cause of action for intentional infliction of emotional distress is entitled to a broad range of damages.<sup>287</sup> Accordingly, the plaintiff who succeeds on a claim of intentional infliction of emotional distress can recover mental pain and anguish damages for humiliation, indignation, severe disappointment, wounded pride, despair, anxiety, stress, depression, fright, as well as for any physical or

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281. *Pavilon*, 561 N.E.2d at 1251.

282. *GTE Southwest, Inc.*, 998 S.W.2d at 611 (finding no liability where the emotional distress is "merely incidental" to the commission of some other tort and is "not the intended or primary consequence of the defendant's conduct").

283. *KEETON ET AL.*, *supra* note 3, §12, at 55.

284. *Id.*

285. *Id.* at 56.

286. *Agarwal v. Johnson*, 603 P.2d 58, 71 (Cal. 1979).

287. *See id.* (approving jury instruction "which provides that damages for the intentional infliction of emotional distress may include 'Reasonable [sic] compensation for any financial loss suffered by the plaintiff which was proximately caused by [the] emotional distress.'").

bodily harm attributable to the defendant's actions.<sup>288</sup> As one court noted, "[w]hen the mental pain rises to the level that the plaintiff loses the ability to function in her daily life as she did before the injury, mental anguish damages can be awarded."<sup>289</sup> Additional damages also encompass sums for reasonable and necessary medical expenses, economic losses, lost income or wages, diminution of earning capacity and even loss of consortium.<sup>290</sup> Future damages can be awarded so long as there is a "reasonable probability" they will be sustained in the future.<sup>291</sup>

According to one commentator, the recovery of emotional distress damages by means of the intentional infliction of emotional distress tort serves the main purpose of punitive damages.<sup>292</sup> Since "[t]he emotional damages awarded normally exceed both the plaintiff's out-of-pocket expenses due to the injury and any economic goal which the defendant may have sought through his outrageous conduct," consequently, "in many cases emotional damages serve the policy of deterrence which also underlies punitive damages."<sup>293</sup>

Even if the plaintiff's actual emotional distress is not compensable by means of the intentional tort cause of action because the defendant's conduct is not sufficiently outrageous, there may be a distress recovery pursuant to another legal doctrine that has less demanding standards than those of the common law tort.<sup>294</sup> For example, even if the former employer's retaliatory actions against the former employee were not sufficiently outrageous for an intentional tort, an emotional distress recovery

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288. RESTATEMENT (SECOND) OF TORTS §46(1) (1965); *see also* *Agarwal*, 603 P.2d at 71 (finding that a \$16,400 jury award to compensate a employee was justified, since emotional distress, "may include humiliation, anxiety, and mental anguish"); *Kroger Co. v. Willgruber*, 920 S.W.2d 61, 67 (Ky. 1996) (affirming a jury award of \$70,000 to "peculiarly susceptible" employee for employer's intentional infliction of emotional distress in course of wrongful termination); *Jackson v. Creditwatch, Inc.*, 84 S.W.3d 397, 408 (Tex. App. 2002) (acknowledging that emotional distress encompasses a wide range of injuries, such as "fright, humiliation, embarrassment, anger, worry, and nausea"); *GTE Southwest Inc. v. Bruce*, 956 S.W.2d 636, 642-43 (Texas App. 1997), *aff'd*, 998 S.W.2d 605 (Tex. 1999) (observing that the jury considered past and future damages for physical pain and mental anguish).

289. *Jackson*, 84 S.W.3d at 408.

290. *GTE Southwest Inc.*, 956 S.W.2d at 642 (supporting a jury instruction to consider necessary medical expenses when calculating an award); *Agarwal*, 603 P.2d at 71 (reiterating that damages may be awarded to compensate a plaintiff for economic loss resulting from "intentionally caused emotional distress"); *Agis v. Howard Johnson Co.*, 355 N.E.2d 315, 319 (Mass. 1976) (noting that a plaintiff may support a loss of consortium claim for emotional injuries to one's spouse, provided the acts causing such injuries were intentional).

291. *GTE Southwest Inc.*, 956 S.W.2d at 642.

292. *Bleeke*, *supra* note 17, at 371.

293. *Id.* at 370-71.

294. *Id.*

could be made pursuant to the anti-retaliation provisions of a statutory cause of action.<sup>295</sup>

## 2. Punitive Damages

Generally, punitive damages cannot be assessed as part of a recovery for the intentional infliction of emotional distress.<sup>296</sup> The reason is “that since the outrageous quality of the defendant’s conduct form(s) the basis of the action, the rendition of compensatory damages was sufficiently punitive.”<sup>297</sup> However, there may be novel ways to use the inherently flagrant misconduct in the intentional infliction cause of action to secure a punitive type award. For example, when a Title VII discrimination or sexual harassment cause of action is coupled with a intentional infliction of emotional distress claim, evidence of intentional, malicious, and outrageous distressing conduct, even if insufficient for the tort “outrage” claim, may be used to sustain a recovery of punitive damages against the employer on the Title VII claim.<sup>298</sup> According to one commentator, the “outrageousness” standard itself in the tort of intentional infliction of emotional distress “gives the tort of outrage an unusual punitive nature.”<sup>299</sup> “Unlike other torts which compensate the victims for their injuries, damages for the tort of outrage often depend more on the character of the defendant’s conduct than the extent of the plaintiff’s injury.”<sup>300</sup>

Intentional infliction of emotional distress by means of the “outrageousness” standard is similar to punitive damages in that both ascertain the presence and extent of damages pursuant to the reprehensibility of the defendant’s behavior. However, it appears likely that a plaintiff will be able to more readily secure a punitive award pursuant to the conven-

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295. *Johnston v. Davis Sec., Inc.*, 217 F. Supp. 2d 1224, 1232–33 (D. Utah 2002) (holding that the plaintiff was entitled to full compensatory damage recovery for consequences of former employer’s retaliatory actions, including emotional distress component, based on anti-retaliation provisions of the Fair Labor Standards Act).

296. *Morrison v. Sandell*, 446 N.E.2d 290, 292 (Ill. App. Ct. 1983). *But see* *Rulon-Miller v. IBM*, 208 Cal. Rptr. 524, 534–35. (Cal. 1985) (upholding a punitive award of \$200,000 for intentional infliction of emotional distress when corporate employer discharged plaintiff marketing manager due to her romantic involvement with the manager of a rival firm).

297. *Morrison*, 446 N.E.2d at 292.

298. *Hatley v. Hilton Hotels Corp.*, 308 F.3d 473, 477–78 (5th Cir. 2002) (acknowledging punitive damages may be imposed for the Title VII claim, but not the intentional infliction of emotional distress claim, while refusing to impose punitive damages because the employer possessed a “good faith” defense in compliance with Title VII).

299. *Bleeke*, *supra* note 17, at 370.

300. *Id.*

tional malice or gross or reckless disregard formulations for punitive damage recovery, presuming the plaintiff possesses a suitable foundation for the punitive damage award.

#### IV. VICARIOUS LIABILITY

The vicarious liability of the employer for the tort of intentional infliction of emotional distress derives from agency law.<sup>301</sup> Pursuant to conventional agency law principles, an employer will not be liable for the intentional torts of its employees unless the employer authorizes or ratifies them.<sup>302</sup> Consequently, even if the behavior by the aggrieved employee's supervisors and/or co-workers is deemed sufficiently outrageous, the employer will not be held vicariously liable for the conduct unless the employee presents evidence that the employer authorized or ratified the conduct.<sup>303</sup> As one federal district court noted, "Kansas, at least in certain circumstances, would recognize ratification as a viable theory for holding a principal liable for the intentional tort of his or her agent."<sup>304</sup> The mere fact, however, that the employer does not terminate the offending employees is not alone adequate to establish ratification.<sup>305</sup> Yet, "ongoing tolerance" by management of a course of sexual harassment misconduct, despite the employee's complaints on multiple occasions, together with the employer's failure to take any corrective action against the offender, was deemed to be sufficient ratification.<sup>306</sup>

Additionally, courts have held that for an intentional tortious action by the employee to be imputed vicariously to the employer, there must be evidence that "such actions were conducted, at least in part, to serve the employer."<sup>307</sup>

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301. See *Agarwal v. Johnson*, 603 P.2d 58, 69 (Cal. 1979).

302. *Hatley*, 308 F.3d at 476.

303. *Id.* (specifying sexual harassment by supervisors); see also *Agarwal*, 603 P.2d at 67 (discussing the ratification of termination for reasons manager knew were not true).

304. *Greenhorn v. Marriott Int'l, Inc.*, 258 F. Supp. 2d 1249, 1256 (D. Kan. 2003).

305. *Hatley*, 308 F.3d at 476.

306. *Greenhorn*, 258 F. Supp. 2d at 1257.

307. *Paraohoa v. Bankers Club, Inc.*, 225 F. Supp. 2d 1353, 1361–62 (S.D. Fla. 2002)  
Plaintiff alleges that defendants allowed plaintiff to be subjected to harassment in the form of unwanted sexual comments, touching, vulgarities, and solicitations by [supervisor] resulting in her demotion and resignation. Once again, plaintiff presents absolutely no evidence of defendant's knowledge of such actions by [its supervisor]—much less their tolerance for such conduct. Also, plaintiff fails to show that [supervisor's] actions were taken, even in part, to serve the defendant employer.

*Id.* at 1362.

However, in some jurisdictions which take a more expansive approach, an employer can be held vicariously liable for its employees' intentional torts, even if they were neither authorized nor ratified, if they nevertheless were still within the employees' "scope of employment."<sup>308</sup> The fact that the wrongful conduct was willful, intentional or even criminal does not mean it is per se outside the scope of employment.<sup>309</sup> According to one court, if the employee's intentional conduct is "generally foreseeable and a natural incident of the employment," the employer may be vicariously liable.<sup>310</sup> Similarly, according to another court, "[i]f the intentional tort is committed in the accomplishment of a duty entrusted to the employee, rather than because of personal animosity, the employer may not be liable."<sup>311</sup> An employee's conduct will be deemed outside the scope of employment if it "is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master."<sup>312</sup> Similarly, if the employee's intentional torts are "committed by the employee for personal motives unrelated to the furtherance of the employer's business," the employer is not vicariously liable.<sup>313</sup> If the employee is acting "entirely upon his own impulse, for his own amusement, and for no purpose of or benefit to the defendant employer," the employer is not vicariously liable for the employee's intentional wrongs.<sup>314</sup> The "proper inquiry," according to one state supreme court, "is whether the employee was fulfilling his or her job functions at the time he or she engaged in the injurious conduct."<sup>315</sup>

In one intentional infliction case, where co-workers and a manager ridiculed and demeaned an injured employee on light-duty, the employer, the owner of a deli, was found to be "vicariously liable for the

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308. *Wait v. Beck's N. Am., Inc.*, 241 F. Supp. 2d 172, 181 (N.D.N.Y. 2003); *Agarwal v. Johnson*, 603 P.2d 58, 68 (Cal. 1979) (reiterating that "an employer is liable for willful and malicious torts of his employee committed in the scope of employment."); *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 618-19 (Tex. 1999) (holding that an intentional act must be "closely connected with the servant's authorized duties"); *Robel v. Roundup Corp.*, 59 P.3d 611, 620-21 (Wash. 2002).

