

# EMPLOYMENT TORTS

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## Introduction

During recent years, there has been an increase in claims brought against employers arising under the general category of employment torts. These tort theories are *widely* used, sometimes in an attempt to overcome statutory caps, or to *provide* additional bases for employer liability. Tort theories are also appealing to plaintiffs who have failed to meet the administrative conditions prerequisite for filing under federal employment discrimination laws or who wish to include supervisors as defendants, either to establish *individual* liability or to *avoid* removal of their claims to federal court. Additionally, employment torts may be used to increase the economic viability of what would otherwise be a wrongful discharge claim for contract damages only.

Some of the most often utilized torts in employment litigation, and the ones which will be addressed below, are intentional infliction of emotional distress, defamation (libel and slander), intentional interference with employment contracts, invasion of privacy, assault and battery and negligent hiring, training and retention.

## I. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

One of most common torts claims brought by plaintiffs against employers is intentional infliction of emotional distress, also referred to as the tort of outrage. According to the Restatement (Second) of Torts § 46, (1965) “one 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.” *Id.* To establish a cause of action for intentional infliction of emotional distress, a plaintiff must show: (1) extreme and outrageous conduct; (2) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and injury; and (4) severe emotional distress. *Id.*; *See also* Harty, Frank B., *Employment Torts: Emerging Areas of Liability*, 39 Drake L. Rev. 3, 41 (1989-90). In most jurisdictions, the complained of conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as intolerable in a civilized community. Restatement (Second) of Torts § 46, cmt. d (1965); *See Soti v. Lowe’s Home Centers Inc.*, 2005 Ala. Lexis 15 (Ala. 2005); *Ford v. Revlon, Inc.* 734 P.2d 580 (Ariz. 1987). Further, the distress inflicted must be so severe that no reasonable man could be expected to endure it. Restatement (Second) of Torts § 46, cmt. j (1965).

It is well established that criticism of an employee’s job performance, abrasive interrogations, unjustified reprimands, opposition to unemployment benefits, excessive supervision, or negative evaluations alone do not constitute outrageous conduct on the part of the employer. *See, e.g., Barber v. Whirlpool Corp.*, 34 F.3d 1268 (4th Cir. 1994); *Spence v. Maryland Casualty Co.*, 995 F.2d 1147 (2nd Cir. 1993); *Brown v. Freedman Baking Co.*, 810 F.2d 6 (1st Cir. 1987); *Larson v. Koch Ref. Co.*, 1995 U.S. Dist. Lexis 1995 (Minn. Dist. Ct. 1995). However, employers have been held liable for intentional infliction of emotional distress

for such actions as subjecting employees to second-hand cigarette smoke and requiring an employee to submit a urine sample for drug testing in the presence of another employee. *See, e.g., Kelly v. Schlumberger Tech. Corp.*, 849 F. 2d 41 (1st Cir. 1988); *Carroll v. Tennessee Valley Authority*, 697 F. Supp. 508 (D.C. Col. 1988).

One of the more frequent uses of intentional infliction of emotional distress claims is in complaints for alleged sexual harassment. *See, e.g., Hill v. New Jersey Dept. of Corrections*, 776 A.2d 828 (N.J. Super 2001); *Lawson v. Straus*, 750 So. 2d 234 (La. App. 1999); *Laughinghouse v. Risser*, 786 F. Supp. 920 (D.C. Kan. 1992); *American Road Service Company v. Inmon*, 394 So. 2d 361 (Ala. 1981). While most courts recognize that ordinary employment suits involving sexual discrimination will not establish a cause of action for intentional infliction of emotional distress, some courts have held that egregious sexual harassment may rise to the level of intentional infliction of emotional distress. *See Wilson v. Monarch Paper Co.*, 939 F.2d 1138, 1144 (5th Cir. 1991); *See also Skidmore v. Precision Printing & Packaging, Incorp.*, 188 F.3d 606 (5th Cir. 1999) (upholding claim for intentional infliction of emotional distress where co-worker touched plaintiff sexually, kissed her neck, pulled her to his waist as she bent over, suggested she lick him from head to toe, and circulated false rumors about her sexual activity despite knowing the rumors were causing trouble in her marriage); *Hill v. New Jersey Dept. of Corrections*, 776 A.2d 828 (N.J. Super 2001) (holding that conduct involving sexual harassment may rise to the level of outrageousness necessary to provide a basis of recovery for the tort of intentional infliction of emotional distress); *Stabler v. City of Mobile*, 844 So. 2d 555 (Ala. 2002) (holding that Alabama recognizes the tort of outrage in cases involving egregious sexual harassment).

