

**1999 ANNUAL REPORT OF THE
PRIVACY AND COLLATERAL TORTS SUBCOMMITTEE
OF THE COMMITTEE ON
EMPLOYEE RIGHTS AND RESPONSIBILITIES**

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¹ This paper covers cases from March 1, 1998 through January 15, 1999.

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DIGNITY

Marino v. Arandell Corp., 1 F. Supp. 2d 947 (E.D. Wis. 1998) (Wisconsin privacy statute aims “to affect the behavior of individuals to encourage respect for personal dignity and basic rights”; court described the injury as the “plundering” of dignity and self-esteem).

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random drug test); Hind v. Superior Court, 77 Cal. Rptr. 2d 596 (Cal. App. 1998) (applicant who delayed pre-employment test until after he was employed does not convert the drug test to a post-employment test for purposes of the Fourth Amendment).

ELECTRONIC SURVEILLANCE - AUDIO

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ELECTRONIC SURVEILLANCE - TELEPHONES

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See also Cellular Phones, *supra*.

ELECTRONIC SURVEILLANCE - VIDEO

Medical Laboratory Management Consultants v. ABC, 1998 U.S. Dist. LEXIS 20084 (D. Ariz.) (ABC reporter's surreptitious video and audio taping of two hours of conversation with owners of business and tour of their business, which was procured under false pretenses, did not invade reasonable expectation of privacy of the parties; workplace has reduced privacy and no reasonable expectation of privacy in words spoken especially inside of semi-public workplace; nor was the ABC reporter's conduct highly offensive to a reasonable person under the Arizona common law of privacy); Shulman v. Group W Productions, 955 P.2d 469 (Cal. 1998) (intrusion into patient's privacy during video of taping of scene in emergency helicopter flight could support a jury verdict for intrusion into patient's privacy and dignity); Cowles v. State, 961 P.2d 438 (Alaska App. 1998) (secret video taping of ticket cashier at university event center not an unreasonable invasion of privacy).

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ELECTRONIC SURVEILLANCE - VOICE MAIL

United States v. Smith, 155 F.3d 1051 (9th Cir. 1998) (unauthorized listening of co-worker voice mail constitutes an unlawful interception under the Federal Wire Tap Act).

EMPLOYER PLAINTIFF

Feidl v. Greentree Mortgage Co., 1998 U.S. Dist. LEXIS 17253 (limited partnership is not an individual who can bring an invasion of privacy claim under the false light tort).

EXCLUSIONARY RULE

Ahart v. Colorado Dept. of Corrections, 964 P.2d 517 (Colo. 1998) (drug test which violated employee's Fourth Amendment rights was admissible in termination hearing of correctional officer).

FALSE LIGHT

Feidl v. Greentree Mortgage Co., 1998 U.S. Dist. LEXIS 17253 (limited partnership is not an individual who can bring an invasion of privacy claim under the false light tort); Frye v. IBP, Inc., 15 F. Supp. 2d 1032 (D. Kan. 1998) (employer's disclosure during unemployment hearing of information about employee could not place him in a false light given the small number of people who were present at the hearing).

HOMOSEXUALITY

Powell v. State, 98 Ga. LEXIS 1148 (statutory ban on homosexual sodomy violates constitutional right to privacy).

MEDICAL PRIVACY

Robinson v. Department of Veteran Affairs, 1998 U.S. App. LEXIS 18636 (Fed. Cir. 1998) (unpublished) (Merit System Appeals Board did not abuse its discretion by terminating an employee who provided his employer with information about his medical condition or treatment on days he did not work but refused to provide more detailed information like his diagnosis; court declined to rule on constitutional privacy claim); Doe v. Henderson, 1999 U.S. App. LEXIS 848 (6th Cir.) (employer's disclosure of information about Plaintiff's hospitalization to a few employees with a need to know was not communicated to a large enough audience to meet publicity requirement under common law of privacy); Knox County Educ. Ass'n v. Knox County Bd. of Educ., 158 F.3d 361 (6th Cir. 1998) (suspicionless drug testing of persons applying to be teachers in elementary school, middle school, and high school does not violate their fourth amendment rights; teachers are heavily regulated and in safety-sensitive jobs; fact that district tests for over ten legal drugs not tested by the Department of Transportation is not a significant privacy concern); Proffitt v. International Paper Co., 1998 U.S. App. LEXIS 23773 (6th Cir.) (union employee's objection to being fired for refusing to answer medical questionnaire preempted by §301 of LMRA); McInerney v. Fagan, 1998 U.S. Dist. LEXIS 7596 (N.D. Ill.) (doctor's disclosure of federal employee's learning disability to employer pursuant to a federal worker's compensation examination was not actionable under state statute protecting confidentiality of medical information in view of the facts that (1) Federal Workers' Comp. Act preempted state statute; (2) doctor was required by federal regulations to disclose the information to the employer; (3) plaintiff requested the information be sent to the Federal Workers' Comp. office and therefore consented to the disclosure; and (4) plaintiff was present while doctor dictated the report to his employer and did not object to its contents); Gruenke v. SCIP, 1998 U.S. Dist. LEXIS 16439 (E.D.Pa.) (swim coach's requirement that eleventh grade swimmer take a pregnancy test, which she reluctantly took, did not violate any clearly established privacy rights under the fourth or fourteenth amendments; hence coach awarded qualified immunity); Shulman v. Group W Productions, 955 P.2d 469 (Cal. 1998) (intrusion into patient's privacy during video of

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taping of scene in emergency helicopter flight and secret taping of conversation between patient and nurse while in flight to hospital could support a jury verdict for intrusion into patient's privacy and dignity); Doe v. High-Tech Institute, Inc., 1998 Colo. App. LEXIS 176 (testing of student's blood for HIV, pursuant to a test of all students for rubella, without his consent stated claim for invasion of common law right to privacy; lab's disclosure of HIV positive status of student without his consent also stated a claim for wrongful publication of private facts); Pennsylvania v. Alexander, 708 A.2d 1251 (Pa. 1998) (secret audio tape of doctor by patient during visit to doctor's office, at request of law enforcement, does not violate privacy of doctor).

OFF DUTY CONDUCT

French v. UPS, 2 F. Supp. 2d 128 (D. Mass. 1998) (supervisor's request that employee explain to upper management a drinking incident in his home with other employees while off duty was not a "private" matter and thus not actionable as an invasion of privacy; company had legitimate interest in knowing how a supervisor handled an intoxicated subordinate's conduct off duty where the co-worker got drunk and went into a self-injuring rage in plaintiff's garage).

OFFICES, DESKS, CONTAINERS

United States v. Anderson, 154 F.3d 1225 (10th Cir. 1998) (vice-president of company who lawfully entered building in which his office was located and used a vacant office to view pornographic tape had a reasonable expectation of privacy in the room against the FBI's warrantless entry into the building and into the vacant office he was using); Philadelphia Fed. of Teachers v. School Dist. of Philadelphia, 1998 U.S. Dist. LEXIS 5592 (E. D. Pa.) (routine searches of boxes teachers had taken out of school building may have violated their reasonable expectations of privacy in the content of the boxes).

PERSONNEL INFORMATION

Kimberlin v. Department of Justice, 139 F.3d 944 (D.C. Cir.) (agency disclosure of its internal investigative file regarding a low-level attorney who was investigated for improper investigative leaks is protected against disclosure under FOIA and the Privacy Act exemption 7(c) compiled for law enforcement and can reasonably be expected to constitute an unwarranted invasion of personal privacy); Scottsdale Unified Sch. Dist. No. 48 v. KPNX Production Co., 955 P.2d 534 (Ariz. 1998) (public records act cannot require disclosure of birth dates of teachers because privacy interest in birth dates outweighs public need for disclosure); Freedom Newspapers, Inc. v. Tollefson, 961 P.2d 1150 (Colo. App. 1998) (although employees have minimal privacy interest in employment history, job performance and evaluations, no undue invasion of privacy occurred when state public records act required disclosure of employee's salaries); Fincher v. State, 497 S.E.2d 632 (Ga. App. 1998) (disclosure of investigative report of employee's sexual harassment pursuant to a public records act does not constitute an invasion of personal privacy); Sapp Roofing Co. v. Sheet Metal Worker's International Association, Local #12, 713 A.2d 627 (Pa. 1998) (privacy interest of public contractors in personal information (names, addresses, social security number, phone numbers) outweighs public's interest in disclosure of such information under state public records act).

See also "Discovery," *supra*.

PREEMPTION

Proffitt v. International Paper Co., 1998 U.S. App. LEXIS 23773 (6th Cir.) (union employee's objection to being fired for refusing to answer medical questionnaire preempted by §301 of LMRA); Anderson v. Anheuser-Busch Companies, Inc., 1998 U.S. App. LEXIS 17487 (9th Cir.) (employer's search of employees and their vehicles for drugs was preempted by §301 of the LMRA); Marino v. Arandell Corp., 1 F. Supp. 2d 947 (E.D. Wis. 1998) (Wisconsin Workers' Comp. statute does not preempt invasion of privacy claim for wrongful search and disclosure of employee medical information; harm caused by invasion of privacy is neither physical or "mental harm", but rather an "intangible injury"); Jones v. Colonial Banc Group, 1998 Ala. Civ. App. 210 (invasion of privacy claim based on purely "psychological injuries" not barred by state Workers' Comp. Act).

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PREGNANCY TESTING

Gruenke v. SCIP, 1998 U.S. Dist. LEXIS 16439 E.D.Pa. (swim coach's requirement that eleventh grade swimmer take a pregnancy test, which she reluctantly took, did not violate any clearly established privacy rights under the fourth or fourteenth amendments; hence coach awarded qualified immunity).

PRELIMINARY INJUNCTION

United Teachers of New Orleans v. Orleans Parish Sch. Bd., 142 F.3d 853 (5th Cir. 1998) (requiring all teachers to submit to drug testing based solely upon involvement in work-related accident violates fourth amendment; preliminary injunction issued); O'Neill v. State of Louisiana, 1998 U.S. Dist. LEXIS 18743 (E.D. La.) (on the basis of Chandler v. Miller court granted preliminary injunction against state statute requiring random drug testing of all elected officials).

PRIVILEGES

Wilson v. Proctor & Gamble, 1998 U.S. App. LEXIS 5290 (supervisor's disclosure to group of employees that he had investigated allegations of sexual harassment against Plaintiff and had found no evidence to support the allegations was protected by a qualified privilege); Shulman v. Group W Productions, 955 P.2d 469 (Cal. 1998) (truthful newsworthy material is not a wrongful publication of private facts; court balances privacy interests against public interest to determine whether newsworthiness privilege has been met by looking at whether the intrusiveness is "greatly disproportionate to" its relevance; thorough discussion of first amendment-common law newsworthiness privilege; a publication is newsworthy if "some reasonable members of the community could entertain a legitimate interest" in the information).

PUBLICATION OF PRIVATE FACTS

Doe v. Henderson, 1999 U.S. App. LEXIS 848 (6th Cir.) (employer's disclosure of information about plaintiff's hospitalization to a few employees with a need to know was not communicated to a large enough audience to reach the publicity requirement); Dotson v. Walmart Stores, Inc., 1998 U.S. App. LEXIS 24139 (6th Cir.) (disclosure of Walmart investigative report reflecting suspicions that an individual engaged in shoplifting in the store, which was mailed to plaintiff's supervisors, did not constitute a common law invasion of privacy because it did not involve private facts - alleged shoplifting is public - and was not disseminated to a large enough audience); Aguinaga v. Sanmina Corp., 1998 U.S. Dist. LEXIS 6630 (N.D. Tex.) (gross sexual harassment states a claim for common law invasion of privacy; statements made to co-workers not a large enough audience to meet publicity requirement); Gates v. City of Dallas, 1998 U.S. Dist. LEXIS 3442 (N.D. Tex.) (police sergeant's disclosure of employee's medical information to other sergeants is not actionable because the disclosure was not made to a large enough audience); Blackwell v. Harris Chemical Co., 11 F. Supp. 2d 1371 (D. Kan. 1998) (disclosure of plaintiff's medical condition to co-workers states a valid claim for common law invasion of privacy).

See also False Light, *supra*.

SEXUAL HARASSMENT

Kelley v. Worley, 1998 U.S. Dist. LEXIS 19583 (M. D. Ala.) (physical sexual harassment by supervisor states a cause of action for common law invasion of privacy under Alabama law; employer not liable under doctrine of respondeat superior); Aguinaga v. Sanmina Corp., 1998 U.S. Dist. LEXIS 6630 (N.D. Tex.) (gross sexual harassment states a claim for common law invasion of privacy; statements made to co-workers not made to large enough audience to meet publicity requirement); Portera v. Winn Dixie of Montgomery, 996 F. Supp. 1418 (M.D. Ala. 1998) (for sexual harassment to be an actionable invasion of privacy in Alabama it must have occurred pursuant to a "course of conduct which rises to a level that has been previously held to constitute an invasion of privacy"; facts did not meet this test); Ex parte Atmore Community Hospital, 719 So.2d 1190 (Ala. 1998) (physical touching in sexual ways sufficient to state claim for common law invasion of privacy; employer not liable under respondeat superior).

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SEXUAL PRIVACY

Bloch v. Ribar, 156 F.3d 673 (6th Cir. 1998) (sheriff's press conference disclosing intimate details of a rape violated victim's constitutional right to privacy where disclosure was not supported by a compelling state interest of informing the public about the case, but suit against the Sheriff dismissed on qualified immunity grounds).

UNEMPLOYMENT COMPENSATION

Rebel v. Unemployment Compensation Bd. of Review, 1998 Pa. LEXIS 2719 (unemployment benefits may be denied to non-safety sensitive employee who refuses random drug test).

RECENT DEVELOPMENTS IN EMPLOYMENT DEFAMATION

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Although employment defamation suits continued to be common in 1998, employers generally enjoyed success in defending these cases. In particular, employers seemed to prevail on the basis of privilege or causation issues, although other issues were presented. In the end, 1998 provides a good illustration of the defenses available to the defendant in employment defamation suits.

PRIVILEGE

Employers continued to enjoy success in defending defamation suits on the basis of qualified privilege which arises as a result of communications between fellow employees. Thus, in Landrum v. Braun, 978 S.W.2d 756 (Ky. Ct. App. 1998), an allegedly defamatory memorandum written by the Vice President of Academic Affairs for a state university and which was passed on to the business school dean and university president was subject to qualified privilege. The Court found that such a privilege covers communications within a chain of command. Likewise, a New York court found in Bisso v. DeFreest, 674 N.Y. S.2d 824 (N.Y. App. Div. 1998), that a statement made before 15 co-workers that plaintiff had been terminated for engaging in sexual harassment was protected since it was “made by a person having an interest in the subject to others with a corresponding interest in furtherance of the common interest of the employer.”

Similarly, a Georgia court ruled in favor of the employer because the allegedly defamatory written statement was not shown to anyone who did not see it for employment purposes. See Luckey v. Gioia, 496 S.E.2d (Ga. Ct. App. 1998). Finally, a California court found that the employer was entitled to an absolute privilege because the alleged defamatory statement, even if done maliciously, was authorized by law. Cruey v. Gannet Co., Inc., 76 Cal. Rptr. 2d 670 (Cal. Ct. App. 1998). In that case, the alleged defamatory statement was contained in an EEOC charge filed by the defendant.

CAUSATION

In addition to privilege, courts in 1998 also appeared to be particularly sensitive to causation, refusing to impose liability if the plaintiff could not prove that the alleged defamatory statement caused injury. Therefore, in Lopez v. Kline, 953 P.2d 304 (N.M. Ct. App. 1998), summary judgment for a former employer was affirmed where the plaintiff failed to show that her failure to be hired by a prospective employer was caused by defendant’s statements. In addition, in Culverhouse v. Cooke Center for Learning and Development, 675 N.Y. S.2d 776 (N.Y. App. Div. 1998), the Court determined that a statement must be made with reference to a matter of significance as to plaintiff’s trade, business or profession, rather than a more general reflection upon the plaintiff’s character or qualities. The employer prevailed because the allegedly defamatory statement did not cause apprehension about the plaintiff’s ability to conduct business.

Interestingly, a New Mexico court suggested that there can be no defamation if the recipient of the statement knows that it is untrue. See Silverman v. Progressive Broadcasting Inc., 964 P.2d 61 (N.M. 1998). And in Dunlap v. Alcuin Montessori School, 698 N.E.2d 574 (Ill. App. Ct. 1998), the Court held that the challenged statements could be reasonably construed as innocent, and therefore, plaintiff could not recover, even if the statements were per se defamatory.

VICTIM FAULT

Some courts began applying principles similar to contributory negligence in the context of employment defamation. For example, in Robinson v. The Globe Newspaper, 26 F.Supp.2d 195 (D.C. Me. 1998), a Maine district court held that plaintiff, a police officer, could not assert the falsity of a newspaper article due to collateral estoppel. One month after filing suit, plaintiff plead guilty to the conduct referred to in the article. Furthermore, a New Jersey court in Beck v. Tribert Howden Food Equipment Inc., 711 A.2d 951 (N.J. Super. Ct. App. Div. 1998), would not allow plaintiff, a former employee, to recover since he had invited the alleged injury by having friends pose as prospective employers.

Summaries of Selected Cases:

California

Cruey v. Gannett Co., Inc., 76 Cal. Rptr. 2d 670 (Cal. Ct. App. 1998). Plaintiff, a former employee, sued defendant, his former employer, for defamation. Plaintiff's former supervisor filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging sexual harassment against the plaintiff. The Court held that the EEOC charge (the alleged defamatory statement) was absolutely privileged as a statement made in a proceeding authorized by law. Therefore, the Court reasoned that even if the statement was made maliciously, the sexual harassment complaint against the plaintiff could not be used to establish liability in plaintiff's defamation action.

Colorado

Fluid Technology, Inc. v. CVJ Axles, Inc., 964 P.2d 614 (Colo. Ct. App. 1998). Plaintiff, an employer, sued defendant, a bookkeeper's former employer, for negligent misrepresentation relating to the former employer's positive employment reference regarding the bookkeeper. The bookkeeper's former employer gave the bookkeeper a positive recommendation when the employer conducted a reference check. After the bookkeeper stole from the employer, the employer discovered that the bookkeeper stole from the former employer and had been convicted for that theft. The Court held that the judgment of the trial court, which granted defendant's dismissal of plaintiff's complaint, could not stand.

Georgia

Luckey v. Gioia, 496 S.E.2d 539 (Ga. Ct. App. 1998). Plaintiff, a nurse, accused defendant, a physician, of "patient dumping." The physician accused the nurse of improper and unprofessional conduct. The nurse was terminated and then brought an action against the physician for defamation. After he accused the nurse of improper and unprofessional conduct, the physician provided a letter regarding the situation to the hospital administrator who communicated it only to the director of human resources. The Appellate Court of Georgia affirmed the trial court's decision that the physician's written statement was not "published" when it was given to the hospital administrator because it had not been shown to anyone who did not need to see it for employment purposes.

Illinois

Cianci v. Pettiboner Corp., 698 N.E.2d 674, (Ill. App. Ct. 1998). Plaintiffs, former employees, sued defendant, an employer, for defamation after defendant discussed in a meeting and in a letter plaintiffs' actions of using the employer's courier service for personal use. The Court first determined that the qualified privilege applied because the statements were made among a small group of employees and in a situation in which the interests of the employer were involved. Furthermore, the Court held that the qualified privilege was not abused because there was neither intent to injure nor reckless disregard of the rights of the plaintiffs, particularly since the statements made by the defendant were substantially true according to the plaintiffs' own testimony.

Dunlap v. Alcuin Montessori School, 698 N.E.2d 574 (Ill. App. Ct. 1998). Plaintiff, a former employee of a private school, sued defendant, the school and members of the school's board of trustees, for defamation based on statements made by the private school's board of trustees in a letter sent to students' parents informing them of plaintiff's termination. The letter stated that there had been a "total breakdown of trust and confidence between [employee] and the [b]oard" and that the employee was not "satisfactorily performing her duties or carrying out the policies of the [b]oard." The Court held that the statements could be reasonably construed as innocent. Where there is innocent construction, an employee cannot recover

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on a defamation claim even if the statements made were per se defamatory. In this case, the Court found that the board of trustees' statements in its letter could be reasonably construed as plaintiff's failure to perform at one school in one particular job setting rather than her inability to perform well in other positions or at other schools.

Kansas

St. Catherine Hospital of Garden City, Kansas v. Rodriguez, 1998 WL 936408 (Kan. Ct. App. Dec. 24, 1998). Defendant, a former employee, filed a counterclaim against plaintiff, St. Catherine Hospital ("Hospital"), for business defamation. The Hospital hired an investigative company to evaluate whether it should continue to employ defendant who handled all of the radiology work. The report from the investigative company indicated that there were numerous criticisms of the radiology department. The Hospital decided to terminate defendant's employment. The Court held that defendant could not show that his reputation was damaged by the investigative report and therefore, defendant was not defamed.

Kentucky

Landrum v. Braun, 978 S.W.2d 756 (Ky. Ct. App. 1998). Plaintiff, a visiting professor of the business school at Kentucky State University, sued defendant, the Vice President of Academic Affairs, for writing a memorandum concerning plaintiff's character and performance which defendant passed on to the business school dean and the university president. The Court held that the allegedly defamatory memorandum written by the defendant which was passed on to the business school dean and the university president was entitled to qualified privilege because the privilege extends to communications between employees in chain of command.

Louisiana

Fitzgerald v. Tucker, 97-916 (La.App. 3d Cir. 7/29/98), 715 So.2d 1281. Plaintiff, an administrative director for a state board, alleged that she was defamed when the defendant suggested on television that she was not a qualified counselor when, in fact, her certificate contained a mere clerical error. During her four month tenure with the board, her duties included typing, answering the phone, assembling test packets and paying bills. Plaintiff did not seek publicity, and the controversy about which she was defamed was not of interest to the general public. Furthermore, the general public would not consider plaintiff a public official. Therefore, the Court held that, although plaintiff was a government employee, she was neither a public official nor public figure, and therefore, was not required to prove that defendant acted with malice. Malice was implied if she could prove that the statements were false. Since the defamation action was by a private person and the words adversely affected her business, and thus were defamatory per se, both malice and falsity were presumed. In such a case, the burden shifted to defendant to prove either lack of falsity or absence of malice.

Maine

Robinson v. The Globe Newspaper Co., 26 F.Supp.2d 195 (D.C. Me. 1998). Plaintiff, a police officer, brought an action against defendant, a newspaper and reporter, for defamation. The newspaper printed nine articles alleging plaintiff engaged in various types of corrupt activities while he was a detective, including stealing thousands of dollars from drug dealers he arrested, falsifying affidavits for such warrants, and arranging for the dismissal of legitimate criminal charges. Plaintiff resigned from the police department, was indicted by a federal grand jury and pled guilty to certain counts of a Superseding Indictment. One month prior to pleading guilty, plaintiff filed suit alleging the newspaper articles were defamatory. The Court held that the plaintiff was collaterally estopped from asserting the falsity of the newspaper statements based on his prior plea of guilty to federal charges based on the same conduct described by the alleged defamatory statements.

New Jersey

Beck v. Tribert and Howden Food Equipment Inc., 711 A.2d 951 (N.J. Super. Ct. App. Div. 1998). Plaintiff, a former employee, sued defendant, his former employer, for defamation alleging that his former employer defamed him when defendant made allegedly defamatory statements to plaintiff's friends who were posing as prospective employees. Plaintiff's friend called defendant to find out what defendant was saying about him. Defendant stated the former employee was an average worker and that although he did not care for his character, it had nothing to do with the job. Defendant also told plaintiff's friend that he discharged plaintiff and in return plaintiff filed a complaint with OSHA. In this case, plaintiff had no knowledge that defendant had previously made slanderous remarks and plaintiff had his friends contact defendant simply because he was curious about what his former employer would say about him. The Superior Court of New Jersey held that

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plaintiff cannot win on a defamation claim for an injury he invited. In addition, the Court held that defendant's statements may not be actionable because the statements were either true or protected by the qualified privilege.

New Mexico

Silverman v. Progressive Broadcasting Inc., 964 P.2d 61 (N.M. 1998). Plaintiff, an employee, sued defendants, former supervisors and a supervisor's subsequent employer, alleging defamation. Plaintiff's job was eliminated and she subsequently got a position with another employer. Plaintiff's supervisors from her former employer sent a letter to her new employer accusing plaintiff of "intentionally and maliciously" poisoning her former employer's relationship with her new employer. The letter also stated that plaintiff spread lies, was a gossip, and suffered from tirades which caused "her to lose control and say completely off the wall things." The defendants argued that the plaintiff's employer knew that the statements they made in their letter were false. If a defamatory statement is made to a person who knows the statement is false, then a publication has not occurred. Here, plaintiff's employer "investigated the allegations and found them to be untrue," indicating that initially, he was not sure whether the statements in the letter were false. Therefore, because contradictory inferences could be drawn from the employer's testimony concerning what he believed with respect to the statements, the Court decided that summary judgment would not be granted to the defendants.

Lopez v. Kline, 953 P.2d 304 (N.M. Ct. App. 1998). Plaintiff, a former employee, brought an action against defendant, the former employer, alleging defamation. Plaintiff was diagnosed with a brain tumor and asked the former employer for medical leave after the operation. Three to four months after her leave began, she scheduled an appointment to determine when she would be back to work. Prior to her meeting with her employer, plaintiff received a letter advising her that her employment was terminated. Plaintiff applied for a position with a prospective employer. The former employer told the prospective employer about plaintiff, stating that, "she was sick [and] had lots of medical problems" and "she went on extended leave. The insurance company told us she was a high risk and asked us to terminate her. That's the reason we fired her." The Court upheld the trial court's finding of summary judgment for the defendants, reasoning that plaintiff failed to show that the alleged statements were defamatory or that she was damaged thereby; and that plaintiff failed to show that her failure to be hired by the prospective employer was proximately caused by the statements.

New York

Bisso v. DeFreest, 674 N.Y.S.2d 824 (N.Y. App. Div. 1998). Plaintiff, a nursing technician, sued defendant, his former supervisor, alleging defamation. St. Francis Hospital terminated plaintiff's employment after an investigation determined that plaintiff subjected a female co-worker to sexual harassment. Defendant explained plaintiff's absence in a staff meeting attended by 15 of plaintiff's former coworkers, by stating that plaintiff had been "terminated for engaging in sexual harassment." The Court held that the statement was protected by the limited privilege that attaches to communications "made by a person having an interest in the subject to others with a corresponding interest in furtherance of the common interest of the employer." Therefore, because the plaintiff failed to show the statement was made with malice, the qualified privilege applied.

Culverhouse v. Cooke Center for Learning and Development, 675 N.Y.S.2d 776 (N.Y. App. Div. 1998). Plaintiff, a former employee, sued defendant, the former employer, for defamation. Plaintiff alleged that defendant defamed her by calling her a "rich bitch" and by circulating a memorandum to the company board stating that plaintiff resigned. The Court held with respect to the "rich bitch" statement, that an oral statement is considered slander per se if it tends to injure another in his or her trade, business or profession. To be actionable, the statement must be made with reference to a matter of significance as to the plaintiff's trade, business or profession, rather than a more general reflection upon the plaintiff's character or qualities. Numerous courts over the years have held that the term "bitch" is too imprecise to be actionable, and this Court agreed. In addition, the Court held that plaintiff's claim that the memorandum was defamatory is not actionable because it did not cause "apprehension" about plaintiff's ability to conduct business.

**RECENT DEVELOPMENTS IN THE LAW OF
WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY**

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A tort cause of action for wrongful discharge in violation of public policy is recognized as an exception to the doctrine of employment at-will in most states. In general, the case law provides that an employee has a wrongful discharge action if he or she was terminated for reasons contrary to public policy as expressed in statutory or constitutional mandates, or as otherwise well-recognized.

Although most states recognize the tort of wrongful discharge in violation of public policy, state law varies considerably on when the tort applies. Attorneys seeking to raise or defend such claims should consider the following issues under the applicable state law:

1. What is the public policy at issue? Are there legislative enactments, constitutional standards, or judicial decisions that specifically articulate the public policy? Does applicable state law allow the plaintiff to rely on expressions of public policy found in federal or local authority?
2. If a clearly articulated public policy exists, can the plaintiff show that his or her conduct implicated or furthered that public policy? Can the plaintiff show that his or her actions served public, rather than private, interests?
3. Does the plaintiff have a statutory remedy for the alleged wrongful discharge? If so, does that remedy preclude the common law wrongful discharge claim?
4. If the relevant statute does not apply to the plaintiff (i.e. the plaintiff's employer does not have the requisite number of employees to be covered under fair employment laws), can the plaintiff still rely upon the statute to establish a public policy? Is the plaintiff bound by the procedural requirements or damage limitations in the statute?
5. If the plaintiff is alleging termination in retaliation for whistle blower activity, did he or she make a report to authorities internally or externally? If the report was internal, does state law allow the plaintiff to use that report as the basis for a wrongful termination action?
6. Does applicable state law allow the plaintiff to sustain a cause of action for retaliation in violation of public policy based on any adverse action other than termination?

Arizona

O'Day v. McDonnell Douglas Helicopter Co., 959 P.2d 792 (Ariz. 1998). On a certified question from the federal court, the Arizona Supreme Court held that after-acquired evidence of employee misconduct is not a defense to a tortious wrongful termination action. Rather, such evidence precludes the remedies of lost earnings from the time the employer discovers the misconduct and front pay or reinstatement. The evidence is not a bar to other compensatory damages attributable to the employer's wrongful conduct, including diminished earning capacity and punitive damages.

California

Green v. Ralee Engineering Co., 78 Cal.Rptr.2d 16 (1998). Plaintiff, an aircraft parts inspector, made numerous reports to his employer that it was shipping parts that failed inspection. The Company eliminated Plaintiff's shift and terminated him, although it retained less-senior inspectors from his shift. Plaintiff sued for wrongful termination in violation of public policy, alleging that his internal reports, which furthered the public policy set forth in FAA regulations, caused his discharge.

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The Supreme Court held that administrative regulations, such as those promulgated by the FAA, could support a public policy claim. The Court rejected the Company's arguments that the regulations affected only private interests. The Court also found immaterial the Company's allegation that it did not violate the FAA regulations, holding that the Company's "alleged conduct in shipping nonconforming parts," even if not technically in violation of the regulations, nonetheless violated the public policies embodied in the regulations.

City of Moorepark v. Superior Court, 77 Cal.Rptr.2d 445 (1998). Former employee, who suffered a work-related injury prior to termination, made claims for disability discrimination under the Fair Employment and Housing Act and wrongful discharge in violation of public policy. The Company demurred to both causes of action, arguing that because the employee's disability was work-related, §132a of the Labor Code (which prohibits employers from discriminating against employees who are injured during employment) provided her exclusive remedy.

The Supreme Court concluded that §132a does not provide the exclusive remedy for disability arising from a work-related injury, and that Plaintiff could avail herself of both FEHA and common law remedies as well. Moreover, the Court held that the public policy against disability discrimination is "substantial and fundamental," and therefore can support a wrongful discharge claim.

Reno v. Baird, 76 Cal.Rptr.2d 499 (1998). A plaintiff cannot sustain a claim for wrongful discharge in violation of public policy against an individual.

Illinois

Jacobson v. Knepper & Moga, P.C., No. 84740, 1998 WL 906697 (Ill. Dec. 31, 1998). Plaintiff, an attorney, brought a cause of action for wrongful termination in violation of public policy, arguing that he was terminated in retaliation for reporting his firm's violations of the Fair Debt Collection Practice Act and the Illinois Collection Agency Act. On a certified question from the Circuit Court, the Illinois Supreme Court ruled that Plaintiff could not maintain a cause of action for retaliatory discharge because the ethical obligations imposed by the Rules of Professional Conduct adequately protects the public policy implicated in the case.

Buckner v. Atlantic Plant Maintenance, Inc., 694 N.E.2d 565 (Ill. 1998). A plaintiff cannot sustain a cause of action for wrongful discharge in violation of public policy against an employee or agent of the former employer.

Iowa

Teachout v. Forest City Commun. School, 584 N.W.2d 296 (Iowa 1998). A former teacher brought suit against the school district alleging that her termination resulted from her attempts to report child abuse. The Court held that it would be "contrary to the public policy articulated in the child abuse laws to allow an employer to take adverse employment action" based on an employee's good faith intent to report abuse, even if the employee contravened public policy by failing to make the report promptly. The Court nonetheless affirmed summary judgment to the employer because the teacher failed to demonstrate a causal connection between her intended activity and her discharge.