309. *Robel*, 59 P.3d at 620-21; *Agarwal*, 603 P.2d at 67 ("[A]ssuming no ratification or authorization by [defendant], the rule in this state is that the employer is liable for the willful misconduct of his employees acting in a managerial capacity.").

310. *Wait*, 241 F. Supp. 2d at 181.

311. *GTE Southwest, Inc.*, 998 S.W.2d at 618.

312. *Robel*, 59 P.3d at 621 (quoting from RESTATEMENT (SECOND) OF AGENCY § 228(2) (1958)).

313. *Wait*, 241 F. Supp. 2d at 181; *accord GTE Southwest, Inc.*, 998 S.W.2d at 618.

314. *Higgins v. Metro-North R.R. Co.*, 318 F.3d 422, 426 (2d Cir. 2003).

315. *Robel*, 59 P.3d at 621.

offending conduct of its deli employees.”<sup>316</sup> In that case, the defendant’s deli workers tormented the employee during working hours and on company property, while performing the duties they were assigned and interacting with customers and co-workers.<sup>317</sup> The court noted that the record was devoid of any suggestion “that the abusive employees left their job stations or neglected their assigned duties to launch their verbal attacks on [plaintiff]. Nor was the employees’ conduct in this case directed toward deriving personal sexual gratification, an exceptional circumstance that could have taken the conduct outside the scope of their employment.”<sup>318</sup>

In another example, the employees’ supervisor, a former United States Army supply sergeant, yelled, screamed and charged at the employees, with head down and fists balled, and continually uttered profane and vulgar obscenities.<sup>319</sup> The sergeant made the employees stand in his office for up to thirty minutes at a time several times a day, simply staring at them but not allowing them to leave.<sup>320</sup> The court ruled that the supervisor’s “acts, although inappropriate, involved conduct within the scope of his position as the employees’ supervisor,” and the court noted that the employer “has cited no evidence that [supervisor’s] actions were motivated by personal animosity rather than a misguided attempt to carry out his job duties.”<sup>321</sup> Thus, the court found there was adequate evidence to support the jury’s finding that the supervisor’s acts were committed in the “scope of his employment.”<sup>322</sup>

The intersection of vicarious liability principles with sexual harassment allegations could prove a dangerous area indeed for the intentional infliction of emotional distress employee who is basing their case on sexual harassment misconduct. As one court peremptorily declared, “[i]t is well settled that sexual harassment ‘consisting of unwelcome remarks and touching is motivated solely by individual desires and serves no purpose of the employer.’”<sup>323</sup> In one case, the employer’s shop superintendent was alleged to have engaged in a course of inappropriate sexual conduct towards the plaintiff, including unwanted sexual banter, poking her in the ribs, brushing his hand across her breast, putting his

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316. *Id.*

317. *Id.*

318. *Id.*

319. *GTE Southwest, Inc.*, 998 S.W.2d at 608–09.

320. *Id.* at 614.

321. *Id.* at 618.

322. *Id.*

323. *Higgins v. Metro-North R.R. Co.*, 318 F.3d 422, 426 (2d Cir. 2003).

arms around her waist and slapping her in the rear.<sup>324</sup> The Court of Appeals for the Second Circuit affirmed a summary judgment dismissal of the employee's intentional infliction claim against her employer,<sup>325</sup> succinctly stating that "the alleged sex-related comments and acts cannot be imputed to [employer] under this doctrine."<sup>326</sup> Yet, in another case, the intentional wrongful actions did encompass sexual harassment by supervisors, including unwanted and inappropriate touching and inappropriate sexual comments, as well as improper reprimands and attempts to undermine the employee's work.<sup>327</sup> Although the court sustained the intentional infliction of emotional distress claim against a supervisor, the court dismissed the interference claim against the employer,<sup>328</sup> explaining that "[a]lthough [supervisor] may have committed the alleged acts during business hours and abused the authority of his position within [employer's company], his conduct cannot be said to have been within the scope of, or a natural incident of, his employment."<sup>329</sup> "Inappropriate sexual comments, gestures and physical contact have been held to be outside the scope of employment."<sup>330</sup> "Undermining the plaintiff's work at her employer's firm, does not further the employer's interest and, as such, cannot be said to be within the scope of, or a natural incident of, plaintiff's employment."<sup>331</sup> Thus, with reference to the intentional infliction of emotional distress claim, the court ruled that the employer could not be held vicariously liable for the intentional sexual harassment nor the undermining misconduct.<sup>332</sup>

Vicarious liability is a "two-edged sword" for the employee. If the employee contends that the misconduct of the managers and supervisors and other personnel of the employer is not directly related to the employment relationship or is beyond the course and scope of employment, the employee may be bolstering an intentional infliction claim by focusing on this offending extraneous conduct. However, the misconduct may be so unrelated to the employment that it may be deemed to be personally vindictive behavior on the part of the tortfeasor and the employer will not be held vicariously liable. Consequently, it is a fine line that the

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324. *Id.* at 424.

325. *Id.* at 428.

326. *Id.* at 426.

327. *Wait v. Beck's N. Am., Inc.*, 241 F. Supp. 2d 172, 181 (N.D.N.Y. 2003).

328. *Id.* at 181.

329. *Id.* at 181 (noting that the supervisor's conduct consisted of alleged sexual battery, offensive touching, unwarranted reprimands, and attempts to undermine the plaintiff's work).

330. *Id.*

331. *Id.* at 182.

332. *Id.*

employee must draw. The employee must underscore offensive conduct that is beyond the norm of the usual employment relationship so as to secure a finding of outrageousness, but not so far beyond the norm that the conduct will be deemed merely personal, non-imputable misconduct by the employer.

## V. OUTRAGE AND ANTI-DISCRIMINATION STATUTES

### *A. Racial Discrimination or Harassment*

Intentional infliction of emotional distress cases in the private employment context are frequently intertwined with claims for discrimination and harassment pursuant to federal and state civil rights statutes. Emotional distress can readily result from purposeful discrimination or harassment, which can be in the form of physical conduct or merely words. In such a case, the common law of torts becomes entangled with federal and/or state statutory law, and the discrimination or harassment may also warrant a common law intentional infliction claim.

When the employee has prevailed on a claim of impermissible discrimination against his or her employer, the finding of discrimination in and of itself may permit an inference of emotional distress as an ordinary result of the employer's discriminatory actions.<sup>333</sup> Nevertheless, most courts appear very reluctant to automatically extend the tort cause of action to a discrimination case,<sup>334</sup> "Acts of discrimination are not necessarily 'extreme and outrageous.'"<sup>335</sup> Similarly, in *Swanson v. Senior Resources Connection*,<sup>336</sup> the court noted that discrimination, by itself, is insufficient to support an intentional infliction of emotional distress claim.<sup>337</sup> In one troublesome case, the employee, a minority, was terminated while similarly situated white employees were treated differently.<sup>338</sup> Nevertheless the court found the employer's conduct to be insufficiently outrageous and extreme, even if "driven by an unlawful

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333. DOBBS, *supra* note 2 § 305, at 831. ("[I]n some cases, racial slurs or epithets uttered by an employer or supervisor . . . may create a hostile and discriminatory work environment that violates anti-discrimination statutes and may also warrant submission of the outrage question to the jury on a common law claim for intentional infliction of emotional distress.")

334. *Briggs v. Aldi, Inc.*, 218 F. Supp. 2d 1260, 1263 (D. Kan. 2002).

335. *Jackson v. Blue Dolphin Communications of N.C.*, 226 F. Supp. 2d 785, 795 (W.D.N.C. 2002).

336. 254 F. Supp. 2d 945 (S.D. Ohio 2003).

337. *Id.* at 962.

338. *Briggs*, 218 F. Supp. 2d at 1263.

motive” of racial discrimination.<sup>339</sup> The court explained “that if defendant did terminate plaintiff’s employment based on her race, then such conduct would be ‘outrageous’ as that term is used in everyday parlance.”<sup>340</sup> However, since Kansas courts have construed the term narrowly in the discrimination context, the court found that the allegations were insufficient to rise to the level of outrageousness required to state a claim for intentional infliction of emotional distress.<sup>341</sup> Similarly, in another troubling case,<sup>342</sup> a minority employee was demoted in part for poor attendance, even though similarly situated non-minority employees with the same or worse attendance records were not demoted.<sup>343</sup> Yet, even though the court found that a question of fact existed on the race discrimination claim,<sup>344</sup> the employee’s demotion was insufficiently outrageous for the tort of intentional infliction of emotional distress, even if racially motivated.<sup>345</sup> The court required “something more” beyond discrimination for extreme and outrageous conduct.<sup>346</sup> Otherwise, the court warned, “every discrimination would simultaneously become a cause of action for the intentional infliction of emotional distress.”<sup>347</sup> Finally, in yet another very unsettling case, the employee refused to sign a false affidavit to be used in future litigation.<sup>348</sup> Following her refusal, one of her employer’s representatives made a racially discriminatory statement to her, and soon afterward she was dismissed from her position.<sup>349</sup> Nevertheless, the court held that the defendant’s conduct did not rise to the legally required “outrage” level.<sup>350</sup>

Whether the employee’s managers or supervisors engaged in racial discrimination or harassment for a continuous period of time emerges as a very important issue in ascertaining whether the racial conduct was sufficiently extreme and outrageous for the intentional infliction of emotional distress tort. For example, in one federal district court case, the black employee plaintiff was subjected to “an unceasing farrago of racial

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339. *Id.*

340. *Id.*

341. *Id.*

342. *Bush v. Am. Honda Motor Co.*, 227 F. Supp. 2d 780 (S.D. Ohio 2002).

343. *Id.* at 791.

344. *Id.* at 799.

345. *Id.* at 800–01.

346. *Id.* at 801 n.17.

347. *Id.*; accord *Swanson v. Senior Res. Connection*, 254 F. Supp. 2d 945, 962 (S.D. Ohio 2003).

348. *Jackson v. Blue Dolphin Communications of N.C.*, 226 F. Supp. 2d 785, 790 (W.D.N.C. 2002).

349. *Id.* at 791.

350. *Id.* at 795.

epithets” by a manager who “openly expressed his desire to eliminate blacks from the facility, and, in fact, engineered the dismissal of many black employees.”<sup>351</sup> Moreover, this manager colluded with another manager, who had also made racial comments, to eliminate black employees.<sup>352</sup> The defendant managers and company contended that the employee failed to state a claim “because racial harassment and epithets do not constitute ‘extreme and outrageous conduct.’”<sup>353</sup> The federal district court, in examining state law, responded: “We hesitate to predict that the Pennsylvania Supreme Court would hold that racial epithets and harassment can never be the basis of an IIED claim under Pennsylvania law. The Pennsylvania Supreme Court has never examined this question. . . .”<sup>354</sup> The federal district court did point to one state court decision in which a store employee used a racial epithet during a dispute with a customer.<sup>355</sup> However, in that case the lower state court held that considering the brevity of the encounter as well as the relationship of the parties, the employee’s conduct did not rise to the level of extreme and outrageous conduct.<sup>356</sup> Yet the federal district court did underscore a point made in the state court decision that could be distinguished from cases involving “continuing malicious actions or a special relationship between the parties.”<sup>357</sup> Consequently, the federal district court noted that the employee’s complaint alleged both “continuous malicious conduct” as well as a “special relationship between the parties,”<sup>358</sup> and that these allegations were sufficient to withstand a motion for dismissal of the complaint.<sup>359</sup> Nevertheless, a federal district court in Louisiana held that being “subjected to racial slurs and badgering” by one’s coworkers did “not rise to the high level of ‘extreme and outrageous’ conduct, *over a sufficient period of time*, to constitute a tort under existing Louisiana law.”<sup>360</sup>

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351. *McClease v. R.R. Donnelley & Sons Co.*, 226 F. Supp. 2d 695, 698 (E.D. Pa. 2002).