Under the theory of respondeat superior, an employer may be held vicariously liable for an employee's intentional torts (including intentional infliction of emotional distress) if the employee was acting within the scope of his employment when he committed the tort. However, as with many employment torts, the allegedly tortuous conduct cited in claims for intentional infliction of emotional distress is frequently outside the line and scope of the offending employee's employment. *See, e.g. Busby v. Truswal Sys. Co.*, 551 So. 2d 322, 327 (Ala. 1989). Plaintiffs may nonetheless hold employers liable for intentional infliction of emotional distress where it can be demonstrated that the employer adopted or ratified the tortuous conduct of its supervisory employees. To establish ratification, a plaintiff must prove that: (1) the employer has actual knowledge of the tortuous conduct; (2) based on this knowledge, the employer knew the conduct constituted a tort; and (3) the employer failed to take adequate steps to remedy the situation. *See, e.g., Potts v. BE & K Construction Co.*, 604 So. 2d 398, 400 (Ala. 1995).

## **II. INVASION OF PRIVACY**

Another tort frequently used by employees in claims against their employers is invasion of privacy. According to the Restatement (Second) of Torts § 652 (1977), "one who invades the privacy of another is subject to liability for the resulting harm to the interests of the other." *Id.* Liability for invasion of privacy attempts to compensate plaintiffs for emotional harm caused by improper and unauthorized intrusion into private affairs. Restatement (Second) of Torts § 652H cmts. b-c. Most states recognize four types of invasion of privacy claims: (a) unreasonable intrusion upon the seclusion of another; (b) appropriation of the other's name or likeness; (c) unreasonable publicity given to the other's private life; (d) publicity that unreasonably places the other in a false light before the public. Restatement (Second) of Torts § 652 (1977).

As with intentional infliction of emotional distress, claims for invasion of privacy are often made in the sexual harassment context. *See AllState Ins. Co. v. Ginsberg*, 863 So. 2d 156

(Fla. 2003); *Busby v. Truswal System Corp.*, 551 So. 2d 322 (Ala. 1989); *Phillips v. Smalley Maint. Servs. Inc.*, 435 So. 2d 705 (Ala. 1983); *Hamrick v. Wellman Products Group*, 2004 WL 2243168 (Ohio App. 2004). When complaining of alleged sexual harassment, plaintiffs generally proceed under the “unreasonable intrusion” theory of invasion of privacy. Intrusion upon seclusion occurs when one intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, and the intrusion is highly offensive to a reasonable person. Restatement (Second) of Torts § 652B (1977). An employer can be held liable for invasion of privacy committed by an employee where it ratifies the offending conduct. *See, e.g., Busby v. Truswal System Corp.*, 551 So. 2d 322 (Ala. 1989).

Another commonly claimed theory in employment-related lawsuits is the “public disclosure of private facts.” *See Kureczka v. Freedom of Information Comm’n*, 636 A.2d 777 (Conn. 1994); *Washington State Human Rights Comm’n v. City of Seattle*, 607 P.2d 332 (Wash. Ct. App. 1980). Under this theory, an invasion of privacy occurs where an employer publicizes a private or personal fact about an employee without serving any legitimate business purpose by the disclosure. *See Eddy v. Brown*, 715 P.2d 74 (Okla. 1986); *Bratt v. Internat’l Business Machines Corp. Inc.*, 467 N.E. 2d 126 (Mass. 1984). These claims often involve the disclosure of medical information. *See id.*

Other examples of invasion of privacy claims made by employees against employers include actions pertaining to highly invasive investigations or surveillance, drug tests administered in a highly offensive manner, and unreasonable searches of an employee’s belongings. *See O’Brien v. Papa Gino’s of America, Inc.*, 780 F.2d 1067 (1st Cir. 1986); *Stevenson v. Precision Std., Inc.*, 762 So. 2d 820 (Ala. 1999). Further, some jurisdictions have found liability for invasion of privacy where an employer makes employment decisions based

upon an employee's off duty activities. See *Talley v. Washington Inventory Serv.*, 37 F.3d 310 (7th Cir. 1994); *Brantley v. Surles*, 765 F.2d 478 (5th Cir. 1985).