Kansas

Flenker v. Willamette Industries Inc., 967 P.2d 295 (Kan. 1998). Plaintiff contended that he was fired because he reported unsafe working conditions to the Company and OSHA. The Tenth Circuit certified to the Kansas Supreme Court the question of whether or not an employee could maintain a common law wrongful discharge claim based on filing an OSHA complaint where § 11(c) of OSHA provided a statutory remedy for retaliatory action. The court held that Plaintiff could maintain a common law cause of action because the alternate remedy provided by §11(c) was not "adequate" insofar as it allowed the secretary of labor to exercise discretion over whether an action is brought and required the employee to bring a complaint within thirty days after discharge.

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Maryland

Owen v. The Carpenters' District Counsel, 161 F.3d 767 (4th Cir. 1998). Plaintiff brought a common law wrongful discharge claim alleging that she was fired because she rebuffed her supervisor's sexual advances. Because Plaintiff's employer had fewer than 15 employees, Plaintiff could not avail herself of the statutory remedy set forth in the Maryland Fair Employment Practices Act. The court nonetheless held that Maryland courts would find a clear violation of public policy where an employer of less than 15 people discharged an employee for rebuffing her supervisor's sexual advances.

Nevada

Allum v. Valley Bank of Nevada, No. 24604, 1998 WL 909766 (Nev. Dec. 30, 1998). Plaintiff, a loan officer, claimed to have been discharged for refusing to violate rules and regulations of the Federal Housing Administration ("FHA"), and for reporting such conduct by his employer to the FHA. The jury returned a verdict for the employer. Plaintiff appealed, claiming that the jury should have been given a "mixed motive" instruction on his retaliatory discharge claim. The Nevada Supreme Court declined to adopt a "mixed motive" approach to tortious discharge cases, concluding that the use of the "mixed motive" concept in the context of wrongful termination cases would undermine the Nevada legislature's intent in creating the at-will doctrine.

Oklahoma

Whelless v. Willard Grain & Feed, Inc., 964 P.2d 204 (Okla. 1998). Pursuant to management's instruction, Plaintiff submitted environmental regulatory reports containing false data to the State of Oklahoma. When the Company Vice President confronted Plaintiff, he admitted the conduct. The Company then terminated him.

On a certified question from the federal court, the Oklahoma Supreme Court held that Plaintiff could not maintain a viable cause of action for wrongful termination in violation of public policy. Plaintiff was not discharged for refusing to act in violation of, or for acting consistently with, public policy. "Public policy commitment to environmental safety and protection is not advanced by an employee who participates in violating a state statute . . . even when his motivation is fear of being discharged."

Pennsylvania

Shick v. Shirley, 716 A.2d 1231 (Pa. 1998). In a case of first impression, the Pennsylvania Supreme Court determined that Pennsylvania law recognizes a common law cause of action for wrongful discharge in violation of public policy where an at-will employee is terminated for filing a workers' compensation claim.

Texas

Austin v. Healthtrust, Inc., 967 S.W.2d 400 (Tex. 1998). The Supreme Court declined to extend the theory of wrongful termination in violation of public policy to protect whistle blowers in the private sector. The Court reasoned that "the Legislature has enacted specific statutes to redress wrongful termination . . . Accordingly, rather than recognize a common-law cause of action that would effectively emasculate a number of statutory schemes, we leave to the Legislature the task of crafting remedies for retaliation by employers."

Utah

Ryan v. Dan's Food Stores, Inc., No. 970213, 1998 WL 480823 (Utah Aug. 18, 1998). Plaintiff, a former pharmacist, alleged that the Company terminated him for questioning customer's prescriptions, as required under certain circumstances by federal law. The Court held that the Company violated a clear and substantial policy only if it fired Plaintiff for questioning prescriptions that federal law required him to question or for reporting criminal activity to the public authorities. The Court further held, however, that Plaintiff had failed to show that the Company's non-retaliatory reason for termination was pretextual, and affirmed summary judgment on that basis.

Virginia

Shaw v. Titan Corp., 498 S.E.2d 696 (Va. 1998). Plaintiff alleged that he was terminated from his employment because of his race, gender and age in violation of the public policy embodied in the Virginia Human Rights Act. A jury awarded him

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\$65,000 in compensatory damages and \$400,000 in punitive damages. Defendant appealed, challenging the trial court's refusal to give a "but-for," "sole cause" or "mixed motive" jury instruction, and the award of punitive damages.

On certified questions from the federal court, the Virginia Supreme Court held that a plaintiff is not required to prove that the employer's improper motive was the sole cause of the wrongful termination. The Court therefore approved the given jury instruction, which stated that the jury could find for the plaintiff if he proved that the Company "terminated him because of his race, his gender, or his age." The Court also held that Plaintiff could recover punitive damages for wrongful termination, even though his claim arose when the Virginia Human Rights Act did not provide for the recovery of punitive damages.

Washington

Webb v. Puget Sound Broadcasting Company, No. 41228-1-I, 1998 WL 898788 (Wash. App. Dec. 28, 1998). Plaintiff alleged that he was discharged because he was a homosexual. In support of his claim that the discharge violated public policy, Plaintiff cited to two local ordinances which specifically stated that discriminating against an employee based on sexual orientation violated public policy; the United States Supreme Court decision in Romer v. Evan, 517 U.S. 620 (1996); and the state's hate crime statute. The court upheld the dismissal of plaintiff's wrongful discharge claim, holding that the authority relied upon did not establish the existence of a clear statewide mandate of public policy.

West Virginia

Tiernan v. Charleston Area Medical Center, Inc., 506 S.E.2d 578 (W. Va. 1998). Employer terminated Plaintiff, a nurse, for publicly criticizing the employer's budgetary cutbacks and bringing a reporter to a private meeting addressing a proposed merger. Plaintiff alleged that her termination violated the public policy embodied in the state constitutional right to free speech and association.

The West Virginia Supreme Court held that, generally, an employee can sustain a cause of action for wrongful discharge based on a violation of public policy emanating from a specific provision of the state constitution. The Court went on to hold, however, that the Free Speech Clause of the state constitution does not apply to private sector employers. The Court therefore ruled that Plaintiff could not sustain a wrongful discharge action against her private sector employer based on the public policy embodied in the state constitutional right of free speech.

Wisconsin

Tatge v. Chambers & Owen, Inc., 579 N.W.2d 217 (Wisc. 1998). Employer terminated Plaintiff for refusing to sign a non-competition/non-disclosure agreement. Plaintiff filed suit, alleging that his termination violated the public policy expressed in Wisc. Stat. § 103.465, which provides that restrictive covenants are enforceable only "if the restrictions imposed are reasonably necessary for the protection of the employer or principle."

The Court held that while § 103.465 evinced clear public policy, it was not sufficient to support a tortious wrongful discharge claim. The proper remedy for violations of § 103.465 was to render the covenant void and unenforceable, not bestow on the employee a wrongful discharge claim. The Court noted that allowing Plaintiff's cause of action would allow employees to "indiscriminately decline to sign non-disclosure/non-compete agreements which in their own minds are 'unreasonable,' and subsequently bring a wrongful discharge claim if terminated for doing so."

FRAUD AND MISREPRESENTATION UPDATE

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Federal - 1998

1. Supervisor Cannot Change Nature of Termination by Alleging Fraudulent Misrepresentation. At-will employee did not have cause of action for wrongful discharge, even though claim was phrased as fraudulent misrepresentation, because Oklahoma has restricted the availability of wrongful termination claims by at-will employees. The statements contained in both the Supervisor's Guide and the Guidelines are in the nature of "general platitudes" and "vague assurances," language that the Oklahoma Supreme Court has stated is insufficient to support the finding of an implied contract changing the at-will nature of employment. Employee who was discharged after his secretary made sexual harassment allegations against him cannot claim that employer fraudulently misrepresented that supervisor guidelines entitled him to substantive and procedural protections, where his allegation is functional equivalent of wrongful discharge claim, and employee does not allege that his discharge violated public policy. Vice v. Conoco, Inc., 150 F.3d 1286 (10th Cir. 1998).
2. Reliance Required for Misrepresentation Claim in Massachusetts. Under Massachusetts law, to recover for either intentional or negligent misrepresentation, terminated employee must submit evidence that supervisor made false representations and that he reasonably relied on those misrepresentations. During negotiations, employee specifically informed supervisor that he was no longer interested in plan they had previously discussed; accordingly, he cannot claim that he reasonably relied on a promise he rejected. Hinchey v. Nynex Corporation, 144 F.3d 134 (1st Cir. 1998).
3. Lack of Duty to Warn May Be Distinguished from Fraudulent Omission of Information. While employer newspaper had no duty to warn of prior sexual assaults, some upon newspaper carriers, within the past five years, the fact that its unnamed agent may have represented to or concealed from the plaintiff's mother, in particular, the safety history of the newspaper's carriers was sufficient to survive motion for summary judgment and was question for jury's consideration. Fraud may consist of the suppression or omission of that which is true as well as the articulation of that which is false. Howarth v. Rockingham Publishing Co., 20 F.Supp.2d 959 (W.D.Va. 1998).
4. Initial Misrepresentation Does Not Constitute Ongoing Violation for Statute of Limitations Purposes. Misrepresentation to applicant that expunging his arrest record would allow him to qualify as a police officer can no longer be claimed as actionable (under Illinois law, when a continuing violation is alleged, the statute of limitations does not begin to run until the date of the last injury or tortious act) since, once he was disqualified in March, 1996 because of his arrest record, applicant knew that the Chicago Police Department's previous statement about his arrest record was untrue. Under Illinois law, applicant can no longer prove the required element of reliance upon the truth of the statement since he knew it to be false. McCraven v. The City of Chicago, 18 F.Supp.2d 877 (N.D.Ill. 1998).
5. Misrepresentations which Do Not Conceal Hazardous Health Condition Nor Limit Access to Medical Attention Do Not Constitute Exception to Workmen's Compensation Act. Employee truck driver with chronic asthma was promoted to inside salesperson. Other employees smoked in and around areas through which this employee had to pass to perform the essential functions of his position. Due to the smoke in the work environment, plaintiff employee's asthma was aggravated to the level of becoming a serious illness for which he has been hospitalized repeatedly, been out on disability and, finally, threatens to shorten his life span significantly. Employer's misrepresentations to employee that they would do something to regulate the smoking in the work environment but did not, do not rise to the level necessary to comprise an exception to the Workmen's Compensation Act as this is not a situation where there was a concealed condition that aggravated employee's pre-existing medical condition nor is this a situation where the employer's actions precluded employee from limiting his contact with the hazard or from receiving prompt medical attention and care. Malone v. Specialty Products and Insulation Company, 15 F.Supp.2d 769 (E.D.Pa. 1998).

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6. Discrimination Fact Pattern Supports Multiple Claims but Not Breach of Implied Covenant of Good Faith and Fair Dealing Where Other Remedies Exist. Alleged actions of denying Indian educated physician career-track promotion and shareholder status in medical office will support both discrimination and misrepresentation claims, since the crucial underlying element of each differs. Massachusetts also recognizes a claim for breach of implied covenant of good faith and fair dealing when an employer's reason for discharge is contrary to public policy, but that cause of action exists only when there is no other adequate way to vindicate the public policy. Bhawan v. Fallon Clinic, Inc., 5 F.Supp.2d 64, 136 Lab. Cas. P 33,741 (D.Mass. 1998).
7. Sufficiency of Fraud Claim. Terminated employee alleged that although he was told by company president that he would receive a bonus if company realized a particular level of cash profit, president and other corporate officers had determined, at the time plaintiff was told that he would likely receive a bonus, that in fact he would never receive a bonus because they would manipulate corporate record-keeping and expenditures in order to avoid paying the bonus. In furtherance of that goal, employee alleged, corporate officials had entered into an agreement, not disclosed to him, under which company funds were paid to them for non-business purposes in part to depress the company's profitability below the threshold that would trigger the bonus provision. Such allegations are adequate to state a claim for fraud. Brower v. Nydic, Inc., 1 F.Supp.2d 325 (S.D.N.Y. 1998).
8. Plaintiff Must Show Injury to Self to Support Claim of Fraudulent Misrepresentation. Having alleged that her termination was due to her efforts to expose irregularities in company billing practices, employee brought suit for, among other things, breach of fiduciary duty, gross negligence, negligent misrepresentation, constructive fraud and fraudulent misrepresentation. The first three theories are inconsistent with the doctrine of at-will employment; while there may have been some duty toward corporate shareholders, that duty did not extend to employee. The last two claims, supported by the allegation that her employer had represented to the state unemployment office that her position had been eliminated, lack the requisite elements as they did not defraud nor injure employee but rather she was able to benefit by collecting unemployment benefits. Hawkes v. University Physicians, Inc., 6 F.Supp.2d 445 (D.Md. 1998).
9. NLRA Pre-empts Misrepresentation Claim when LMRA Does Not. A claim that the president of a postal worker's union local misrepresented that an appeal had been taken from an adverse employment decision by the Postal Service was not preempted by the Labor Management Relations Act; the truth or falsity of the representation involved only a finding of whether the appeal was filed. The alleged misrepresentation by the president of the postal workers' union, that the union had appealed the Postal Service's adverse employment decision involving the worker, was a breach of the union's duty of fair representation that could have been brought before the National Labor Relations Board, and a state court misrepresentation suit was consequently preempted by the National Labor Relations Act (NLRA). The claim is preempted if the state claim "creat[es] no new rights for an employee and impos[es] no new duty on a union not already clearly present under existing federal labor law." Sheehan v. United States Postal Service, 6 F.Supp.2d 141 (N.D.N.Y. 1997).
10. Breach of Oral Contract and Fraud Claims not Preempted by RLA. Railway Labor Act (RLA) did not preempt railroad employee's claims against his employer for breach of oral contract and fraud, stemming from employer's alleged promise to employee that he would be promoted to management position if he curtailed his exercise of certain right under collective bargaining agreement (CBA), as such claims did not require interpretation of and were only peripherally related to collective bargaining agreement. Under the CBA's provisions, an employee in a position covered by the CBA, can file "time slips" seeking overtime pay for work management improperly gave to someone other than the complaining employee. Employee contended that, in exchange for curtailing his repetitive submission of "time slips," employer railroad promised to promote him to the management position of Assistant Road Master. This position is a management position which is not covered by the express terms of the CBA. Where the resolution of a state law claim turned on the interpretation of the CBA, the claim is preempted but, where there are purely factual questions about an employee's or employer's conduct and motives and no interpretation of the CBA is involved, no preemption exists. Oney v. Kansas City Southern Railway Company, 3 F.Supp.2d 729 (E.D.Texas 1997).

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11. Privacy Torts Associated with Michigan Claim of Discrimination are Preempted by Airline Deregulation Act. Former airline employee brought claims under Michigan's Elliott-Larsen Civil Rights Act including intentional infliction of emotional distress and misrepresentation and fraud relating to airline's application of its policies regarding medical leaves and re-employment of employees who resign. Four days after filing complaint, the Michigan Court of Appeals held that the Airline Deregulation Act preempts Elliott-Larsen claims. Thus, those tort claims which are tied to the discrimination claim are also preempted. Wellons v. Northwest Airlines, Inc., 999 F.Supp. 941, 76 Fair Empl.Prac.Cas. (BNA) 1474 (E.D.Michigan 1996).

State - 1998

1. Issues Determined in Arbitration Have Collateral Estoppel Effect on Litigation of Privacy Torts. Findings in labor arbitration award, that closure of facility was result of independent economic conditions, rather than labor dispute, were entitled to collateral estoppel effect in tort litigation brought against employer by employees, and thus precluded any claim that employer's alleged fraud and negligent misrepresentation at time of hiring in concealing pending labor dispute with union led to employees being damaged by eventual plant closure. Issues adjudicated during a labor arbitration may be given collateral estoppel effect in an employee's subsequent lawsuit for fraud and negligent misrepresentation where there was identity of parties, issues had been litigated and were determined on the merits in arbitration of a "judicial character." Kelly v. Vons Companies, Inc., 79 Cal.Rptr.2d 763, 67 Cal.App.4th 1329 (Cal. Ct. App 1998).
2. Termination of At-Will Employment Due to Alleged Misrepresentation Stands. When employee quit her job based on alleged false representation of her employer, action for fraud did not accrue. Whether employer induced her to terminate her employment by resorting to false representations, or whether he terminated her employment without comment, the result is still the same, namely: the loss of employment. Without more the loss of employment of an at will employee cannot form the basis for a claim of fraud and misrepresentation. Sample v. Kinser Insurance Agency, 700 N.E.2d 802 (Ind. Ct. App. 1998).
3. False Reasons for Termination Do Not Constitute Fraud. Manager of apartment complex sustained work-related injury, and her job was subsequently terminated. Employer's written statements that employee was being terminated for lack of work, even if false, did not rise to level of actionable fraudulent concealment; fraud is actionable only if it results in damage to the complainant, and there can be no recovery where the fraud fails of its intended effect. This type of fraudulent concealment is actionable only if the concealment itself caused damages independent of those flowing from the wrongful act attempted to be concealed. Manager did not sustain any separate and distinct damages as a result of alleged attempt to conceal the real reason for her termination; and if the assertions contained in her employee file were intended to prevent recovery damages for her wrongful discharge, they failed in their intended effect. Hardaway Management Company v. Southerland, 977 S.W.2d 910 (Ky. 1998).
4. Signing Employment Contract without Reading It. A question of fact exists where doctor, familiar with prior employment contract, took substantially identical job in new facility with prior employer and signed new employment agreement, without reading it, upon being told it was "the same" when there was arguably a change in commission structure. Trier of fact must determine whether, and to what extent, there was requisite intent for misrepresentation and whether doctor's reliance was justified under circumstances. Ruff v. Charter Behavioral Health System of Northwest Indiana, Inc., 699 N.E.2d 1171, 14 IER Cases 746 (Ind. Ct. App. 1998).
5. Representations Made During Strike to Non-Union Workers Tested for Truth. During strike at printing plant, employer made representations to non-union workers that they would have permanent employment in a harassment-free environment, although employer did not in fact protect them. Employer knew that the only way the company could obtain workers during the strike was to promise job applicants that no harassment or intimidation would occur or be tolerated, and workers relied upon these statements and were damaged as a result. Genuine issue of fact exists as to

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extent employer knew statements to be untrue. Foreman v. A.S. Mid-America, Inc., 586 N.W.2d 290, 159 L.R.R.M. (BNA) 2434, 136 Lab.Cas. P 10,258 (Neb. 1998).

6. Employer's Alleged False Statement to Doctor Not Covered by Workers' Compensation Act. Worker exposed to chemicals received medical treatment for chemical poisoning which was discontinued by doctor when his manager allegedly indicated that worker had not been exposed to any chemicals. Worker subsequently died and widow brought Workers' Compensation Act claim. Court held that manager's alleged statement was not made "in the course of" business and therefore was not compensable under the exclusive remedy provision of the Georgia Workers' Compensation Act. The court noted that "the law provides a common law cause of action for fraud and other intentional torts committed by an employer." Potts v. UAP-GA. AG Chem., Inc., 506 S.E.2d 101, 270 Ga. 14, 98 FCDR 3106 (Ga. 1998).
7. Court Reinforces that Party Can Assert a Fraud in the Inducement Claim in an Employment-at-Will Situation. Material fact issues precluded summary judgment on fraud in the inducement and fraudulent misrepresentation claims where alleged prospective employer provided document indicating terms of salary, bonuses, and benefits. In response, employee-to-be sold home and possessions, terminated current business and relocated. Borum v. Alabama Inter-Forest Corporation, 719 So.2d 851, 136 Lab.Cas. P 58,477, 14 IER Cases 799 (Ala. Civ. App. 1998).
8. Unclean Hands Doctrine Bars Wrongful Discharge and Contractual Claims. By misrepresenting that she was a resident alien entitled to work in this country, employee created a risk that her employer could be sanctioned not only for knowingly employing an undocumented alien but for submitting a perjurious I-9 form. Such misrepresentation goes to the heart of the employment relationship. The unclean hands doctrine therefore would bar wrongful discharge and contractual claims. Murillo v. Rite Stuff Foods, Inc., 65 Cal.App.4th 833, 77 Cal.Rptr.2d 12, 77 Fair Empl.Prac.Cas. (BNA) 605 (Cal. Ct. App. 1998).
9. Assurances Regarding Non-Signing of Non-Compete Clause are Not Fraudulent as Not Separable from At-Will Employment Relationship. Employee, after several years of at-will employment, was issued employee handbook and ultimately asked to sign a non-competes clause. In discussions with company president, employee was allegedly told nothing would happen if he did not sign, and that he would only be terminated for good cause. Employee refused to sign non-competes agreement, and was terminated. Court found that the misrepresentation claim was dependent upon the termination and that, under Wisconsin law, no duty to refrain from misrepresentation exists independently of the performance of the at-will employment contract. Tatge v. Chambers & Owen, Inc., 579 N.W.2d 217, 219 Wis.2d 99, 14 IER Cases 129 (Wis. 1998).
10. References to Employee as "Terminated" before Date of Termination Present Questions of Fact. Genuine issues of material fact existed as to whether employer made misrepresentation to employee that he was fired prior to his actual termination, which employee relied on in not reporting to work by requested date, precluding summary judgment for employer in employee's fraudulent misrepresentation claim. Employee's showing that a July 19, 1996, letter stated, "Your job will still be available for you on 07/29/96." and that a July 24, 1996, letter referred to Hiatt as a "terminated employee," and on July 25, 1996, his boss told him, "[Y]ou [have] been terminated." and that he relied upon the employer's representations that he was a "terminated employee" in not returning to work were sufficient to warrant a ruling of reversible error. Hiatt v. Standard Furniture Manufacturing Company, Inc., 135 Lab.Cas. P 58,398, 1998 WL 257267 (Ala. Civ. App. 1998).
11. Absent Reliance, Company's Financial Fraud Will Not Support Estoppel Claim. Employer's intentional misrepresentation of its profits in the financial information are not sufficient to support employee's claim of estoppel where employee never compared the division's profits to his bonus entitlements to determine whether he was receiving the appropriate amount. Accordingly, he did not rely on any misrepresentation or deception as to the financial information, and thus any claim of equitable estoppel based on this misconduct fails for lack of the essential element of reliance. Maher v. Tietex Corporation, 500 S.E.2d 204, 331 S.C. 371 (S.C. Ct. App. 1998).

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12. Facts Surrounding Claim of Fraudulent Inducement Must Go to Trier of Fact. First employer negotiated sale of business dependent on employee being retained for four years by new employer/purchaser. Employee signed employment contract with new employer with ambiguous language regarding duration to "continue for a period of one (1) year or until termination." Employee relocated. Whether contract was signed before or after relocation was unproved. Employee was terminated after eighteen months and filed claim for fraudulent inducement. Sufficient questions existed regarding reliance and injury for the issues to go to trier of fact rather than be determined by summary judgment. Carr v. Christie, 970 S.W.2d 620 (Tex. App. 1998).
13. Alleged Promise Not to Terminate Employee was Not Misrepresentation of Existing Fact. Employee was subject to a conflicts of interest policy which extended to her spouse. Employee's spouse was considering acquiring company which was in competition with her employer's, so she sought consent from her manager, per company policy. Her manager allegedly stated, that "would not be a problem at all." Later, conflict of interest policy was reviewed and revised, and employee was told that husband must give up his competing venture or she would be terminated. She and her husband refused, and she was terminated. She then sued for negligent misrepresentation. The court found that manager's alleged oral promise not to terminate employee was not misrepresentation of existing fact but was, at most, a promise to refrain from taking some action in future, and thus employee could not maintain claim for negligent misrepresentation. Miksch v. Exxon, 979 S.W.2d 700 (Tex. App. 1998).
14. Agency's Finding on Facts of Misrepresentation Claim Deferred to by Court. Widow sued when husband's pension benefits did not survive him, claiming company had misrepresented pension plan options. The record indicated here was confusion as to how retirement options were explained to employee and his wife by company representatives; conflicting testimony raised an issue of fact. The appellate court deferred to the agency on the question of agency's findings on the credibility of witnesses. Ricks v. Missouri Local Government Employees' Retirement System, 1998 WL 663217 (Mo.App. Sept. 29, 1998).
15. Employer Has No Duty to Avoid Misrepresentations that Cause Only Emotional Harm. Job applicant was told that company was "\$35 million per year" company and was going to "double its size" over the next two to three years. Relying on these representations, applicant accepted job offer. Subsequently, he found out the company's financial situation was not strong. A few months later, he was fired as part of what employer described as an "economically-induced restructuring." Court found that employer did not have a duty to avoid negligent misrepresentations that cause only emotional harm, rather than physical injury. Brogan v. Mitchell International, Inc., 181 Ill.2d 178, 692 N.E.2d 276, 229 Ill.Dec. 503 (Ill. 1998).

FRAUD AND MISREPRESENTATION UPDATE (June 1998)

1. No Fraudulent Inducement to Sign Release. Facts do not support claim of fraudulent inducement to sign release of employment claims when employee was told that she would receive a separation package regardless of whether she signed the release, was given opportunity to consult with an attorney (which she did), and had an opportunity to revoke (which she did not) although signing the release increased the severance package from \$32,800.77 to \$68,891.91. Branker v. Pfizer, Inc., 981 F.Supp. 862 (D.C.N.Y. 1997).
2. Intent to Deceive not Required in Connecticut. Under Connecticut law, a claim for negligent misrepresentation requires that the information have been false at the time it was given, not simply that the decision maker changed his mind. A plaintiff need not allege present intent to deceive, however, merely that the statement was false when made, and the maker had the means to know it was false. Ruffalo v. CUC Intern., Inc., 989 F.Supp. 430 (D. Conn. 1997).
3. Negligent Conduct by Union not Sufficient to Breach Fair Representation Duty. That representatives were negligent in communicating terms of plant-closing agreement to union member is not sufficient grounds for claim of breach of duty of fair representation as union's actions were not arbitrary, discriminatory, nor made in bad faith. Overton v. Local 597, 158 L.R.R.M. (BNA) 2176 (E.D.Mo. 1998).

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4. Claims not Requiring Application of Collective Bargaining Agreement Are not Preempted. Airline's duty to disclose its intention to scale back service, which affected value of flight passes used as part of early retirement program, was independent of airline's right, under collective bargaining agreement, to alter its level of service to and from Denver. Resolution of former flight attendants' claims depends not on interpretation of the CBA, but on a factual determination of whether the elements required to recover for fraudulent concealment can be proved. Claims are therefore not preempted as "minor disputes" under Railway Labor Act. Ertle v. Continental Airlines, Inc., 136 F.3d 690 (10th Cir. 1998).
5. Non-specific Plans for Future of Treatment Clinic Cannot Form Basis of Misrepresentation. Claim of fraudulent misrepresentation does not lie when representation made took the form of expressed desires and plans regarding the future of clinic's operation, but was not a promise to prospective employee doctor, and when representation related to future act. To be actionable, a misrepresentation must relate to a pre-existing or present fact; statements about future occurrences are not actionable. Thomas v. Talbott Recovery Systems, Inc., 982 F.Supp. 794 (D. Kansas 1997).
6. Alabama At-Will Employment Reinforced. Employees of mortgage company, who left their established employment to work in company's new branch which was closed a few months after it opened, failed to establish fraud claim based on suppression of information regarding minimal level of production at early stages of office development. When hired by a new business venture the idea that this new business must obtain a minimal profitability in order to remain open is inherent in the at-will employment relationship. Since employer could terminate "each and every employee for any reason it desired," it had no legal obligation to inform them of any grounds that could result in their employment being terminated, including productivity or profitability for a new branch office being below the employer's projections or expectations after the first few months of operation. As at-will employees, they were on notice that they could be terminated at any time for good cause, bad cause, or no cause at all. Wade v. Chase Manhattan Mortg. Corp., 994 F.Supp. 1369, 13 IER Cases 1079 (N.D.Ala. 1997).

**1998 CASE LAW DEVELOPMENTS INTENTIONAL AND
NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS
IN THE EMPLOYMENT CONTEXT**

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I. INTRODUCTION AND OVERVIEW

As in previous years, in 1998 courts routinely dismissed claims of intentional or negligent infliction of emotional distress brought by employees against their employer or former employer. In doing so, they typically reasoned that the alleged acts, even if proven, were insufficient as a matter of law to satisfy the “extreme or outrageous” conduct element of the tort. The workplace acts alleged -- often termination on grounds the plaintiff alleged to be unfair or discriminatory -- in a majority of reported decisions fell short of the requirement that they be “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society.”

Nonetheless, two themes frequently arose in 1998 decisions addressing intentional and negligent infliction of emotional distress claims in the employment context. *First*, courts frequently were asked to decide whether a plaintiff’s emotional distress claim was preempted by: (1) a state workers’ compensation statute; (2) a state human rights act; or (3) the Labor-Management Relations Act. *Second*, courts often were asked to rule whether, as a matter of law, allegations of sexual or other unlawful forms of harassment in the workplace were sufficient to state an infliction of emotional distress claim and more specifically, to satisfy the outrageous conduct requirement.

A. Preemption Issues

1. Preemption by State Workers’ Compensation Statutes: Analysis of preemption by state workers’ compensation acts usually arose in the context of alleged intentional infliction of emotional distress claims. Courts finding that such claims were preempted generally reasoned that the complained-of conduct was an “accident” from the perspective of the plaintiff and did not fit the “intentional acts” exception typical of state workers’ compensation statutes. The “intentional acts” exception did not apply, these courts reasoned, because the alleged conduct was not foreseeable by the employer or the employee, and was not authorized by the employer. *See, e.g., Cibrario v. American Drug Stores, Inc.* (Illinois); *Hibben v. Nardone* (Wisconsin). Other courts reasoned that because the alleged conduct was incidental to the normal employment relationship, claims for emotional injuries resulting from such conduct were compensable exclusively under the workers’ compensation act. *E.g., Benson v. Gomez* (California); *Brown v. United States Postal Service* (California).

Courts holding that emotional distress claims were not preempted by state workers’ compensation statutes varied in their rationale. For instance, some courts found that the behavior was intentional, and therefore fell within the intentional acts exception to the workers’ compensation statute or otherwise was not covered by the act’s exclusivity provision. *E.g., Takaki v. Allied Machinery* (Hawaii); *Coble v. Joseph Motors* (Indiana). Another court looked to the definition of “injury” in the workers’ compensation statute and determined that when an intentional infliction claim is based on sexual harassment, the tort is not an “injury” as defined by the statute because the harm neither arises out of employment nor is a harm incidental

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to employment. *Lucero-Nelson v. Washington Metropolitan Area Transit Authority* (District of Columbia). Similarly, another court held that a manager's alleged misrepresentations about the plaintiff's working conditions, which misrepresentations allegedly were made while the plaintiff was hospitalized for a work-related condition and resulted in discontinuation of certain medical treatments, were not made "in the course of" the plaintiff's employment, and tort claims based on those misrepresentations therefore were not preempted by the workers' compensation act. *Potts v. UAP-GA.AG. Chemicals, Inc.* (Georgia). At least one court has held that the Federal Employee's Compensation Act preempts a claim of intentional infliction of emotional distress. *Vargo-Adams v. United States Postal Service* (Ohio).

Negligent infliction of emotional distress claims also were held to be preempted by state workers' compensation laws. *E.g., Dunlap v. Association of Bay Area Governments* (California).

2. Preemption by State Human Rights Acts: Courts addressing preemption in reference to a state human rights act examined whether the plaintiff based his or her emotional distress claim on the same acts which formed the basis of the plaintiff's human rights act claim. Where the factual basis for the tort claim was coextensive with the alleged human rights act violation, courts typically held that the emotional distress claim was preempted. *See, e.g., Ratley v. City of Aurora* (Illinois); *Westin v. Mercy Medical Services, Inc.* (Iowa). In contrast, where the plaintiff alleged facts beyond those supporting the human rights act violation, courts found that the human rights act did not preempt the emotional distress claim. *See, e.g., Knutson v. Sioux Tools, Inc.* (Iowa); *Scribner v. Waffle House, Inc.* (Texas).