352. *Id.*

353. *Id.* at 703.

354. *Id.*

355. *Id.*

356. *Id.*

357. *Id.*

358. *Id.*

359. *Id.*

360. *Mitchell v. Tracer Const. Co.*, 256 F. Supp. 2d 520, 527 (M.D. La. 2003) (emphasis added).

### B. Sexual Harassment

Similar to the racial discrimination and harassment cases, the courts typically hold that sexual harassment, even though violating Title VII, does not necessarily equate to a finding of intentional infliction of emotional distress.<sup>361</sup> Some courts go even further, noting that “[i]n fact, federal courts in this circuit have consistently held that even acts of lewd physical touching and obscene suggestive comments in sexual harassment cases . . . were not sufficiently outrageous, as a matter of law, to establish a claim for intentional infliction of emotional distress in the employment context.”<sup>362</sup> To illustrate, one federal district court ruled that a regional manager’s “sexually-themed comments” to and in front of subordinate employees did not meet the state standard of “the most egregious conduct” for intentional infliction of emotional distress liability, even though the comments were consisted of the most vulgar, sexually explicit and racist terms.<sup>363</sup>

However, as noted by Dobbs, “[a] number of courts have recognized that sexual harassment (at work or elsewhere) justifies a recovery for intentional infliction of [emotional] distress.”<sup>364</sup> Although the “more common case of sexual harassment” is in the employment context and sometimes by co-workers, “the classic case of abusing power or position occurs when a supervisor or employer engages in or refuses to halt such indignities.”<sup>365</sup> Thus, *Bushell v. Dean*<sup>366</sup> “is consistent with cases holding that pervasive sexual harassment, particularly involving vulgar, obscene, or physically assaultive conduct and inappropriate sexual coercion by supervisors of subordinates, can justify a finding of outrageousness.”<sup>367</sup> For example, in *Wait v. Beck’s North America, Inc.*,<sup>368</sup> the employee’s supervisors’ sexual harassment was sufficient to withstand dismissal, when such conduct including inappropriate and unwanted touching, comments and conduct toward other females.<sup>369</sup> In *Greenhorn v. Mar-*

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361. See, e.g., *Hatley v. Hilton Hotels Corp.*, 308 F.3d 473, 476 (5th Cir. 2002).

362. *Paraohoa v. Bankers Club, Inc.*, 225 F. Supp. 2d 1353, 1361 (S.D. Fla. 2002).

363. *Ogden v. Keystone Residence*, 226 F. Supp. 2d 588, 595–96, 604 (M.D. Pa. 2002).

364. DOBBS, *supra* note 2, § 305, at 831; see also *Greenwood v. Delphi Auto. Sys.*, 257 F. Supp. 2d 1047, 1073–74 (S.D. Ohio 2003) (discussing Sixth Circuit law regarding “what constitutes extreme and outrageous conduct in the sexual harassment context”).

365. DOBBS, *supra* note 2 § 305, at 831.

366. 781 S.W.2d 652 (Tex. App. 1989), *rev’d on other grounds*, 803 S.W.2d 711 (Tex. 1991).

367. Duffy, *supra* note 12, at 387.

368. 241 F. Supp. 2d 172 (N.D.N.Y. 2003).

369. *Id.* at 186.

*riott International, Inc.*,<sup>370</sup> the offender's sexual harassment misconduct was so flagrant—forcibly kissing the employee, exposing himself, and attempting to require the plaintiff to perform oral sex on him—that the misconduct formed the basis for a sexual harassment count as well as an intentional infliction tort and other intentional tort counts to proceed through summary dismissal stage.<sup>371</sup> These courts and commentators correctly recognize that the tort action of intentional infliction of emotional distress can arise as a separate legal wrong during the course of the employment discrimination and/or harassment. The main legal wrong is derived from the statutory, typically federal, civil rights discrimination or harassment action based on the discriminating or harassing conduct itself, while the ancillary state common law claim is predicated on the outrageous manner in which the discrimination or harassment occurred. It will be especially important for the plaintiff to clearly differentiate and specify the independent tort “infliction” conduct, not only to sustain the tort, but also to avoid its preemption. In such circumstances, the common law tort claim can provide an additional means of protection for the mistreated and perhaps terminated employee.

#### VI. OUTRAGE AS AN EXCEPTION TO EMPLOYMENT-AT-WILL

Due to inherent inequality of the typical employer-employee relationship, especially an employment-at-will one, many terminated at will employees have used the tort of intentional infliction of emotional distress as part of their general “wrongful discharge” actions against their former employers.<sup>372</sup> Considering the usual superiority in bargaining and economic power of the employer in this theoretically symmetrical at will relationship, and also considering the difficulties involved in finding or carving out a viable exception to the employment-at-will doctrine, it is not unexpected that many employees have attempted to utilize the tort of

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370. 258 F. Supp. 2d 1249 (D. Kan. 2003).

371. *Id.* at 1262.

372. For a thorough article exploring the tort of intentional infliction of emotional distress in the employment at will context, see Duffy, *supra* note 12. Duffy views the “[a]pplication of the tort of intentional infliction of emotional distress in the employment context as part of a larger judicial and legislative trend toward ‘tortification’ of labor and employment law, in which the paradigmatic vehicle for vindication of workers’ rights is the private individual civil action.” *Id.* at 392. However, Duffy believes that “[i]his trend represents a false promise for workers, in that the beneficial effects of civil tort litigation are episodic and do not generally effectuate real changes in the workplace behavior of employers.” *Id.* For another discussion of the tort of intentional infliction of emotional distress in the employment setting of employment-at-will and wrongful discharge, see Bleeker, *supra* note 17.

intentional infliction as another independent tort weapon in their “wrongful discharge” arsenal.

The use of the intentional infliction of emotional distress as another independent tort “exception” to the employment-at-will doctrine has been met, however, with decidedly mixed judicial results. Certain courts are absolutely adamant that if the employee is an employee-at-will, the employee is without recourse to sue for wrongful discharge by means of a tort suit for intentional infliction of emotional distress.<sup>373</sup> According to the Wyoming Supreme Court, the fact that the employment relationship is at will is a “complete defense” to an intentional infliction of emotional distress lawsuit predicated on the employee’s termination, “even if the employer knows that the termination will cause the employee emotional distress.”<sup>374</sup> For example, in the Wyoming case,<sup>375</sup> the at will employee was a manager at a copy store who had been receiving “above-standard” reviews.<sup>376</sup> When the sales revenue of the store began to decline, she began receiving negative reviews from her staff regarding the way she performed her job and the manner in which she treated her employees.<sup>377</sup> The plaintiff admitted she was having difficulties, and attributed part of her problems to the fact that her mother was fighting and ultimately lost a long battle with cancer.<sup>378</sup> The plaintiff was instructed to develop a plan for improving her performance, so she made various attempts to contact her regional manager for assistance in drafting her plan.<sup>379</sup> However, the regional manager said that he could not discuss the situation, then terminated her when the plaintiff failed to draft a plan for improve-

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373. *Trabing v. Kinko’s, Inc.*, 57 P.3d 1248, 1256 (Wyo. 2002); *Abeles v. Mellon Bank Corp.*, 747 N.Y.S.2d 372, 373 (N.Y. App. Div. 2002); Duffy, *supra* note 12, at 395–96.

In general, . . . discharging an at will employee will not be sufficient to make out a cause of action absent any other tortious conduct. This is so because the at will rule, despite its recent erosion, is considered by the courts to be an established presumption of the ‘civilized society’ of the employment relationship. If the employment is truly at will, an employer may terminate an employee without cause for any reason, good, bad, or nonexistent. In such a situation, the employer is arguably doing nothing more than exercising his legal rights in a way permitted by the at will rule—discharge for any reason deemed sufficient by the employer. Thus, for many courts, distress caused by the discharge from at will employment is simply part of the accepted risks of employment to which employees must become accustomed.

*Id.*

374. *Trabing*, 57 P.3d at 1256.

375. *Id.*

376. *Id.* at 1251.

377. *Id.* at 1251–52.

378. *Id.*

379. *Id.* at 1252.

ment by the deadline.<sup>380</sup> The plaintiff sued for intentional infliction of emotional distress. Although the jurisdiction recognized the tort in the employment context, the fact that the plaintiff's employment status was at will operated as a "complete defense" to her claim.<sup>381</sup> The court explained that her employer "did nothing more than act within its legal rights when it terminated [her] employment."<sup>382</sup>

In another case, the defendant firm's accountant enticed an employee at will into a scheme to help the employee pay for her increasing health care premiums by "padding" her time card.<sup>383</sup> The accountant supposedly valued the plaintiff as an employee, and was allegedly acting with the knowledge and consent of the firm's principals.<sup>384</sup> When the owner of the firm presumably discovered the discrepancy in the plaintiff's time card, he accused her of embezzlement, demanded the repayment of several thousand dollars, threatened criminal action and thereby forced the plaintiff to resign.<sup>385</sup> The employee sued generally for wrongful discharge and specifically for the intentional infliction of emotional distress.<sup>386</sup> The state appellate court, although noting that "the conduct alleged in this case may have been distressful or hurtful to the plaintiff," declared that it was insufficiently "extreme or outrageous" for intentional distress tort liability.<sup>387</sup>

The superseding judicial view of the at will relationship, together with the constrained view of the tort fails to realize that even though the employer in an at will situation, may possess the general legal right to terminate the employee for any reason, the employer should not be insulated from abusive and coercive conduct that occurs prior to, during and after the discharge. Such a draconian at will standard provides the motivation for employers to discharge employees by granting "blanket" immunity for disingenuous discharge conduct, which can produce some very harsh and unjust results.

Other courts hold that the employee's at will status does not automatically preclude the cause of action, but asserts that even a "wrongful" at will termination, standing alone, is not sufficient evidence of extreme

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380. *Id.*

381. *Id.* at 1256.

382. *Id.*

383. *Carnemolla v. Walsh*, 815 A.2d 1251, 1254 (Conn. App. Ct. 2003).