### III. DEFAMATION

Defamation is the unprivileged publication of false information that injures a person's reputation. Harty, Frank B., *Employment Torts. Emerging Areas of Employer Liability*, 39 Drake L. Rev. 3. (1989-90). To establish a cause of action for defamation, a plaintiff must show: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. Restatement (Second) of Torts § 558 (1977). According to the Restatement (Second) of Torts § 559, (1977), "[a] communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Id.*

Defamatory communications which are written, printed or of similar nature are libelous, and verbal defamatory communications are slanderous. Restatement (Second) of Torts §§ 568-570 (1977). Many states analyze slander and libel separately, recognizing libel as the more serious wrong. Restatement (Second) of Torts §§ 568 cmts. (1977). Other states use a single set of rules for both. *Id.*

In the employment context, defamation usually involves employer statements to third parties, usually other employers, concerning why an employee was terminated or otherwise disciplined. Harty, Frank B., *Employment Torts: Emerging Areas of Liability*, 39 Drake L. Rev. 3, 47 (1989-90). If these statements are not privileged, they may be per se defamatory. Statements are defamatory per se if they impute to the defamed individual: (a) a criminal offense; (b) a loathsome disease; (c) a matter incompatible with his business, trade, profession or

office; or (d) serious sexual misconduct. Restatement (Second) of Torts § 570 (1977). If the statement is *per se* defamatory, a plaintiff does not have to prove the statement injured his reputation. Harty Frank B., *Employment Torts: Emerging Areas of Liability*, 39 Drake L. Rev. 3, 47 (1989-90).

Defamation generally requires a false communication by a third person. Restatement (Second) of Torts § 558 (1977). However, under the doctrine of self-compelled publication, employees may assert defamation claims where they themselves made the defamatory statement, but claim they were forced to do so by a former employer's actions. *See McKinney v. Santa Clara County*, 110 Cal. App. 3d 787 (Cal. App. 1980). Although many jurisdictions recognize the theory of self-compelled publication, other states still refuse to recognize this theory. *See Gore v. Health-Tex Inc.*, 567 So. 2d 1307 (Ala. 1990); *Layne v. Builders Plumbing Supply Co.*, 569 N.E. 2d 1104 (111. Ct. App. 1991); *Yetter v. Ward Trucking Corp.*, 585 A.2d 1022, 1025 (Pa. Super Ct. 1991).

Truth and privilege are the primary defenses to a defamation claim. Harty, Frank B., *Employment Torts: Emerging Areas of Liability*, 39 Drake L. Rev. 3, 47 (1989-90). Truth is an absolute defense, and privilege may be either absolute or conditional, depending on the context in which the statement is made. *Id.* Because truth is an absolute defense, an employer may disclose facts concerning an employee to a third person so long as the statements are not false. *Id.* The employer's motivation for making the statement is entirely irrelevant under these circumstances. *Id.*

A defamatory communication is privileged if it is published to a person who has a legitimate interest in knowing the substance of the defamatory statement. Harty, Frank B., *Employment Torts: Emerging Areas of Liability*, 39 Drake L. Rev. 3, 47 (1989-90). A statement

concerning an employee's work performance is absolutely privileged if the employer publishes the statement within a judicial or quasi-judicial proceeding. Restatement (Second) of Torts, § 585 cmt. c. (1977). A statement concerning an employee is conditionally privileged if the statement is communicated among persons with a mutual interest in the statement's subject matter or if the person making the statement has a duty or obligation to disclose the statement to a third party. Restatement (Second) of Torts § § 595-96 (1976). If an employer proves that a defamatory statement is subject to a qualified privilege, then the employee must prove that the statement was made with actual malice. Harty, Frank B., *Employment Torts: Emerging Areas of Liability*, 39 Drake L. Rev. 3, 47 (1989-90).