3. Preemption by Section 301 of the Labor-Management Relations Act: Finally, courts continued to address whether the terms of a collective bargaining agreement determine or affect resolution of plaintiffs' emotional distress claims, and thus whether Section 301 of the Labor-Management Relations Act preempts those claims. Where the plaintiff's emotional distress claim arose from the terms of, or required analysis of, the collective bargaining agreement (such as, typically, claims based on allegedly wrongful discharge), courts held that Section 301 preempted the plaintiff's tort claim. *See, e.g., Henderson v. Merck & Co.* (Pennsylvania); *Tidwell v. Southwestern Bell Yellow Pages, Inc.* (Texas). In these cases, the plaintiff's sole remedy was held to be in the arbitral forum or otherwise pursuant to the terms of the collective bargaining agreement. A federal appeals court noted, however, that those parts of an emotional distress claim that were based on particularly vicious or abusive conduct would not be preempted by the LMRA, even though other portions of the claim would be. *E.g., St. John v. International Association of Machinists and Aerospace Workers, Local 1010* (8th Cir. (Iowa)).

Where the alleged conduct involves claims of unlawful discrimination or otherwise is not governed by a collective bargaining agreement, Section 301 preemption does not apply. *E.g., Cortes v. American Stores Co.* (California).

B. Emotional Distress Claims Based on Harassment Allegations

In many of the relatively rare cases in which a workplace-context emotional distress claim survived the employer's motion to dismiss or motion for summary judgment, the plaintiff alleged sexual, racial, or other forms of workplace harassment and typically also brought a harassment claim under Title VII, the ADA, and/or their state statutory counterparts. When mostly verbal, non-physical harassment was alleged, summary judgment often was granted on grounds that the outrageous conduct and/or severe emotional distress elements could not be proven. *E.g., Cherry v. Champion International Corp.* (North Carolina). On the other hand, where an employer failed to respond to harassment claims or retaliated against the plaintiff for reporting them, or where physical harassment was alleged, intentional infliction claims survived summary judgment. *Poole v. Copland, Inc.* (North Carolina); *McLaughlin v. Rose Tree Media School District* (Pennsylvania); *Speight v. Albano Cleaners, Inc.* (Virginia). Allegations of other forms of harassment, such as national origin harassment, sometimes also were sufficient to withstand summary judgment. *E.g., Takaki v. Allied Machinery* (Hawaii).

Another notable development in decisions involving sexual harassment allegations is courts' treatment of the "thin skull" rule. When plaintiffs seek emotional distress damages, employers often are permitted to discover other possible causes of the alleged emotional distress, sometimes leading to discovery of prior sexual, physical, or emotional abuse. Accordingly, courts in 1998 were called upon to analyze whether the plaintiff's evidence proved that the defendant's conduct would have caused injury to a plaintiff of ordinary mental condition. If such evidence is offered, the employee can recover for the full

extent of her damages. *E.g., Poole v. Copland, Inc.* (North Carolina). In another case, the plaintiff attempted unsuccessfully to use her supervisor's alleged knowledge of her past abuse to bolster the outrageousness of the conduct. *Philips v. AccuLab, Inc.* (Louisiana).

II. STATE-BY-STATE SUMMARY OF DEVELOPMENTS⁴

ALABAMA

Henry v. Georgia-Pacific Corp., No. 19708867 (Ala. 1998): The Supreme Court of Alabama held that Georgia-Pacific may be liable for the tort of intentional infliction of emotional distress where a male supervisor told a female employee that, in order to retain her employment, she was required to continue attending third-party counseling sessions, even after the female employee had reported improper sexual conduct by the third party conducting the sessions.

ARKANSAS

Unicare Homes, Inc. v. Gribble, ___ S.W.2d ___, 1998 WL 748426 (Ark. Ct. App. 1998): The court reversed judgment for a discharged nurse on her intentional infliction of emotional distress claim where her discharge was based on theft of milk from the facility's refrigerator. The court reasoned that even if the facts surrounding the discharge resulted from a claimed "conspiracy" to "frame" the plaintiff, those facts did not rise to extreme and outrageous conduct.

CALIFORNIA

Benson v. Gomez, No. C-96-1877-VRW, 1998 U.S. Dist. LEXIS 7327 (N.D. Cal. 1998): The chief psychiatrist in a prison alleged that when he took steps to ensure that inmates received adequate mental health care, he suffered retaliation in the form of impracticable assignments, withholding of needed assistance, verbal berating, loss of responsibilities, demotion and discipline on false grounds, and ultimately, coerced resignation. He brought various constitutional and tort claims including intentional and negligent infliction of emotional distress. The court held that the intentional infliction claim was barred by the California Workers' Compensation Act because the alleged acts were part of the normal employment relationship. In the alternative, the court held that summary judgment would be granted because the plaintiff's evidence did not satisfy the outrageous conduct requirement or the intent element.

Brown v. United States Postal Service, No. C-95-4623-FMS, 1998 WL 242677 (N.D. Cal. 1998): The plaintiff, a postal supervisor, alleged that her superiors failed to provide her with an evaluation, assigned her too few workers, refused to provide her with a telephone, screamed at her in the presence of coworkers, and otherwise discriminated against her in the terms and conditions of employment on the basis of her race or age. She experienced depression, nervousness, drowsiness, difficulty communicating, and headaches, for which she underwent psychotherapy and took Prozac. The court granted summary judgment on her intentional infliction claim, reasoning that the claim was preempted by the California Workers' Compensation Act. "Assignment of workers, evaluations, reprimands, locations of desks and telephones, and decisions about the coding of mail are all within the normal range of supervisory conduct at the Post Office." Even alleged yelling by the plaintiff's supervisors, which was related to their supervisory decisions, was not "outside the 'risk inherent in the employment relationship.'"

Cortes v. American Stores Co., No. C97-4171-FMS, 1998 U.S. Dist. LEXIS 1448 (N.D. Cal. 1998): The plaintiff, a union-represented courtesy clerk, alleged sex and disability discrimination related to promotional opportunities, training and mentoring, work assignments, transfer opportunities, performance evaluations, accommodation requests, and other terms and conditions of employment. She brought various tort claims, including intentional infliction of emotional distress. The employer sought summary judgment, arguing that the claim was preempted by Section 301 of the Labor-Management

⁴ This summary includes only 1998 and a few late 1997 decisions. Cases are discussed in alphabetical order (rather than by court and recency) within each state.

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Relations Act. The court rejected the preemption argument, holding that “most of the conduct alleged by plaintiff to have caused her emotional distress is not controlled by provisions of the CBA. Thus examination or interpretation of the CBA would not help the court determine whether the conduct was extreme or outrageous.”

Dunlap v. Association of Bay Area Governments, No. C-97-2224-THE, 1998 U.S. Dist. LEXIS 2984 (N.D. Cal. 1998): The plaintiff sustained injuries on the job and sought and received a workers’ compensation settlement. He alleged that his former employer and the insurer failed to authorize certain necessary medical care and treatment, including in-home physical therapy, home exercise equipment, and a surgical procedure. Among other claims, he asserted negligent infliction of emotional distress. The court dismissed the claim, holding that it was preempted by the California Workers’ Compensation Act.

Harper v. United States, ___ F. Supp. ___, 1998 WL 765049 (N.D. Cal. 1998): The court dismissed negligent and intentional infliction of emotional distress claims brought by a postal worker after an “Uzi” had been found approximately 100 feet from her work space and a coworker asked the plaintiff if she thought “that [the] Uzi was meant for [her].” The plaintiff failed to comply with and fulfill the administrative prerequisites to suit under the Federal Tort Claims Act.

Philips v. Gemini Moving Specialists, 74 Cal. Rptr. 2d 29, 13 IER Cas. (BNA) 1587 (Cal. Ct. App. 1998): The plaintiff drove a van and performed other assignments as a “casual employee” for a moving company. The plaintiff alleged that his employment was terminated because he questioned the defendants about their right under California law to make a payroll deduction to cover towing expenses. He brought wrongful discharge, retaliation, and intentional and negligent infliction claims. The appeals court first ruled that the wrongful discharge claim against the employer was improperly dismissed, reasoning that the plaintiff’s discharge, if proven, violated a fundamental and substantial public policy protecting employees’ wages. The court then ruled that the emotional distress claims were not preempted by the Workers’ Compensation Act. Notwithstanding the usual rule that emotional distress incident to the employment relationship is exclusively compensable under the Act, “a plaintiff can recover for infliction of emotional distress if he or she has a tort cause of action for wrongful termination in violation of public policy or . . . of an express statute because then, emotional distress damages are simply a component of compensatory damages.”

Sheppard v. Freeman, 67 Cal. App. 4th 339, 79 Cal. Rptr. 2d 13 (Cal. Ct. App. 1998): Judgment was entered in favor of coworkers who had been named as individual defendants on an intentional infliction claim brought by a pilot who was discharged after failing a contractually required captain upgrade test. The California Court of Appeals affirmed the judgment reasoning that, under California law, coworkers cannot be held liable for tort claims based on their conduct related to the employer’s discharge decision, regardless of whether they acted within the scope of their employment, if the employer could not be held liable for the underlying tort of wrongful discharge.

24 Hour Fitness, Inc. v. Superior Court, 66 Cal. App. 4th 1199, 78 Cal. Rptr. 2d 533 (Cal. Ct. App. 1998): The court ordered arbitration of sexual harassment claims and various tort claims, including intentional infliction of emotional distress, where the arbitration clause at issue extended to “every kind or type of dispute” arising from the plaintiff’s employment. The court further held that individual defendants also were entitled to the benefit of the arbitration agreement to the extent the plaintiff alleged that they were acting within the scope of their employment.

COLORADO

Brunetti v. Rubin, ___ F. Supp. ___, 1998 WL 162189 (D. Colo. 1998): The plaintiff, who worked for the IRS as Secretary to the Branch Chief, Noreen Medeiros, sued the IRS and Medeiros alleging gender harassment against the IRS under Title VII and intentional infliction of emotional distress against Medeiros. Medeiros moved to dismiss on three grounds: that the claim against her was preempted by Title VII; that the plaintiff’s allegations were insufficient as a matter of law to state a claim; and that the court should decline to exercise supplemental jurisdiction over the claim. The court ruled that although Title VII is the exclusive judicial remedy for claims of discrimination in federal employment, it does not preempt causes of

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action where the harms suffered by the federal employee involve more than discrimination, such as the right to be free from intentional infliction of emotional distress. The court found that the conduct alleged by the plaintiff (which included insisting that the plaintiff accompany her on out-of-town business trips and sleep in adjoining hotel rooms with the connecting door open; repeatedly contacting the plaintiff by telephone after work and on weekends and appearing at the plaintiff's house without invitation; and repeatedly touching the plaintiff in an offensive manner even after the plaintiff requested that Medeiros cease) was sufficient to withstand a motion to dismiss. The court also ruled that it would continue to exercise supplemental jurisdiction because the plaintiff's claims under Title VII against the IRS and under state law against Medeiros relied on common evidence.

Mein v. Pool Company, Inc., 989 F. Supp. 1337 (D. Colo. 1998): The plaintiff was injured working as a rig manager on an oil rigging drill in Saudi Arabia when he fell off the rig and landed on his neck and shoulders. After receiving various disability benefits for more than ten years, the plaintiff's disability benefits were terminated because he no longer met the definition of "total disability" under the plan. The plaintiff sued both the plan and his employer, alleging violation of ERISA and various state law claims, including intentional and negligent infliction of severe emotional distress. The court ruled that the plaintiff's state law claims, including the emotional distress claim, were preempted by ERISA (citing Pitman v. Blue Cross & Blue Shield of Oklahoma, 24 F.3d 118 (10th Cir. 1994)).

CONNECTICUT

Belanger v. Commerce Clearing House, ___ F. Supp. ___, 1998 WL 758447 (D. Conn. 1998): The court dismissed for failure to state a claim upon which relief could be granted the negligent infliction of emotional distress claim brought by the plaintiff following her discharge from a sales position after reorganization of the defendant's field sales force. The court found that the plaintiff had failed to allege that the defendant acted unreasonably in the termination process where the plaintiff alleged only that the employer stated it would consider her for an open sales position but did not ultimately select her for such a position.

Knight v. Southern New England Telephone Corp., ___ F. Supp. ___, 1998 WL 696014 (D. Conn. 1998): On preemption grounds, the court dismissed an intentional infliction of emotional distress claim brought by a disabled union employee allegedly discriminatorily denied certain job assignments and transfers. The court reasoned that the claim is preempted by Section 301 of the Labor-Management Relations Act where "[i]t would be impossible to determine whether or not defendant's conduct was extreme and outrageous without reviewing and interpreting whether defendant's actions were in compliance with the terms and conditions of the CBA, in particular, the [transfer] program terms, wage standards, and the procedures for job placement, job transfers, and medical restrictions."

Northup v. Connecticut Commission on Human Rights & Opportunities, ___ F. Supp. ___, 1998 U.S. Dist. LEXIS 3111 (D. Conn. 1998): The plaintiff sued her employer and two individual supervisors alleging disability and race discrimination under federal law and intentional and negligent infliction of emotional distress under Connecticut law. The plaintiff alleged that she was subjected to race-based harassment and racially motivated remarks. After the defendants failed to take remedial action, she took unpaid medical leave due to work-related depression, stress, and anxiety. Upon returning from her medical leave, the plaintiff claims the defendants failed to accommodate her disability. She eventually took early retirement and terminated her employment. The court dismissed the negligent infliction of emotional distress claims as barred by the two-year Connecticut statute of limitations. Because the statute of limitations for intentional infliction of emotional distress in Connecticut is three years, this claim was not time-barred. The court rejected the defendants' argument that the intentional infliction claim was barred by a collective bargaining agreement because the plaintiff's claims were not based on promotions, layoffs, and grievances, but on claims of outrageous activity involving racial discrimination and racially disparaging comments in the workplace. The court stated that although an employee faces a high hurdle in establishing that conduct within the employer/employee relationship amounts to intentional infliction of emotional distress, this matter is more appropriately taken up at summary judgment or at trial than on a motion to dismiss. The court therefore denied the defendants' motion to dismiss the intentional infliction claim.

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Olson v. United Technologies Corp., 1998 WL 698499 (D. Conn. 1998): A discharged employee's claims of intentional and negligent infliction of emotional distress claims survived the employer's summary judgment motion. The court found triable factual issues on the tort claim where the employee had established triable factual issues on her claims of gender discrimination in employment.

Pavlisca v. Bridgeport Hospital, ___ A.2d ___, 1998 WL 215805 (Conn. App. 1998): The defendant appealed a jury verdict in favor of the plaintiff on her claims related to the termination of her employment. At the time of her termination, the plaintiff was employed as a scrub nurse in the delivery room of the hospital. Prior to the incident which led to her termination, the plaintiff had received a warning after a lap pad was left inside a patient during an operation. Approximately six months later, the plaintiff left the sterile environment of an operating room after being specifically directed not to do so. She received another written warning. When she returned from vacation a few weeks later she was notified by her supervisor that her employment was being terminated, effective immediately. She was asked to gather her personal items from her locker and to leave the hospital premises. The appellate court set aside the jury verdict on the plaintiff's claim of negligent infliction of emotional distress because there was no evidence regarding any unreasonable conduct by the defendant during the termination process. The evidence showed only that the plaintiff was terminated from employment without warning, and, since plaintiff was an employee-at-will who could be terminated at any time, the court ruled that there was no support for a finding that the defendant acted unreasonably during the termination process.

Proctor v. MCI Telecommunications Corp., ___ F. Supp. ___, 1998 U.S. Dist. LEXIS 2358 (D. Conn. 1998): Proctor sued MCI for employment discrimination based on his race in connection with his failure to receive a promotion and his termination from employment. He also brought related common law claims under Connecticut law, including claims for intentional and negligent infliction of emotional distress. The plaintiff had applied for a position of National Account Executive for which he was not hired. The plaintiff was then terminated for sexual harassment based on the allegations of two female employees. The plaintiff denied the sexual harassment allegations and claimed it was the female employees who behaved inappropriately. MCI eventually posted a position for National Accounts Manager, a more senior position, and, after determining it did not need to fill both positions, filled the position of National Accounts Manager several months after the plaintiff's termination. Proctor sued, claiming that he was not hired for the position of National Account Executive because of his race and that sexual harassment was a mere pretext for his discriminatory termination. The court found sufficient factual disputes regarding the Title VII claims that it denied MCI's motion for summary judgment. It granted summary judgment on the common law claims, however, including the claims for intentional and negligent infliction of emotional distress, because the plaintiff did not respond to MCI's arguments with respect to these claims and the court could not discern sufficient factual support for them in the record.

Rose v. James River Paper Company, ___ F. Supp. ___, 1998 WL 226348 (D. Conn. 1998): Rose sued James River for age discrimination, intentional infliction of emotional distress, and other tort claims following his termination as a result of a reduction in force. The plaintiff became a manager of sales technology in 1984. In 1991 he was demoted, ostensibly based on performance problems. In 1992 he was demoted again to the position of sales technology analyst. After an operating loss in 1992, James River undertook a headcount reduction in the summer of 1993. The plaintiff's supervisor, with whom the plaintiff had a personality conflict, selected his job for elimination. The plaintiff was not offered the opportunity to post for any other positions. The court dismissed the plaintiff's intentional infliction of emotional distress claim because the plaintiff did not allege that his termination was done in a manner that was sufficiently egregious or oppressive to rise to the level of extreme and outrageous conduct.

Thomas v. Saint Francis Hospital and Medical Center, 990 F. Supp. 81 (D. Conn. 1998): Thomas, a single black mother and member of a Pentecostal church, worked for Saint Francis Hospital as a radiology technician for over 15 years. She was terminated for allegedly violating hospital policies relating to patient care by preaching to patients while conducting mammograms. Thomas received a verbal warning and two written warnings for this conduct, as well as warnings for violations of the hospital's attendance policies and excessive personal phone calls. She received a third written warning and

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was terminated when a patient filed a formal complaint stating that Thomas had preached to her. In response to these allegations, the plaintiff claimed that the defendant used the alleged violations of hospital policies as a pretext to discriminate against her due to her race, religion, marital status, and gender. She alleged that comments were made to her concerning how a black single mother could go away on vacation and send her child to private school. The court found that as a matter of law the defendant's behavior did not constitute extreme and outrageous conduct and therefore granted summary judgment in favor of the defendant. With respect to the plaintiff's claim for negligent infliction of emotional distress, the court ruled that in the employment context such a claim arises only if it is based upon unreasonable conduct of the defendant in the termination process. Although the plaintiff may not have been satisfied with the defendant's actions, the record did not indicate that the defendant acted so negligently as to give rise to an action for negligent infliction of emotional distress. The court stated that the plaintiff could not rely on the wrongful termination alone, but must allege unreasonable conduct on the defendant's part that occurred with respect to her termination. It therefore granted summary judgment in the defendant's favor.

DELAWARE

Pamintuan v. Nanticoke Memorial Hospital, Inc., ___ F. Supp. ___, 1998 WL 743680 (D. Del. 1998): After granting summary judgment on federal discrimination claims brought by the plaintiff, a discharged physician, the court dismissed state law intentional infliction of emotional distress claims on jurisdictional grounds.

DISTRICT OF COLUMBIA

Duncan v. Children's National Medical Center, 702 A.2d 207 (D.C. 1997): The court held that an allegation that the defendant hospital forced the pregnant plaintiff either to accept transfer to a department in which she would be exposed to radiation or lose her job was not sufficiently outrageous to sustain a claim for intentional infliction of emotional distress. The court reasoned that the emotional distress suffered by the employee was not a result of the hospital's intentional conduct, as the employee had the choice to refuse the transfer and the hospital did not force her to work where she would be exposed to radiation. Further, the hospital was merely implementing its staffing changes.

Lucero-Nelson v. Washington Metropolitan Area Transit Authority, 1 F. Supp. 2d 1 (Dist. D.C. 1998): In considering whether the D.C. Workers Compensation Act preempted the plaintiff's claim for intentional infliction of emotional distress, the court examined the Act's definition of "injury" and ruled that when emotional distress is based primarily on sexual harassment, the tort falls outside the definition because the harm neither arises out of employment nor is a harm incidental to employment. Therefore, the court denied summary judgment on the intentional infliction claim.

FLORIDA

Weld v. Southeastern Cos., 10 F. Supp. 1318 (M.D. Fla. 1998): The plaintiff brought various national origin discrimination, contract, and tort claims following the termination of her employment as a benefits clerk. With respect to the plaintiff's intentional infliction claim, an allegedly discriminatory remark by one of the individual defendants and an alleged altercation with her immediate supervisor did not fulfill the outrageous conduct requirement. With respect to the negligent infliction claim, the plaintiff failed to satisfy the impact requirement.

GEORGIA

Amstadter v. Liberty Health Care, __ Ga. App. ___, No. A98A0735 (1998): Amstadter, a practicing psychiatrist, had a written independent contractor agreement with Liberty Health Care, which provided physicians to Central State Hospital. Under the contract, Amstadter was to provide the hospital with medical services for three years. After six weeks' work, the hospital informed Liberty that Amstadter was not adjusting well to his job assignment and hospital guidelines, and asked that he be reassigned. Liberty thereafter sent Amstadter a letter terminating his contract and also stating that Amstadter would be reported to the federal National Practitioner Data Bank ("NPDB"). Amstadter sued Liberty, claiming improper termination of his contract and intentional infliction of emotional distress allegedly resulting from the termination of his employment without cause and the threat to "ruin" him by reporting him to the NPDB. The appeals court held that both the

breach of contract claim and the intentional infliction of emotional distress claim had been properly dismissed. With respect to the latter, the court reasoned that Georgia courts have repeatedly held that the mere termination of employment does not support an intentional infliction claim. Rather, an employer's actions must have been so terrifying that they naturally humiliated, embarrassed, or frightened the employee. Georgia courts also hold that neither the mere filing of a lawsuit nor threatening to file a lawsuit is sufficient to establish humiliating, embarrassing, or frightening conduct. Here, although Amstadter claimed to feel a "precipitous state of shock, trauma and mental depression" upon his termination and claimed that the threat to report him to the NPDB resulted in "dejection, depression, [and] rejection," the court ruled that the results of his termination and the threatened report were no more than mere insults and indignities and were not sufficient to state a claim.

Potts v. UAP-GA.AG. Chemicals, Inc., No. S97G1889 (Ga. 1998): The administrator of the estate of a chemical plant employee who died brought wrongful death, fraud, and intentional infliction claims against the deceased's former employer, alleging that his death resulted from workplace exposure to certain chemicals. The plaintiff further alleged that treatment for chemical poisoning had been discontinued because the deceased's former manager fraudulently and tortiously told the treating doctor that the deceased could not possibly have been exposed to chemicals in the workplace. The Georgia Supreme Court held that these claims were not preempted by the Georgia Workers' Compensation Act. The court reasoned that willful acts of a third person directed against an employee for reasons personal to such employee do not result in covered injuries. Here, the alleged fraud "did not occur during the period of [the deceased's] employment, the hospital clearly was not a place where he performed employment duties, and he was not fulfilling or doing anything incidental to his employment duties." Accordingly, the alleged wrongdoing did not arise "in the course of" the deceased's employment and the tort claims therefore were not preempted. A dissenting judge argued that "[b]y denying tort immunity in this case, we are encouraging employers to refuse to talk to health care providers concerning on-the-job activities."

HAWAII

Takaki v. Allied Machinery, 13 IER Cas. (BNA) 1256 (Ha. Ct. App. 1998): The plaintiff's intentional infliction claim against his former employer was not preempted by the Hawaii Workers' Compensation Act, where the employee alleged that his emotional distress was caused by his racially motivated termination and thus was not work-related. The court cited an earlier Hawaii Supreme Court decision (Furukawa), which reasoned that "'the workers' compensation scheme serves to bar a civil action for physical and emotional damages resulting from work-related injuries and accidents. [The plaintiff's] claims are not based on any such 'accident,' but rather on the alleged intentional conduct of [the defendants].'" The court also rejected the defendant's argument that the outrageous conduct element had not been satisfied, where the plaintiff stated in an affidavit that his immediate supervisor often called him a "'lousy f---ing Jap.'" "We cannot say that reasonable people would not differ on the question of whether Defendants' act of terminating [the plaintiff] in this alleged context of racial discrimination was unreasonable or outrageous."

IDAHO

Jeremiah v. Yanke Machine Shop, Inc., 953 P.2d 992 (Idaho 1998): The plaintiff, a Romanian emigre, claimed harassment and eventual termination from his machinist job based on his national origin. He alleged that he was called demeaning names, that his property was damaged, that threats against his well-being were made, that his mistakes were exaggerated, that helpers refused to assist him on rush jobs, and that "an employment evaluation which contained mean-spirited and obscene entries was placed on his desk." He was fired for alleged work performance reasons shortly after he complained about the harassment. The appeals court affirmed the jury's verdict in favor of the plaintiff on the harassment claim, but also affirmed dismissal of the intentional infliction claim. The court reasoned that the plaintiff had failed to present evidence satisfying the severe emotional distress requirement where the plaintiff's counselor testified that the plaintiff was "seriously frustrated," but that he was not depressed or otherwise experiencing severe emotional distress.

ILLINOIS

Ackerman v. City of Harvey Police Dep't, No. 96 C 4363, 1998 U.S. Dist. LEXIS 1758 (N.D. Ill. Jan. 29, 1998): The plaintiff alleged intentional infliction of emotional distress based on the defendants' intentionally interfering with her religious practices, attempting to sabotage her career with unwarranted and untrue bad evaluations, mocking and degrading her, and attempting to "terrorize" her through interrogating her for long durations. The court ruled that in the employment context, Illinois courts have recognized that personality conflicts and questioning of job performance are "unavoidable aspects of employment," and that "frequently they produce concern and distress." The court dismissed the plaintiff's claim because she failed to show that the defendants' conduct was extreme and outrageous.

Cibrario v. American Drug Stores, Inc., No. 97 C 8279, 1998 WL 677167 (N.D. Ill. Sept. 22, 1998) (slip op.): The plaintiff brought a claim of intentional infliction of emotional distress against her employer based on alleged sexual assault by a co-employee and the employer's retention and hiring of the alleged assailant. The court opined that the Illinois Workers Compensation Act provides the exclusive remedy for work-related injuries and bars personal injury suits by employees against employers. The exception to the Act regarding injuries that are not accidental does not apply to "intentional" acts where the act was not foreseeable by the employer or the employee and was not authorized by the employer. The court found that because the alleged assault was by a co-employee and the employer neither foresaw nor authorized this action, the claim was preempted.

Fenner v. Favorite Brands, Inc., No. 97 C 5906, 1998 U.S. Dist. LEXIS 7224 (N.D. Ill. May 12, 1998): The plaintiff was an art director whose employer was purchased by the defendant. After a period of time when the plaintiff was unsure whether she was on the correct payroll and was unsure of the status of her home working situation, the plaintiff's employment was terminated. The plaintiff alleged negligent infliction of emotional distress, claiming that the defendant breached its duty under COBRA to notify her of her right to continued coverage. The plaintiff further alleged that she suffered severe emotional distress from this breach. The court reasoned that the plaintiff was alleging that she was a direct victim of the defendant's negligence. To sustain a negligent infliction claim, the plaintiff must allege a physical impact or injury. Because the plaintiff failed to do so, the court dismissed this claim.

Neal v. Children's Habilitation Center, No. 97 C 7711, 1998 WL 673592 (N.D. Ill. Sept. 14, 1998) (slip op.): The plaintiff brought a claim for intentional infliction of emotional distress based on the employer's denying her FMLA leave and eventually terminating her employment. The court stated that the conduct alleged here was not the type of outrageous and intolerable conduct intended to be sanctioned by this tort. Further, the plaintiff's only evidence of emotional distress was the alleged occurrence of migraine headaches, and the record revealed that the plaintiff suffered from such headaches prior to the defendant's actions. Therefore, the court granted summary judgment for the employer.

Ratley v. City of Aurora, No. 97 C 3422, 1998 U.S. Dist. LEXIS 1021 (N.D. Ill. Jan. 22, 1998): The employer moved to dismiss the employee's claim of intentional infliction of emotional distress based on racial discrimination and retaliation on the basis that it was preempted by the Illinois Human Rights Act. The court stated that whether a circuit court may exercise jurisdiction over a tort claim related to racial discrimination depends upon whether the tort claim was inextricably linked to a human rights violation such that there is no independent basis for the action apart from the Act itself. In this case, because it was clear from the face of the complaint that the plaintiff was basing her emotional distress claim solely on the allegations of race discrimination and retaliation, the court held that it did not have jurisdiction over the claim.

Strasburger v. Board of Education, 143 F.3d 351 (7th Cir. 1998): The plaintiff, a teacher terminated in a reduction-in-force, supported his claim of intentional infliction of emotional distress with allegations that the reduction-in-force was pretextual and that the School Board members had ruined his reputation and standing in the community by investigating and publicizing his criminal background. The court found that the plaintiff had presented insufficient evidence to show that it was the members of the School Board who made defamatory statements. Even if the allegations were true, the conduct complained of was not sufficiently outrageous.

INDIANA

Coble v. Joseph Motors, 695 N.E.2d 129 (Ind. Ct. App. 1998): The plaintiff claimed that after a workplace injury in which her finger was severed, her manager found the finger and “kept [it] on public display” to remind others of workplace safety. The court found that the claim fell outside of the workers’ compensation statute based on the exclusion for intentional conduct. The court went on to find the defendant not liable because the manager did not intend to hurt the plaintiff, and was not substantially certain that harm would occur to the plaintiff. In addition, the court held that the manager’s actions could not be imputed to the defendant employer. The court therefore granted summary judgment to the employer.

Filippo v. Northern Indiana Public Service Corp., 141 F.3d 744 (7th Cir. 1998): The plaintiff brought a claim against her employer and union for intentional infliction of emotional distress based on retaliatory discharge, discipline, harassment, over-broad supervision, and the union’s alleged failure to provide representation for her grievance hearing. The court found that to determine whether the employer’s or the union’s actions were extreme or outrageous would necessarily require an interpretation of the collective bargaining agreement. Therefore, the court held that the LMRA displaced the intentional infliction claim.

IOWA

Knutson v. Sioux Tools, Inc., 990 F. Supp. 1114 (N.D. Iowa 1998): The plaintiff based her claim of intentional infliction of emotional distress on the same conduct (sexual comments and teasing) that allegedly created a sexually hostile environment. The plaintiff also alleged that her supervisor knocked her on the head. The court found that to the extent the plaintiff based her claim on allegedly assaultive conduct, it was independent of any claim under the Human Rights Act. Therefore, the court held that the plaintiff’s intentional infliction claim was not preempted by the Iowa Human Rights Act.

St. John v. International Association of Machinists and Aerospace Workers, Local 1010, ___ F.3d ___, 157 L.R.R.M. (BNA) 2927 (8th Cir. 1998): The Eighth Circuit reversed the district court’s ruling that certain state tort claims were not preempted by the federal Labor-Management Relations Act. After resigning from the union, the plaintiff allegedly was required to work excessive hours with little or no time off, contrary to medical advice. He eventually was admitted to a psychiatric medical center for treatment of mental distress. The Eighth Circuit held that substantial parts of the intentional infliction claims against the Union were preempted by the LMRA because their resolution required consideration of the Union’s power to control hours and work assignments under the collective bargaining agreement. The court noted, however, that that part of the tort claim which was based on conduct unrelated to the employment discrimination or on “the particularly abusive manner in which the discrimination is accomplished” would not be preempted. Likewise, with respect to the tort claims against the employer, the parts of the claim requiring consideration of the collective bargaining agreement were preempted. However, “[a] claim of intentional infliction of emotional distress in the workplace will avoid preemption if the employer’s outrageous conduct violates its duty ‘to every member of society, not just to employees covered by the collective bargaining agreement.’” The record on appeal was insufficient to determine whether parts of the tort claim were not preempted.

Westin v. Mercy Medical Services, Inc., 994 F. Supp. 1050 (N.D. Iowa 1998): The court held that the Iowa Human Rights Act preempted a claim for intentional infliction of emotional distress because it was based on the same conduct the plaintiff alleged was discriminatory. Therefore, the emotional distress claim was not a separate, independent cause of action.

KANSAS

Blackwell v. Harris Chemical North America, Inc., 11 F. Supp. 2d 1302 (D. Kan. 1998): The court dismissed the intentional infliction claim brought by an employee and her spouse following the employee’s demotion from a management position and subsequent termination because of alleged performance deficiencies. The court held that the plaintiffs’ allegations “did not rise to the level of extreme and outrageous conduct which is beyond the bounds of decency.” Likewise, the court was unable to find any allegations of negligence in the plaintiffs’ complaint, and therefore dismissed their negligent infliction of emotional distress claim.