384. *Id.*

385. *Id.*

386. *Id.*

387. *Id.* at 1261.

and outrageous conduct.<sup>388</sup> The Texas Supreme Court has provided the main rationale, stating that “there would be little left of the employment-at-will doctrine if an employer’s public statements of the reason for termination was, so long as the employee disputed that reason, in and of itself some evidence that a tort of intentional infliction of emotional distress had been committed.”<sup>389</sup> A termination, according to one court, is “likely to be an upsetting episode,” but alone is not grounds for an intentional infliction lawsuit.<sup>390</sup> For example, in one recent case, the plaintiff, an employee at will, was discharged for her refusal to sign a false affidavit to be used for future litigation.<sup>391</sup> Even though she had a viable wrongful discharge claim because state law forbids perjury, she did not automatically have an intentional infliction of emotional distress claim.<sup>392</sup> In another case, an at will insurance agent, who blew the whistle on an insurance kickback scheme involving one of the company’s adjusters and several of its agents, was terminated after an allegedly negligent investigation naming him as one of the suspects, even though the agent was never prosecuted.<sup>393</sup> Here, the court proclaimed that the insurance company’s “conduct was within the bounds of its discretion to supervise, review, discipline, and ultimately terminate its independent agents in light of allegations regarding an ongoing kickback scheme.”<sup>394</sup> In another case, the plaintiff at will employee was questioned in front of other employees regarding his personal use of his employer’s credit card. He was escorted out of the building into an open “bull pen area,”<sup>395</sup> where a co-worker announced in front of other employees that the plaintiff was being terminated and would not be eligible for rehire.<sup>396</sup> The

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388. *Frank v. Delta Airlines*, 314 F.3d 195, 202 n. 11 (5th 2002) (“[U]nder Texas law, termination from employment without more, even if the termination is wrongful, does not give rise to a claim of IIED.”) (interpreting *Brewerton v. Dalrymple*, 997 S.W.2d 212, 216–17 (Tex. 1999)); *Dirham v. Van Wert Co. Hosp.*, No. 3:99CV7485, 2000 WL 621139 at \*5 (N.D. Ohio Mar. 3, 2000) (“[T]he settled rule in Ohio is that the mere claim that a termination was unjustified does not rise to the level of extreme and outrageous required to state a claim for intentional infliction of emotional distress.”); *Southwestern Bell Mobile Sys., Inc. v. Franco*, 971 S.W.2d 52, 54 (Tex. 1998) (stating that “even wrongful termination is not extreme and outrageous.”).

389. *Tex. Farm Bureau Mut. Ins. Cos. v. Sears*, 84 S.W.3d 604, 610 (Tex. 2002) (citing *Diamond Shamrock Ref. & Mktg. Co. v. Mendez*, 844 S.W.2d 198, 202 (Tex. 1992)).

390. *Swanson v. Senior Res. Connection*, 254 F. Supp. 2d 945, 962–63 (S.D. Ohio 2003).

391. *Jackson v. Blue Dolphin Communications of N.C.*, 226 F. Supp. 2d 785, 794 (W.D.N.C. 2002).

392. *Id.*

393. *Tex. Farm Bureau Mut. Ins. Cos.*, 84 S.W.3d at 611.

394. *Id.*

395. *Williams v. First Tenn. Nat’l Corp.*, 97 S.W.3d 798, 805 (Tex. App. 2003).

396. *Id.*; *see also* *Southwestern Bell Mobile Sys., Inc. v. Franco*, 971 S.W.2d 52, 54 (Tex. 1998) (holding that wrongful termination is not extreme and outrageous conduct).

court, noting that ordinary employment disputes do not constitute extreme and outrageous conduct, ruled that the employee had not met his burden.<sup>397</sup>

These courts, though not summarily rejecting the tort of intentional infliction of emotional distress in the at will context, are evidently disinclined to create another judicially recognized “exception” to circumvent the general rule of employment-at-will. Those courts which bar the tort from application in the context of employment-at-will often arbitrarily fail to recognize that despite the employer’s legal right to terminate an at will employee, the employer’s representatives’ conduct before, during, and especially after the discharge may be separate and distinct from the reasons for the discharge. The conduct may be so offensive, abusive, coercive, or retaliatory so as to give rise to a valid intentional infliction of emotional distress tort claim.<sup>398</sup>

## VII. DEFENSES AND PRIVILEGES

### *A. Generic Intentional Tort Defenses and Privileges*

As a general rule, there are no affirmative defenses that are specific to the tort of intentional infliction of emotional distress; but the traditional intentional tort defenses of consent and self-defense can form

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397. *Williams*, 97 S.W.3d at 805.

398. *See, e.g.*, *Wilson v. Monarch Paper Co.*, 939 F.2d 1138, 1145 (5th Cir. 1991); *United States ex rel. Barrett v. Columbia/HCA Healthcare Corp.*, 251 F. Supp. 2d 28, 39 (D.C. 2003); *McCleave v. R.R. Donnelley & Assocs.*, 226 F. Supp. 695, 703 (E.D. Pa. 2002); *Agarwal v. Johnson*, 603 P.2d 58, 67 (Cal. 1979); *Rulon-Miller v. IBM Corp.*, 208 Cal. Rptr. 524, 534–35 (Cal. Ct. App. 1985); *Nicholson v. Windham*, 571 S.E.2d 466, 470 (Ga. Ct. App. 2002) (noting that discharge of employee for refusing to commit allegedly illegal acts supports claim); *Pavilon v. Kaferly*, 561 N.E.2d 1245, 1251 (Ill. App. Ct. 1990) (“A jury reasonably could have found that [defendant’s] specific acts of [sexual harassment misconduct], as well as his cumulative pattern of conduct toward [plaintiff], commencing while she was still his employee and continuing long after he fired her, constituted extreme and outrageous conduct.”); *Kroger Co. v. Wilgruber*, 920 S.W.2d 61, 66–67 (Ky. 1996) (affirming jury’s decision that the employer coerced employee into signing release of liability papers was a plan of “attempted fraud, deceit, slander and interference with contractual rights”); *Rigby v. Fallsway Equip. Co.*, 779 N.E.2d 1056, 1065–66 (Ohio Ct. App. 2002) (stating that improper and frequent contact with discharged employee at home was not sufficient to support intentional infliction of emotional distress claim); *Jackson v. Creditwatch, Inc.* 84 S.W.3d 397, 407–08 (Tex. App. 2002) (discussing post-termination misconduct); *see also Duffy, supra* note 12, at 397 (noting that a “[f]ew courts have used the outrageousness tort to challenge the fairness or motivation underlying an employer’s decision to discharge discipline, or otherwise alter the terms and conditions of at will employment”).

valid affirmative defenses.<sup>399</sup> Moreover, some New York courts have held that if the “conduct underlying the intentional infliction of emotional distress claim falls within the ambit of traditional tort liability,” a cause of action for intentional interference will not lie.<sup>400</sup> For example, in a New York federal district court case, the employee based her intentional tort case on sexual harassment conduct by her supervisors, which included unwanted touching and reprimands that may have undermined the plaintiff’s work.<sup>401</sup> This wrongful conduct as a basis for the intentional infliction claim, “overlaps other traditional tort claims,” such as battery and defamation, and therefore could not be used to support the plaintiff’s claim of intentional infliction of emotional distress.<sup>402</sup> However, since other aspects of the defendant supervisors’ wrongful sexual harassment conduct, such as inappropriate sexual comments, did “not fall within the ambit of any traditional torts,” the employee could maintain her intentional infliction of emotional distress claim.<sup>403</sup>

As to privileges, the *Restatement (Second) of Torts* marks the defendant’s assertion or insistence of his or her legal rights, “in a permissible way,” as privileged conduct. Although the defendant’s conduct may otherwise be extreme and outrageous and even though the defendant is “well aware” that such an assertion or insistence is “certain” to cause emotional distress, such conduct remains privileged.<sup>404</sup>

### B. Arbitration

A court may dismiss an employee’s intentional infliction of emotional distress claim due to an arbitration clause in an employee’s contract, since the court will dismiss all claims when they can be arbitrated.<sup>405</sup> Courts also look at the inequality in the bargaining power between the employer and the employee before dismissing the employee’s claim, but that alone will not hold an arbitration agreement in the employment context unenforceable.<sup>406</sup>

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399. KEETON ET AL., *supra* note 3 §18, at 113, 125.

400. *Wait v. Beck’s N. Am., Inc.*, 241 F. Supp. 2d 172, 182 (N.D.N.Y. 2003) (citing *Hansel v. Sheridan*, 991 F. Supp. 69, 75 (N.D.N.Y. 1998)).

401. *Id.* at 181.

402. *Id.* at 182.

403. *Id.*

404. RESTATEMENT (SECOND) OF TORTS § 46 cmt. g (1965).

405. *Lloyd v. Hovensa, L.L.C.*, 243 F. Supp. 2d 346, 353 (D.V.I. 2003).

406. *Id.* at 349.

### C. Statutes of Limitations

The “running” of an applicable statute of limitations will bar the employee’s claim. Depending on the state in which a claim is filed, the statute of limitations for the tort of intentional infliction of emotional distress can typically be one,<sup>407</sup> two<sup>408</sup> or three years.<sup>409</sup> However, some courts have utilized a “continuing violation” theory that can be used to extend the technical statute of limitations period if there was a course of objectionable conduct and if the final objectionable act occurred within the pertinent statutory limitations period.<sup>410</sup>

### D. Preemption and Exclusivity

#### 1. State Statutes

State Workers’ Compensation statutes may be a bar to the common law tort claim of intentional infliction of emotional distress.<sup>411</sup> As one court explained, “[w]orkers’ compensation exclusivity rests on the no-

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407. *Wait*, 241 F. Supp. 2d at 180 (noting the statute of limitations in New York for an intentional tort is one year).

408. *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 619 (Tex. 1999); *Jackson v. Creditwatch, Inc.*, 84 S.W.3d 397, 404 (Tex. App. 2002).

409. *Kennedy v. St. Francis Hosp.*, 225 F. Supp. 2d, 128, 144 (D. Conn. 2002) (finding that employee’s claim for intentional infliction of emotional distress is barred because the alleged conduct took place more than three years prior to the filing of the complaint).

410. *Wait*, 241 F. Supp. 2d at 180; *see also Bonner v. Guccione*, 916 F. Supp. 271, 277 (S.D.N.Y. 1996) (explaining that where a plaintiff is the target of a planned program of harassment and some of the conduct falls within the limitations period, a cause of action may be established).

411. *Cole v. Fair Oaks Fire Dept. Dist.*, 729 P.2d 743, 744 (Cal. 1987) (finding that employee could not maintain civil action for intentional distress against employer and fellow employee because mental disability conduct was compensable under the exclusive remedy provisions of Workers’ Compensation law); *see also DOBBS, supra* note 2 § 305, at 831–32; *Duffy, supra* note 12, at 414 (“Even assuming that a claim for intentional infliction of emotional distress in the workplace can be established, the tort’s practical effect is limited in many jurisdictions by preemption provisions in state and federal law, the most notable of which are state workers’ compensation statutes.”). For a further discussion of this topic see Raymond A. Cowley, “*Mixed Blessing: The Texas Supreme Court’s Comments on the Availability of the Workers’ Compensation Defense in Employment Tort Cases*,” *TEX. B.J.*, at 470 (2003). Cowley comments that the Texas Supreme Court recently indicated that “intentional tort claims, depending on the particular facts presented, may in fact fall within the Act’s exclusive remedy provision and thus be barred when brought against a subscribing employer.” *Id.* at 474; *see also, GTE*, 998 S.W.2d at 611 (ruling that severe emotional distress caused by a supervisor’s continuing abuse was not a “compensable injury” under the Texas Workers’ Compensation Act, and thus a employee’s lawsuit for intentional infliction of emotional distress was not barred by the Act).

tion that, as a quid pro quo for swift and certain payment on a no-fault basis, workers cede the possibly greater recovery that might arise from a range of fault-based tort claims.<sup>412</sup> In the context of private employment, the employer often will raise the exclusivity provisions of its state's workers' compensation statute as a defense against the tort of intentional infliction of emotional distress.<sup>413</sup> Due to such statutes, an employee's ability to sue his or her employer in tort is a very narrowly circumscribed right, typically based on circumstances involving allegations of intentional wrongdoing.<sup>414</sup> The court further explained that workers' compensation "exclusivity only extends to conduct which is part of the normal risks of the employment relationship."<sup>415</sup> Thus, intentional, deliberate or reckless misconduct in the workplace by the employer and the employee's co-workers may overcome the traditional tort immunity in workers' compensation statutory schemes.<sup>416</sup> For example, the exclusivity of workers' compensation was held not to bar an employee's "derivative emotional distress claim" based on the anti-retaliation provisions of the Fair Employment and Housing Act.<sup>417</sup> Similarly, a recovery for emotional distress was allowed when the distress was caused by the employer's violation of the statute that prohibits the discharge of an employee for claiming or attempting to claim workers' compensation.<sup>418</sup> Nevertheless, worker's compensation statutes have been interpreted in some states to bar any claims against the employer for the intentional or negligent infliction of emotional distress arising out of the employment relationship.<sup>419</sup> Of course, if the extreme and outrageous conduct occurred after the termination of the employment relationship, and was sufficiently separate and distinct from the termination, then the employee can make a convincing argument that the jurisdiction's workers'

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412. *Yanowitz v. L'Oreal, USA, Inc.*, 131 Cal. Rptr. 2d 575, 600 (Cal. Ct. App. 2003).