#### **IV. INTENTIONAL INTERFERENCE WITH THE EMPLOYMENT CONTRACT**

According to the Restatement (Second) of Torts § 766A (1977), "one who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract." *Id.* To establish a cause of action for intentional interference with a contractual relationship, the plaintiff must show: (1) an existing valid contractual relationship; (2) knowledge of the relationship on the part of the interfering party; (3) intentional interference with performance of the contract; (4) causation; (5) damages. A.B.A Model Jury Instructions for Business Litigation §§ 2.01-2.09 (1987). According to the Restatement (Second) of Torts § 766B (1977), "one who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from the loss of the benefits of the relation." *Id.* The elements of the tort of interference with a prospective business relation are: (1) an existing business expectancy; (2) knowledge of the expectancy on the part of the defendant;

(3) intentional interference with the expectancy; (4) causation; and (5) damage. *Hibbs v. K-Mart Corp.*, 870 F.2d 435 (8th Cir. 1989);

Interference with employment contracts generally arises in three different employment contexts: where a former employer provides an unfavorable post-employment job reference that results in the rejection of the employee for the new job; where an employer seeks to enforce a non-competition agreement; and where a supervisor or manager allegedly interferes with an employee's job performance or causes the employee to be terminated. Harty, Franklin B., *Employment Torts: Emerging Areas of Employer Liability*, 35 Drake L. Rev. 3, (1990). While interference with contractual relations requires a valid existing contract, prospective interference requires only that an expectancy exist. *Id.* For interference with a prospective employment, most jurisdictions require that defendant's conduct be malicious. See *Stoller Fisheries, Inc. v. American Title Ins.*, 258 N.W. 2d 336 (Iowa 1977).

Generally, an employer or its agents cannot be held liable for tortious interference with the employment relationship to which the employer is a party. Although the majority rule remains that a party to the contract cannot be liable for interference with contractual relations, several jurisdictions have permitted suits against employees for interference with contracts. See *Cote v. Burroughs Wellcome Co.*, 558 F. Supp. 883 (E. D. Pa. 1987); *Haigh v. Matusheta Electric Corp.*, 676 F. Supp. 1332 (E. D. Va. 1987).

The principal defense to an intentional interference claim is legal justification - whether the employer or agent acted with a proper motive to advance a legitimate interest. Restatement (Second) of Torts § 767 (1977). Truth is also a defense to an intentional interference claim, and employers may generally provide truthful post-employment references without incurring liability for intentional interference. Restatement (Second) of Torts § 772 (1977).

## V. ASSAULT AND BATTERY

Assault and Battery provides individuals with a theory of recovery for unwanted, non-consensual contact, or the fear of such contact. Blakely, Allison C., *Employer-Employee Relations: Employment Torts Come of Age: Increasing Risks of Liability for Employers and Their Insurers*, 24 Tort & Ins. L.J. 268 (1989). According to the Restatement (Second) of Torts § 18 (1965), one is subject to liability for battery if. (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact; and (b) a harmful contact with the person of the other directly or indirectly results. *Id.*

Assault occurs where the alleged tortfeasor: (a) acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact; and (b) the other is thereby put in such imminent apprehension. Restatement (Second) of Torts § 33 (1965). To prove assault, the tortfeasor is not required to have the present ability to inflict injury, so long as the plaintiff had reasonable apprehension of injury. Restatement (Second) of Torts § 33 (1965).