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Gearhart v. Sears, Roebuck & Co., ___ F. Supp. ___, 1998 WL 781144 (D. Kan. 1998): The court granted summary judgment on a discharged employee's negligent infliction of emotional distress. Under Kansas law, the alleged emotional distress must result in an actual physical injury to the plaintiff. Here, the plaintiff's alleged depression and crying spells resulting from the claimed misconduct did not rise above "generalized physical symptoms, which are insufficient to state a cause of action."

Newell v. Kmart Corp., No. 97-2258-KHV, 1998 WL 230966 (D. Kan. 1998): After rejecting the continuing violation theory advanced by the plaintiff in support of her intentional infliction claim, which was based on events that took place more than two years before she filed a charge, the court granted summary judgment in favor of her employer. The court also concluded that the events that were not time barred -- reinstatement of the plaintiff's allegedly abusive former manager and termination of the plaintiff's employment -- were insufficient to sustain a claim of outrage under Kansas law.

White v. Midwest Technology, Inc., No. 96-4116-DES, 1998 WL 240266 (D. Kan. 1998): The court granted summary judgment on the plaintiff's intentional infliction claim, reasoning that the non-threatening sexual harassment directed at the plaintiff upon which she based her emotional distress claim was not sufficiently extreme and outrageous. Because there was no evidence that the plaintiff suffered any type of physical injury, the court also granted summary judgment on her negligent infliction of emotional distress claim.

LOUISIANA

Bahan v. Louisiana Chapter National Multiple Sclerosis Society, No. 97-2052 (E. D. La. 1998): An employee's intentional infliction claim was dismissed where neither a subordinate's letter reporting poor management and policy violations by the plaintiff nor management's resultant audit of the plaintiff's performance and decision to terminate her employment, constituted extreme and outrageous conduct as a matter of law. The court further reasoned that where the plaintiff's disability claim failed as a matter of law, so did an intentional infliction of emotional distress claim based on the same facts.

Chaffin v. John H. Carter Co., 4 WH Cases 622 (E.D. La. 1998): The court noted that employees are entitled to slightly greater protection from insult and outrage by a supervisor than a stranger. Nevertheless, the defendant's act of firing the plaintiff for taking five weeks off for depression and then being seen in a bar and asking the witness not to report this, and its act of paying her slightly less than a male co-worker, were not sufficiently extreme and outrageous to allow recovery for intentional infliction of emotional distress. The plaintiff's claim for negligent infliction of emotional distress was barred by the worker's compensation act.

Ferrier v. Ratheon Corp., 1998 U.S. Dist. LEXIS 439 (E.D. La. 1998): The plaintiff, an aircraft mechanic, was fired for trying to obtain help for his psychiatric problems (severe anxiety disorder), and a jury awarded him \$500,000 in compensatory damages for disability discrimination. The court reduced the award to \$300,000, but stated that a high award was warranted because the defendant was found to have discriminated against an individual with an already fragile psyche. The court observed that the plaintiff's claim for emotional distress had been dismissed prior to trial. This dismissal must have been based on a lack of outrageous conduct, as the resulting distress was clearly severe.

Gee v. Texaco, Inc., ___ F. Supp. ___, 1998 WL 781780 (E.D. La. 1998): The court denied the plaintiff's motion to remand an intentional infliction of emotional distress claim to state court based on alleged absence of diversity jurisdiction where the plaintiff had failed to state a claim for relief against the in-state defendant, his former supervisor. The plaintiff's allegations that his supervisor should have given him higher performance evaluations and that the supervisor otherwise treated him unfairly did not amount to extreme and outrageous conduct.

Gluck v. Casino America, Inc., 1998 WL 612866 (W.D. La. 1998): Where a discharged employee asserted age discrimination under the ADEA and also asserted a general tort claim under Louisiana law based on his discharge, but did

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not assert breach of a specific duty such as intentional infliction of emotional distress, recoverable damages are limited to those permitted by the Louisiana Age Discrimination in Employment Act.

Holder v. Koch Indus., 1998 U.S. Dist. LEXIS 3305 (E.D. La. 1998): The plaintiff alleged that he was discharged in violation of Louisiana's environmental whistleblower statute and that he was subjected to intentional infliction of emotional distress. He alleged nothing more than unpleasant discussions between himself and his supervisor, which the court held did not rise to the degree of outrageous conduct necessary to be actionable.

Jackson v. Entergy Operations, Inc., 1998 U.S. Dist. LEXIS 2523 (E.D. La. 1998): The plaintiff's claim for intentional infliction of emotional distress based on the fact that her supervisor harassed her for two years and denied her promotion was found to be barred by Louisiana's statute of limitations for all "delictual actions." The limitations period begins to run when the plaintiff knows or reasonably should know that damage has been sustained.

King v. Dunbar, 716 So. 2d 104 (La. App. 1998): An African-American attorney's claim against his firm and partners that he was denied opportunities to work on commercial litigation and was instead asked to handle tort matters that would be tried before predominantly African-American jurors, and that the work atmosphere became hostile when he refused, failed to state a claim for intentional infliction of emotional distress. As a matter of law, none of these allegations rises to the level of outrageousness necessary to recover.

Landry v. AT&T Corp., 1998 U.S. Dist. LEXIS (E.D. La. 1998): In order to retain jurisdiction, the court had to find that the non-diverse defendant had been sued for intentional infliction of emotional distress as a sham. The court noted that both the Fifth Circuit and the Louisiana Supreme Court have held that if a claim for intentional infliction of emotional distress is premised on conduct that took place in the workplace, then the conduct usually must involve "a pattern of deliberate, repeated harassment over a period of time." In this case, there was no evidence demonstrating a desire to cause emotional distress, and the alleged offensive actions -- using an increasingly hostile tone, and being deceptive and misleading so as to cause a false sense of security -- do not even approach the required level of outrageousness.

McGhee v. Treasure Chest Casino, LLC, 1998 WL 187699 (E.D. La. 1998): The plaintiff, a cocktail waitress, brought claims for sexual harassment, constructive discharge, and intentional infliction of emotional distress. The plaintiff alleged that following an accident in which she spilled coffee on her blouse, a security officer asked her to pull her blouse aside, partially revealing her breast, so that he could photograph her injury. The plaintiff further alleged that the security officer told the security supervisor that "You don't get to see those," and that the supervisor responded that he could get the picture if he wanted to. The court dismissed the plaintiff's intentional infliction claim finding no evidence of extreme or outrageous conduct, intent to inflict emotional distress, or resulting severe distress.

McMillon v. Corridan, ___ F. Supp. ___, 1998 WL 756755 (E.D. La. 1998): The court granted summary judgment on the intentional infliction claim based on the Louisiana statute of limitations. The court also noted, however, that the plaintiff's claim against her former supervisor "[a]rguably . . . should be dismissed on the merits" where the claim was based on the plaintiff's allegations that her supervisor had retaliated against her after she complained of sexual harassment.

Phillips v. AccuLab, Inc., 1997 U.S. Dist. LEXIS 21107 (E.D. La. 1998): The plaintiff alleged that her supervisor screamed expletives at her on three occasions, told her he could talk to her any f . . . way he wanted, and that she feared for her personal safety. Further, the plaintiff alleged that she was an incest survivor and that this tortious assault triggered pre-existing post-traumatic stress disorder. The court noted the Louisiana Supreme Court's statement in White v. Monsanto Co., 585 So. 2d 1205, 1209 (La. 1991), that employees may be entitled to a greater degree of protection than a mere stranger, though disciplinary action intended to cause some mental anguish is not actionable, but found that the plaintiff's supervisor's actions did not meet the requisite level of outrageousness and he did not know of her alleged traumatic past.

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Sylve v. HSPC, LLC, No. 97-2015, 1998 WL 186700 (E.D. La. 1998): The court granted summary judgment on the plaintiff's age discrimination and intentional infliction claims brought in connection with the termination of the plaintiff's employment as a foreman at a grain elevator, holding that the circumstances of the termination did not satisfy the "outrageous" conduct requirement.

MARYLAND

Etefia v. East Baltimore Community Corp., 2 F. Supp. 2d 751 (D. Md. 1998): The plaintiff brought a claim for intentional infliction of emotional distress in conjunction with Title VII claims for discrimination based on national origin. The plaintiff stated that after his termination he visited a mental health professional and was worried about providing for his son. Further, the plaintiff worked "menial" jobs for a year until securing permanent employment. The court reasoned that Maryland law requires proof of "truly egregious acts." In this case the defendant's acts were not extreme and outrageous, and the plaintiff did not show "a severely disabling emotional response so acute that no reasonable man could be expected to endure it." The plaintiff's worries about finances were insufficient to support the claim.

MASSACHUSETTS

French v. United Parcel Service, Inc., ___ F. Supp. ___, 1998 WL 180840 (D. Mass. 1998): French invited three fellow UPS supervisory employees, one senior to him and two junior, to attend a beer festival. The four spent several hours at French's home where one of them became intoxicated, emotionally volatile, and uncontrollable. While drying out alone in the garage, this employee went into a violent rage and injured himself. When the other three employees found him, they called an ambulance which took him to a local hospital where he was treated and released. French was put on leave pending an investigation of the incident. As a result of the suspension, French began treatment for depression. According to the complaint, while French was still on leave, UPS personnel demanded to meet with him to discuss the incident, peppered him with questions, and otherwise shamed him. In addition, they repeatedly contacted the mental health professionals who were treating French to determine his condition and prognosis. French was demoted and worked in that position for five weeks before he resigned because of the humiliation he felt in having to perform tasks which had not been required of him for years. French subsequently sued UPS for invasion of privacy, reckless infliction of emotional distress, violation of the Massachusetts Civil Rights Act, and wrongful constructive discharge. The court dismissed all four counts of French's complaint. On the reckless infliction of emotional distress claim, the court found that the complaint did not set forth any facts that would establish outrageous conduct. The court also found that the claim was barred by the exclusivity provision of the Massachusetts Workers' Compensation Act.

LaManque v. Massachusetts Department of Employment and Training, 1998 U.S. Dist. LEXIS 5838 (D. Mass. 1998): The plaintiff sued her former employer and several other defendants after she was terminated from her employment following her public opposition to her employer's plans to move from a handicapped accessible location to an inaccessible location. She sued under the ADA and made a number of other claims, including a claim for intentional infliction of emotional distress and civil conspiracy to cause her severe emotional distress. The plaintiff's supervisor was initially supportive of her efforts to block the move to an inaccessible location. After the plaintiff obtained 1,200 signatures on a petition to block the move, however, her supervisor told her to "call off the troops." After the move took place, the plaintiff had allergic reactions to the conditions at the new office. The landlord at the new location issued an ultimatum requiring the plaintiff's employer to fire her or the landlord would evict the agency from the building. The plaintiff remained on medical leave, but had difficulty getting in touch with any of her supervisors to report her status. She received a letter informing her that she was being transferred to another office because of her conflict with the landlord. She refused the transfer on the grounds she was on medical leave. The plaintiff then received a letter notifying her that she was being placed on unauthorized leave without pay because she failed to properly inform her supervisors of her absence. A few weeks later, she was terminated for job abandonment. The court dismissed the plaintiff's claim for intentional infliction of emotional distress. The court stated that even if the supervisor's decision to terminate the plaintiff was a bad, unjust, and unkind decision, the plaintiff could not establish a plausible case of outrage.

MICHIGAN

Hall v. State Farm Insurance Co., 18 F. Supp. 2d 751 (E.D. Mich. 1998): Though the court found sufficient evidence to sustain a claim for racial discrimination, it granted summary judgment in favor of the employer on the plaintiff's claim of intentional infliction of emotional distress. The plaintiff, a discharged insurance claims supervisor, offered triable evidence that the employer's proffered reasons for dismissal were pretextual and that the employee suffered racial discrimination while she was employed. However, the court found that the nature of the defendant's alleged actions -- writing grievances against the plaintiff in retaliation for his filing a grievance, intensive file reviews unrelated to any standard practice or performance questions, knowledge on the part of the company that employees intended to collude against the plaintiff, and utter lack of support for the alleged reasons for firing the plaintiff -- did not cross the line of "utter intolerability" necessary to support a claim for intentional infliction of emotional distress.

Matthews v. Consolidated Rail Corp., No. 97-CV-70692, 1998 U.S. Dist. LEXIS 1821 (E.D. Mich. Jan. 26, 1998): The plaintiff was a former rail car inspector who claimed intentional infliction of emotional distress based on his allegedly racially discriminatory discharge. The defendant argued that the plaintiff was terminated after a thorough investigation which revealed that the plaintiff continually left work early and falsified his time records. The court held that as a matter of law, the defendant's conduct was not sufficiently extreme and outrageous to constitute intentional infliction of emotional distress, and granted summary judgment for the defendant.

Norris v. State Farm Fire & Casualty Co., 581 N.W.2d 746 (Mich. Ct. App. 1998): The stated reason for plaintiff's termination was poor job performance as a claims specialist, but she alleged that the defendant told her she was fired because of her handicap. The plaintiff claimed these actions amounted to intentional infliction of emotional distress. The court disagreed, stating that even assuming the plaintiff's allegations were true, the defendants' conduct was not sufficiently outrageous to give rise to a separate cause of action for intentional infliction of emotional distress.

MISSISSIPPI

Odum v. Beverly Enterprises Mississippi, Inc., No. 1:96CV382-D-D, 1998 U.S. Dist. LEXIS 4475 (N.D. Miss. 1998): Judgment was entered in favor of the defendant on the intentional infliction of emotional distress claim of a plaintiff who alleged that he was wrongfully accused of violating work policies and had been subjected to abusive comments over a twenty-eight-month period. The court explained that the proof the plaintiff offered was insufficient to support the outrageous element of an intentional infliction claim under Mississippi law.

Raper v. Northeast Mississippi Daily Journal, No. 1:96CV383-B-D, 1998 WL 211790 (N.D. Miss. 1998): The court granted the defendant's motion for summary judgment on the plaintiff's intentional infliction of emotional distress claim, which she based on her employer's allegedly having required her to work on Wednesday nights instead of going to church and subsequently having terminated her employment because of her religion. The court held that the plaintiff had "produced no evidence of any conduct by the defendants which could be deemed to be so outrageous as to support an award for the intentional infliction of emotional distress."

MISSOURI

Palermo v. Tension Envelope Corp., No. 71554, 13 IER Cas. (BNA) 1275 (Mo. Ct. App. 1997): The plaintiff in this case alleged, under the Missouri Human Rights Act, that she was discriminated against and subsequently discharged because she filed a claim for workers' compensation, seeking emotional distress damages. The trial court granted summary judgment in favor of the defendant finding, among other things, that the "proper forum for the plaintiff's emotional distress claim was under workers' compensation law because the distress resulted, at least in part, from [her] work-related . . . injury." The court of appeals reversed and remanded the trial court's decision and concluded that whether the plaintiff suffered emotional distress as a result of discriminatory treatment was a question of fact for a jury.

NEVADA

Barmettler v. Reno Air Inc., ___ P.2d ___, 1998 WL 178459 (Nev. 1998): Reno Air employed Barmettler for approximately eight months. After he had been employed for four months, he informed his supervisors he was suffering from an alcohol problem and admitted himself into a residential treatment facility. Barmettler alleged that his supervisor discussed the situation with a number of employees, in violation of Reno Air's confidentiality policy, and that his co-workers jeered when he returned. This allegedly caused him to contemplate suicide and seek additional psychotherapy. Barmettler was terminated for the stated reason that he circulated rumors that two Reno Air employees were having an illicit affair. Barmettler maintained that Reno Air terminated his employment in retaliation for his complaints in connection with his supervisor's violation of the confidentiality policy. Barmettler sued Reno Air based on these events and included claims for intentional and negligent infliction of emotional distress. The Supreme Court of Nevada found that Barmettler did not establish either extreme and outrageous conduct by his employer or that he suffered severe or extreme emotional distress, and therefore affirmed summary judgment of the intentional infliction claim. On the negligent infliction claim, the appeals court held that where emotional distress damages are not secondary to physical injuries, but rather precipitate physical symptoms, either a physical impact must have occurred, or, in the absence of physical impact, proof of serious emotional distress causing physical injury or illness must be presented. It affirmed summary judgment because the trial court had correctly found that Barmettler did not satisfy the physical injury or impact requirement.

NEW JERSEY

Ferraro v. Bell Atlantic Company, Inc., ___ F. Supp. ___, 1998 WL 167274 (D.N.J. 1998): The district court granted summary judgment in favor of Bell Atlantic and individual defendants on the plaintiff's claim for intentional infliction of emotional distress, ruling that the plaintiff had not demonstrated extreme and outrageous conduct on the part of the defendants. The plaintiff claimed that she was alienated from her male co-workers who were uncooperative, stopped giving her telephone messages, and stopped speaking with her. One employee called her a "bitch" on several occasions, including one occasion when he screamed at her and said that she did not do anything in the shop and he was tired of getting all the "shit work." He then stormed out of the shop and slammed the door. The court stated that while that this employee treated the plaintiff in a rude, unprofessional manner and that his outburst, for which he should have apologized, was completely unacceptable, his behavior did not rise to the level of outrageousness necessary to constitute intentional infliction of emotional distress. Moreover, the court stated that the conduct to which the plaintiff was subject was not as outrageous as conduct which other courts had found inadequate to support a harassment-based intentional infliction of emotional distress claim.

Hyman v. Atlantic City Medical Center, 1998 U.S. Dist. LEXIS 3416 (D.N.J. 1998): The court granted summary judgment in favor of the employer on the plaintiff's claims, including claims for race discrimination and intentional infliction of emotional distress. The plaintiff claimed she was led to believe that her administrative supervisor position was going to be eliminated and that she could not work a part-time schedule compatible with her full-time job for another employer. At the time of her resignation, the plaintiff declined to remain as a fill-in administrative supervisor. She also declined to apply for any other jobs in the hospital either at the time of her resignation or subsequent to that time. Several months after the plaintiff's resignation, the new supervisor hired a white applicant to work as an administrative supervisor. The plaintiff thereafter sued, claiming that the hospital discriminated against her on the basis of race by compelling her to resign her position. The court found that there was no evidence from which a jury could conclude that a reasonable person would have felt compelled to resign under the circumstances surrounding the plaintiff's resignation. The court noted that the plaintiff herself did not perceive she had been discriminated against on the basis of race at the time that she resigned. The court further found that the plaintiff resigned voluntarily and, having chosen not to apply for any subsequent positions at the hospital, could not complain when a white person was hired as an administrative supervisor. On the basis of these factual findings, the court found that the plaintiff's allegations did not state a claim for intentional infliction of emotional distress. The court stated that the plaintiff's own characterization of her treatment was not extreme and outrageous. Moreover, when asked to describe her emotional distress, she stated that she was hurt because she wasn't given a party, a card, or a good-bye.

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The court concluded that the plaintiff failed to show any facts that, even when viewed in her favor, rose to the required level of extreme outrageousness.

Schillaci v. First Fidelity Bank, 1998 N.J. Super. LEXIS 229 (Super. Ct. N.J. 1998): The appellate court affirmed summary judgment in the defendant's favor on the plaintiff's claim for intentional infliction of emotional distress because the plaintiff did not allege sufficiently severe emotional distress to establish an essential element of her claim. The plaintiff was a store manager at Cumberland Farms where her duties included depositing the store's daily receipts of cash and food stamps in the bank. After the plaintiff allegedly made a deposit which the bank said it did not receive, she was fired and became the subject of a police investigation. Several months later, the bank discovered the deposit bag wedged into the bank's night deposit box. The plaintiff sued both First Fidelity Bank and Cumberland Farms, claiming they caused her emotional distress by failing to notify her promptly when the deposit bag was found. The plaintiff testified that although she was badly upset she did not seek psychiatric or psychological counseling because she could not afford it. The court stated that the plaintiff was required to show emotional distress "so severe that no reasonable man could be expected to endure it." Severe emotional distress requires a condition "which may be generally recognized and diagnosed by a professionals trained to do so." Although the plaintiff was "acutely upset," her emotional distress was not "sufficiently substantial to result in physical illness or serious psychological sequelae."

NEW YORK

Bailey v. New York City Transit Authority, No. CIV. A. CV-97-102, 1998 U.S. Dist. LEXIS 3772 (E.D.N.Y. March 10, 1998): The plaintiff brought claims for negligent and intentional infliction of emotional distress for the erroneous overpayment by the defendants of workers' compensation benefits. The court held that the plaintiff's claim was "fatally flawed" because there was no evidence that the defendant's conduct exceeded all possible bounds of decency. The court noted that "while three years of overpayments may have caused plaintiff confusion, or even caused him to believe he stood in a stronger financial footing than was correct, there is no basis to infer that defendants' conduct went beyond mere negligence, which is insufficient to support plaintiff's claim." The court found it "absurd" that defendants would willfully part with the money to cause the plaintiff harm, and equally unreasonable to believe that the plaintiff suffered such harm from the overpayments.

Castro v. New York City Board of Education Personnel Director, No. 96 Civ. 6314 (MBM), 1998 U.S. Dist. LEXIS 2863 (S.D.N.Y. March 12, 1998): The plaintiff, a teacher who was fired for failure to meet the defendant's educational requirements, had to be escorted from the school premises by police when she did not leave voluntarily. The plaintiff claimed intentional infliction of emotional distress, alleging that officials at the school subjected her to a work environment where she was humiliated, degraded, and ultimately fired. The court noted that generally a claim for intentional infliction of emotional distress will not lie unless there is a "deliberate and malicious campaign of harassment or intimidation." The court noted that only one official even arguably discriminated against the plaintiff, and that these alleged acts of discrimination were not egregious. Further, the police only escorted the plaintiff off the premises after she refused to leave. Therefore, none of the defendant's actions amounted to behavior which went beyond all bounds of decency.

Gerson v. Giorgio Sant'angelo Collectibles, Inc., 671 N.Y.S.2d 958 (N.Y. App. Div. 1998): The plaintiff, a female administrative assistant, asserted sex discrimination and negligent infliction of emotional distress claims against the company and its president. The defendants argued that the action was barred by state workers' compensation statute and that the plaintiff failed to state a claim upon which relief could be granted. Regarding the negligent infliction claim, New York courts have held that when there is a duty owed by the defendant to the plaintiff, a breach of that duty which results in emotional harm is compensable even when no physical injury occurred. A plaintiff must show at least a threat of such impact or injury before a claim may be maintained. Here, the plaintiff did not allege any incidents of touching or any threat thereof. The court held that short of sexual assault or battery, or threat thereof, the court would not acknowledge a cause of action for negligent infliction of emotional distress. Further, the claim was barred by the workers' compensation statute because negligence is exclusively covered by that act.

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Gryga v. Ganzman, 991 F. Supp. 105 (E.D.N.Y. 1998): An employee of the county public administrator brought a Title VII action against the county administrator and the city and also alleged a claim for intentional infliction of emotional distress against the city. The plaintiff claimed that the city ratified, encouraged, and authorized the sexual advances of her supervisor. The court found that because the plaintiff failed specifically to allege any willful or tortious act by the city relating to her sexual harassment claim, she could not maintain a claim for intentional infliction against the city.

La Duke v. Lyons, 673 N.Y.S.2d 240 (N.Y. App. Div. 1998): The plaintiff was terminated from her employment as a nurse manager of the critical care unit for the defendant hospital after it was alleged she had euthanized a patient under her care. The plaintiff alleged that her coworkers' conduct in making allegedly false statements, accusing her of euthanasia, her termination based on those statements, and the hospital's advising the District Attorney about her termination constituted extreme and outrageous behavior sufficient to state a cause of action for intentional infliction of emotional distress. The court noted that while under some circumstances unjustified criminal charges or an employer's abuse of power may rise to the level of outrageousness, the facts here showed that the coworkers and hospital were obligated to report the incident. Further, even if the employees and hospital intentionally relayed false information, this conduct was not sufficiently outrageous.

Lapsley v. Columbia University-College of Physicians and Surgeons, 999 F. Supp. 506 (S.D.N.Y. 1998): The plaintiff brought a Title VII claim, contending that her former employer discriminated against her on the basis of race in virtually all aspects of her employment, including salary increases and bonuses, job classification and the use of cell phones, as well as her termination and severance benefits. The plaintiff claimed that these actions also constituted intentional infliction of emotional distress, specifically alleging that her supervisor told her she should "choose her company more carefully since he did not know how long" certain low-level African-American employees would be around. She also claimed to have "experienced intentional emotional distress at various staff meetings and insults in the presence of various employees." The court noted that the plaintiff did not allege any specifics regarding the alleged insults, and even if true, these acts were not sufficiently outrageous.

Lian v. Sedgwick James of New York, Inc., 992 F. Supp. 644 (S.D.N.Y. 1998): The plaintiff, a former insurance agent, claimed libel and intentional infliction of emotional distress by his former employer based on an allegedly defamatory e-mail. After a meeting, the plaintiff's supervisor distributed an e-mail to the plaintiff's team stating that he and the plaintiff had agreed that the plaintiff would seek other employment. The plaintiff claimed that he had not made such an agreement, that the distribution of the e-mail impugned his professional integrity, and that he suffered great embarrassment, eventually causing him to turn in his resignation. New York courts have rejected intentional infliction claims when the conduct falls under another tort. Here, the plaintiff's claims were more properly brought as a libel action or as a claim for wrongful discharge. Also, the court found that the defendants' conduct was not extreme and outrageous, because the e-mail merely informed certain employees of the termination of the plaintiff's employment and was otherwise benign.

Ross v. Fudosan, Inc., 2 F.Supp. 2d 522 (S.D.N.Y. 1998): The plaintiff was a concierge at a building owned by the defendant corporation. The plaintiff alleged that two supervisors began making sexual advances towards her, going so far as to trick her into accompanying them to an apartment and forcing her to watch pornographic movies. The plaintiff alleged that she complained of these actions to her superior and requested that he intercede to prevent any further sexual harassment and misconduct. She further alleged that in response, her superior told her to remain quiet. The court held that even assuming that the plaintiff's allegations were true, as a matter of law, this conduct was not sufficiently outrageous and extreme to satisfy the very strict standard New York courts have set for claims of intentional infliction of emotional distress.

Savitt v. Vacco, No. 95CV1842(RSP/DRH), 1998 WL 690939 (N.D.N.Y. Sept. 28, 1998): While the attorney general's office was undergoing personnel changes due to the election of a new state Attorney General, the plaintiff took maternity leave. During her leave she was asked to reapply for her position. She did so, but when she did not receive a response two and one-half months later, the plaintiff resigned. In her suit against her former employer, the plaintiff asserted a claim for intentional infliction of emotional distress, claiming that in a meeting for the new hires and rehires, the Attorney General

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made several general disparaging remarks about the individuals who had been fired. The plaintiff claimed that she believed the remarks were directed at her personally and that this caused her great stress. The court held that the alleged conduct fell far short of the standard of extreme and outrageous conduct, and therefore dismissed the plaintiff's claim.

Stordeur v. Computer Associates International, Inc., 995 F. Supp. 94 (E.D.N.Y. 1998): The court refused to acknowledge a claim for "reckless infliction of emotional distress," finding no authority for imposing liability for inflicting emotional distress "recklessly" though not "intentionally."

NORTH CAROLINA

Cherry v. Champion International Corp., No. 1:97CV145-C, 1998 U.S. Dist. LEXIS 6390 (W.D.N.D. 1998): The plaintiff alleged eight isolated incidents of sexual harassment between the years 1988 and 1995 when she was employed at a pulp mill. The court ruled that seven of those alleged incidents were time-barred, rejecting the plaintiff's continuing violations argument where no connection between the untimely and the timely alleged incidents was demonstrated. With respect to the eighth, timely incident (an unkind statement by one co-worker and a sexist statement by another co-worker), the court rejected the hostile environment claim, finding that the defendant took prompt remedial action when the plaintiff complained. The court also rejected the intentional infliction claim. Noting that the plaintiff had admitted that no manager ever attempted to intentionally harm her in any way, and that she had further admitted that she had not experienced any depression attributable to the defendant since one month after her resignation, the court held that the plaintiff failed to satisfy both the outrageous conduct and the severe emotional distress elements of the claim.

Darnell v. B.P. Exploration & Oil, Inc., No. 97-2040, 1998 U.S. App. LEXIS 4651 (4th Cir. 1998): The plaintiff's employment as a fuel/desk shop manager was terminated after an investigation revealed that he had signed fraudulent vendor receipts and obtained cash that had been disbursed in connection with those receipts. After the plaintiff was acquitted on criminal charges, he brought malicious prosecution and intentional infliction claims against his former employer. Summary judgment was affirmed. The employer's alleged conduct in investigating the losses was not extreme and outrageous.

Hamby v. Bernhardt Furniture Co., No. 5:97CV190-V, 1998 U.S. Dist. LEXIS 6458 (W.D.N.C. 1998): The plaintiff alleged that a supervisory employee subjected her to unwelcome sexual advances and touching, promised her job promotions if she consented and threatened her termination if she did not, and, when she spurned his advances, transferred her to work for a supervisor, against whom she had earlier lodged a sexual harassment complaint. The new supervisor continued to harass her after her transfer and on one occasion, the plaintiff alleged, threatened to rape her. On these facts, the court refused to dismiss both the Title VII sexual harassment claim and the state law intentional infliction claim. Ruling on what was construed as a Rule 12(b)(6) motion, the court held that "[t]he complaint . . . alleges facts which would be sufficient to establish extreme and outrageous conduct"

Johnson v. First Union Corp., 496 S.E.2d 1 (N.C. Ct. App. 1998): The plaintiffs, bank customer representatives, suffered "repetitive motion disorder" affecting their hands, arms, shoulders, and necks as a result of their workplace duties and filed workers' compensation claims. They alleged that, when confronted with a requirement to pay compensation for an indeterminate period of time, the insurer first failed to submit the relevant form to the state workers' compensation commission and then materially altered the relevant form. The plaintiffs brought bad faith refusal to pay, fraud, conspiracy and other state claims, including an intentional infliction claim, against their former employer and the insurer. The appeals court, after holding that the workers' compensation act did not provide the exclusive remedy for claims of this nature, reversed the trial court's dismissal of the intentional infliction claim. The facts as alleged satisfied the elements of the tort.

Poole v. Copland, Inc., ___ S.E.2d ___, 1998 WL 236960 (N.C. 1998): The plaintiff alleged that a co-worker made lewd and unwelcome sexual comments to her, and that on one occasion he grabbed his crotch and made an obscene gesture. She complained, and following a meeting involving the plaintiff, the alleged harasser, the company president, and other managers, the alleged harasser's employment was terminated — and so was the plaintiff's. A jury returned a verdict for the plaintiff

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on her intentional and negligent infliction claims against the supervisor, and on her negligent retention and supervision and imputed liability claims against her former employer. The jury's verdict was reversed by the court of appeals, but reinstated by the North Carolina Supreme Court, which extensively discussed the "thin skull" rule. This rule was at issue because the plaintiff had been repeatedly sexually molested and physically abused in the past. The court found that the trial judge had adequately instructed the jury that it must find that the supervisor's conduct could reasonably have been expected to injure a person of ordinary mental condition. Because such evidence was present, the plaintiff was permitted to recover for the full extent of her emotional distress damages.

Presnell v. Collins & Aikman Corp., No. 4:97CV174, 1998 U.S. Dist. LEXIS 6263 (W.D.N.C. 1998): The plaintiff had been criticized for her management style and was required to take steps, including completing a six-week Dale Carnegie course, to improve her communications skills. She also was repeatedly counseled and warned for failing to follow quality control procedures. When she ultimately was terminated for this reason, she asserted age discrimination, wrongful discharge, and intentional infliction claims. The court granted summary judgment on all claims. With respect to the intentional infliction claim, the plaintiff failed to satisfy the outrageous conduct, intent, and severe emotional distress elements.

Traft v. American Threshold Industries, Inc., No. 1:97CV162-T, 1998 U.S. Dist. LEXIS 6419 (W.D.N.C. 1998): The plaintiff, a machine operator, asserted an intentional infliction claim in addition to her claims of age discrimination and retaliation. She alleged that she suffered a reduction in pay and was denied incentive pay, more desirable positions, and other work opportunities because of her age (45). In granting summary judgment on all claims, the court held with respect to the intentional infliction claim: "There is no evidence of any behavior on the part of any of Defendant's agents which this Court finds to be sufficiently outrageous to justify sending this claim to a jury. Further, there is no showing of intent . . . and no showing that severe emotional distress was caused by any conduct complained of by Plaintiff."