413. Duffy, *supra* note 12, at 414-17.

414. *Thomas v. Fina Oil & Chem. Co.*, 845 So. 2d 498, 503 (La. Ct. App. 2003); *Alford v. Catalytica Pharm., Inc.*, 577 S.E.2d 293, 293 (N.C. 2003) (holding that intentional misconduct by employer is regarded as an "exception to the general exclusivity of the Workers' Compensation Act"); (discussing intentional act exception to state Workers' Compensation Act but deciding that it was not applicable to the case at bar due to lack of evidence); *Hanford v. Plaza Packaging Corp.*, 760 N.Y.S.2d 31, 31 (N.Y. App. Div. 2003) (reviewing the determination by Workers' Compensation Board that employee's injury was accidental, thus barring the employee's intentional infliction tort claim against co-worker).

415. *Yanowitz*, 131 Cal. Rptr. 2d at 600.

416. *Alford*, 577 S.E.2d at 293; see also Robert L. Dietz, *Torts in the Workplace: How Exclusive is the Exclusive Remedy?*, LXVIII FLA. B.J. No. 3, at 72 (March 1994).

417. *Yanowitz*, 131 Cal. Rptr. 2d at 601.

418. Dietz, *supra* note 416, at 72 (citing *Scott v. Otis Elevator*, 572 So. 2d 902 (Fla. 1990)).

419. See *Ogden v. Keystone Residence*, 226 F. Supp. 2d 588, 604 (M.D. Pa. 2002).

compensation statute does not apply to or preempt their intentional infliction claim.<sup>420</sup> Co-workers also may be held liable in tort for their intentional wrongs in the workplace, thereby superseding the traditional workers' compensation protection of employees for their negligent wrongs.<sup>421</sup>

State civil rights statutes also may bar a state common law claim for the intentional infliction of emotional distress. For example, the Seventh Circuit Court of Appeals ruled that the state's Human Rights Act preempted the employee's intentional infliction tort claim.<sup>422</sup> In that case, the employee sued her employer and supervisor for sexual harassment and intentional infliction of emotional distress based on the fact that the supervisor had directly requested sex from the plaintiff, a subordinate employee.<sup>423</sup> The court ruled that the presence of a factual dispute precluded the dismissal on summary judgment of the plaintiff's statutory sexual harassment claim.<sup>424</sup> Regarding the common law tort claim, however, the court held that it was preempted by the state statute.<sup>425</sup> The court affirmed summary judgment on the preemption issue, explaining that the state statute would preempt any claim that is "inextricably linked" to the allegation of sexual harassment, which must be brought before the state's Human Rights Commission, and noted that the employee's claim for intentional infliction of emotional distress was supported by "factual allegations identical to those set forth in her Title VII sexual harassment claim."<sup>426</sup> Similarly, the federal district court for the Northern District of Iowa ruled that Iowa's Civil Rights Act preempted an employee's intentional infliction of emotional distress claim.<sup>427</sup> The court explained that the employee's state tort claim, predicated on sex, national origin, disability discrimination and harassment, was preempted by the state statute because the employee, in her intentional infliction of emotional distress claim, "relie[d] on precisely the same allegations as her discrimination claims."<sup>428</sup> However, the Illinois Appellate court ruled that the employee's intentional infliction tort case, although based on a pattern of sexual harassment misconduct, was not preempted by the

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420. *Kroger Co. v. Willgruber*, 920 S.W.2d 61, 64 (Ky. 1996).

421. *Dietz*, *supra* note 416, at 75.

422. *See Quantock v. Shared Mktg. Serv., Inc.* 312 F.3d 899, 905 (7th Cir. 2002).

423. *Id.* at 904-05.

424. *Id.* at 905.

425. *Id.*

426. *Id.*

427. *Martinez v. Cole Sewell Corp.*, 233 F. Supp. 2d 1097, 1139-40 (N.D. Iowa 2002).

428. *Id.* at 1137.

state's Human Rights Law because "the tort of intentional infliction of emotional distress required proof of more than was required for sexual harassment and served a different policy than that served by the Human Rights Act . . . ."<sup>429</sup>

## 2. Federal Statutes

Federal statutes can also preempt state claims for intentional infliction of emotional distress.<sup>430</sup> Federal law will supersede state law pursuant to the Supremacy Clause of the Constitution<sup>431</sup> when: (1) Congress has expressly preempted state law; (2) a Congressional intent to preempt may be inferred from the presence of a "pervasive" federal regulatory scheme; or (3) a state law conflicts with a federal law.<sup>432</sup> Moreover, if a federal regulatory agency has "substantially subsumed" the subject matter of the state tort in question, preemption will occur.<sup>433</sup> Regarding the common law tort of intentional infliction of emotional distress, the tort can be preempted by federal and state statutes. For example, the Omnibus Transportation Employee Testing Act<sup>434</sup> and Federal Aviation Administration regulations<sup>435</sup> preempted the intentional tort when an aircraft mechanic employee sued his employer for falsely accusing him of adulterating his specimen for a drug test, refusing to administer a proper drug test, improperly relying on tests with no scientific validity, and for discharging him for the failure to take the test.<sup>436</sup> Similarly, in *Chapman v. Labone*,<sup>437</sup> a plaintiff railroad employee's intentional infliction of emotional distress claim based on the employee's drug test was preempted by the Federal Railroad Safety Act, according to the federal district court for the Southern District of Iowa, because the drug-testing regulations promulgated by the Department of Transportation "substantially subsume the subject matter" of state tort law regarding drug testing of railway employees.<sup>438</sup>

Preemption of state common law torts by federal labor law is a major area of concern. In particular, the preemption of the tort of intentional

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429. *Pavilon v. Kaferly*, 561 N.E.2d 1245, 1249 (Ill. App. Ct. 1990).

430. *Frank v. Delta Airlines*, 314 F.3d 195, 197 (5th Cir. 2002).

431. U.S. CONST. art. VI.

432. *Frank*, 314 F.3d at 197.

433. *Id.* at 202.

434. *Id.* at 197.

435. *Id.*

436. *Id.* at 202.

437. *Chapman v. Labone*, 252 F. Supp. 2d 814 (S.D. Iowa 2003).

438. *Id.* at 818.

infliction of emotional distress is, according to one court, a “thorny area.”<sup>439</sup> In the field of labor relations, Section 301 of the Labor Management Relations Act<sup>440</sup> provides that all lawsuits seeking redress for the violation of a collective bargaining agreement may be brought in federal court.<sup>441</sup> Section 301 consequently has been interpreted to preempt state law claims that substantially depend on the collective bargaining agreement.<sup>442</sup> With regard to a plaintiff covered by a collective bargaining agreement, who is attempting to sue his or her employer for the tort of intentional infliction of emotional distress, the Ninth Circuit Court of Appeals recently commented:

[W]e have previously acknowledged its difficulty and the uphill battle a plaintiff typically faces to explain why the tort claim is not being used to alter the terms agreed to under the CBA, or to sidestep its grievance procedures. There is a wide range of action or inaction an employer might take that, while seemingly unfair or insensitive, may be the product of negotiated terms of the CBA and subject to arbitration. If . . . the plaintiff’s outrage claim attempts to enforce rights or duties established by the CBA while sidestepping the CBA’s dispute resolution processes, it is preempted.<sup>443</sup>

The Ninth Circuit Court of Appeals then delineated some “general principles,” whereby the tort of intentional infliction of emotional distress will be preempted:

First, if the CBA *specifically* covers the conduct at issue, the claim will generally be preempted. In such circumstances the allegedly wrongful behavior has been the product of negotiation between the employer and the employee, and allowing the plaintiff to proceed with the claim will tend to allow circumvention of the CBA’s grievance and arbitration provisions. . . . Conversely, we have explained that if the CBA does not ‘cover’ the allegedly extreme and outrageous conduct, the intentional infliction claim will not [be] preempted.<sup>444</sup>

In the case before the Ninth Circuit, the employee argued that her employer, Boeing, committed the tort of intentional outrage by repeatedly

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439. *Humble v. Boeing Co.*, 305 F.3d 1004, 1012 (9th Cir. 2002).

440. Labor Management Relations (Taft-Hartley) Act § 301(a), 29 U.S.C. §185(a) (2000).

441. *Id.*; see also *Humble*, 305 F.3d at 1007 (holding that “all suits seeking relief for violation of a CBA may be brought in federal court”).

442. *Humble*, 305 F.3d at 1007.

443. *Id.* at 1012–13.

444. *Id.* at 1013.

placing her in a job which she could not medically perform and by not accommodating her upon her return from medical leave.<sup>445</sup> The court, in ruling that the employee's intentional tort claim was preempted, explained:

There is a provision of the CBA that fairly directly addresses the situation at issue in this case. The parties have negotiated that when an employee returns from medical leave and is not medically able to perform his or her existing job, Boeing has an obligation to consider an employee for any other position that is open and that the employee is able to perform. Whether Boeing fulfills this obligation on any given occasion is an issue to be resolved in accordance with the dispute resolution procedures established by the CBA.<sup>446</sup>

Similarly, in another Ninth Circuit case, the court ruled that the employee's common law tort actions for intentional and negligent infliction of emotional distress<sup>447</sup> were preempted by Section 301 of the Labor Management Relations Act because the state law claims required the court to interpret the terms of the collective bargaining agreement.<sup>448</sup>

Much like the Labor Management Relations Act, the Railway Labor Act can cause preemption of an employee's state tort claim.<sup>449</sup> For example, in one case, the employee, a railroad worker, sued his railroad employer for intentional infliction of emotional distress based on his termination for initially failing to provide a sample for a drug test and then for a laboratory transmitting his test results to his employer. However, the federal district court ruled that the intentional tort distress claim, as well as his other state law tort claims for invasion of privacy, misrepresentation and defamation, were preempted by the federal Railway Labor Act.<sup>450</sup> The court first stated the fundamental preemption standard and rationale:

If the resolution of a state-law claim "depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-

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445. *Id.* at 1012, 1014.

446. *Id.* at 1014.

447. *Gradilla v. Ruskin Mfg.*, 320 F.3d 951 (9th Cir. 2003). The negligent infliction of emotional distress claim resulted from his termination for allegedly unannounced absenteeism, due to the employee's traveling to Mexico with his wife to attend her father's funeral. *See id.* at 953-55.