Employees typically bring assault and battery claims against employers in cases of sexual harassment or where there has been some other alleged physical contact between the employee and the employer. *Mardis Mardis Robbins Tire & Rubber Co.*, 669 So. 2d 885 (Ala. 1995); *Crihfield v. Monsanto Co.*, 844 F. Supp. 371 (S.D. Ohio 1994). Additionally, assault and battery may stem from workplace investigations, polygraph and drug testing, and exposure to toxic substances in the workplace. *See Singer Shop-Rite Inc. v. Rangel*, 416 A.2d 965 (N.J. App. 1980), *cert. denied*, 425 A.2d 299 (N.J. 1980); *Walden v. General Mills Restaurant Group, Inc.*, 508 N.E. 2d 168 (Ohio App. 1986).

Under the doctrine of respondeat superior, an employer may be held liable for the assault and/or battery of its employee was acting within the line and scope of his employment when he committed the tort. *Stevenson v. Precision Std., Inc.*, 762 So. 2d 820 (Ala. 1999); *Potts BE & K Construction Co.*, 604 So. 2d 398 (Ala. 1992). Furthermore, an employer may be held liable for assault and battery where it ratifies the offending conduct. *Id.*

## **VI. NEGLIGENCE SUPERVISION, TRAINING AND RETENTION**

Employers may be held directly liable for negligence towards employees resulting in harm. Frequently, negligence claims are used to establish liability on the part of an employer for its retention of a supervisor who commits tortuous acts against employees, or for its failure to adequately supervise or train an employee. To establish an employer's liability for negligent supervision, training or retention, a plaintiff must prove that the employer: (1) knew or should have known that one its employees was behaving in a dangerous or otherwise incompetent manner, and (2) that the employer nevertheless retained or failed to adequately train or supervise the employee. *Daisley v. Riggs Bank. N.A.*, 2005 U.S. Dist. LEXIS 10232 (D.C. May 31, 2005); *Mardis v. Robbins Tire & Rubber Co.*, 669 So. 2d 885, 889 (Ala. 1995).

As with many other employment torts, negligent hiring, supervision and retention claims are often brought in the sexual harassment context. These claims are favorites among the plaintiff's bar for the second-time-offender sexual harasser, where plaintiffs can argue that the employer knew (often because of previous complaints) or should have known (because of the widespread or open nature of the conduct) that the alleged harasser was committing tortuous acts. Where an employer knew or should have known that an employee was likely to sexually harass others, it may be deemed negligent. *See, e.g., B.C.B. Co., Inc. v. Troutman*, 409 S.E.2d 218, 220 (Ga. App. 1991) ("a cause of action for negligence against an employer may be stated if the employer, in the exercise of reasonable care, should have known of an employee's reputation

for sexual harassment and that it was foreseeable that the employee would engage in sexual harassment of a fellow employee but he was continued in his employment”).

Employers may also be directly liable for failing to train or for improperly training and/or educating its employees. Porter, Lindbergh, *Employment Torts: High Risk Components of Wrongful Discharge Lawsuits*, 548 PLI/Lit 65 (1996). If an employee fails to provide the employee with training, and the employee proceeds to injure someone as a result, the employer may be independently liable for the actions of its employee. *Id.*

When asserted against an employer, claims of negligent supervision, training and retention are derivative state torts that must hinge on underlying tortious conduct of an employee. *See, e.g., Stevenson v. Precision Standard, Inc.*, 762 So. 2d 820, 824 (Ala. 1999); *Phinazee v. Interstate Nationallease, Inc.*, 514 S.E.2d 843, 846 (Ga. App. 1999). Moreover, some courts have held that negligence claims cannot be used to “bootstrap” Title VII liability into state common law. *See Hathorn v. Boise Cascade Corp.*, 1998 U.S. Dist. LEXIS 18113, pp. 24-25 (S.D. Ala. 1998); *Portera v. Winn Dixie of Montgomery, Inc.*, 996 F. Supp. 1418, 1438 (M.D. Ala. 1998). Thus, employers may be able to avoid liability for negligence where a plaintiff fails to bring or succeed on other tort theories.

### **Conclusion**

There has been a steady increase of tort claims asserted in employment disputes. While most of these claims are brought under the theories of intentional infliction of emotional distress, defamation (libel and slander), intentional interference with employment contracts, invasion of privacy, assault and battery and negligent supervision, training and retention, plaintiffs’ attorneys are increasingly creative in crafting theories of employer tort liability.