OHIO

Godfredson v. Hess & Clark, Inc., 996 F. Supp. 730 (N.D. Ohio 1998): The plaintiff brought a claim for intentional infliction of emotional distress based upon the alleged age-based termination of his employment. The plaintiff developed, and spent the majority of his time on, an offshoot of a company division which marketed high-end pet food. Ultimately, the defendant eliminated the pet food business, which had only garnered a fraction of projected sales. The defendant thereafter approached the plaintiff with a severance package, telling the plaintiff that the poor performance of the pet food business and the decision to eliminate that business were the reasons he was fired. The plaintiff claimed that other employees terminated at the same time were given better severance packages, and that a younger employee was hired to fill his prior position. The court found no evidence to support either claim. Further, the court found that the defendant's alleged behavior was not outrageous or extreme conduct sufficient to show intentional infliction of emotional distress. Simply being fired, the court reasoned, even if the evidence shows age discrimination, is not enough to establish this tort cause of action.

Priest v. TFH-EB, Inc., No. 97APE08-1051, 1998 WL 151119 (Ohio Ct. App. March 31, 1998): The plaintiff appealed a directed verdict in favor of the defendant on her claim of intentional infliction of emotional distress. The plaintiff alleged that she was pregnant while working for the defendant and was concerned about the effect of the heavy smoking environment on her baby. The plaintiff further alleged that she gave the chairman of the board a note from her doctor asking that the company to provide her with a fan and a no smoking sign. The chairman then allegedly walked by her desk, blew smoke in her face, and dumped ashes on her desk. The plaintiff claimed she was upset, humiliated, and degraded by these actions, but did not produce any testimony of a mental health professional. The court of appeals stated that even if the chairman's behavior amounted to the extreme and outrageous conduct necessary to support a claim for intentional infliction of emotional distress, the plaintiff did not show evidence of serious emotional distress.

Sumlin v. Nationwide Mutual Insur. Co., No. 97APE08-1043, 1998 Ohio App. LEXIS 505 (Ohio Ct. App. Feb. 10, 1998): The plaintiff supported his claims for negligent and intentional infliction of emotional distress with allegations that his employer terminated his employment while he was recovering from an on-the-job injury even though he had followed the

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requirements for taking sick leave. The plaintiff further argued that even if this conduct was not intentional infliction of emotional distress, it was negligent or reckless because the employer knew or should have known that the plaintiff would suffer emotional distress from the alleged unwarranted termination. The plaintiff testified that he suffered from depression due to his termination and was prescribed Prozac. The court ruled that Ohio does not recognize a separate tort of negligent infliction of emotional distress in the employment context. Regarding the intentional infliction claim, the court ruled that a defendant will never be liable for intentional infliction of emotional distress for insisting upon his legal rights in a permissible way, even if the defendant knows that such insistence is certain to cause emotional distress. The court found that the employer here had a right to terminate the plaintiff's employment, and did so in a permissible way. Further, the plaintiff failed to show serious emotional distress.

Tarver v. Calnex Corp., No. 96 CA 149, 1998 Ohio App. LEXIS 591 (Ohio Ct. App. Jan. 29, 1998): Two male employees filed claims for intentional and negligent infliction of emotional distress based on the alleged actions of their male supervisor. The plaintiffs claimed that the supervisor had touched their crotches and buttocks without consent, and that this caused them unnecessary stress and worry while on the job, including the fear of being discharged. Neither plaintiff sought medical or psychological treatment for their alleged emotional injuries, and both plaintiffs testified that the supervisor's actions did not interfere with their ability to perform their jobs. Regarding the intentional infliction of emotional distress claim, the court held that the plaintiffs failed to show the severe and debilitating emotional harm necessary to support this cause of action. Regarding the negligent infliction of emotional distress claim, the court cited an earlier decision by an Ohio appellate court holding that such a claim cannot stand in the employment context. Further, the court reasoned, even if such a cause of action was recognized, the plaintiffs did not show the necessary fear of harm to sustain a claim.

Vargo-Adams v. U.S. Postal Service, 992 F. Supp. 939 (N.D. Ohio 1998): The court held that the Federal Employee's Compensation Act preempted the plaintiff's tort claim for intentional infliction of emotional distress.

Wilson v. Proctor & Gamble, No. C-970778, 1998 Ohio App. LEXIS 5290 (Ohio Ct. App. Nov. 6, 1998): The plaintiff brought a claim for intentional infliction of emotion distress based on the employer's handling of sexual harassment allegations against him. Management had investigated the allegations and concluded that the employee had not engaged in harassment. Rumors subsequently spread throughout the company, so management held a meeting of the employee's work team and informed them that the employee had been cleared and had done nothing wrong. Subsequent to this meeting, the employee went on disability leave. The employee alleged that both the accusation of sexual harassment and the meeting had caused him severe and debilitating emotional distress. The court found that the employer's behavior was not extreme and outrageous, reasoning that the employee was never charged with sexual harassment, and the meeting was not held to cause the plaintiff disrepute. Therefore, the court affirmed summary judgment in favor of the employer.

OKLAHOMA

Henderson v. Whirlpool Corp., 17 F. Supp. 2d 1238 (N.D. Ok. 1998): The court granted summary judgment in favor of the employer on the plaintiff's claim of intentional infliction of emotional distress based on alleged sexual harassment. The evidence showed that the plaintiff complained of two instances of inappropriate contact by her supervisor. The employer verbally counseled the supervisor regarding its sexual harassment policy and told him to leave the plaintiff alone. The plaintiff then requested that the company either transfer her or transfer the supervisor, but this request was denied. The plaintiff did not make any further complaints to her employer about the supervisor. Thereafter, the plaintiff was terminated on the grounds of excessive absenteeism. The court held that the plaintiff had not demonstrated either that she suffered any harmful effects or that the employer's actions constituted extreme or outrageous conduct.

OREGON

Mockler v. Multnomah County, Nos. 96-35895, 96-36122, 1998 WL 166529 (9th Cir. March 31, 1998): The court upheld a finding of intentional infliction of emotional distress, and further held that the plaintiff was entitled to punitive damages. The plaintiff, a female deputy in the sheriff's office, alleged that a male deputy harassed her. The evidence showed that the

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deputy intended to cause the plaintiff emotional distress, based on the deputy's continuous name-calling, rumor-spreading, encouragement of supervisors to discipline the plaintiff, filing complaints against the plaintiff, glaring at the plaintiff, and attempting to interfere with her appointment as a coach. The court also found that the plaintiff demonstrated severe emotional distress as a result of this conduct, where the plaintiff showed that she was in therapy, on medication, sought administrative leave for stress, and eventually transferred out of the sheriff's office.

Turnbow v. K.E. Enterprises, Inc., 962 P.2d 764 (Or. Ct. App. 1998): The court upheld summary judgment in favor of an employer on a claim of intentional infliction of emotional distress by a truck driver who suffered an on-the-job back injury. The plaintiff sought transfer to an easier type of driving position. That request was denied, and the plaintiff's employment was later terminated. He asserted a claim for intentional infliction of emotional distress, alleging that in denying the transfer, the employer kept the plaintiff in the same truck in which he had been injured, and that one of his supervisors admitted he was aware that the plaintiff was in pain but did not do anything to remedy it. The plaintiff testified he was "really upset" by these actions. The court found that this evidence did not rise to the level of "extraordinary transgression of the bounds of socially tolerable conduct" as a matter of law, but rather at most signaled indifference by the employer.

PENNSYLVANIA

Henderson v. Merck & Co., 998 F. Supp. 532 (E.D. Pa. 1998): The court's decision centered on whether Section 301 of the Labor-Management Relations Act preempted the plaintiff's claim for intentional infliction of emotional distress. The plaintiff alleged that the defendant discharged him without good cause and forced him to retire involuntarily based upon the terms of a proposed settlement agreement. The court held that because the emotional distress claim arose directly out of the plaintiff's discharge, and would require an analysis of whether the defendant properly discharged the plaintiff, the claim was preempted.

LaRose v. Philadelphia Newspapers, Inc., ___ F. Supp. 2d ___, 1998 WL 664230 (E.D. Pa. Sept. 9, 1998): The plaintiff claimed sexual harassment and intentional infliction of emotional distress alleging: (1) the denial of overtime by her supervisor; (2) the supervisor's leaving errors in the plaintiff's work; (3) the supervisor standing too close to the plaintiff on occasion; (4) the denial of computer training to the plaintiff; (5) the supervisor's filing of complaints against her to management; and (6) the supervisor following her and monitoring her at work. Regarding the intentional infliction of emotional distress allegation, the court found that even accepting the plaintiff's allegations as true, the supervisor's conduct did not rise to the level of outrageousness required to support her claim. The court noted that "[u]nder Pennsylvania law, conduct in the employment context will rarely rise to the level of outrageous conduct required to support a claim for intentional infliction of emotion [sic] distress."

McLaughlin v. Rose Tree Media School District, 1 F. Supp. 2d 476 (E.D. Pa. 1998): The plaintiff alleged that she and other female school district employees suffered a six-year period of sexual harassment. The plaintiff claimed that her direct supervisor publicly sexually assaulted female custodians by touching their breasts, buttocks, and crotch areas; made inappropriate sexual comments; questioned employees about their preferred positions while engaging in sexual intercourse; kept pornographic photos in his office which he showed to female employees; and exposed himself to one female custodian. Further, the supervisor regularly and repeatedly issued threats of retaliation and intimidation toward employees. Pennsylvania courts ordinarily hold that sexual harassment alone does not rise to the level of outrageousness necessary for intentional infliction, but that courts will recognize such a claim when there is an "extra factor" such as retaliation. Here, because the plaintiff alleged retaliation, the court denied the defendant's motion to dismiss the intentional infliction claim.

Seiple v. Community Hospital of Lancaster, No. Civ. A. 97-8107, 1998 WL 175593 (E.D. Pa. April 14, 1998): The plaintiff, an anesthetist, asserted a claim for intentional infliction of emotional distress based on reports made by a nurse and surgeon to hospital officials that the plaintiff was sleeping during an operation, after which the plaintiff was suspended without pay. The court noted that "in a hospital setting reporting that an employee responsible for administering anesthesia was sleeping during an operation, even if ultimately false, is expected rather than outrageous conduct." Therefore, the reports were within

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the bounds of decency. Also, the court stated that the Pennsylvania workers' compensation statute's exclusivity provision barred claims for intentional infliction of emotional distress arising out of an employment relationship.

Taylor v. City of Philadelphia, No. CIV. A. 96-740, 1998 WL 151802 (E.D. Pa. April 1, 1998): The plaintiff was a former police officer terminated and prosecuted for accepting bribes. The plaintiff was acquitted of the criminal charge, but was refused reinstatement. The plaintiff claimed that the defendant City intentionally or negligently inflicted emotional distress on him by its investigation and by discharging him based on allegedly incredible evidence. The court found that the city's conduct did not remotely come close to conduct which "was atrocious, outrageous or utterly intolerable in our civilized society," and therefore there was no cause of action for intentional infliction of emotional distress. Regarding negligent infliction, the court reasoned that only a plaintiff who witnesses an accident causing injury to a close relative, sustains physical injury to himself, or suffers distress as a result of a breach of a pre-existing duty of care can maintain such a claim.

Weston v. Commonwealth of Pennsylvania Dept. of Corrections, No. CIV. A. 98CV3899, 1998 WL 695352 (E.D. Pa. Sept. 29, 1998): The court held that the Eleventh Amendment precluded suit against the defendant, a state agency, for claims of negligent and intentional infliction of emotional distress.

Williams v. Claims Overload Systems, Inc., No. 97-6851, 1998 U.S. Dist. LEXIS 2387 (E.D. Pa. Feb. 25, 1998): The plaintiff brought claims of intentional and negligent infliction of emotional distress based on a manager allegedly failing to take any action when the plaintiff made a report of sexual harassment, wrongful termination, intentional invasion of privacy through a background check, and defamation based on a transmission concerning a criminal complaint previously filed against the plaintiff. The court reasoned that it is very rare to find conduct in the employment context that will constitute outrageous behavior recoverable as intentional infliction of emotional distress. The court then noted that the only personal attack alleged by the plaintiff was a threatening phone call from the manager, which was not outrageous behavior. Further, the court held that to the extent that the plaintiff wished to bring a claim for negligent infliction of emotional distress, the plaintiff must allege either that he directly perceived an injury to a close relative or that the manager owed the plaintiff some preexisting contractual or fiduciary duty. Since the plaintiff failed to allege either set of factors, the court dismissed both claims for infliction of emotional distress.

TENNESSEE

DeVore v. Deloitte & Touche, No. 01A01-9602-CH-00073, 1998 Tenn. App. LEXIS 122 (Tenn. 1998): A computer programmer asserted claims of race discrimination and retaliation after he was discharged for performance reasons. The plaintiff conceded that summary judgment was appropriate on his intentional or negligent infliction of emotional distress claims. Summary judgment on the discrimination claims also was affirmed.

Parker v. Warren County Utility District, 72 Empl. Prac. Dec. (CCH) ¶ 45,122 (Tenn. Ct. App. 1998): The plaintiff did not appeal the dismissal of her intentional infliction of emotional distress claim based upon sexual harassment allegations (including allegations that a supervisor touched her breast, attempted to kiss her, rubbed his body against hers, rubbed her legs and shoulders, commented about the way her clothes fit her body, and whispered sexual remarks in her ear while she was working). Dismissal of the sexual harassment claims was reversed.

TEXAS

Benningfield v. City of Houston, 157 F.3d 369 (5th Cir. 1998): The court refused to dismiss a claim for intentional infliction of emotional distress brought by a former employee of the city police department's identification division. The employee alleged that her supervisor intentionally assigned her to work for a supervisor who she believed had sexually abused her daughter, then removed partitions from around her work area which she had placed there to escape his constant scrutiny. The plaintiff claimed these actions caused her psychological injury. The court noted that requiring an employee to work under a supervisor she dislikes would not be considered outrageous conduct under normal circumstances. Here, however, the allegation that the plaintiff's supervisor acted in bad faith when he knowingly placed her under the supervision of

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someone who she believed had molested her daughter raised the claim to a level of egregious conduct. Therefore, the defendant could potentially be liable for intentional infliction of emotional distress.

Carter v. TCI Media Services, (slip op.), No. CA 3:97-CV-1096-R, 1998 WL 686777 (N.D. Tex. Sept. 29, 1998): The plaintiff asserted a claim for intentional infliction of emotional distress based in part on the fact that she was removed from the position of Local Sales Manager and replaced with a younger man. The plaintiff argued that her case was similar to Wilson v. Monarch Paper Co., where the plaintiff was demoted from a thirty-year position to a janitorial position and the court found this was an extreme and outrageous action. Here, however, the court stated that the plaintiff's reassignment occurred in the course of a reorganization of the company, during which the plaintiff was allowed to apply for the local sales manager position and was given a position which had comparable salary. Therefore, the court dismissed the plaintiff's claim.

Chime v. PNC Bank Corp., No. 3:96-CV-2848-H, 1998 U.S. Dist. LEXIS 1149 (N.D. Tex. Jan. 21, 1998): Three African-American female employees brought claims for intentional infliction of emotional distress, alleging that the employer: (1) failed to promote them and paid them an unfair salary; (2) delayed their performance evaluations and gave them negative reviews; (3) subjected them to higher scrutiny and undermined their authority with other employees; (4) denied them privileges given to other employees; (5) subjected them to derogatory remarks; and (6) terminated and/or constructively terminated their employment. The court found that this conduct did not satisfy the extreme and outrageous prong of the tort. The court stated that conduct that may violate federal discrimination laws does not necessarily constitute outrageous conduct, and dismissed the claims.

Cochrane v. Houston Light and Power Co., 996 F. Supp. 657 (S.D. Tex. 1998): The court dismissed with prejudice an employee's claim for intentional infliction of emotional distress filed in conjunction with Title VII sex, race, and retaliation discrimination claims. The plaintiff alleged that she was refused transfer to a desired shift while white women were granted such transfers; that she had to work harder than the men in her department; that while pregnant she was not restricted from working in a radiation area while white women were; and that upon return from pregnancy leave she was not promoted. The court stated that liability for intentional infliction of emotional distress does not attach to mere insults, threats, or petty oppressions. Viewing the allegations in the light most favorable to the plaintiff, the plaintiff could not sustain a claim because the facts did not show that level of intolerable behavior.

Colbert v. Georgia-Pacific Corp., 995 F. Supp. 697 (N.D. Tex. 1998): The plaintiff brought a claim for intentional infliction of emotional distress based on allegations of sexual harassment. The evidence showed that the employer promptly investigated the plaintiff's claims of sexual harassment, and eventually terminated the alleged harasser. The plaintiff claimed that the company intentionally inflicted emotional distress on her by failing to terminate the harasser when it learned of a complaint against him by a former employee before the plaintiff began working at the plant. The court found that the plaintiff could not assert this claim, and that the company handled the matter properly. The employer's alleged inaction regarding the former employee, if any, was not sufficient to constitute intentional infliction of emotional distress.

Fisher v. State Farm Mutual Automobile Ins. Co., 999 F. Supp. 866 (E.D. Tex. 1998): The court found that if the plaintiff had supporting evidence, the allegation that a supervisor placed a memorandum containing false information in the plaintiff's personnel file, if true, might rise to the level of extreme and outrageous conduct necessary to support a claim for intentional infliction of emotional distress. However, because the plaintiff had failed to offer evidence in support of this allegation, the court granted summary judgment in favor of the employer.

Fleischer v. Pinkerton's Inc., No. 05-96-00628, 1998 Tex. App. LEXIS 804 (Tex. Ct. App. Feb. 9, 1998): The court ruled that "ordinary employment disputes do not rise to the level of 'extreme and outrageous' behavior because, 'in order to properly manage its business, an employer must be able to supervise, review, criticize, demote, transfer and discipline employees.'" Because the defendant's actions in firing the plaintiff as a security guard for leaving his post during a tornado

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warning amounted to nothing more than asserting its legal rights, the employee's dismissal did not constitute intentional infliction of emotional distress.

Kalsi v. Whataburger, Inc., No. 4:96-CV-963-BE, 1998 U.S. Dist. LEXIS 1152 (N.D. Tex. Jan. 23, 1998): The court granted summary judgment in favor of the employer. The employee alleged that the defendant intentionally inflicted emotional distress on him by terminating him and by permitting workplace remarks and discriminatory jokes based on his age, race, and national origin. He alleged that his termination was embarrassing and that he was fearful and stressed about losing his job and finding other employment, which caused him to have elevated blood pressure, stomach pains, and headaches. The court held that allegations of wrongful termination and disrespectful attitudes of coworkers or superiors fall within the realm of ordinary employment disputes that are not actionable as intentional infliction of emotional distress because, as a matter of law, such actions are not extreme or outrageous. In addition, the court found that the employee did not prove severe emotional distress because the employee's feelings of anxiety were common after termination, the employee did not seek professional help for his complaints, and the employee was able to obtain another job within three months.

Keller v. Roadway Express, Inc., No. 3:97-CV-1504-P, 1998 U.S. Dist. LEXIS 3443 (N.D. Tex. March 18, 1998): The court granted the employer's motion for summary judgment on the plaintiff's claims, one of which was for intentional infliction of emotional distress. The plaintiff based this claim on the employer's failure to promote him, the fact that some unknown co-employee called him homeless and used profanity against him, and the employer's failure to give him feedback on his work performance. The court stated that with respect to the failure to promote and lack of feedback claims, these actions were more akin to "mere employment disputes," and were not actionable because they were not reprehensible or intolerable conduct. Further, with respect to the alleged profane and insulting remarks, the court found this to be analogous to "mere insults and indignities" to which liability does not attach. See also Stewart v. Houston Lighting & Power Co., No. G-96-566, 1998 U.S. Dist. LEXIS (S.D. Tex. March 19, 1998); Hausenbauer v. O'Brien, No. 01-96-00583-CV, 1998 WL 149588 (Tex. Ct. App. April 2, 1998) (finding that even if done negligently, the filling out and clarifying of an employee evaluation does not amount to "utterly intolerable conduct").

McConathy v. Dr. Pepper/ Seven Up Corp., 131 F.3d 558 (5th Cir. 1998): Noting that the standard for finding intentional infliction of emotional distress resulting from office behavior is rigorous, the court upheld summary judgment in favor of the employer. The court found that the employer did not intentionally inflict emotional distress on the plaintiff when her supervisor became angry after the plaintiff approached him regarding her need for additional surgery, telling her that she "better get well this time" and that he would "no longer tolerate her health problems." The supervisor also complained that it was inappropriate for her to make extensive use of health benefits because of her position as benefits manager. The court reasoned that generally cruel and unfair treatment in the workplace does not fit the standard of utterly indecent, intolerable, and atrocious behavior necessary to prevail on such a claim.

Quintanilla v. K-Bin, Inc., 993 F. Supp. 560 (S.D. Tex. 1998): The plaintiff was randomly drug tested pursuant to company policy. The test came back positive for a cocaine metabolite. When informed of the results, the employee told the company that it may have been due to a Mexican tea he drank. The employer tested the tea, but found no basis for this proffered explanation. Based on the test results and the additional testing, the employee was terminated. The plaintiff brought a claim for intentional infliction of emotional distress, basing his claim on his termination and on the allegation that "the acts and omissions of the defendants . . . branded him as a drug user." The court noted that the plaintiff conceded that his test results were positive and did not allege any wrongdoing in the administration of the test. The court held that "where an employer has reason to suspect that an employee is using illegal drugs, it is neither outrageous nor extreme to terminate that employee, especially after receiving confirmation . . . that the employee's explanation was inadequate, regardless of the consequence that the employee may be 'branded.'"

Sandborn v. David A. Dean & Associates, (slip op.), No. 3:98-CV-2239-D, 1998 WL 690608 (N.D. Tex. Sept. 29, 1998): The plaintiff brought a claim of intentional infliction of emotional distress based on alleged pregnancy discrimination. The

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plaintiff alleged that she discovered she was pregnant ten days after she was hired, was terminated at the conclusion of her sixty-day introductory period, was never informed that her performance was unsatisfactory, and was told by an employer “representative” that the employer never intended to continue the plaintiff’s employment once it learned she was pregnant. The court reasoned that even when an employer’s conduct violates Title VII, such conduct would only in rare circumstances rise to the extreme and outrageous level necessary to maintain a claim for intentional infliction of emotional distress in rare circumstances. Because the plaintiff here did not make any showing of such exceptional circumstances, the court dismissed her claim.

Saucedo v. Rheem Manufacturing Co., 974 S.W.2d 117 (Tex. Ct. App. 1998): The plaintiff brought a claim for intentional infliction of emotional distress claiming that his supervisor often swore in front of him, directed foul language at him, berated him in front of other employees, and beeped him at night at home 20 to 30 times. The court stated that the supervisor’s conduct might be insensitive and rude, but since it did not surpass all possible bounds of decency and was not utterly intolerable in a civilized society, summary judgment in favor of the defendant was proper.

Scribner v. Waffle House, Inc., 993 F. Supp. 976 (N.D. Tex. 1998) (appeal pending): An employee sued her former employer for sexual harassment, retaliatory discharge, unequal pay, breach of contract, defamation, tortious interference with contract, and intentional infliction of emotional distress. A bench trial resulted in a verdict for the employee. In a post-trial motion, the employer argued that the Texas Human Rights Act preempted a tort claim for intentional infliction of emotional distress based on workplace sexual harassment. The court held that because the plaintiff demonstrated that the employer’s actions were extreme and outrageous, the sexual harassment she suffered went beyond discrimination preempted by the Texas Human Rights Act. The court concluded that an unsuccessful emotional distress claim may be preempted by the Texas Human Rights Act, but a successful claim was not.

Tidwell v. Southwestern Bell Yellow Pages, Inc., No. 3:97-DV-2542-D, 1998 U.S. Dist. LEXIS 564 (N.D. Tex. Jan. 9, 1998): The plaintiff brought a claim for intentional infliction of emotional distress based on her termination for refusing to work in contravention of her doctor’s orders. Citing an earlier Fifth Circuit decision applying Texas law, Brown v. Southwestern Bell Tel. Co., 901 F.2d 1250 (5th Cir. 1990), the court ruled that because the plaintiff’s claim was tantamount to a wrongful discharge claim, it was covered by a collective bargaining agreement to which the plaintiff was subject, so that her claim was preempted by Section 301 of the Labor-Management Relations Act.

Ward v. Dr. Pepper Bottling Co. of Texas, No. CIV. A. 3:98-CV-0952-G, 1998 WL 664962 (N.D. Tex. Sept. 17, 1998): The court awarded summary judgment in favor of the employer on the plaintiff’s claim of intentional infliction of emotional distress. The employee alleged that the employer inflicted emotional distress upon him by encouraging a child custody case and a criminal complaint brought against the plaintiff by the mother of his child and then attempting to interfere in the litigation. The court reasoned that the plaintiff did not produce any evidence regarding the defendant’s behavior to support the elements of the tort, and that all that supported the plaintiff’s claim were the “bare allegations” contained in his complaint.

Young v. Houston Lighting & Power Co., 11 F. Supp. 2d 921 (S.D. Tex. 1998): The plaintiff sued under Title VII, alleging sex discrimination and retaliation based on denial of promotions and differential treatment. The plaintiff also alleged hostile work environment, based in part on an atmosphere of sexual jokes, male employees discussing their sex lives, and sexually explicit posters. The court found no evidence to substantiate any of these allegations, noting that the plaintiff failed to show that any of these incidents was based on her sex and that she failed to report several of the incidents to her employer. The plaintiff also alleged that, based on the discrimination, harassment, and retaliation, the defendant intentionally or recklessly inflicted emotional distress on her. The court found that the rejection of the Title VII allegations was dispositive of her intentional infliction claim. Further, the court found that even if the plaintiff’s Title VII claims had succeeded, they did not rise to the necessary level of extreme and outrageous conduct.

VIRGINIA

Speight v. Albano Cleaners, Inc., ___ F. Supp. 2d ___, 1998 WL 710438 (E.D. Va. 1998): The court denied summary judgment for the employer on the plaintiff's claim for intentional infliction of emotional distress where the plaintiff based the claim on alleged sexual harassment by her supervisor, including verbal remarks, small gifts, grabbing or attempting to grab portions of the plaintiff's body, and phone calls. The court found that the alleged incidents of the supervisor putting his hand under the plaintiff's dress and grabbing her buttocks and his attempts to grab her breasts were sufficiently severe, outrageous, and intolerable (as opposed to merely rude and inappropriate) to support a claim of intentional infliction of emotional distress.

WASHINGTON

Anaya v. Graham, 950 P.2d 16 (Wash. Ct. App. 1998): The employee brought claims for negligent and intentional infliction of emotional distress in conjunction with her claim that she was dismissed because of her disability. The plaintiff claimed that the public policy against disability discrimination in employment gave rise to a duty to not terminate an employee because of her disability. The court held that termination itself was insufficient to support a claim for intentional infliction of emotional distress.

Hayes v. Concrete Technology Corp., No. 22343-1-11, 1998 WL 726480 (Wash. Ct. App. Oct. 16, 1998): An African-American male sued his employer for intentional infliction of emotional distress, alleging that the defendant's Director of Operations spoke to him using the word "nigger." The company learned of the incident, and disciplined the Director by requiring that he apologize to the plaintiff in front of the Human Resources head and the President of the company; send a written apology to the plaintiff; write letters of apology to the entire workplace, which were posted for 30 days; and have copies of the letter placed in his employment file. The plaintiff claimed that the apology, which did not mention his name, "allowed all the employees at the plant to know that [the plaintiff] had been labeled the 'nigger' at the plant and that no significant action had been taken against the Director." The plaintiff also claimed that the posting caused others to use the word "nigger." The court noted that an employer is not liable for an employee who acts on personal feelings outside the scope of employment. Because the Director was not effectuating any of the company's purposes at the time of the original incident, the court found that the employer was entitled to summary judgment.

WEST VIRGINIA

Burgess v. Gateway Communications, Inc., ___ F. Supp. 2d ___, 1998 WL 790586 (S.D.W. Va. Nov. 10, 1998): The plaintiff asserted intentional infliction of emotional distress based on the supervisor's alleged breach of an oral employment contract, making fun of the employee's speech impediment, questioning the employee in front of others about why he failed to sign up some small accounts, and warnings to employees that they should not go over his head to complain. The court found that these complaints were merely a relatively small number of "insults, indignities, threats, annoyances, and petty oppressions -- all of it unpleasant, but none of it actionable," and granted summary judgment for the employer.

Travis v. Alcon Laboratories, 503 S.E.2d 419 (W. Va. 1998): The plaintiff claimed intentional infliction of emotional distress based on outrageous conduct by his supervisor which the defendant employer failed to remedy. The plaintiff alleged his supervisor belittled and demeaned him, and when the employer did not act on the plaintiff's complaints, he quit. The court ruled that the plaintiff alleged sufficient facts to survive summary judgment, and that an employer may be held liable for a supervisor's outrageous actions committed within the scope of employment.

WISCONSIN

Harris-Scaggs v. Soo Line Railroad Co., 2 F. Supp. 2d 1179 (E.D. Wis. 1998): Considering whether the Federal Employers' Liability Act (FELA) preempted negligent and intentional infliction of emotional distress claims brought by a railroad employee against her employer, the court held that the plaintiff's claims were not cognizable under FELA because the plaintiff did not allege any physical contact or harm. The court reasoned that a plaintiff must allege a threat to her zone of physical danger to meet FELA standards. Further, the court held that since the plaintiff's claims for emotional distress did

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not conflict with the goals of FELA, these claims were not preempted by FELA so that the plaintiff could bring such claims under state law.

Hibben v. Nardone, 137 F.3d 480 (7th Cir. 1998): The court found that the exclusivity provisions of the Wisconsin Workers' Compensation Act barred the female employee's claim for intentional infliction of emotional distress against the principle executive of a bankrupt company who had been found liable under Title VII for sexually harassing her. The court reasoned that the harassment was an "accident" from the perspective of the plaintiff in that it was not expected or foreseeable and there was no allegation of physical assault with intent to cause bodily harm.

TORTIOUS INTERFERENCE WITH CONTRACT AND BUSINESS OPPORTUNITIES: 1998 YEAR IN REVIEW

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The popularity of the torts of interference with contract and interference with business opportunities continues to grow. Each year, these torts are invoked in new and more creative ways – unfortunately for plaintiffs, with little (or no) success. Rarely are interference claims invoked as stand-alone claims. More typically, they are included in a laundry list of claims ill-suited to the facts at hand or missing a key component, such as a predicate contract or a credible business opportunity that has been lost. Other times, insurmountable defenses exist, such as the Federal Tort Claims Act which prohibits these torts being brought against the United States. See Duran v. City of New York, 1998 U.S. Dist. LEXIS 14370 (S.D.N.Y.).

These torts, when employed appropriately, can be quite effective against and costly to a defendant. One of the more practical and effective uses of the tort of interference with contract is in the enforcement of a noncompete agreement. In contrast, tortious interference with contract claims has generally failed when invoked by at-will employees due to the lack of an enforceable contract. To succeed, a plaintiff must demonstrate (1) the existence of an enforceable contract or realistic business opportunity, (2) defendant's knowledge of the contract or business opportunity, (3) an intentional breach of the contract or interference with the business opportunity, and (4) damages.

Some states require proof of malice for a claim to succeed.

The following highlights some of the more notable cases from 1998.

Arkansas: Wal-Mart's president wrote a letter to its vendors saying it preferred dealing directly with them and not through independent representatives. Plaintiff, an independent representative, lost clients as a result and sued for tortious interference with contract. The Arkansas Supreme Court rejected plaintiff's claim that Wal-Mart's motive was improper or that its objective was "greed." The Court commented that in place of the word "greed" could be substituted "profit motive" and to allow the claim here would require that a claim go to a jury "in any instance when a business threatens not to buy in order to get a better price." Mason v. Wal-Mart Stores, 333 Ark. 3, 969 S.W.2d 160 (1998).

California: A California appeals court recognized and applied an absolute privilege in favor of a manager who allegedly wrongfully caused the termination of an at-will employee. The court reasoned that employers are "entitled to the full and open participation of management in the decision of whether to continue the employment" of an at-will employee. The motives of the management may not be questioned, according to the court, because to allow plaintiffs to plead around at-will agreements by challenging management's motives would require employers to have good cause to terminate in those cases. Halvorsen v. Aramark Uniform Services, 65 Cal. App. 4th 1383, 77 Cal. Rptr.2d 383 (1998).