448. *Id.* at 959-60.

449. *Howell v. Lab One, Inc.*, 243 F. Supp. 2d 987, 989 (D. Neb. 2003).

450. *Id.* at 989.

law principles as there are States) is pre-empted and federal labor-law principles—necessarily uniform throughout the nation—must be employed to resolve the dispute.”<sup>451</sup>

In the case at bar, the court further explained that the resolution of the drug testing dispute would involve the interpretation or application of the existing collective bargaining agreement, and would be “inextricably intertwined” with the provisions of the agreement, thereby mandating the preemption of the drug testing based state tort claims.<sup>452</sup>

If the employee’s claim of intentional infliction of emotional distress is predicated on the employer’s benefit plan, the employee will confront a serious preemption problem created by the Federal Employee Retirement Income Security Act of 1974 (ERISA).<sup>453</sup> ERISA provisions explicitly “supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan (covered by ERISA).”<sup>454</sup> One federal district court concisely explained the expansive preemptive reach of the ERISA statute:

Congress’ intent in enacting ERISA was to completely preempt the area of employee benefit plans and to make regulation of benefit plans solely a federal concern. The Supreme Court has consistently emphasized the expansive sweep of the preemption clause. “Thus, only those state laws and state law claims whose effect on employee benefit plans is merely tenuous, remote or peripheral are not preempted.” The Sixth Circuit, too, “has repeatedly recognized that virtually all state law claims relating to an employee benefit plan are preempted by ERISA.” Regardless of the label that a plaintiff assigns, a state law claim is preempted if it makes reference to, or has a connection with, an ERISA plan.<sup>455</sup>

In the case before the district court, the employee’s intentional infliction of emotional distress claim involved “the non-payment of disability retirement benefits and thus, ‘relates to (an) employee benefit plan, and therefore [is] preempted’ by ERISA.”<sup>456</sup>

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451. *Id.* at 990–91 (quoting *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405–06 (1988)).

452. *Id.* at 992.

453. *Marshall v. Ormet Corp.*, 228 F. Supp. 2d 811, 815–16 (S.D. Ohio 2002).

454. *Id.* at 815 (quoting 29 U.S.C. § 1144(a) (2002)).

455. *Id.* (citations omitted).

456. *Id.* at 816.

The Federal Employers Liability Act (FELA),<sup>457</sup> however, has been interpreted to neither expressly nor impliedly preempt a former railroad employee's intentional infliction of emotional distress claim. Employer post-injury claims-handling practices, including rejecting a settlement offer and then discontinuing the employee's wage advances, thereby leaving the employee with no means to support his family, are not preempted.<sup>458</sup> The court concluded that FELA did not "so pervasively 'occupy the field' of recovery for injured railroad employees as to preempt all supplemental state remedies."<sup>459</sup> Moreover, the *Reidelbach* court explained that "the State has an overriding interest in protecting its citizens from fraudulent, malicious, and bad faith claims practices and the intentional infliction of emotional injury, . . . and there is virtually no risk that the state cause of action would interfere with the effective administration of FELA."<sup>460</sup> Similarly, FELA was deemed not to preempt an employee's claim<sup>461</sup> when the plaintiff, an African-American male, was denied a higher paying position which was given to a white employee with less seniority.<sup>462</sup> When the plaintiff complained, he was confronted with a "snickering supervisor" and a hangman's noose above the supervisor's door.<sup>463</sup> The federal district court reasoned that since FELA is the "exclusive remedy" for allegations of physical harm, and since the plaintiff alleged emotional harm, the claim for intentional infliction of emotional distress was not cognizable under FELA. Thus the claim was actionable only pursuant to state tort law.<sup>464</sup> Moreover, the court explained that "nothing in the statutory design of FELA or its subsequent judicial interpretations compels a conclusion that FELA 'occupies the field' to such an extent that non-actionable FELA claims cannot be pursued as state law torts."<sup>465</sup>

### *E. First Amendment Concerns*

The First Amendment to the United States Constitution,<sup>466</sup> as well as "free speech" rights in state constitutions, may provide a defense to

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457. Federal Employee Liability Act, 45 U.S.C. §§ 51–60 (2000).

458. *Reidelbach v. Burlington N. & Santa Fe Ry. Co.*, 60 P.3d 418, 421, 428 (Mont. 2002).

459. *Id.* at 425.

460. *Id.* at 430.

461. *Starks v. Northeast Ill. Reg'l Commuter R.R.*, 245 F. Supp. 2d 896, 900 (N.D. Ill. 2003).

462. *Id.* at 898.

463. *Id.*

464. *Id.* at 899–900.

465. *Id.* at 900.

466. U.S. CONST. amend. I.

the intentional infliction of emotional distress tort.<sup>467</sup> *Prosser and Keeton* states:

There is still, in this country at least, such a thing as liberty to express an unflattering opinion of another, however wounding it may be to the other's feelings; and in the interest not only of freedom of speech but also of avoidance of other more dangerous conduct, it is still very desirable that some safety valve be left through which irascible tempers may blow off relatively harmless steam.<sup>468</sup>

According to Dobbs, referring to the context of racial slurs, “[c]onceivably, the First Amendment’s protection of free speech could impose a degree of constraint on liability for verbal infliction of emotional harm.”<sup>469</sup>

#### VIII. BURDENS OF PROOF AND PERSUASION AND ROLES OF COURT AND JURY

An employee clearly may recover damages for the tort of intentional infliction of emotional distress in an employment context.<sup>470</sup> The plaintiff, however, bears the burden of proving all the elements of the cause of action.<sup>471</sup> In establishing the “outrage” element, the employee must provide “substantial evidence” of outrageous conduct.<sup>472</sup> However, a jury is allowed to make a “reasonable inference” from the facts to deduce that a defendant’s conduct is extreme and outrageous.<sup>473</sup> With regard to the presence and degree of distress, the employee, as plaintiff,

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467. See *Van Dyun v. Smith*, 527 N.E.2d 1005, 1011 (Ill. App. Ct. 1988) (discussing the “actual malice” and “public concern” standards of *New York Times v. Sullivan* in reference to a tort of intentional infliction of emotional distress, but in the context of an abortion protest case rather than an employment dispute).

468. KEETON ET AL., *supra* note 3 §12, at 59.

469. DOBBS, *supra* note 2 § 305, at 830 (“The question has been considered in connection with statutory anti-discrimination laws, which to some extent parallel the tort of intentional infliction of emotional distress; but the answer has not identified itself.”).

470. See, e.g., *Gradilla v. Ruskin Mfg.*, 320 F.3d 951, 959 (9th Cir. 2003) (analyzing California law); *Leavitt v. Wal-Mart Stores, Inc.*, 238 F. Supp. 2d 313, 316–17 (D. Me. 2003); *Darboe v. Staples, Inc.*, 243 F. Supp. 2d 5, 19 (S.D.N.Y. 2003) (applying New Jersey law); *Proctor v. Wackenhut Corrs. Corp.*, 232 F. Supp. 2d 709, 714 (N.D. Tex. 2002); *Martinez v. Cole Sewell Corp.*, 233 F. Supp. 2d 1097, 1138 (N.D. Iowa 2002); *Jackson v. Creditwatch, Inc.*, 84 S.W.3d 397, 405 (Tex. App. 2002).

471. See *Gradilla*, 320 F.3d at 959; *Leavitt*, 238 F. Supp. 2d at 316–17; *Darboe*, 243 F. Supp. 2d at 19; *Proctor*, 232 F. Supp. 2d at 714; *Martinez*, 233 F. Supp. 2d at 1137–38; *Jackson*, 84 S.W.3d at 405.

472. *Martinez*, 233 F. Supp. 2d at 1138.

473. *Swanson v. Senior Res. Connection*, 254 F. Supp. 2d 945, 963 (S.D. Ohio 2003).

must assume the burden of validating his or her actual severe emotional distress.<sup>474</sup> Showing objective manifestations of physical harm produced by the distress naturally will aid the plaintiff in sustaining this burden.

The seminal issue as to whether the defendant's conduct is reasonably sufficient to satisfy the extreme and outrageous standard so as to permit recovery is initially a question of law for the court to determine.<sup>475</sup> For example, in one state appellate case,<sup>476</sup> the court ruled that as a matter of law the plaintiff's termination for violating the employer's conduct policy, which forbade fighting or attempting bodily harm, did not constitute extreme and outrageous conduct and thus was not actionable as an intentional infliction of emotional distress.<sup>477</sup> In another case, the federal district court, applying Florida law, held that as a matter of law "even acts of lewd physical touching and obscene suggestive comments in sexual harassment cases, such as those alleged here, were not sufficiently outrageous. . . ."<sup>478</sup> In another case,<sup>479</sup> the state appellate court ruled that as a matter of law it was not extreme and outrageous conduct for the employer's accountant to solicit the employee to participate in a scheme to secure her health benefits, and then for the defendant employer's principal owner to accuse the plaintiff of embezzlement and to force her to resign.<sup>480</sup> The court concluded that the conduct, "may have been distressful or hurtful," but it was not as a matter of law extreme and outrageous.<sup>481</sup> Similarly, another federal district court ruled that a supervisor criticizing an employee on three separate occasions for his work performance, demoting the employee, as well as calling the employee a "nothing" and a "nobody," did not "create a genuine issue of material fact" and "[n]o reasonable jury could find that the defendant's

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474. *Proctor*, 232 F. Supp. 2d at 714 (indicating that evidence must show the distress was so severe that no reasonable person could be expected to endure it).

475. RESTATEMENT (SECOND) OF TORTS § 46 cmt. h (1965); *see also Leavitt*, 238 F. Supp. 2d at 317; *Proctor*, 232 F. Supp. 2d at 714; *Jackson v. Blue Dolphin Communications of N.C.*, 226 F. Supp. 2d 785, 793 (W.D.N.C. 2002) (applying North Carolina law); *Johnston v. Davis Sec., Inc.*, 217 F. Supp. 2d 1224, 1232 (D. Utah 2002); *Carnemolla v. Walsh*, 815 A.2d 1251, 1260 (Conn. App. Ct. 2003); *Bator v. Yale-New Haven Hosp.*, 808 A.2d 1149, 1151 (Conn. App. Ct. 2002); *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 616 (Tex. 1999); *Williams v. First Tenn. Nat'l Corp.*, 97 S.W.3d 798, 805 (Texas App. 2003); *Jackson*, 84 S.W.3d at 407; *Robel v. Roundup Corp.*, 59 P.3d 611, 619 (Wash. 2002).

476. *Powdertech Inc. v. Joganic*, 776 N.E.2d 1251 (Ind. Ct. App. 2002).

477. *Id.* at 1263.

478. *Paraohoa v. Bankers Club, Inc.*, 225 F. Supp. 2d 1353, 1361 (S.D. Fla. 2002).

479. *Carnemolla v. Walsh*, 815 A.2d 1251 (Conn. App. Ct. 2003).

480. *Id.* at 1254, 1260.