Georgia: Plaintiff was a psychologist whose patients included residents in defendant's nursing home. Defendant terminated its contract with plaintiff who, in turn, alleged that he had independent contractual relationships with his patients and that by denying him access to his patients, defendant tortiously interfered with these contracts. The Georgia appeals court commented that these "are indeed murky waters which, under the circumstances of this case, are not susceptible to resolution

⁵ The author would like to acknowledge the contribution made by his colleague, Sanjay Malhotra, in the preparation of this report.

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by a court as a matter of law” and allowed the claim to proceed to trial. Strahley v. Pruitt Corp., 231 Ga. App. 502, 498 S.E.2d 78 (1998).

Hawaii: Plaintiff’s claim for interference with prospective contractual relations was rejected by the Hawaii Supreme Court because the alleged offensive communication was truthful and therefore privileged. Defendant lab workers reported to plaintiff’s prospective employer that he had not completed his drug test at the lab in that plaintiff’s urine sample was insufficient. The Court ruled that the communication of truthful information in this case was privileged, but declined to convert this privilege into an absolute privilege applicable in all factual settings. Kutcher v. Zimmerman, 87 Haw. 394, 957 P.2d 1076 (1998).

Illinois: Plaintiff alleged that he was terminated for refusing to smoke marijuana with other employees. His tortious interference with contract claim against those involved in his termination was denied, however, because plaintiff failed to show that he had a valid, enforceable contract for continued employment. Davis v. Times Mirror Magazines, 297 Ill. App. 3d 488, 697 N.E.3d 380 (1998).

A pilot’s interference with prospective economic advantage claim was dismissed for failing to allege any reasonable expectation of a business relationship with a prospective employer. Plaintiff’s claim rested on his former employer’s revocation of his medical certification which prevented him from working as a pilot. Plaintiff’s claim failed because he merely alleged that he wished to continue as a pilot, not that he had been offered or even applied for other pilot positions. Frederick v. Simmons Airlines, 144 F.3d 500 (7th Cir. 1998).

Louisiana: Plaintiff was terminated following an audit of the chapter of the Multiple Sclerosis Society she headed. Prior to the audit, plaintiff’s subordinate wrote a letter critical of her performance to the Society’s Board. Plaintiff sued the Society and certain individuals for tortious interference with business relations. The court dismissed her claim, finding that plaintiff had failed to meet Louisiana’s stringent requirement that malice on the part of defendant be demonstrated. In doing so, the court rejected plaintiff’s claim that malice was present because her former subordinate wrote her letter to the Board because she wanted plaintiff’s job, finding no evidentiary support for the claim. Bahan v. Louisiana Chapter, Civil Action 97-2052 (E.D. La. 1998).

Massachusetts: Plaintiff doctor established improper and intentional interference with business opportunities by a hospital and a fellow doctor. Nonetheless, the doctor’s claim of tortious interference with business relations failed because plaintiff could not establish any pecuniary loss. Birbiglia v. St. Vincent’s Hospital, 427 Mass. 80, 692 N.E.2d 9 (1998).

Minnesota: Plaintiff employer successfully demonstrated that defendant tortiously interfered with a noncompetition agreement it had with one of its senior managers. In doing so, the Minnesota Supreme Court ruled that the litigation costs, including attorneys’ fees, constituted damages for which plaintiff could recover. The Court found that injuries caused by third parties fell within the exception to the American Rule under which each party to a litigation must bear its own costs. Kallok v. Medtronic, Inc., 573 N.W.2d 356 (Minn. 1998).

New York: Defendant salesman was bound by a non-compete agreement for a period of two years after his separation from plaintiff Trionic. Trionic’s primary account chose to end its relationship with Trionic and hired a competitor, Parallax. The salesman resigned from Trionic and, shortly thereafter, was hired by Parallax which was unaware of the non-compete agreement. The court dismissed Trionic’s claim against Parallax for tortious interference with the salesman’s employment contract because Parallax did not know of the non-compete agreement between the salesman and his former employer and, therefore, could not have intentionally interfered with it. The court reasoned “there is no action for negligent interference; intention and knowledge must be alleged and proven.” Trionic Associates, Inc., v. Harris Corp. et al., 1998 U.S. Dist. LEXIS 18489 (E.D.N.Y. 1998).

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Plaintiff was found to have stated a tortious interference with business relationship claim where he alleged that his former employer called his current employer attempting to convince it to terminate all ties with plaintiff. The former employer offered to restore the new employer as a vendor if it terminated plaintiff, which it did. In contrast, plaintiff's tortious interference with contract claim failed because no contract between plaintiff and his current employer was shown to exist. Aquilone v. Republic National Bank, 1998 U.S. Dist. LEXIS 19531 (S.D.N.Y.)

A tortious interference with prospective business relations claim was allowed to proceed to a jury where plaintiffs alleged that defendants interfered with the plaintiffs' relationship with their customers by making use of customer information wrongfully obtained by them. The court ruled that the malice requirement was satisfied by defendants' alleged use of wrongful means in interfering with plaintiffs' long-standing customer relations. Ivy Mar Co., Inc. v. C.R. Seasons Ltd., 1998 U.S. Dist. LEXIS 15902 (E.D.N.Y.)

Oklahoma: A teacher's claim of tortious interference with a contract will survive against the superintendent and principal of a school district under the Oklahoma Governmental Tort Claims Act, only if the acts of the superintendent and the principal were malicious or in bad faith and outside the scope of their employment. If such is the case, however, the school district will be relieved of liability. Martin v. Johnson, 1998 Okla. LEXIS 134 (1998).

Plaintiff was terminated by Conoco for sexually harassing his secretary. Later, Conoco allegedly had plaintiff removed from a project working at Conoco for an independent contractor. Plaintiff's malicious interference with contract claim was dismissed because, even if the facts alleged were shown to be true, he failed to show that his former employer acted with malice in prompting his removal as an independent contractor. Vice v. Conoco, Inc., 150 F.3d 1286 (10th Cir. 1998).

No tortious interference with contract claim was stated where plaintiff, a police officer, was transferred to another position after he contradicted police management relating to a murder investigation. The Tenth Circuit ruled that plaintiff did not demonstrate a contractual right to a particular shift or assignment. Dill v. Edmond, Oklahoma, 155 F.3d 1193 (10th Cir. 1998).

Ohio: A former employee sued her former employer's executive director for tortious interference with contract, alleging that the director retaliated against plaintiff for complaining about sexual harassment in the workplace. The court dismissed the claim, finding that plaintiff was an at-will employee and therefore no contractual relationship was shown to exist and that plaintiff had failed to produce evidence that the executive director acted outside the scope of her employment. Dorricott v. Fairhill Center for Aging, 2 F.Supp.2d 982 (N.D. Ohio 1998).

South Carolina: Plaintiff, a diabetic, was required to take a randomly administered drug and alcohol test. She was terminated when the testing lab reported the presence of a high level of alcohol in plaintiff's urine. Plaintiff claimed that the test results were corrupted as the result of the medicine she was taking related to her diabetes, and she sued her employer and the testing company alleging negligence, defamation, and interference with contractual relations. Her interference claim against the testing company was dismissed under South Carolina law because she failed to show that the testing company intentionally procured her termination or was not justified in producing its test results. Cooper v. Laboratory Corp. of America, 150 F.3d 376 (4th Cir. 1998).

South Dakota: Plaintiff consulting firm did business with defendant Gateway 2000 and defendant Densmore, plaintiff's former employee. Gateway terminated its relationship with plaintiff and hired Densmore to perform the same services that plaintiff was performing. Plaintiff sued, seeking to enforce an agreement it signed with Gateway under which Gateway agreed not to recruit plaintiff's employees. The South Dakota Supreme Court rejected plaintiff's interference with business relationship claim and its agreement with Gateway as an unlawful restraint of trade. The court noted that Densmore was an at-will employee and Gateway properly terminated its contract with plaintiff. Communication Tech. Systems v. Densmore, 583 N.W.2d 125 (1998).

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Virginia: The Virginia Supreme Court upheld the award of punitive damages under an intentional interference with contract claim against a company and its former managers and employees that acquired an entire department of 26 managers and employees, complete with confidential files and documents, from a competitor. The managers and employees conspired to leave together, and defendant employer agreed to hire them knowing they had all signed employment agreements containing noncompetition agreements. Advanced Marine Enterprises v. PRC, 256 Va. 106; 501 S.E. 2d 148 (Va. 1998).

Washington: Two correctional officers challenged their terminations before a state personnel appeals board, lost, and brought a tortious interference claim in court against their fellow officers who they contended contributed to their discharges. The Washington Supreme Court upheld the dismissal of the interference claim on collateral estoppel grounds, finding that plaintiffs had every incentive to pursue their claims diligently in the administrative proceeding and the “same bundle of operative facts was before both” the administrative agency and the court. Reninger v. Washington Department of Corrections, 134 Wash.2d 437; 951 P.2d 782 (Wash. 1998).

Wyoming: The Supreme Court of Wyoming found that a claim of intentional interference with contract by one employee against a co-employee will not survive if the co-employee acted within the scope of his authority. Bear v. Volunteers of America, 964 P.2d 1245 (Wyo. 1998).

**RECENT DEVELOPMENTS IN THE EMPLOYMENT
TORTS OF NEGLIGENT HIRING, RETENTION
AND SUPERVISION**

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The application of negligence principles to the employment relationship as a basis for liability to third parties dates back to the 1800's. Nonetheless, negligence traditionally has not been the most common theory of liability advanced by third parties against employers for the acts of their employees; that distinction has fallen to the doctrine of respondeat superior. According to that theory, a principal (i.e., employer) may be vicariously liable to third parties injured by the acts or omissions of its agents (i.e., employees). Respondeat superior is a derivative theory of liability premised on agency principles and focuses on the "scope of employment" concept. Accordingly, vicarious liability is not imposed on the employer for conduct that is outside the employee's scope of employment. This theory also focuses on the agent's, or employee's, underlying negligence and not the employer's; consequently, the standard of care exercised by the employer in selecting or retaining employees is irrelevant.

The theory of negligent hiring, on the other hand, establishes direct liability based upon the employer's own negligence in hiring a particular individual. As such, the "scope of employment" concept has no application and an employer can be liable even for employee acts that are outside the scope of employment. Similarly, liability can be imposed even though the underlying employee conduct is not itself negligent or actionable, for it is the employer's own negligence in hiring that gives rise to liability. And, because liability is premised on the employer's own conduct, punitive damages may be available, even in those jurisdictions that do not allow punitive damages in the respondeat superior context.

In general terms, a cause of action based on negligent hiring requires proof of the basic negligence elements. Thus, a plaintiff must show that: (1) the employee was unfit for hiring; (2) the employer knew or should have known the employee was unfit; (3) the employer could foresee that the employee, through his/her employment, would come into contact with the plaintiff under circumstances creating a risk of danger to the plaintiff; (4) the employer's negligence was the proximate cause of the injury; and (5) the plaintiff was injured. The plaintiff must initially establish that the employer owed the plaintiff a duty of care. In most states, foreseeability defines the scope of this duty: an employer owes a duty of care to those persons the employer reasonably foresees could be harmed by an unfit employee. Next the plaintiff must establish that the duty was breached; that is, the employer failed to use reasonable care under the circumstances. Not surprisingly, the nature of the employer's business can affect the level of care expected, with certain employers (e.g., common carriers, landlords, health care facilities) being subjected to a "special" level of care. Oftentimes, nonexistent or inadequate background investigations of applicants, which if properly performed would have disclosed unfitness, have been alleged to constitute the employer's breach of its duty of care. Finally, the plaintiff must show that the employer's breach of its duty was a proximate cause of the injury ultimately suffered.

Negligent retention involves nearly identical considerations, timing being the factor that distinguishes it from negligent hiring. When the employer knows, or should have known, of the employee's unfitness at the time of hiring, the plaintiff's claim is properly for negligent hiring. When that knowledge is only acquired (or reasonably should have been acquired) after the employment relationship has commenced, and the employer fails to take further action (such as investigation, reassignment or discharge), the plaintiff's claim is for negligent retention.

The doctrine of negligent supervision, like respondeat superior, is premised upon derivative liability and is summarized in Section 317 of the Restatement (Second) of Torts;

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A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if

- (a) the servant
 - (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or
 - (ii) is using a chattel of the master, and
- (b) the master
 - (i) knows or has reason to know that he has the ability to control his servant, and
 - (ii) knows or should know of the necessity and opportunity for exercising such control.

See also Restatement (Second) of Agency Section 213.

A summary by state of negligent hiring/retention/supervision cases decided in 1998 follows.

DISTRICT OF COLUMBIA

Moore v. National Children's Center, Inc., 14 IER Cases (BNA) 87 (D.D.C. 1998). Shearer Bailey, an employee of the defendant, alleged that a co-worker sexually harassed her. Specifically, Bailey alleged she was subjected to sexual jokes, a question about another female employee's personal life, and discussions about the sexual tension between male and female co-workers. She filed an action in federal court against her employer, in which she asserted a claim of sexual harassment under Title VII of the 1964 Civil Rights Act, along with claims of negligent hiring and supervision of her co-worker.

The District Court granted the defendant's motion for summary judgment. With respect to the negligent hiring and supervision claims, the court ruled that "there is no credible evidence that the defendant knew or should have known that the employee had a propensity to harass female employees and no evidence that anyone, including the plaintiff herself, ever complained to the defendant about the employee's alleged harassment." Moore, 14 IER Cases at 88. Without such knowledge, the court concluded that the defendant did not breach the proper standard of care in either hiring or supervising the employee.

FLORIDA

Doe v. Evans, et al., 718 So.2d 286, 1998 Fla. App. LEXIS 11438, 14 IER Cases (BNA) 577 (Fla. Dist. Ct. App. 1998). The plaintiff alleged that a church negligently hired, supervised, and retained a priest who became romantically involved with the plaintiff during pastoral counseling. The lower court dismissed the complaint and the appellate court affirmed.

The appeals court ruled that the First Amendment bars the plaintiff's claim of negligent hiring, retention, and supervision. The court rejected any notion that a negligence claim could be resolved by tort principles, relying upon language in a United States Supreme Court decision which stated that "when a civil court undertakes to compare the relationship between a religious institution and its clergy with the agency relationship of the business world, secular duties are necessarily introduced into the ecclesiastical relationship and the risk of a constitutional violation is evident." Doe, 14 IER Cases at 580 (quoting Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94 (1952)).

The court distinguished this case from Doe v. Dorsey, 683 So.2d 614 (Fla. 5th Dist. Ct. App. 1996), which found that the First Amendment did not bar a negligent hiring claim. In Dorsey, there was evidence of pedophilia and other illegal adult sexual behavior. The Evans court interpreted Dorsey to suggest that this type of criminal misconduct is necessary to avoid the First Amendment bar. Here, the plaintiff consented to the sexual relationship and there was no evidence of a sexual battery.

ILLINOIS

Van Horne v. Muller, 1998 Ill. LEXIS 1590 (Ill. 1998). Keith Van Horne brought this action to recover damages for injury to his reputation resulting from allegedly defamatory statements made by a radio deejay. In his complaint, Van Horne asserted claims against the radio station for negligent and reckless hiring, supervision and retention of the deejay. The trial court dismissed all the claims against the defendant. The appellate court reversed the trial court's dismissal, but the Illinois Supreme Court reversed again, siding with the trial court. The Supreme Court ruled that Van Horne was required to plead facts showing that the radio station knew or should have known that the deejay was likely to make false, defamatory statements during his radio show if the deejay were hired. More specifically, the plaintiff had to prove that the deejay's particular unfitness for the job proximately caused his injuries.

The Court also emphasized that to show an employer had notice of an employee's lack of fitness, the plaintiff's proof of an employee's past misconduct must be closely related to the specific current misconduct alleged in the complaint. In this case, the plaintiff cited to the deejay's past outrageous conduct as proof of the employer's being on notice of his propensity to make defamatory statements. The Court held that none of the examples of past conduct would show a propensity to make false, defamatory statements, stating that a negligent hiring or retention cause of action "may not be premised solely on allegations that an employer hired an employee who had previously engaged in controversial, but nondefamatory, speech or conduct." Van Horne, 1998 Ill. LEXIS at *21.

The Court also noted that "the type of prior conduct by an employee which will be sufficient to put an employer on notice that the employee is unfit for a particular position will differ in every case. In this case, we employ a narrow interpretation of this requirement because of the First Amendment concerns which arise when liability is predicated on speech." Van Horne, 1998 Ill. LEXIS at *21.

INDIANA

Grzan v. Charter Hosp. of Northwest Indiana, 702 N.E.2d 786, 1998 Ind. App. LEXIS 2185 (Ind. Ct. App. 1998). Cherilynn Grzan, a former psychiatric patient at the defendant hospital, filed medical malpractice and negligent retention claims against the hospital and one of its employees, Simon Greer. The lawsuit arose from Greer's alleged sexual relationship with Grzan. The trial court granted summary judgment in favor of the hospital on the negligent retention and supervision claims, but the Court of Appeals reversed.

According to the appeals court, in order to establish liability the plaintiff must prove that the defendant knew or had reason to know of the employee's misconduct and failed to take appropriate action. Although the evidence was undisputed that neither Grzan nor Greer informed any hospital staff about their relationship, a hospital nurse stated in her affidavit that it was rumored that Grzan and Greer were engaged in a sexual relationship. Further, Grzan testified in her deposition that another hospital employee was uncomfortable leaving her and Greer alone. The appellate court held that this evidence was sufficient to raise a question of fact about whether the hospital knew or should have known of the employee's improper sexual conduct with Grzan.

KENTUCKY

Oakley v. Flor-Shin, Inc., 964 S.W.2d 438, 1998 Ky. App. LEXIS 24, 13 IER Cases (BNA) 1363 (Ky. Ct. App. 1998). Holly Oakley, a part-time employee at a K-Mart Department store, alleged that she was sexually assaulted by William Bayes, an area supervisor for Flor-Shin, at the store. Flor-Shin was hired by K-Mart to maintain its floors. Oakley filed an action against both Bayes and Flor-Shin. Among her many claims, she asserted a negligent hiring cause of action against Flor-Shin. The trial court granted Flor-Shin's motion for summary judgment with respect to all claims. The Court of Appeals reversed the trial court's dismissal of her negligent hiring claim.

The appellate court agreed with the plaintiff that an employer can be held liable when its failure to exercise ordinary care in the hiring or retaining of an employee creates a foreseeable risk of harm to a third person. The court held that the

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standard for liability is whether Flor-Shin knew or had reason to know that Bayes was unfit for the job for which he was employed and whether his placement or retention in that job created an unreasonable risk of harm to Oakley.

The court determined that Flor-Shin knew or should have known about Bayes' criminal record, which included burglary and theft convictions and an arrest for attempted rape. Flor-Shin should have learned about Bayes' criminal record by conducting a background check as required by its agreement with K-Mart. Furthermore, Flor-Shin had actual knowledge of Bayes' criminal record because he was related to the Flor-Shin regional manager who hired him. Based on this knowledge, Flor-Shin placed Oakley in an unreasonable risk of harm by leaving her alone with Bayes in a locked store. The court found that this evidence was sufficient to raise an issue of fact for a jury, making an award of summary judgment erroneous.

MASSACHUSETTS

Perkins v. Commonwealth of Massachusetts Executive Office of Public Safety et al., 1998 Mass. Super. LEXIS 408 (Mass. Super. 1998). Carol Perkins was a cadet in the Massachusetts State Police 70th Training Academy between June 1992 to July 1992. Upon her decision to leave the academy, Perkins filed a lawsuit against the Academy. She asserted in her complaint that the Academy negligently failed to supervise its staff in reference to her medical needs.

The defendants' motion for summary judgment was granted. Perkins argued that the negligent supervision claim was not barred by the Workers' Compensation Act. She relied upon the "dual persona" doctrine, which states that an employee may maintain a cause of action against the employer, distinct from any worker's compensation coverage, if the employer's liability arises from its existence as an individual or entity distinct from its employer status. She argued that the Academy's status as an employer and a medical provider are distinct. Thus, the defendant was operating as a dual persona, creating separate liability for the defendants in rendering medical care.

The court rejected this argument. While the court recognized the existence of the dual persona doctrine, it found the theory inapplicable in this case. The court determined that it was evident that the defendants were not acting as a separate entity when rendering medical assistance, but rather were acting as employers pursuant to a Massachusetts law which requires an employer to provide medical care to employees. Therefore, any injuries suffered by Perkins during the course of her employment were covered by the Workers Compensation Act.

MINNESOTA

Ivers v. The Church of St. William, 1998 Minn. App. LEXIS 1397 (Minn. Ct. App. 1998). A priest, employed by the defendant church, allegedly engaged in sexual contact with the plaintiff, Michael Ivers, over a period of five years. Two of the incidents occurred while Ivers was employed by the church. Subsequently, Ivers reported the incidents to the church administrator, Mary Joe Dolan. The priest alleged that Dolan's behavior towards him changed as a result of his disclosure. Specifically, he relied upon a negative evaluation, a three day suspension, and repeated threats of termination as evidence of Dolan's unfavorable treatment. Ivers then filed suit against the church, alleging that the church was negligent in hiring, retaining, and supervising the priest, Dolan, and Dolan's supervisor. The district court granted the defendant's motion for summary judgment on the ground that judicial inquiry into the church's hiring and appointment procedures with respect to the priest, Dolan, and her supervisor are constitutionally barred because they involve purely religious matters. The Court of Appeals upheld the district court's ruling with respect to the priest, but ruled that the First Amendment did not preclude the court from applying negligent hiring principles with respect to the conduct of Dolan and her supervisor.

The court's analysis began by declaring that the doctrine of negligent hiring and retention imposes direct liability on an employer for an employee's intentional tort if the employer "knew or should have known" of the employee's propensities. Ivers, 1998 Minn. App. LEXIS at *12. The court also noted that in Minnesota liability for negligent supervision of an employee is imposed under a theory of respondeat superior.

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Here, the court found no evidence to demonstrate that the church was on notice that Dolan was abusive. Furthermore, the plaintiff did not establish a causal connection between Dolan's actions and alleged physical injury or threat of physical injury to support his negligence claims.

NEW YORK

Rodriguez v. United Transportation, et al., 677 N.Y.S.2d 130, 14 IER Cases (BNA) 583 (1st Dep't 1998). The plaintiff, a mentally retarded woman, was raped and assaulted by a driver employed by a transportation company responsible for providing her transportation to and from a health care facility where she was receiving counseling. At the time of the incident, the bus driver was not on duty. He had driven the plaintiff to the facility the previous day and asked her for the approximate time of her departure from the facility for the following day. That next day, he waited for the plaintiff outside the facility in a company van. The driver threw her into the van and drove her to a public park where he sexually assaulted her. The plaintiff alleged that the company negligently hired and retained the driver and therefore was liable to the plaintiff for damages. The trial court denied the defendant's motion for summary judgment. The Appellate Division reversed the trial court's decision.

The company faced potential liability for not verifying the driver's job references or having him complete an employment questionnaire. The appellate court rejected liability on this basis, however, because the plaintiff had not offered anything about the driver's background that would have led the employer to believe that he had a propensity for sexual violence. The driver, who had been employed by the defendant for nine years at the time of the incident, had never been accused of abusing patients or been the subject of any complaints, and he had no criminal record. Because an investigation would not have uncovered any evidence of a propensity for sexual violence or misconduct, the court concluded that the plaintiff would have been unable to prove the element of causation.

The plaintiff also argued that because she was a person with special needs, the company had a duty to protect her from an employee's criminal conduct. The court rejected this argument, holding that absent a showing of negligence, an employer is not obligated to be "an insurer of the safety of its passengers." Rodriguez, 677 N.Y.S.2d at 133.

PENNSYLVANIA

Heller v. Patwil Homes, Inc., 713 A.2d 105, 1998 Pa. Super. LEXIS 837 (Pa. Superior Ct. 1998). The plaintiffs alleged that the defendant was liable for the negligent hiring/supervision of an employee who defrauded them. The lawsuit arose when a married couple, Paul and June Heller, entered into an agreement with the defendant for the construction of a model home. The defendant's sales manager, William Strouse, informed the plaintiff that he had an investment business which the Hellers might consider as a means of upgrading their home. The plaintiffs agreed to invest \$49,500 with Strouse. With the exception of \$2,530, the plaintiffs never recovered their investment. Strouse pled guilty to criminal charges arising out of the investment scheme. A bench trial resulted in an award favoring the plaintiffs' negligence claim. On appeal, the Superior Court affirmed the lower court's decision.

Although Strouse was hired without a background check that would have notified the employer that he previously engaged in investment fraud, the court found no fault with the manner and method by which the defendants hired him. The court held that "discovery of his involvement in securities fraud may not have discouraged his employment in the unrelated real estate market." Heller, 1998 Pa. Super. LEXIS at *10.

However, the court did find that the defendant was liable for the negligent supervision of the employee. The court concluded that the defendant's total absence of supervision led to Strouse's criminal behavior. The defendant should have known that Strouse was operating an investment scam because the activity was taking place at the defendant's offices and the clients being solicited were prospective buyers of the defendant's homes. Therefore, the defendant was on "constructive notice" that the sales manager was defrauding their potential customers.

RHODE ISLAND

Morrissey v. Capstone Financial Services, 706 A.2d 1338, 1998 R.I. LEXIS 92 (R.I. 1998). This negligent hiring cause of action arose from the plaintiff's allegedly being injured as a result of a collision between his vehicle and a snow plow operated by an independent contractor at the plaintiff's place of business. The plaintiff alleged that the property owners were negligent for hiring a contractor who did not have insurance for his snow plow. The Superior Court trial justice granted the defendants' motion for summary judgment on the basis that no duty existed to hire a snow plow driver with insurance.

The Rhode Island Supreme Court agreed with the trial justice's decision. The Court held that the plaintiff did not raise any allegations that the snow plow driver was unfit or incompetent. Furthermore, the Court declined to adopt a rule that any person who hires an independent contractor has a duty to investigate whether a contractor has valid insurance.

TEXAS

Swanson v. Steak and Ale of Texas, Inc., 1998 Tex. App. LEXIS 4009 (Texas Ct. App., First District, Houston 1998).⁶ This action for negligent hiring and retention arose from an off-duty social gathering of five restaurant employees at a local drinking establishment. At the end of the evening, two employees crashed their vehicle into a guardrail, killing the passenger. The driver admitted that he was driving while intoxicated and was convicted of involuntary manslaughter. The deceased employee's family alleged that the restaurant's negligent hiring and retention of the driver and one other restaurant manager who was present that evening was the proximate cause of their daughter's death. The trial court granted the restaurant's motion for summary judgment and the Court of Appeals affirmed.

The appeals court held that while liability for negligent hiring and supervision is not dependent upon a finding that the employee was acting within the scope of his employment when the tortious act occurred, there must be some connection between the plaintiff's injury and the fact of employment. In this case, there was no connection. The evidence established that the contacts between the deceased and three restaurant employees were social in nature and not made on behalf of the restaurant. All three employees testified that they were not on duty on the evening in question, they did not perform any employment-related function, no restaurant business was transacted that evening, no one was compensated by the restaurant for being present, and no restaurant policy aided, abetted, or encouraged them to consume alcoholic beverages that evening. Each individual paid for his or her own drink and no restaurant employee provided the plaintiff or the driver with any alcohol. Finally, the court noted that the plaintiff did not offer any evidence that if the restaurant had investigated the background of the driver and restaurant manager, it would have discovered something that would have enabled the restaurant to prevent the accident.

WISCONSIN

Miller v. Wal-Mart Stores, Inc., 219 Wis. 2d 250, 580 N.W.2d 233, 1998 Wisc. LEXIS 83 (Wis. 1998). Stanley Miller filed a negligent hiring, training, or supervision claim against the defendant, Wal-Mart, as a result of being unlawfully detained by three store employees who thought Miller was shoplifting. The jury determined that Wal-Mart was negligent in the hiring, training or supervising of its employees, thereby entitling the plaintiff to compensatory and punitive damages. The court of appeals certified this case to the Wisconsin Supreme Court to determine whether the tort of negligent hiring, training or supervision is a valid claim in Wisconsin.

The Wisconsin Supreme Court recognized the tort of negligent hiring, training or supervision and held that, in order to state such a claim, the plaintiff must show that the employer has a duty of care to the plaintiff, that the employer breached that duty, that the act or omission of the employee was a cause-in-fact of the plaintiff's injury, and that the act or omission of the employer was a cause-in-fact of the wrongful act of the employee. The court noted that the wrongful act by the employee does not necessarily have to be a tort to establish a claim of negligent hiring.

⁶ Pursuant to the Texas Rules of Appellate Procedure, this unpublished opinion may not be cited as authority by a counsel or court.

**PERSONAL HARM TORTS: ASSAULT, BATTERY,
FALSE IMPRISONMENT, MALICIOUS PROSECUTION,
AND ABUSE OF PROCESS**

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This section sets forth the elements of the torts of assault, battery, false imprisonment, malicious prosecution, and abuse of process, and outlines recent case law developments in these areas.

Assault and Battery: Elements

§ 21 Assault.

- (1) An actor is subject to liability to another for assault 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) the other is thereby put in such imminent apprehension.
- (2) An action which is not done with the intention stated in Subsection (1)(a) does not make the actor liable to the other for an apprehension caused thereby although the act involves an unreasonable risk of causing it and, therefore, would be negligent or reckless if the risk threatened bodily harm.

§ 18 Battery: Offensive Contact.

- (1) An actor is subject to liability to another 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) an offensive contact with the person of the other directly or indirectly results.
- (2) An act which is not done with the intention stated in Subsection (1)(a) does not make the actor liable to the other for a mere offensive contact with the other's person although the act involves an unreasonable risk of inflicting it and, therefore, would be negligent or reckless if the risk threatened bodily harm.

Restatement of the Law (Second) of Torts §§ 18, 21 (1965).

Recent Case Law Developments

Barnard v. City of Chicago Heights, 692 N.E.2d 733 (Ill. App. Ct. 1998). Plaintiff was employed as a desk clerk by the City of Chicago Heights police department. Plaintiff alleged that a sergeant also employed by the police department made sexually offensive comments to her and that these advances were followed by an incident in which Plaintiff was attacked by the sergeant and a struggle ensued. Plaintiff later reported the incident to supervisors who investigated and ultimately

⁷ Mr. Schwimmer gratefully acknowledges the assistance of Sylvia R. Adams of Kiesewetter Wise Kaplan Schwimmer & Prather, PLC in preparing this section.

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suspended the sergeant without pay for thirty days. Plaintiff took a medical leave of absence from the department, claiming that the incident caused her severe emotional trauma, including a fear of going to work. Plaintiff never returned to work, and instead, submitted a formal resignation letter. In her complaint, Plaintiff alleged violations of Title VII of the Civil Rights Act of 1964, as well as, allegations of assault, battery, intentional infliction of emotional distress and negligent supervision against her former employer and several individually named defendants. **Held:** The trial court's decision granting the Defendants summary judgment was overturned and the matter was remanded with instructions. The trial court's decision was based solely on the exclusive remedy provision of the Human Rights Act which prevents jurisdiction over civil rights violations, including sexual harassment, in Illinois state courts. The court reasoned that to the extent Plaintiff has alleged the elements of each of the torts without reference to legal duties created by the Act, she established a basis of imposing liability on the Defendants independent of the Act. Therefore, summary judgment was not appropriate.

Vandiver v. Morgan Adhesive Co., 1998 Ohio App. LEXIS 1035 (Ohio Ct. App. Mar. 18, 1998). Plaintiff alleged that while in a stall in the company restroom, a coworker sprayed him with a fire extinguisher. Approximately ten days later, Plaintiff claimed he was again in a stall in the company restroom when three coworkers allegedly tossed an "ice-bomb" into the stall he was occupying. (An ice-bomb is a sealed, plastic bottle containing a mixture of dry ice and water which expands and erupts with a loud explosion.) Just moments after the first explosion, a second ice-bomb was tossed into the stall. Plaintiff alleges that the second bomb blew him off the toilet. Plaintiff claimed his supervisor refused to come to his aid and his employer knew and approved of these actions. **Held:** The court affirmed the lower court's decision granting summary judgment to the Defendants. The statute of limitations of Plaintiff's intentional infliction of emotional distress claim was governed by the tortious action on which the emotional distress was based. Because Plaintiff's alleged emotional distress arose out of acts that would have constituted assault and/or battery, the Plaintiff's action was limited by the one year statute of limitations for assault and battery instead of by the four year statute of limitations for intentional infliction of emotional distress.