481. *Id.* at 1261.

conduct was extreme and outrageous.”<sup>482</sup> Finally, in *Leavitt v. Wal-Mart Stores, Inc.*,<sup>483</sup> the plaintiff alleged that since her employer did not accommodate her disability, assigned her to an evening shift against her wishes, and did not facilitate her transfer to a store closer to home, such conduct was extreme and outrageous.<sup>484</sup> Although noting that the defendant employer’s conduct “frustrated” the plaintiff and “caused her to feel humiliated,”<sup>485</sup> the court ruled that “no factfinder could reasonably find that [the employer’s] conduct met the extreme and outrageous standard,” and thus dismissed the intentional infliction claim on summary judgment.<sup>486</sup>

One commentator has underscored the role of the judiciary in making this initial legal determination as a proper “gatekeeper” role for the courts in order to police this “vague” and “punitive” tort.<sup>487</sup> This brand of judicial “activism” has been posited as a means for keeping these cases away from overly emotional and “sympathetic” juries.<sup>488</sup> Another commentator has also noted that “[t]he *Restatement* provides that the judge is to perform a gate-keeping function.”<sup>489</sup> Concomitantly, as one court remarked in explaining why courts are hesitant to find this claim in an employment situation, “[c]ourts are concerned that, if everyday job stresses resulting from discipline, personality conflicts, job transfers or even terminations could give rise to a cause of action for intentional infliction of emotional distress, nearly every employee would have a cause of action.”<sup>490</sup> Nonetheless, there are cases in which the courts appear too fervent in fulfilling the “gatekeeper” function.<sup>491</sup> For example, in one federal district court case applying Oklahoma law, the employee with eight years service was terminated after returning from a hospitalization after being assured by the employer’s representatives that he would be “taken care of.”<sup>492</sup> Despite this assurance, the employee’s termination notice was taped to the door of his home while his wife was present,

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482. *Darboe v. Staples, Inc.*, 243 F. Supp. 2d 5, 19 (S.D.N.Y. 2003) (applying New Jersey law).

483. 238 F. Supp. 2d 313 (D. Me. 2003).

484. *Id.* at 315–16.

485. *Id.* at 317.

486. *Id.*

487. Bleeke, *supra* note 17, at 371.

488. *Id.*

489. Duffy, *supra* note 12, at 394–95 (stating that the generalized and often conflicting comments to the Restatement provide little guidance to judges, telling them, in essence, that “outrageous conduct . . . is conduct that is outrageous”).

490. *Graham v. Commonwealth Edison Co.*, 742 N.E.2d 858, 867 (Ill. App. Ct. 2000).

491. *See EEOC v. Voss Elec. Co.*, 257 F. Supp. 2d 1354 (W.D. Okla. 2003).

492. *Id.*

thereby causing a stress-related re-hospitalization.<sup>493</sup> Although the defendant employer knew of the plaintiff's medical condition, the court concluded that "the facts fail to demonstrate conduct sufficiently outrageous to satisfy either elements of the Court's gatekeeper analysis."<sup>494</sup> The court declared that although the defendant's conduct may have been "callous and condemnable," it did not rise to the level of extreme and outrageous.<sup>495</sup> Admittedly, it is likely that there is a judicial fear of opening the floodgates of litigation in this area. The cases examined herein indicate that the judiciary may be a bit too active in their judicial "gatekeeper" role. Several of the situations examined, such as the aforementioned case, and others within the context of discrimination and harassment appear to be sufficiently extreme and outrageous to pass the "gate" and go to a jury for ultimate determination.<sup>496</sup>

When there is a judicial determination that reasonable minds could disagree as to the outrageous nature of the defendant's conduct, then the issue becomes one for the trier of fact, typically the jury, to resolve and ascertain ultimate liability.<sup>497</sup> Moreover, if the outrageous conduct "is reasonably debatable, a court cannot substitute its judgment on the facts for that of the jury."<sup>498</sup> For example, in *Jackson v. Creditwatch, Inc.*,<sup>499</sup> the employer's supervisor threatened a co-worker and current employee with termination unless the co-worker evicted the plaintiff, a former employee, from the home the plaintiff shared with the co-worker.<sup>500</sup> Consequently, the plaintiff was forced to find a new place to live.<sup>501</sup> The court held that "reasonable minds could differ"<sup>502</sup> as to whether the supervisor's conduct was sufficiently extreme and outrageous to result in liability, and thus the plaintiff raised an issue of fact on this element for the jury to resolve.<sup>503</sup> However, it should be noted that many courts require

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493. *Id.*

494. *Id.* at 1363.

495. *Id.*

496. *See id.*

497. RESTATEMENT (SECOND) OF TORTS § 46 cmt. h (1965); *see also* *Carnemolla v. Walsh*, 815 A.2d 1251, 1260 (Conn. App. Ct. 2003); *Bator v. Yale-New Haven Hosp.*, 808 A.2d 1149, 1151 (Conn. App. Ct. 2002); *Tex. Farm Bureau Mut. Ins. Cos. v. Sears*, 84 S.W.3d 604, 610 (Tex. 2002); *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 616 (Tex. 1999); *Williams v. First Tenn. Nat'l Corp.*, 97 S.W.2d 798, 805 (Tex. App. 2003); *Jackson v. Creditwatch, Inc.*, 84 S.W.3d 397, 407 (Tex. App. 2002); *Robel v. Roundup Corp.*, 59 P.3d 611, 619 (Wash. 2002).

498. *LaBrier v. Anheuser Ford, Inc.*, 612 S.W.2d 790, 793 (Mo. Ct. App. 1981).

499. 84 S.W.3d 397, 475 (Tex. App. 2002).

500. *Id.* at 400.

501. *Id.* at 408.

502. *Id.*

503. *Id.*

that the plaintiff produce more than the “mere existence of a scintilla of evidence in support of the plaintiff’s position . . . there must be evidence upon which a jury could reasonably find for plaintiff.”<sup>504</sup>

Similarly, in *Alcorn v. Anbro Engineering, Inc.*,<sup>505</sup> the employee was discharged “without just cause or provocation” and in a humiliating and racially insulting manner by his foreman.<sup>506</sup> In noting that the foreman was aware of plaintiff’s particular susceptibility to distress,<sup>507</sup> the court ruled that reasonable people could differ as to whether the conduct was sufficiently outrageous and thus the case went to the jury to decide.<sup>508</sup> Notably, a jury is allowed to make a “reasonable inference” from the facts of the case in deciding whether the defendant’s conduct is extreme and outrageous.<sup>509</sup>

Similar to the outrage issue, the question whether the distress is severe enough to support the cause of action is initially a question of law for the court to resolve. However, when reasonable minds can differ as to the degree of severity, it becomes a question of fact for the jury.<sup>510</sup> For example, in *Jackson v. Creditwatch, Inc.*,<sup>511</sup> the court also held that reasonable minds could differ as to whether the employee suffered severe emotional distress, and thus the plaintiff raised an issue of fact on this element for the jury to resolve.<sup>512</sup> In another Texas appellate case,<sup>513</sup> the employee was questioned by the defendant employer’s staff in front of two other employees regarding the plaintiff’s use of the company credit card. The plaintiff was allowed to retrieve his personal belongings, and while he was being escorted out of the building, a co-worker told the plaintiff in front of other employees that he was being terminated and would not be rehired.<sup>514</sup> The court dismissed the plaintiff’s intentional infliction claim, however, because there was “no genuine issue of material fact” with regard to the severe distress requirement.<sup>515</sup>

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504. See, e.g., *Proctor v. Wackenhut Corrs. Corp.*, 232 F. Supp. 2d 709, 714 (N.D. Tex. 2002).

505. 468 P.2d 216 (Cal. 1970).

506. *Id.* at 219.

507. *Id.* at 218.

508. *Id.* at 219.

509. *Swanson v. Senior Res. Connection*, 254 F. Supp. 2d 945, 963 (S.D. Ohio 2003).

510. *DOBBS*, *supra* note 2 § 306, at 832; see also *Proctor*, 232 F. Supp. 2d at 714; *Johnston v. Davis Sec., Inc.*, 217 F. Supp. 2d 1224, 1232 (D. Utah 2002); *Williams v. First Tenn. Nat’l Corp.*, 97 S.W.3d 798, 805–06 (Tex. App. 2003); *Jackson v. Creditwatch, Inc.*, 84 S.W.3d 397, 407 (Texas App. 2002); *Robel v. Roundup Corp.*, 59 P.3d 611, 619 (Wash. 2002).

511. 84 S.W.3d 397 (Tex. App. 2002).

512. *Id.*

513. *Williams v. First Tenn. Nat’l Corp.*, 97 S.W.3d 798 (Tex. App. 2003).

514. *Id.* at 805.

515. *Id.* at 805–06.

In determining the requisite severity for a claim of emotional distress as a consequence of the defendant's actions, the trier of fact is allowed to consider whether the employee suffered embarrassment, sadness, fear, worry, depression, humiliation, shame, as well as the degree of such feelings.<sup>516</sup> The jury may also consider whether the employee experienced physical pain and suffering, including a loss of sleep, as a consequence of the stress, tension, and emotional agitation and turmoil caused by the defendant's conduct.<sup>517</sup> Finally, the jury can note whether the employee required or sought medical or psychological treatment for the distress caused by the defendant.<sup>518</sup> Yet other "proof of such feelings as depression, confusion, fright, and anger and changes in physical appearance and demeanor can establish this element even if no medical treatment is sought."<sup>519</sup> Severe emotional distress, therefore, must be so severe that "no reasonable person would be expected to put up with it."<sup>520</sup>

The determination of the defendant's intent or recklessness is regarded as a question of fact for the jury,<sup>521</sup> as is the causation issue.<sup>522</sup> The jury, moreover, is permitted to make "a reasonable inference from the evidence" on the issues of causation or intent,<sup>523</sup> especially if there are special factors present, such as the relationship between the parties, the knowledge of particular susceptibility to distress, and the cumulative pattern of the distress.<sup>524</sup> The assessment of damages for the intentional infliction of emotional distress is also a question of fact for the jury.<sup>525</sup> As one court noted, "it is the members of the jury who, when properly instructed, are in the best position to assess the degree of harm suffered and to fix a monetary amount as just compensation therefore."<sup>526</sup> The

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516. *Jackson v. Creditwatch, Inc.*, 84 S.W.3d 397, 408 (Tex. App. 2002).

517. *Id.*

518. *Id.*

519. *Id.*

520. *Id.*

521. *Pavilon v. Kaferly*, 561 N.E.2d 1245, 1252 (Ill. App. 1990); *LaBrier v. Anheuser Ford, Inc.*, 612 S.W.2d 790, 794 (Mo. Ct. App. 1981); *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 617 (Tex. 1999); *Robel v. Roundup Corp.*, 59 P.3d 611, 619 (Wash. 2002).

522. *DOBBS*, *supra* note 2 § 306, at 832; *see also Pavilon*, 561 N.E.2d at 1252; *LaBrier*, 612 S.W.2d at 793.

523. *Pavilon*, 561 N.E.2d at 1252.

524. *Id.* at 1251-52.

525. *See Kroger Co. v. Willgruber*, 920 S.W.2d 61, 67 (Ky. 1996) (awarding \$70,000 by jury to "peculiarly susceptible" employee for employer's intentional infliction of emotional distress in course of wrongfully terminating employee); *GTE Southwest Inc.*, 998 S.W.2d at 642-43; *Jackson v. Creditwatch, Inc.*, 84 S.W.3d 397, 408-09 (Texas App. 2002).