Fretland v. County of Humboldt, 63 Cal. App. 4th 897 (Cal. Ct. App. 1998) Plaintiff alleged that he was subjected to harassment and discrimination by fellow county employees. Specifically, Plaintiff alleged he was falsely accused of stealing county materials, that he was ordered to use unsafe machinery, that he was verbally abused, that his car was vandalized, that he received obscene and threatening phone calls, and that he was lied about to his fellow employees. Plaintiff further alleged that a co-employee committed an unprovoked assault and battery on him by grabbing him and propelling him against a stair railing while yelling profanities. Plaintiff contended that the assault and battery claim fell within an express exception to the exclusivity rule of the workers' compensation act, and that the employer ratified the co-employee's actions. **Held:** Plaintiff's claims were barred by the exclusive remedy provisions of the workers' compensation law. There is no express exception that applied to these facts.

Murillo v. Rite Stuff Foods, Inc., 65 Cal. App. 4th 833 (Cal. Ct. App. 1998). Plaintiff sued her former employer claiming sexual harassment, wrongful termination, breach of contract and the covenant of good faith and fair dealing, general negligence, negligent supervision and retention of an employee, invasion of privacy, assault, battery, false imprisonment, and intentional and negligent infliction of emotional distress. Plaintiff alleged that throughout her employment, her immediate supervisor touched her inappropriately and made crude sexual propositions and lewd remarks to her, isolated her from other employees to facilitate his predations, and insulted her in front of her coworkers. Plaintiff stated that she complained of these incidents on two separate occasions to the plant manager who assured her that he would take care of it. Nothing was done to investigate or remedy the situation. Instead, the Defendant suspended the Plaintiff from work for one week and then terminated her employment. After the Plaintiff filed suit, she admitted that she was an illegal immigrant. The Defendant asserted that given this after-acquired evidence, it would not have hired the Plaintiff in the first place, and, therefore, she should have no cause of action. **Held:** Under the doctrine of unclean hands, Plaintiff's wrongful discharge and contractual claims were barred. However, neither the after-acquired evidence doctrine or the unclean hands doctrine barred the Plaintiff's discrimination or tort claims. Plaintiff's status as an undocumented alien did not preclude her from the protections of employment law. Where the discriminatory conduct was pervasive during the term of employment, it would

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not be sound public policy to bar recovery for injury suffered while employed. Furthermore, the Plaintiff's alleged injury was not the consequence of her fraud and there was no direct connection between the Plaintiff's wrongdoing and the harm suffered.

Miller v. Dockham, 1998 Del. LEXIS 443 (Del. Aug. 15, 1998). The Defendant appealed from an adverse jury verdict. The Plaintiff was a waitress at Captain John's Restaurant, the Defendant's business. On more than one occasion, the Defendant mentioned to the Plaintiff that the buffet was not in good condition. When he checked it again at noon, the Defendant became upset because the buffet was half empty and the food that remained was not appetizing. The Defendant took a hard black biscuit and held it up to the hostess's mouth and asked her whether she would eat it. She pushed it away and laughed. The Defendant then went to the Plaintiff and tried to put the biscuit in her mouth. The details of what occurred next were disputed. The Defendant testified that he put the biscuit up to Plaintiff's mouth and asked "would you eat that crap?" Plaintiff testified that the Defendant grabbed her, shoved the biscuit and his hand into her mouth, pushing her backwards as he did so. Plaintiff testified that she dropped the dishes she was carrying as she tried to tell the Defendant to stop. According to the Plaintiff, her mouth and lip were bleeding when the Defendant released the Plaintiff. The trial court ruled that the Plaintiff established battery as a matter of law. **Held:** Affirmed. Defendant admitted at trial that he went up to the Plaintiff, grabbed her arm and held her for three to four seconds before she screamed and he let her go. Those admissions establish that there was an offensive contact sufficient to constitute battery as a matter of law.

False Imprisonment: Elements

§ 35 False Imprisonment.

(1) An actor is subject to liability to another for false imprisonment if:

- (a) he acts intending to confine the other or a third person within boundaries fixed by the actor, and
- (b) his act directly or indirectly results in such a confinement of the other, and
- (c) the other is conscious of the confinement or is harmed by it.

(2) An act which is not done with the intention stated in Subsection (1)(a) does not make the actor liable to the other for a merely transitory or otherwise harmless confinement, although the act involves an unreasonable risk of imposing it and, therefore, would be negligent or reckless if the risk threatened bodily harm.

Restatement of the Law (Second) of Torts § 35 (1965).

Recent Case Law Developments

Rossi v. Town of Pelham, 13 Indiv. Empl. Rights Cas. (BNA) 665 (D.N.H. 1997). Plaintiff served as town clerk and town tax collector for twenty-three years. In 1993, Plaintiff lost a bid for reelection. New Hampshire law requires a succession audit when the position of town tax collector passes to a successor. Plaintiff planned to take the books and records home for the weekend in preparation for the audit. The Board of Selectmen voted to have the Police Chief take action to prevent the Plaintiff from removing the books from the building. A police officer positioned himself inside the Plaintiff's private office to ensure that she did not remove any work-related books or records. Plaintiff claimed that Pelham officials unlawfully searched her office at the town hall and unlawfully seized her person and her property by placing a police guard in her office to watch over her on her last day of service. One of Plaintiff's state law claims was false imprisonment. **Held:** Although the police officer had confined the plaintiff by preventing her from removing the books and records from the town hall, summary judgment was granted to the Defendant on the issue of false imprisonment because the confinement was privileged. Tort law recognizes a privilege to confine another if it appears reasonably necessary in defense of property. In this case, the police officer was protecting the town's important administrative interest in making sure the records were not lost or destroyed.

Malicious Prosecution: Elements

§ 653 Elements of a Cause of Action.

A private person who initiates or procures the institution of criminal proceedings against another who is not guilty of the offense charged is subject to liability for malicious prosecution if:

- (a) he initiates or procures the proceedings without probable cause and primarily for a purpose other than that of bringing an offender to justice, and
- (b) the proceedings have terminated in favor of the accused.

Restatement of the Law (Second) of Torts § 653 (1977).

Recent Case Law Developments

Foshee v. Southern Finance & Thrift Corp., No. 03A01-9607-CV-00231, 22 TAM 36-10 (Tenn. Ct. App. Aug. 12, 1997).

Held: The dismissal of a criminal case on the grounds of double jeopardy is not the kind of “favorable termination” necessary to support a malicious prosecution lawsuit. In other words, the employee has to be found not guilty of the underlying criminal charge before he or she can hold the employer liable for malicious prosecution.

Barnett v. Shoney’s, Inc., 1998 Ala. Civ. App. LEXIS 803 (Ala. Civ. App. Dec. 11, 1998). Plaintiff was employed as Defendant’s kitchen manager. When the restaurant was burglarized in January 1995, the Defendants reported the theft and named the Plaintiff as a suspect. Plaintiff was subsequently arrested and was incarcerated for 32 days. The criminal case against the Plaintiff was submitted to a grand jury after a judge found probable cause to indict at a preliminary hearing. The judge’s finding of probable cause was based in part on the testimony of the executive manager of the Defendant. The grand jury returned an indictment. The police detective assigned to the case had significant doubts about the testimony of one of the Defendant’s employees and recommended that the case not be prosecuted. The case was not prosecuted and the plaintiff then sued his former employer and its agents for negligence, slander, abuse of process, and malicious prosecution. The trial court denied the Defendant’s summary judgment motion regarding malicious prosecution. **Held:** The court affirmed the trial court’s denial of summary judgment to the Defendant. There were sufficient issues of disputed fact regarding whether or not Defendant’s agents told the police all of the relevant facts during the investigation and whether or not there was probable cause to support prosecution of the Plaintiff.

Abuse of Process: Elements

§ 682 General Principle.

One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process.

Restatement of the Law (Second) of Torts § 682 (1977).

Recent Case Law Developments

Estridge v. Housecalls Healthcare Group, Inc., 1998 N.C. App. LEXIS 1546, (N.C. Ct. App. Dec. 29, 1998).⁸ Plaintiff was a Certified Public Accountant and Certified Internal Auditor who was employed by the Defendant. Plaintiff alleged that after being promoted to Controller he realized that the accounting system was inadequate. Despite Plaintiff’s recommendations regarding the need for an improved system, his suggestions were largely ignored. Plaintiff decided to resign. Defendant

⁸ Pursuant to Rule 32(b) North Carolina Rules of Appellate Procedure, this decision is not final until the expiration of the twenty-one day rehearing period.

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paged the Plaintiff the morning following his resignation telling him to return the company keys. Defendant stated that it also told Plaintiff to return any other company property in his possession. Plaintiff returned the keys and told one of Defendant's employees that he would return the pager and cellular phone after receiving his last check. The Defendant, after hearing Plaintiff's response, explained the situation to the magistrate who issued a warrant charging conversion by a bailee of the pager and cellular phone. Plaintiff, unaware of the warrant, turned in both the pager and cellular phone as promised. When the case came up for trial, the Defendants discussed the case with the Assistant District Attorney, telling her that they did not want the case dismissed. The Assistant District Attorney dismissed the case because the property had been returned. Plaintiff filed suit against the Defendants for malicious prosecution and abuse of process two weeks after the criminal case was dismissed. Thereafter, a jury awarded the Plaintiff \$1,295.93 in unpaid wages and \$30,000.00 in compensatory damages. The jury awarded punitive damages of four million dollars. The trial court denied the Defendant's motions for judgment notwithstanding the verdict or a new trial. **Held:** The trial court erred in failing to dismiss the claim for abuse of process against all the Defendants and ordered a new trial on the issue of damages with regard to the malicious prosecution claim. The fact that the Defendants disagreed with the Assistant District Attorney regarding her decision to dismiss the case was not in itself sufficient to meet the willful act requirement. Abuse of process requires a Defendant to commit some willful act whereby he seeks to use the existence of the proceeding to gain advantage over Plaintiff in respect to some collateral matter. The appellate court found no such evidence in this matter and dismissed the abuse of process claim and remanded the malicious prosecution claim for new trial.

**RECENT DEVELOPMENTS IN THE AREA OF
PREEMPTION OF EMPLOYMENT CLAIMS⁹**

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A. United States Supreme Court Decisions

- **Marquez v. Screen Actors' Guild, Inc., ___ U.S. ___, 119 S. Ct. 292 (1998) (NLRB primary jurisdiction of claims relating to § 7 or § 8 of the NLRA).** An actress sued a production company and labor organization representing performers alleging the labor organization breached its duty of fair representation under the NLRA by negotiating and enforcing a flawed union security clause and by failing to notify her about her rights under the NLRA. One issue in the case involved the employee's challenge to a 30-day grace period provision of the collective bargaining agreement's union security clause, alleging that the provision was inconsistent with the NLRA. Despite being couched in terms of a breach of duty of fair representation, the Court affirmed the Ninth Circuit's decision to refuse to exercise jurisdiction over the challenge because the challenge was within the primary jurisdiction of the NLRB. The Court determined a plaintiff cannot avoid the jurisdiction of the NLRB by characterizing statutory violations as a breach of the duty of fair representation. To invoke federal jurisdiction when the claim is based in part on a violation of the NLRA, the plaintiff must adduce facts suggesting that the union's violation of the statute was arbitrary, discriminatory, or in bad faith.

B. Selected Federal Court of Appeals Decisions

- **O'Connor v. Unum Life Ins. Co. of America, 146 F.3d 959 (D.C. Cir. 1998) (ERISA preemption of California notice-prejudice law).** Former employee brought action against employer and its insurer for their failure to pay long term disability benefits under an employee benefit plan. In reversing summary judgment for the employer, the Court determined ERISA did not preempt California's notice-prejudice rule which required insurer to suffer substantial prejudice due to insured's failure to give timely notice of a claim. The notice-prejudice rule related to an employee benefit plan covered by ERISA and came within the saving clause of ERISA's preemption provision.
- **Ralph v. Lucent Technologies, Inc., 135 F.3d 166 (1st Cir. 1998) (ERISA preemption of disability discrimination claims).** Former employee who was diagnosed with major depression and post traumatic stress disorder after he suffered a mental breakdown allegedly because of same sex sexual harassment, sought an injunction requiring employer to return him to work. The Court determined the collective bargaining contract's grievance and arbitration procedure did not preempt the employee's disability discrimination claim which concerned non-negotiable rights under state and federal laws that exist independently of the contract and do not require contract interpretation. Additionally, the Court held ERISA did not preempt the disability discrimination action because the only impact on the employer's ERISA plan would be an extension of time to apply for certain benefits. There was no variation in terms of benefits or their application, nor was there any authority that ERISA preempts rights afforded by federal law such as the ADA, and only a very minor impingement on the employer's ERISA plan may be a reasonable accommodation under the ADA.
- **Owen v. Carpenters' District Council, 78 FEP Cases 669 (4th Cir. 1998) (LMRA preemption of state law employment discrimination claims).** Section 301 of LMRA did not preempt cause of action arising under Maryland's public policy and based on female employee's discharge by employer of less than 15 people, allegedly for rebuffing supervisor's sexual advances or complaining about being sexually harassed, even though just cause provision of

⁹ For additional guidance on preemption issues, see Recent Developments in Remedies for Employment Torts, *infra*, p. 134.

collective bargaining contract may be referred to or consulted during litigation, since no reference to contract is required to adjudicate claim.

- **McClelland v. Gronwaldt, 155 F.3d 507 (5th Cir. 1998) (ERISA preemption as a basis for removal).** The request by employees for an injunction restraining their employer from soliciting waivers of employment related claims may have related to “an employee benefit plan so as to trigger the ‘ordinary preemption’ provisions of ERISA, however, it did not mean that ERISA completely preempted the suit in which the injunction was sought.” Thus, federal question jurisdiction was lacking as a basis for removal in a class action alleging the manner in which the employer provided workers’ compensation benefits violated state law.
- **Thibodeaux v. Continental Casualty Ins. Co., 138 F.3d 593 (5th Cir. 1998) (ERISA preemption of state law governing interpretation of disability insurance policy).** Former employee who was injured in an auto accident brought action against former employer and insurer under ERISA after insurer ceased to pay employee’s disability benefits based on a finding that employee could perform light duty work. In affirming denial of benefits, the Court determined ERISA preempted the state law which allegedly governed interpretation of the disability insurance policy because the law did not regulate insurance, and the term “total disability” would thus be defined in accordance with policy, not state law.
- **United States v. Palumbo Brothers, Inc., 145 F.3d 850 (7th Cir. 1998) (RICO preemption by federal labor law).** Road construction firms, firm owners, plant supervisor and others were charged with violations of RICO, mail fraud, and violations of ERISA. In reversing dismissal for defendants, the Court held RICO indictments were not preempted by federal labor law, even assuming the alleged acts underlying the indictments constitute unfair labor practices. Additionally, indictments for mail fraud and violations of ERISA reporting requirements were not preempted by federal labor law.
- **Lovilia Coal Co. v. Williams, 143 F.3d 317 (7th Cir. 1998) (Black Lung Benefits Act (BLBA) preemption of state insurance law).** Employer and its workers’ compensation carrier appealed decision of Department of Labor Benefits Review Board holding them liable for workers’ compensation benefits pursuant to BLBA. The BLBA is specifically related to the business of insurance and is required under the McCarran-Ferguson Act to permit application of BLBA to preempt state insurance law. Because the requirement that coal operators purchase insurance had the effect of spreading the risk, BLBA was an intricate part of the relationship between operator and its carrier, and BLBA was aimed solely at entities that ensured those employees who are exposed to dangers of the coal mining industry.
- **Hibben v. Nardone, 137 F.3d 480 (7th Cir. 1998) (workers’ compensation exclusivity bars claim for emotional distress arising from sexual harassment).** Former employee brought action against former employer for sex discrimination, and against former employer and former supervisor for intentional infliction of emotional distress. In reversing judgment for employee, the Court determined sexual harassment inflicted on employee by supervisor was an “accident” covered by the Wisconsin Workers’ Compensation Act. Therefore, employee’s claim for intentional infliction of emotional distress was barred by exclusivity provision of workers’ compensation.
- **Independent Federation of Flight Attendants v. Cooper, 141 F.3d 900 (8th Cir. 1998) (RLA preemption of misappropriation of trade secrets and tortious interference claims).** Incumbent union brought action alleging rival union misappropriated trade secrets by using incumbent’s logo and membership list and tortiously interfered with contracts by inducing incumbent’s president to breach her obligations to incumbent. In affirming dismissal for rival union, the Court determined RLA preempted incumbent union’s claims because the claims were inextricably intertwined with representation dispute which the National Mediation Board had the exclusive power to resolve.

- **Oberkramer v. IBEW-NECA Service Center, Inc., 151 F.3d 752 (8th Cir. 1998) (LMRA preemption of state law claims).** Former employee sued former employer and supervisor in state court alleging breach of contract, tortious interference with contract, intentional infliction of emotional distress, and violation of city ordinance prohibiting discrimination in employment based on sexual orientation. Each of plaintiff's claims was substantially dependent upon analysis of terms or provisions of the collective bargaining agreement or was inextricably intertwined with considerations of terms and provisions of the collective bargaining agreement and was, therefore, preempted by LMRA.
- **Deneen v. Northwest Airlines, Inc., 132 F.3d 431 (8th Cir. 1998) (RLA preemption of employment discrimination claims).** Employee brought action against employer under Pregnancy Discrimination Act and Minnesota Human Rights Act. Defendant contended the discrimination claims should have been dismissed because there were minor contract disputes preempted by the RLA. The Court rejected this contention, holding the claims were independent of the collective bargaining agreement and because federal and state law were the source of the claims, not the collective bargaining agreement, the RLA did not preempt the discrimination claims.
- **O'Hara v. Teamsters Union Local No. 856, 151 F.3d 1152 (9th Cir. 1998) (LMRDA preemption of California law claims for indemnification).** Former union employee brought suit against the union and two of its officers asserting violations of LMRDA and state law claims. The claims against the Union for indemnification for costs of defending against union employees' suit were not preempted by the LMRDA section permitting union members to sue officers for breach of fiduciary duties. The Court stated the LMRDA made references to continued viability of state laws and indicated no congressional intent to occupy the field of regulation, and section did not apply to employee's claims because they were not for the benefit of the union, but to obtain personal compensation for alleged harassment and improper termination.
- **Californians for Safe & Competitive Dump Truck Transportation v. Mendonca, 152 F.3d 1184 (9th Cir. 1998) (FAAA preemption of California's prevailing wage law).** Association of Motor Carriers and Motor Carrier Enterprises brought action against state agencies and agents vested with authority to enforce California's Prevailing Wage Law (CPWL), seeking declaratory and injunctive relief on grounds that CPWL's enforcement violated the Supremacy Clause. The Court determined the CPWL was not "related to" motor carrier enterprise, routes and services, within the meaning of the preemption clause of Federal Aviation Administration Authorization Act, and therefore, was not preempted.
- **Graham v. Balcor Co., 146 F.3d 1052 (9th Cir. 1998) (ERISA preemption of common law claims).** Former employee sued employer on state law claims of breach of contract, breach of covenant of good faith and fair dealing, and intentional infliction of emotional distress. In affirming judgment for the employee, the Court determined the state law claims arising under an agreement whereby the employee forewent legal claims of wrongful discharge and employment discrimination and employer revoked termination and promised to provide employee with benefits plan coverage for as long as she remained disabled, were not preempted by ERISA because the agreement did not implicate the administration of an employee benefit plan.
- **Operating Engineers Health & Welfare v. JWJ Contracting, Co., 135 F.3d 671 (9th Cir. 1998) (ERISA preemption of Arizona's Little Miller Act).** Multi-employer's employee trust funds brought action against employer seeking payments under Davis Bacon Act, Miller Act, Arizona's Little Miller Act, and other statutes. The district court dismissed the Little Miller Act claim because it determined it was preempted by ERISA. In reversing the district court's decision, the Court determined Arizona's Little Miller Act provided no additional rights to employee benefit plans and neither conflicted with federal regulations of employee benefit plans nor hindered or detracted from the interests of employees who partake of the plans.

- **Migneault v. Peck, 158 F.3d 1131 (10th Cir. 1998) (ADEA preemption of age discrimination claims brought under Section 1983).** Laid off employee sued under the ADEA and Section 1983. Relying on decisions from the Fourth and Fifth Circuits, the Court concluded age discrimination claims brought under Section 1983 are preempted by the ADEA.
- **Whitt v. Sherman Int'l Corp., 147 F.3d 1325 (11th Cir. 1998) (ERISA preemption as basis for removal).** Terminated employee brought state court action against employer seeking benefits for which he had allegedly contracted. Employer removed action to federal court on the grounds that claims were preempted by ERISA. The Court determined the employer's purported executive incentive plan, referenced in the termination letter, did not constitute an ERISA plan as of the time when the employee filed the action, and retroactive effect of the executive incentive plan adopted subsequent to employee's termination was not a proper basis for ERISA preemption or removal.
- **Parise v. Delta Airlines, Inc., 141 F.3d 1463 (11th Cir. 1998) (Airline Deregulation Act preemption of state law age discrimination claim).** Former airline employee sued airline in state court alleging discrimination in violation of the Florida Civil Rights Act. The action was removed to federal court where the district court dismissed the claim based on federal preemption under the Airline Deregulation Act of 1978 (ADA). On appeal, the Court determined the former airline employee's state law age discrimination claim was not preempted by ADA, despite the airline's contention that threatening behavior by the employee "related to" valid airline safety concerns. The court stated the airline's articulated rationale for preemption had no connection to the Florida statute prohibiting age discrimination.
- **Turner v. American Federation of Teachers, 138 F.3d 878 (11th Cir. 1998) (LMRA preemption of tortious interference claim).** Former employee brought state court action against former employer alleging breach of employment contract and tortious interference with employment. The Court determined plaintiff's claims were preempted because tortious interference with employment claims require reference to the terms of the applicable collective bargaining agreement and therefore were preempted.

C. **Federal District Court Decisions**

- **Air Transport v. City & County of San Francisco, 992 F.Supp. 1149 (N.D. Cal. 1998) (Preemption of city ordinance restricting the contracting with companies that do not provided benefits to employee's domestic partners).** Airline trade organization brought action against the City, City Airport Commission and City Human Rights Commission, challenging the validity of ordinance which prohibited City from contracting with companies whose provision of employee benefits discriminated between employees with spouses and employees with domestic partners. The plaintiffs argued the ordinance was preempted under the express preemption provisions of ERISA, and under both express and implied preemption principals of the Airline Deregulation Act (ADA) and the Railway Labor Act (RLA). In sorting out the preemption issues, the court determined the ordinance was not preempted by ERISA to the extent that it applied to benefits that required no ongoing administrative plan, but ERISA preempted the ordinance insofar as it applied to benefits that can be administered only through some sort of plan; the provision of the ADA forbidding state and local authorities to an act or enforce laws relating to price, route, or service of airline preempted city ordinance to the same extent that they provide benefits to employees' spouses unless burden of compliance with respect to benefits not covered by ERISA is so great that all carriers will be forced to stop flying out of the City's airport; and the RLA did not preempt the city ordinance with regard to airlines that use city airports since enforcement of the ordinance would not require interpretation of airline's collective bargaining agreements, the fact the ordinance may impose obligations inconsistent with such contracts does not require preemption, and ordinance does not distinguish between union and non-union employers.
- **Brunetti v. Rubin, 999 F. Supp. 1408 (D. Colo. 1998) (Title VII preemption of state law tort claim).** Employee of the IRS brought action against the IRS alleging gender harassment under Title VII and against former supervisor

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alleging extreme and outrageous conduct under state law. The court determined the employee state law claim was only partially preempted by Section 717 of Title VII and determined her state law tort claim for extreme and outrageous conduct was sufficiently independent to proceed against the supervisor.

- **Gibson v. Hickman, 2 F.Supp. 2d 1481 (M.D. Ga. 1998) (Title VII preemption of Title IX).** Employee brought action against school district and individual school board members alleging sexual harassment in violation of Title VII, Title IX, §1983, and state law. The court dismissed plaintiff's Title IX action stating Title VII provided the exclusive remedy for individuals seeking money damages for alleged gender discrimination.
- **Mariah Boat v. Laborers Int'l Union, 19 F.Supp. 2d 893 (S.D. Ill. 1998) (Garmon Doctrine preemption of RICO claims).** Corporation and its majority owner brought action against the union and its organizing director alleging violations of RICO. The union moved to dismiss for failure to state a claim. In dismissing the case, the court determined RICO claims were not preempted under the Garmon Doctrine, which requires deference to the NLRB for activities involving §7 or §8 of the Act, because none of the predicated acts existed solely because of federal labor law. The violation of mail and wire fraud statutes, Hobbs Act, and state and federal perjury laws did not exist solely because of federal labor law and thus, RICO claims asserted by corporation and its majority owner against union and its regional organizing director arising out of union organizing efforts were not preempted under the Garmon Doctrine, although underlying acts were arguably protected or prohibited by the NLRA.
- **Nagel v. Chukerman Packaging Ltd., 19 F.Supp. 2d 826 (N.D. Ill. 1998) (ERISA preemption of Illinois Wage, Payment & Collection Act (IWPCA)).** Plan participants brought suit in an Illinois state court alleging that their employer violated the IWPCA by deducting medical expenses from their wages without written authorization. Defendants removed the action and plaintiff sought a remand to state court. The court determined the participants' claims were not completely preempted by ERISA and therefore no federal question existed for removal purposes. It stated that although participants could bring a claim under ERISA and their claims were, in fact, claims for nonpayment of benefits, the key question of whether they authorized deductions from their wages for medical expenses could be determined without interpreting the ERISA plan.
- **Flanagan v. Reno, 8 F.Supp. 2d 1049 (N.D. Ill. 1998) (Title VII preemption of Privacy Act claim).** DEA agents brought action against DEA and the Attorney General alleging Privacy Act violations and discrimination and retaliation in violation of Title VII in connection with an investigation of alleged sexual misconduct during training classes. Defendant's argued the Privacy Act claim was preempted by Title VII because Title VII provides exclusive remedy for claims of discrimination in employment. The court determined the Privacy Act claim was not preempted by Title VII because they were two separate claims, noting a privacy violation was not necessarily discriminatory.
- **Marten v. Yellow Freight System, Inc., 993 F.Supp. 822 (D. Kan. 1998) (Workers' compensation preemption of emotional distress claim).** Terminated employee brought retaliatory discharge claim under Title VII, together with related state law claims. The court determined plaintiff's claims of emotional distress were not preempted by Kansas workers' compensation law because terminated employee's stated claim did not involve a physical injury, but rather involved physical manifestations of his principal complaint which was that his termination caused him emotional distress.
- **Evans v. United States, 18 F.Supp. 2d 1217 (D. Kan. 1998) (CSRA preemption of retaliation claim under FHA).** Federal penitentiary employee brought claim against various federal entities under the Fair Housing Act (FHA) alleging he was subjected to adverse working conditions in retaliation for encouraging a coworker to pursue a housing discrimination action against the employer. On the defendant's motion to dismiss, the court determined the plaintiff's claims were preempted by the Civil Service Reform Act (CSRA), even though his claims were cognizable under the FHA, since the action arose out of the employment relationship with the federal government.

- **Munday v. Waste Management of North America, Inc., 997 F.Supp. 681 (D. Md. 1998) (Title VII preemption of state breach of contract law)**. Employee brought action against former employer for retaliatory discharge in violation of Title VII and breach of contract. The court held Title VII remedies did not preempt remedies for breach of contract under Maryland law and thus, Maryland contract law applied to determine the measure of former employee's damages resulting from employer's breach of settlement agreement arising out of the administrative proceedings on employee's Title VII claim. The court pointed to Title VII's legislative history indicating its intent to provide an additional source of rights and remedies for victims of discrimination rather than an exclusive federal scheme.
- **Danfelt v. Board of County Commissioners of Washington County, 998 F.Supp. 606 (D. Md. 1998) (ADA and FMLA preemption of state law wrongful discharge claims)**. Former county employee filed action in state court against county alleging state law breach of contract claim and state law wrongful discharge claims based on alleged violations of the ADA and FMLA. The county removed the action to federal court and the employee filed a motion to remand. The court remanded the case, finding the ADA and FMLA did not preempt the employee's wrongful discharge claim under Maryland law because neither the ADA or FMLA's savings clause evinced an attempt to preempt state tort law completely.
- **Lydon v. Boston Sand & Gravel Co., 15 F.Supp. 2d 150 (D. Mass. 1998) (LMRA preemption of claim under workers' compensation statute)**. Employee brought suit under Massachusetts workers' compensation statute when his employer failed to reinstate him with his accrued seniority rights following his protracted absence from work as a result of a work related injury to his neck. The employer removed the action to federal court and the employee sought to remand. Plaintiff argued that any claim arising under a state workers' compensation law was *per se* nonremovable because of 28 U.S.C. §1445(c) which bars removal of cases arising under workers' compensation laws of a state. The court rejected this assertion finding the federal statute barring removal did not apply to preclude removal of the action to the extent the employee's state law claim was completely preempted by a federal law. The court determined the claim required an interpretation of a provision of the collective bargaining agreement and was accordingly preempted by the LMRA.
- **Greer v. Norfolk & Western Railroad Co., 77 FEP Cases 1125 (E.D. Mich. 1998) (RLA preemption of state's sex discrimination and harassment claims)**. The Railway Labor Act (RLA) does not bar sex discrimination and sexual harassment action under the Michigan Elliott-Larson Civil Rights Act by female employee, despite Railroad's contention that discrimination claims implicate collective bargaining contract and that its actions were justified under contract, since state law is the only source of her claim.
- **Eckel v. Equitable Life Assurance Society of the U.S., 1 F.Supp. 2d 687 (E.D. Mich. 1998) (ERISA preemption of issues covered by arbitration agreement)**. Employee sued former employer for violation of ERISA and submitted identical issue to arbitration under an agreement with the employer. The court dismissed employee's claim stating preemption provision of ERISA did not bar enforcement of an arbitration agreement between the employee and employer, where the arbitration agreement clearly encompasses employee's claim arising under ERISA.
- **Keeley v. Loomis Fargo & Co., 11 F.Supp. 2d 517 (D.N.J. 1998) (FLSA preemption of New Jersey Wage & Hour Law)**. New Jersey trucking industry employees brought class action against employer for overtime under the state wage and hour laws. The employer moved to dismiss the complaint. The court determined FLSA and Federal Motor Carrier Act did not preempt the New Jersey wage and hour laws, which contain no motor carrier exemption and which required employer to pay trucking industry employees for overtime, because the FLSA did not prevent the state from applying a more generous overtime law.

- **A. Terzi Production v. Theatrical Protective Union, 2 F.Supp. 2d 485 (S.D.N.Y. 1998) (NLRA preemption of RICO claims).** Employer and its principal brought suit against union, union president and union business agent asserting various state law tort claims arising out of a union campaign to induce a contractor to sign a labor agreement. Employer also asserted the union officers engaged in a pattern of racketeering activity under RICO in violation of the Hobbs Act, a federal wire fraud statute and the Travel Act. Defendants contended the extortionate acts upon which plaintiffs predicated their RICO claims were at most unfair labor practices and, as such, were preempted by the NLRA pursuant to the Garmon Doctrine. The court stated courts in the circuit have consistently rejected the notion that Garmon preemption applies to federal claims, including RICO claims. As a result, the courts routinely permit the litigation of civil RICO claims against unions and union officers even where such claims arose in the context of labor disputes and involve allegations of unfair labor practices. It therefore determined the NLRA, under the Garmon preemption doctrine, did not preempt the RICO claims.
- **Donald v. V.A. Electric & Power Co., 7 F.Supp.2d 694 (E.D.N.C. 1998) (ERISA preemption of state law age discrimination claim).** ERISA did not bar former employee's state law age discrimination claim, even though he admitted in response to interrogatory that one of his claims was that employer discharged him to avoid paying him retirement and health benefits, where his complaint sets forth only a claim of age discrimination in violation of North Carolina public policy. The claim did not depend on or relate to the existence of an ERISA benefit plan, and his admission is insufficient to trigger ERISA preemption.
- **Vargo-Adams v. U.S. Postal Service, 992 F.Supp. 939 (N.D. Ohio 1998) (FMLA and FECA preemption of wrongful discharge and emotional distress claims).** Postal worker filed suit claiming she was discharged for violation of the FMLA after absences caused by migraines. In dismissing plaintiff's claim for wrongful discharge, the court determined the FMLA preempted her wrongful discharge claim. Additionally, plaintiff's claims for intentional infliction of emotional distress were covered by the Federal Employees Compensation Act and she could therefore not avoid FECA exclusivity.
- **Heck v. Board of Trustees, Kenyon College, 12 F.Supp. 2d 728 (S.D. Ohio 1998) (ERISA preemption of state law discrimination claims).** Former employee brought action against former employer under ADEA, ERISA, and other state law claims relating to alleged discrimination. Defendants argued Heck's complaint requested reinstatement to her position with back pay and benefits and therefore, related to an employee benefit plan and was preempted by ERISA. The court rejected this contention and determined the employee's Ohio law claims of age discrimination, alleging the employer demeaned her and pressured her to retire, would not be characterized as an ERISA action and were therefore not preempted by ERISA because the discrimination claims did not require examination of the ERISA plan.
- **Henderson v. Merck & Co., Inc., 998 F.Supp. 532 (E.D. Pa. 1998) (LMRA preemption of state law claims).** Former employee brought action in Pennsylvania state court against former employer asserting claims of breach of contract, breach of covenant of good faith and fair dealing, wrongful discharge, intentional infliction of emotional distress and detrimental reliance. Employee removed action to federal court and employee filed a motion to remand. The court determined the LMRA preempted plaintiff's claims for breach of contract, detrimental reliance, breach of implied covenant of good faith and fair dealing, and intentional infliction of emotional distress because these claims required an interpretation of the collective bargaining agreement.
- **Prudential Insurance Co. of America v. Stella, 994 F.Supp. 308 (E.D. Pa. 1998) (LMRA preemption of state law regarding restrictive covenants).** Insurance company sought issuance of a preliminary injunction against former sales agent to enforce agent's agreement not to retain company information and to enforce covenant not to compete following termination from company. The court determined federal labor law preempted state law in determining whether restrictive covenants in agent's agreement, which was part of the collective bargaining agreement, were

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supported by adequate consideration and were thus enforceable. Agent was a member of the bargaining unit for which benefit of collective bargaining agreement was created and was, therefore, bound by terms of collective bargaining agreement between the company and union.