526. *Agarwal v. Johnson*, 603 P.2d 58, 71 (Cal. 1979).

resolution of agency issues, such as whether an employee was acting within the scope of employment, is regarded as a question of fact for the jury.<sup>527</sup>

Granted, these legal and factual issues are difficult to resolve with this intentional tort. Nonetheless, “[t]he fact that some claims may be spurious does not mean courts should shut their eyes to the serious wrongs.”<sup>528</sup> As the court stated in *Agis*, “[i]t is the function of courts and juries to determine whether claims are valid or false. This responsibility should not be shunned merely because the task may be difficult to perform.”<sup>529</sup>

## IX. RECOMMENDATIONS

Since the frequency and the duration of the objectionable conduct are important factors in determining such key components to the cause of action as outrageousness, severity and reasonableness, the employee is well-advised to keep a record of any pattern of distressing conduct by his or her employer or co-workers. Although single and isolated acts are much less likely to meet the demanding legal standards for this intentional tort, one especially egregious act may be sufficient.<sup>530</sup> It is best for the employee to keep in mind the counsel in *Prosser and Keeton*, that the “flagrant character” of the conduct “adds especial weight to the plaintiff’s claim, and is in itself an important guarantee that the mental disturbance which follows is serious and not feigned.”<sup>531</sup> That is, if the plaintiff lacks evidence of actual physical harm or even physical symptoms, the plaintiff would be well-advised to emphasize the outrageousness of the wrongful conduct. The extremity of the outrage will add substantial weight to the employee’s assertion that the mental harm inflicted on him or her is genuine and severe, and neither pretended nor trivial.<sup>532</sup> As succinctly stated by Dobbs, “[t]he requirement of outrageous conduct serves to limit the tort, but the same requirement also serves to provide strong evidence that severe harm has in fact resulted.”<sup>533</sup> Thus, a favorable factual finding on the seminal outrage question should also produce

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527. *GTE Southwest, Inc.*, 998 S.W.2d at 617–18.

528. *Agis v. Howard Johnson Co.*, 355 N.E.2d 315, 318 (Mass. 1976) (quoting *Samms v. Eccles*, 358 P.2d 344, 347 (Utah 1961)).

529. *Id.*

530. KEETON ET AL., *supra* note 3 §12, at 60, 62.

531. *Id.* at 57.

532. *Id.* at 64.

533. DOBBS, *supra* note 2 § 303, at 826.

a concomitant favorable decision on not only the severity issue but also the reasonableness of the severity.<sup>534</sup> The outrageousness of the defendant's conduct thereby provides the assurance that the asserted severe emotional distress is in fact real. Nevertheless, it is important to emphasize that even though evidence of physical impact, harm or physical symptoms is not technically required, some type of evidence as to the presence, severity and reasonableness of the emotional distress suffered as a result of the outrage typically will be required.<sup>535</sup>

Considering all the difficulties involved in sustaining the tort, the plaintiff, therefore, is advised to construct a legally and factually well-crafted case, presented by a believable aggrieved party substantiated by convincing evidence, including a credible psychiatric or medical expert witness. As underscored in *Prosser and Keeton*, the role of the courts is not to abandon the tort, but to exercise some "common sense"; and thus "what is required is rather a careful scrutiny of the evidence supporting the claim," so as to distinguish "true claims from false ones."<sup>536</sup> Accordingly, the employee is well-advised to specify as clearly and in as much detail as possible the dates, times, types and mode of conduct on which the plaintiff is relying to substantiate his or her claim of extreme and outrageous misconduct and consequent severe emotional distress.

The perpetrators of the misconduct must be identified, of course. The plaintiff should also note whether the misconduct was reported to supervisory and/or managerial personnel of the employer, and whether the employer took efforts to investigate the facts asserted by the employee to remedy the employee's complaint. Obviously, if the alleged severe emotional distress was inflicted by a supervisor or manager of the defendant employer, that key fact must be noted and underscored. If the misconduct occurred over a period of time, the time frame must be duly noted since any pattern of misconduct is another key component to the employee sustaining a case. Finally, if the employee had a known special susceptibility to the emotional distress, either generally or to the actions of the defendant employer's representatives, the employee must state that susceptibility as well as the substantiating facts.

One cannot sufficiently emphasize how critical it will be for the employee, in order to sustain this ill-defined and highly fact-specific tort, to spell out in detail the underlying "outrage" facts as well as any exacerbating factors. It is also necessary to clearly differentiate and separate

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534. *Id.* at 832.

535. *Id.*

536. KEETON ET AL., *supra* note 3 § 12, at 56.

those independent tort facts from other improper behavior that may be part of the employee's larger wrongful discharge or employment discrimination or harassment case against the employer. As a practical matter, the employee's attorney should strive to plead additional and different "outrageous" conduct as the basis for the tort claim while avoiding the same facts in the larger wrongful discharge, discrimination, harassment or other claim against the employer.

Another important factor is the plaintiff's ability to point out that the offending conduct is not directly related to the plaintiff's employment or to their manager's supervisory role. Thus, pleading as many different and extraneous intentional infliction instances as possible is a key to a successful tort cause of action. Moreover, to further distinguish the intentional infliction of emotional distress claim, it would be advisable for the employee to point out that the state common law intentional infliction tort serves a different policy goal than statutory civil rights, labor laws or the employment-at-will doctrine.

Particularly in an employment-at-will situation, the employee's attorney should focus on any egregious conduct that is different in kind and degree from the reasons and manner of the discharge, including post-termination conduct. The objective is to differentiate the employee's intentional infliction of emotional distress case from the generic "wrongful discharge" action, typically, and at times summarily, superseded by the conventional employment-at-will doctrine. The objective is to differentiate the emotional distress case from the statutory civil rights or labor relations action, which may preempt the state common law tort action. The advice given by one federal district court is particularly instructive.<sup>537</sup> The court, noting that although termination is "inherently unpleasant," the employee must provide proof of "something more" in the way of facts, such as termination conduct that was "offensive or abusive."<sup>538</sup> These or similar facts would distinguish the employee's case from the "garden variety" case of termination, discrimination or retaliation.<sup>539</sup>

If the employee's attorney does not precisely formulate and substantiate the independent tort of intentional infliction of emotional distress, the court may dismiss the employee's tort cause of action on one of many grounds. Predominantly, these include lack of outrage, preemption or deference (perhaps undue) to the employment-at-will doctrine.

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537. *Swanson v. Senior Res. Connection*, 254 F. Supp. 2d 945 (S.D. Ohio 2003).

538. *Id.* at 963.

539. *Id.*

Accordingly, the court's position emerges "loud and clear" from this synthesis of current case law; courts will scrutinize very carefully, strictly, and at times severely, the instances of factual misconduct alleged to have given rise to the independent tort of outrage, especially in an at will employment situation. The employee can make his or her best case to sustain the tort through summary judgment so as to obtain a (perhaps sympathetic) jury and to avoid the case being dismissed by the court on a legal conclusion of lack of outrage through careful and substantive, as well as discrete and distinct factual delineation.

#### X. CONCLUSION

The cases clearly reflect a concern that an emotional distress intentional tort claim generally is hard to define, easy to assert and difficult to disprove. The tort is formulated in very general terms which can apply to an infinite variety of conduct that can legitimately produce emotional distress. Everyone, at some time in his or her life, has been the victim of deliberate stressful behavior, which has produced anxiety, emotional distress and perhaps even psychological upheaval. The law, concomitantly, has always been concerned about "opening up the floodgates" of litigation. Thus, courts are very rigorous, perhaps too much so, as to the requisite components to this intentional legal wrong as well as the degree of evidence necessary to sustain them. The case law indicates, moreover, that the courts are quite skeptical when it comes to intentional distress cases, frequently ruling as a matter of law that the conduct at issue is not sufficiently outrageous for the tort. In the employment context, very clearly, a claim for intentional infliction of emotional distress ordinarily will not lie, not only for "ordinary" employment disputes or standard employment actions, such as review, appraisal, transfer and demotion, but also for many egregious and offensive ones. A termination, even if characterized as wrongful, will not be sufficiently extreme and outrageous for tort liability standing alone. Moreover, racial and sexual discrimination and harassment will not alone be sufficient grounds to meet the very demanding "outrage" and "extreme" standard. Additional, separate and distinct misconduct will be required by the courts. The serious problem that ensues by setting such a demanding standard for outrage as well as severity, especially in an employment-at-will situation, is that wrongdoers, who intend to and actually do cause emotional distress, are shielded from legal liability. Yet, the judiciary is responsible for applying the common law, in the words of the old maxim, "to protect the weak from the insults and abuses of the strong." Accordingly, the judici-

ary must fulfill its obligation with this tort in the employment context and thus develop liability standards that are clear and intelligible, which will then prompt employers to develop policies that will prevent workplace abuse. There are, as this article has pointed out, precedents to guide the judiciary in the realm of intentional infliction of emotional distress.

When the employer's conduct is coercive, retaliatory and beyond the norms of the typical employer-employee relationship, certain courts have found the conduct to be sufficiently extreme and outrageous so as to constitute a claim for intentional infliction of emotional distress. Workplace conduct between an employee and the employer or among employees will rise to the level of tortious intentional infliction of emotional distress more frequently in situations involving a pattern of purposeful, repeated misconduct over a long period of time. This is especially true when the wrongful conduct is inflicted by the employee's supervisor or manager and is considered extraneous to the typical managerial function.

The law and the courts will enable the employee to sustain claims of intentional infliction of emotional distress, but only in extreme and outrageous as well as frequently specialized circumstances. The initial element of extreme and outrageous conduct emerges as crucial to the employee's case, not only as the first legal and factual hurdle to sustain the case, but also because courts seem willing to infer emotional distress from conduct that is so outrageous that one can safely say that the ubiquitous "reasonable person" would suffer such emotional harm. Moreover, in the context of abuse by managerial and supervisory personnel of the employer, especially if inflicted over a period of time and on a known sensitive and susceptible employee, the tort of intentional infliction of emotional distress can provide a fairly useful means to regulate reprehensible and harmful behavior in the workplace. This is especially true in the context of a "wrongful" and highly offensive discharge of an at will employee. Because of the weighty emphasis on the outrageousness of the defendant's conduct, particularly in the employment context, the tort of intentional infliction of emotional distress emerges as a rather unique, yet very fluid and supple, legal vessel. The three key aforementioned factors of (1) abuse of managerial relationship, (2) pattern and duration of distress, and (3) employee susceptibility, will bolster significantly the employee's case, but will also provide some structure and guidance to this rather amorphous "outrageous" legal wrong.

The tort of intentional infliction of emotional distress, as revealed by this article, is more than a mere academic "hornbook" notion. Admit-

tedly and evidently, there are difficulties with this intentional tort as an independent legal wrong and as a legal wrong applied in the private employment sector, especially in the employment-at-will context. Nonetheless, the cases and commentary presented, studied and analyzed for this article indicate that this tort can provide some degree of legal protection to the private sector employee in helping to regulate the workplace and to prevent retaliatory, coercive, abusive, discriminatory and harassing misconduct. Moreover, the at will employee, who feels that he or she was terminated in an improper and unjust manner, will find that this traditional intentional tort cause of action can be another legal means to supplement the employee's "wrongful discharge" case. Ultimately, however, the responsibility falls on the judiciary as the guardians of the common law to delineate this tort more precisely and then to apply it more forcefully, especially in the private employment sector. This will provide a viable legal instrument to counterbalance the inherent inequality of economic bargaining power in the typical employment relationship.