- **Satterfield v. Bureau of Schuylkill Haven, 12 F.Supp. 2d 1423 (E.D. Pa. 1998) (USERRA preemption of equal protection claim).** Former Bureau manager, who was also an active member of the United States Army Reserves, brought an action against Bureau challenging his termination from manager position under the Due Process Clause, Equal Protection Clause, First Amendment, and Uniform Services Employment and Re-employment Rights Act (USERRA). With respect to the equal protection claim, the court determined USERRA provided a statutory remedy for anti-military discrimination and therefore plaintiff's equal protection claims were subsumed by USERRA.
- **Martin v. Runyon, 14 F.Supp. 2d 174 (D.P.R. 1998) (PRA preemption of FTCA claim).** Postal employee with heart condition and his wife brought action against the Postmaster General and local postmaster of office where employee worked alleging violations of the Rehabilitation Act and the Federal Tort Claims Act (FTCA). Plaintiff's FTCA claim was preempted by the Postal Reorganization Act (PRA) which is intended to cover employment controversies within the postal service.
- **Mixer v. M.K. – Ferguson Co., 17 F.Supp. 2d 569 (S.D.W.Va. 1998) (LMRA preemption of state age discrimination claim).** Employee brought age discrimination claim against employer under West Virginia Human Rights Act and employer removed case to federal court based on assertion that LMRA preempted claim. On employee's motion to remand, the district court held the employee's discrimination claim was independent of the collective bargaining agreement because the claim would be resolved under statutory standards rather than under standards of collective bargaining agreement and therefore, it was not preempted by LMRA.
- **Harris-Scaggs v. Soo Line Railroad Co., 2 F.Supp. 2d 1179 (E.D. Wis. 1998) (FELA preemption of state tort claims).** Former railroad employee brought civil rights action against railroad for allegedly failing to respond to employee's complaints of racially derogatory comments by supervisors and coworkers. Employee also asserted state law emotional distress claims and for her husband a claim for loss of consortium. The court examined whether the Federal Employers Liability Act preempted the state law tort claims. In denying the railroad's motion to dismiss the state law claims, the court determined FELA does not occupy the field of work related personnel injury claims by railroad employees as to preempt state law tort claims not actionable under FELA, nor would failing to preempt these claims interfere with FELA compliance or obstruct the legislative goals of FELA.

D. Selected State Court Decisions

- **Peatros v. Bank of America, 1998 W.L. 907894 (Cal. Ct. App. Dec. 31, 1998) (NBA preemption of FEHA).** Former officer of national bank brought suit under the Fair Employment & Housing Act (FEHA) to recover for bank's allegedly discriminatory employment decisions in demoting and then dismissing her based on her age and race. The court determined the National Bank Act (NBA) preempts causes of action under FEHA by an officer of a national bank and the NBA's preemption extended even to a cause of action challenging a termination that was not initiated by the bank's board of directors, as long as the bank's board of directors ratified the decision to terminate the officer. The court stressed that California law holds the NBA preempts all state law causes of action by a bank officer for breach of an employment agreement.

- **Siegel v. Prudential Ins. Co., 79 Cal.Rptr.2d 726 (Cal. Ct. App. 1998) (FAA preemption of state's statute precluding court consideration of arbitrated dispute).** Whistleblowing employee sought enforcement of an arbitration award in his favor obtained after he was discharged. Employer sought vacation of the award. In affirming judgment for the employee, the court held the Federal Arbitration Act (FAA) provisions, interpreted to allow courts to review whether arbitrators manifestly disregarded the law in arriving at their decision, did not preempt the state statute prohibiting a court from reviewing an arbitration award or considering the merits of a case. The FAA did not expressly govern procedures to be followed by state courts in reviewing arbitration decisions, nor did the application of the state court procedures defeat arbitration rights provided by Congress. Additionally, the United States Supreme Court has never ruled that courts review provisions of FAA preempted state procedures nor was there legislative history support for this proposition.
- **Lavelle v. Bank America Corp., 78 Cal.Rptr. 2d 609 (Cal. Ct. App. 1998) (NBA preemption of FEHA and state law claims).** Terminated bank officer brought action against National Banking Association, Bank Holding Company, and her supervisor for wrongful termination, alleging age and sex discrimination in violation of California's Fair Employment & Housing Act (FEHA), breach of implied covenant of good faith and fair dealing in her employment contract, and tortious refusal to return her to work following her leave of absence in violation of public policy. The court determined the bank met the procedural requirements of the National Bank Act's (NBA) dismissal at pleasure provision and therefore the NBA preempted her contract and tortious violation of public policy causes of action. However, the court determined the NBA did not preclude a claim under California's FEHA for discriminatory conduct based on sex and age because Congress did not intend to bar state law actions involving age or sex discrimination.
- **Dowling v. Slotnik, 712 A.2d 396 (Conn. 1998) (IRA preemption of workers' compensation award).** An illegal alien who was injured while working for her employer as a live-in housekeeper and nanny sought workers' compensation benefits. The defendant claimed the Immigration Reform Act (IRA) preempted, either expressly or impliedly, the authority of states to award workers' compensation benefits to undocumented aliens. The court rejected this contention because defendants failed to establish that Congress intended the IRA to preempt state laws that benefit undocumented aliens, nor did they demonstrate that including undocumented aliens in the pool of employees potentially eligible to receive state workers' compensation benefits would result in clear and manifest danger to the goal Congress sought to obtain when it enacted the IRA.
- **Brown v. Knutter, McClennen & Fish, 696 N.E.2d 953 (Mass. Ct. App. 1998) (workers' compensation exclusivity of intentional infliction of emotional distress claim).** A legal secretary brought an action against a law firm and one of its attorneys for intentional infliction of emotional distress. Plaintiff's claim against the law firm was barred because of the exclusivity provision of the state workers' compensation act. However, the exclusivity provision did not immunize the individual attorney from the secretary's claim because coemployees are not immunized from a lawsuit for tortious acts which they commit outside the scope of their employment which are unrelated to the interest of their employer.
- **Gilman v. Northwest Airlines, Inc., 583 N.W.2d 536 (Mich. Ct. App.) (ADA preemption of Civil Rights Act claim).** Former airline employee brought an action against the airline alleging wrongful discharge and age and sex discrimination in violation of the Michigan Civil Rights Act. The court stated the Airline Deregulation Act (ADA) has been interpreted to have a broad preemptive sweep over state Civil Rights Act claims, however, there must be an apparent connection to the airline's routes, prices, or services in order for the preemptive provision of the ADA to be applicable. Because defendants failed to introduce any evidence that plaintiff's claims would frustrate the purpose of the ADA, nor did defendants put forth any evidence to show a connection to the airline's routes, prices, or services, the Court determined the ADA did not preempt the employee's Michigan Civil Rights Act claim.

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- **J.A. Croson Co. v. J.A. Guy, Inc., 691 N.E.2d 655 (Ohio 1998) (NLRA preemption of prevailing wage statutes).** An unsuccessful bidder on two public improvement projects brought an action alleging the successful bidder violated Ohio prevailing wage law by cooperating with a union to receive subsidies under a “job targeting” program. The court determined the prevailing wage statutes were preempted by NLRA to the extent that those provisions could be construed to restrain or inhibit federal protected use of job targeting programs. The court noted the NLRB has determined job targeting is protected conduct under §7 of the NLRA and, therefore, the Ohio law could not peacefully coexist with the Board’s classification.
- **Perez v. Living Centers-Devcon, Inc., 963 S.W.2d 870 (Tex. Ct. App. 1998) (TCHRA preemption of common law claims).** Former employee filed action against former employer asserting claims of sexual harassment, negligence, assault and battery, intentional infliction of emotional distress, and invasion of privacy. The court stated as a matter of first impression, the Texas Commission on Human Rights Act (TCHRA) was not the exclusive remedy for employment discrimination and did not preempt the former employee’s common law causes of action against her former employer. The defendant had moved for summary judgment based on plaintiff’s failure to file a complaint with the TCHR; however, the court determined the Act only prevented an employee from getting “two bites at the apple” and did not preclude her from pursuing common law causes of action that arise from the same facts as her previous sexual harassment claim.

STATUTORY TORTS

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FEDERAL CASES

Constitutional Tort; 42 U.S.C. § 1983

Bogan v. Scott-Harris, 523 U.S. 44 (U.S. Sup. Ct. 1998). Plaintiff was administrator of the Department of Health and Human Services (DHHS) for the city of Fall River, Massachusetts. When she received a complaint that an employee temporarily under her supervision had made repeated racial and ethnic slurs about her colleagues, plaintiff attempted to terminate that employee. However, that employee used political connections to get her punishment greatly reduced. Soon after, the mayor of Fall River called for the elimination of DHHS, of which plaintiff was the sole employee. Plaintiff filed suit under 42 U.S.C. §1983 against the city, the mayor, the vice president of the city council, and other city officials. She alleged that the elimination of her position was motivated in part by a desire to retaliate against her for exercising her First Amendment rights in filing the complaint against the employee. The district court denied motions made by the mayor and the vice president of the city council to dismiss on the grounds of legislative immunity and the case proceeded to trial, resulting in a verdict against these defendants on the First Amendment claim. On appeal, the court held that although these defendants had absolute immunity from civil liability for damages arising out of their performance of legitimate legislative activities, the conduct in this case was actually administrative, rather than legislative, because the defendants had relied on facts relating to a particular individual in the decisionmaking calculus. The Supreme Court granted certiorari. The Court verified that local legislators, like state and regional legislators, are absolutely immune from suit under §1983 for their legislative activities. It reasoned that the common law accorded local legislators the same absolute immunity that it accorded legislators at other levels of government and that the rationales for such immunity are fully applicable to local legislators. The Court also held that whether an act is legislative for the purpose of invoking immunity turns on the nature of the act, rather than on the motive or intent of the official performing it. The Court therefore held that the decision of the mayor and the other officials to eliminate the plaintiff's position must be analyzed without looking at whether the plaintiff's constitutionally protected speech was a substantial or motivating factor behind their conduct. Applying this analysis, the Court held that their conduct was undoubtedly legislative, and thus was protected by absolute immunity.

Horstkoetter v. Department of Public Safety, 159 F.3d 1265 (10th Cir. 1998). The State of Oklahoma, through its Department of Public Safety, prohibited members of the Oklahoma Highway Patrol from displaying political signs at their private residences. Members of the highway patrol and their wives sued under 42 U.S.C. §1983 contending that this prohibition violated the plaintiffs' First Amendment rights to freedom of speech and expression. The appellate court affirmed the granting of summary judgment to the defendants. The court applied the analysis from Pickering v. Board of Education, 391 U.S. 563 (1968), and Connick v. Myers, 461 U.S. 138 (1983), dealing with the rights of employees to free speech. The court held that even if the plaintiffs could establish that the speech in question involved a matter of public concern, they would be unable to show that their interest in the expression outweighed the government employer's interest in regulating it. The court explained that even though the plaintiffs had a strong interest in engaging in political speech, the employer's interest in regulating troopers' political signs served the important interests of promoting efficiency and harmony among law enforcement personnel, of proclaiming that police protection will be available to the public, free from political overtones, and of assuring persons aspiring to careers in law enforcement that they are not obliged to make public display of political affiliation or defer to the wishes of political dignitaries in order to guarantee retention and promotion. The court therefore held that the government's well-established right to restrict the political speech of its employees extends far enough to allow state and local law enforcement organizations to prohibit members from displaying political signs at their residences. However, the court also held that it would be unconstitutional to prohibit the officers' spouses from displaying such political

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signs on the property, as long as the displaying spouse has a joint or common interest in the residential property and the sign was solely the speech of the spouse.

Berthiaume v. Caron, 142 F.3d 12 (1st Cir. 1998). Plaintiff was a nurse practitioner who pleaded guilty to importing obscene materials. The plaintiff had ordered and received from a U.S. Customs Service undercover operation in Mexico a videotape depicting children engaged in sexual activity. While the charges were still pending plaintiff notified the Maine Board of Nursing of the situation and applied for a renewal of his nursing license, claiming he had purchased the child pornography out of professional interest. The Board renewed his license on a probationary basis pending a psychological evaluation by an independent psychologist. The psychologist selected to conduct the psychological evaluation informed the Board that the tests he would employ in such a situation included interviews, filling out surveys, and a penile plethysmograph test. In the plethysmograph test, the subject places on his penis a device that measures its circumference and thus the level of the subject's arousal as he is shown sexually explicit materials. The Board informed plaintiff that if he refused to take this test, the Board would take steps to revoke his nursing license. Plaintiff expressed reservations orally and in writing but ultimately agreed and signed the informed consent form, although he says he signed it under duress and disputes whether he was given enough information about the test to make his consent truly informed. Although the plethysmograph test had inconclusive results, based upon other information, the psychologist made a finding of probable pedophilia. The Board renewed plaintiff's license on a probationary basis and required that he tell employers and supervisors about his agreement with the Board, limit his clientele to patients older than 18, and receive psychological counseling. Plaintiff then sued the Board and the psychologist under 42 U.S.C. §1983. Plaintiff described the defendants' actions as ones that "shock the conscience" in violation of his right to substantive due process. Alternatively, plaintiff claimed that the plethysmograph test violated his right to be free of unwanted bodily searches under the Fourth and Fourteenth Amendments. The defendants asserted the defense of qualified immunity, which applies only if an official's actions do not violate the plaintiff's "clearly established" constitutional rights. The court found that it was not unreasonable nor shocking for the Board to require plaintiff to submit to a psychological test under the circumstances, although the use of the penile plethysmograph test was troublesome. The court stated that although there are plenty of ordinary medical procedures that are disagreeable or upsetting to the patient, the nature of the plethysmograph test would strike most people as especially unpleasant and offensive. However, the court concluded that given the need for inquiry and the importance of regulating the fitness of nurses, the psychologist had good reason to consider the use of any legitimate tool of investigation. Furthermore, because it found the plethysmograph is widely used in the scientific community for treatment of pedophilia and its use for screening is at least debatable, the court concluded that this conduct was not so outrageous or unreasonable as to establish a violation of "clearly established" law. The court therefore held that the defendants were entitled to qualified immunity for this claim.

Kallstrom v. City of Columbus, 136 F.3d 1055 (6th Cir. 1998). Plaintiffs were undercover officers for the Columbus Police Department who objected to the release of their personnel files to defense counsel in a prosecution of members of a violent gang for drug conspiracy in whose investigation they had been actively involved. This release raised concerns among the officers that the gang members might obtain access to the personal information contained therein and use it to retaliate against the officers or their families. The officers therefore brought suit under 42 U.S.C. §§1983 and 1988 against the City, claiming that the dissemination of the personal information contained in their personnel files violated their right to privacy as guaranteed by the Due Process Clause of the Fourteenth Amendment. The court held that the officers' privacy interests implicated a fundamental liberty interest, specifically their interest in preserving their lives and the lives of their family members, as well as preserving their personal security and bodily integrity. The court held that because the City's disclosure of this private information about the officers rose to constitutional dimensions, the officers' interests must therefore be balanced against those of the city. The city's interest in releasing such information was supposedly to further the public's understanding of the workings of its law enforcement agencies. In balancing the competing interests, the court stated that the officers' interest greatly outweighed the City's interest in disclosure and that the automatic disclosure of this information to any member of the public requesting it is not narrowly tailored to serve the important public interest. The court therefore held that the City's policy of freely releasing this information from the undercover officers' personnel files under these circumstances created a constitutionally cognizable "special danger" giving rise to liability under § 1983.

Americans With Disabilities Act (ADA)

Barnett v. U.S. Air Inc., 157 F.3d 744 (9th Cir. 1998). Noting that the Ninth Circuit had not yet adopted a framework for analyzing retaliation claims under the ADA (42 U.S.C. §§12203(a) & (b)), the court adopted the framework used to analyze retaliation claims under Title VII. In order to establish a prima facie case of retaliation under the ADA, a plaintiff must show (1) that he or she engaged in a protected activity, (2) that he or she suffered an adverse employment decision, and (3) that there was a causal link between the protected activity and the adverse decision. The employer then has the burden of producing a legitimate nondiscriminatory reason for the adverse employment decision. The plaintiff must then prove that the employer's proffered reason is mere pretext and that the decision was made as retaliation for the protected activity.

Mondzelewski v. Pathmark Stores, Inc., 1998 U.S. App. LEXIS 31774 (3d Cir. 1998). Plaintiff worked in the meat department of a grocery store when he injured his back and requested reasonable accommodation for a disability under the ADA. Soon after his request for accommodation, plaintiff claimed that his employer retaliated against him for asserting his right under the ADA to obtain reasonable accommodation for a disability. In particular, the employer changed plaintiff's shifts to last from 9:30 a.m. to 6:00 p.m., whereas workers were generally given schedules that allowed them free time either in the mornings or the afternoons by ending their shifts by 2 p.m. or by not beginning their shifts until noon. According to plaintiff and his fellow workers, the 9:30-6:00 shifts were considered "punishment shifts." The court addressed the issue of whether these punishment shifts constituted "adverse employment action" as required for a claim of retaliation under the ADA. The court held that the change in plaintiff's shifts could be found to constitute a change in the terms, conditions, or privileges of his employment and thus fall within the ADA retaliation provisions. The court clarified that the critical question is not whether the employee suffered an "extreme hardship" by the change, but rather, whether the terms, conditions, or privileges of employment were altered. The court reasoned that nothing in the ADA suggests that employers are prohibited from taking only those retaliatory actions that impose an "extreme hardship." The court therefore remanded this issue to be determined by the trial court.

The court also overturned the district court's decision to grant summary judgment to defendants. The district court had granted the summary judgment because it held that the plaintiff, who was not actually disabled, could not recover under the ADA for retaliation unless he suffered serious forms of retaliation for his good faith claim. However, the appellate court clarified that the ADA retaliation provision, 42 U.S.C. 12203(a) protects "any individual" who has opposed any act or practice made unlawful by the ADA or who has made a charge under the ADA. It pointed out that this definition differs from the scope of the ADA disability discrimination provision which may be invoked only by a "qualified individual with a disability." The court therefore concluded that a person who is adjudged not to have a disability may assert a retaliation claim based on some form of protected activity other than the filing of a formal complaint. The court also held that such a person need not have suffered some form of retaliation that is more severe than the statute would otherwise demand. The court therefore reversed the summary judgment on this claim.

False Claims Act (FCA)

Vessell v. DPS Associates of Charleston, 148 F.3d 407 (4th Cir. 1998). Plaintiff claimed that a real estate agency retaliated against him in violation of the FCA by refusing to carry out the terms of his contract after he had participated in an FBI sting operation that exposed the wrongdoing of one of the agency's agents. The plaintiff was a landscaper who had been hired as an independent contractor by the real estate agency to do lawn maintenance. Through this work, the plaintiff learned of an agent's illegal schemes, which he reported to the FBI. The plaintiff then participated in the FBI sting operation. After the sting operation ended, the plaintiff sought to continue providing lawn maintenance for the agency under the contract. However, the agency did not respond to his request. Plaintiff argued that this refusal to carry out the terms of the contract violated the anti-retaliation provisions of the FCA, 31 U.S.C. § 3729 et seq. However, the court concluded that the anti-retaliation provision of the FCA did not apply. Interpreting the language of the provision which specifically covers

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"employees," the court concluded that this term does not extend to cover independent contractors, and thus denied plaintiff's claim.

Samuel v. Holmes, 138 F.3d 173 (5th Cir. 1998). The plaintiff claimed he was discharged in violation of the FCA's anti-retaliation provision, 31 U.S.C. §3730(h). The defendants contended that they were entitled to qualified immunity from this claim under the FCA, even though the statute is silent on the existence of qualified immunity. The court held that no qualified immunity should be recognized under this provision. It explained that not only is there no case that recognizes a qualified immunity under this provision, but the immunity seems particularly ill-suited in this context, given the goals of the FCA. The court reasoned that granting government officials the protection of qualified immunity would hardly spur reluctant employees to step forward, whereas the purpose of the whistleblower provision of the FCA is to encourage those with knowledge of fraud against the government to come forward and report it.

Safety Transportation Assistance Act of 1982 (STAA)

Clean Harbors Environmental Services v. Herman, 146 F.3d 12 (1st Cir. 1998). An employee whose job it was to haul hazardous materials complained to his supervisors that he felt pressured by them to violate Department of Transportation ("DOT") and EPA regulations by hauling drums that did not meet DOT requirements. After orally complaining to a supervisor and writing two letters to the company president and his supervisors that conveyed his unwillingness to violate DOT regulations, the employee was terminated. He had not filed any complaints with a court or government agency before his termination, thus raising the question of whether the whistleblower protection section of STAA, 49 U.S.C. §31105(a)(1)(A), protects an employee who has filed complaints which are purely internal to the employer. The First Circuit held that the STAA does protect purely intra-corporate complaints about alleged violations of federal law. It explained that the employee's oral and written complaints were sufficiently definite to put the employer on notice that he was engaging in protected activity and to invoke the whistleblower protection of the STAA.

Federal Deposit Insurance Act (FDIA)

Frobese v. American Savings & Loan Association, 152 F.3d 602 (7th Cir. 1998). Plaintiff contended that her ouster from her position as officer and from the board of directors of a savings and loan association was retaliation for reporting certain loan irregularities to state and federal regulators. She therefore sued under the whistleblower protection provisions of the FDIA, 12 U.S.C. §1831j(a). The district court rejected her claim. It held that officers and directors are not protected "employees" under the statute and as such, plaintiff could not challenge her removal from these positions. On appeal, the Seventh Circuit disagreed, holding that the plaintiff did have standing to sue under the FDIA. The court held that the possibility that the plaintiff had no contractual entitlement to these positions did not permit the association to remove or exclude her from them in retaliation for her disclosures. The court noted that the Supreme Court had made this same finding in the Title VII context. The court reasoned that the association was not free to assess the plaintiff's fitness for office based on her status as a whistleblower, just as it was not free to exclude or remove her from office based on her race, sex, religion, or national origin.

Haley v. Retsinas, 138 F.3d 1245 (8th Cir. 1998). The plaintiff claimed he was retaliated against for indirectly providing information to the FDIC about possible violations of law. The parties agreed that the plaintiff did not directly provide the memo reporting possible violations to the FDIC. He also did not expressly request that the person who provided it to the FDIC do so. The court held that despite his failure to directly report the possible violations to the FDIC, the plaintiff was protected by the whistleblower protection of the FDIA, 12 U.S.C. §1831j(a)(2). It held that this provision protects those who provide information about violations of the law to the appropriate authorities, even if they try to safeguard themselves by blowing the whistle discreetly. The court held that this is particularly true when the employee's failure to make a direct request is driven by fear of the very conduct the statute proscribes.

Title VII - RETALIATION

Tinsley v. First Union National Bank, 155 F.3d 435 (4th Cir. 1998). The plaintiff filed a charge of sex discrimination against her employer with the Equal Employment Opportunity Commission. The parties settled the claim. Fourteen years later, the plaintiff was terminated. The plaintiff then filed another charge with the EEOC alleging that her termination was in retaliation for her complaint of discrimination fourteen years earlier and thus violated Title VII, 42 U.S.C. § 2000e et seq. The court held that summary judgment for the defendant was appropriate since the plaintiff had not offered evidence sufficient to establish a prima facie case that her discharge was in retaliation for her claim of discrimination fourteen years earlier. The court noted that normally, very little evidence of a causal connection is required to establish a prima facie case. However, the court concluded that the period of fourteen years separating the filing of a charge of discrimination and the termination is "far too long a period of time" to raise by itself an inference of retaliation. The court reasoned that the employer had innumerable chances during the fourteen year period to retaliate against the plaintiff if it so desired. However, to the contrary, the defendant promoted the plaintiff twice during those years. In addition, the court noted that the plaintiff provided no evidence that the supervisor who fired her even knew that she had filed a claim for discrimination.

Douglas v. DynMcDermott Petroleum Operations Co., 144 F.3d 364 (5th Cir. 1998). Plaintiff was a black female attorney hired by a corporation to review contracts, oversee litigation and assist the human resources department with legal issues. As in-house counsel, she was privy to all of her employer's legal files and confidential information concerning employee disputes. At a meeting with auditors, the plaintiff informed the auditors of a particular employee's discrimination complaint that had not been resolved to the employee's satisfaction and voluntarily offered her opinion that there was a separate situation which she thought was a "class action waiting to happen." Soon after, plaintiff's performance evaluation indicated that she had failed to exercise good judgment during the meeting. In response to her performance evaluation, plaintiff composed a letter in which she complained that she had been subjected to racial and sexual discrimination. She also discussed in this letter confidential information, including events surrounding an employee's complaint as well as a separate business matter that she had handled for the company. She presented the letter to her supervisor, three other company employees, and a whistle-blower officer with the Department of Energy ("DOE"). Upon inquiry from the DOE officer, however, the plaintiff confirmed that the DOE was not to treat the letter as a whistle-blower complaint. When the board learned that plaintiff had furnished her letter to an individual outside the confines of the company, it decided to terminate her employment. Plaintiff then filed suit alleging retaliation under Title VII, 42 U.S.C. § 2000e et seq. The jury found in her favor. The Fifth Circuit overturned the verdict, holding that plaintiff's conduct was not a protected activity. The court explained that by revealing confidential company information to an individual outside the company, plaintiff had breached her duties of confidentiality and loyalty to the company. The court stated that this case illustrates that employee conduct, although fairly characterized as protest of or opposition to practices made unlawful by Title VII, may nevertheless be so detrimental to the position of responsibility held by the employee that the conduct is unprotected. It reasoned that to forgive a breach by allowing the legal protections sought in this case obviously would have repercussions beyond this one case because such a ruling would carve out a class of individual rights that trump professional ethical considerations and, by extrapolation, could lead to further tolerances with unanticipated consequences to the legal profession. The court explained that although plaintiff did not surrender her Title VII rights when she was hired as in-house counsel, she did assume professional responsibilities that constrained her exercise of those rights. The court therefore concluded that when an attorney's Title VII right to oppose her employer-client's allegedly discriminatory practices by disclosing confidential information contrary to the ethical obligations of the profession is balanced against her employer-client's right to ethical representation and the profession's interest in assuring the ethical conduct of its members, the employer's and the profession's interests must prevail. Given the obligations to which an attorney agrees when she joins the profession and when she accepts employment, and the importance of the duties of confidentiality and loyalty to the employer-client and to the integrity of the profession, the court held as a matter of law that conduct that breaches the ethical duties of the legal profession is unprotected under Title VII.

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Cross v. Cleaver, 142 F.3d 1059 (8th Cir. 1998). Plaintiff was a police officer who filed a written complaint of sexual harassment against another officer with the department. The officer about whom she complained retired from the department and told his friend, the Chief of Police, what had happened. Allegedly, the Chief of Police demonstrated an intent to punish plaintiff for filing the complaint, and soon after, plaintiff began to suffer retaliatory acts. The plaintiff sued the police department, the Chief of Police, and persons who were or had been members of the Board for retaliation under Title VII, 42 U.S.C. §2000e-3(a). At trial, the jury found for the plaintiff. The Board Members appealed, contending that there was no evidence that they knew or should have known of retaliatory actions against plaintiff. The court noted that courts are uncertain about the standard for liability of an employer for retaliation that violates Title VII. The court concluded that where a supervisory employee with the power to hire, fire, demote, transfer, suspend, or investigate an employee is shown to have used that authority to retaliate for the filing of a charge of sexual harassment, the plaintiff need not also prove that the employer participated in or knew or should have known of the retaliatory conduct to hold the employer liable. In the circumstances where the employer is a board, and that board delegates authority to an individual to run day-to-day operations of a department, application of the "knew or should have known" standard to the members of the board would have the effect of insulating the employer from Title VII liability.

STATE CASES

State Workers' Compensation Retaliation

Reinneck v. Taco Bell Corp., 297 Ill. App. 3d 211 (Ct. App. Ill. 1998). Plaintiff alleged that she was terminated by her employer in retaliation for asserting her right to workers' compensation. Before she was terminated, the plaintiff sought medical attention for her injuries, informed her Illinois supervisors about her injuries, and informed the same supervisors that she was hiring a lawyer to pursue her remedies. She had not yet filed a workers' compensation claim in Illinois, although she had filed one against the same employer in Missouri. The defendant claimed that the trial court erred in entering judgment for plaintiff because no cause of action for retaliatory discharge exists under Illinois law for an exercise of rights under another state's workers' compensation statute. The court disagreed and held that plaintiff's failure to file a claim in Illinois prior to her discharge does not preclude her from bringing a retaliatory discharge cause of action in Illinois. The court explained that it is enough if she had sought medical attention for her injuries and the employer terminated her for that assertion of her workers' compensation rights. The court noted that the Illinois Supreme Court has determined that the tort of retaliatory discharge protects employees who have filed compensation claims against other employers. The court therefore reasoned that there is no logical reason not to protect employees who have filed compensation claims against the same employer in another state.

State Right to Privacy

Norman-Bloodsaw v. Lawrence Berkeley Laboratory, 135 F.3d 1260 (9th Cir. 1998). This appeal involved the question of whether a clerical or administrative worker who undergoes a general employee health examination may, without his knowledge, be tested for highly private and sensitive medical and genetic information such as syphilis, sickle cell trait, and pregnancy. Plaintiffs were employees of a research institution jointly operated by state and federal agencies who were subjected to such tests without their knowledge or consent. They claimed that the defendants violated their federal constitutional right to privacy as well as their right to privacy under Article I, §1 of the California Constitution. The trial court granted defendants' motion for summary judgment on both claims, explaining that no violation of the plaintiffs' right to privacy could have occurred because any intrusions arising from the testing were de minimis in light of the "overall intrusiveness" of a full-scale physical examination as well as the "large overlap" between the subjects covered by the medical questionnaire and the three tests. The appellate court disagreed, finding that this intrusion was not de minimis. It remanded the case to be considered on the merits, holding that material issues of fact exist as to whether such testing falls within the ordinary or accepted medical practice regarding general or pre-employment medical exams. The court explained that the constitutionally protected privacy interest in avoiding disclosure of personal matters clearly encompasses medical information

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and its confidentiality. The court held that fourth amendment analysis must be applied to balance the government's interest in conducting these particular tests and the efficacy of this means against the plaintiffs' expectations of privacy.

In its analysis under the California Constitution, the court pointed out that the only possible difference between the state claim and the federal claim was the threshold requirement that the invasion of privacy be "serious." The court held that for purposes of summary judgment, that requirement had been adequately satisfied, and thus also remanded the state privacy claim to the trial court for consideration.

State Whistleblower Statutes

Austin v. Healthtrust Inc., 967 S.W.2d 400 (Sup. Ct. Texas 1998). Plaintiff was a hospital nurse who alleged she was discharged for reporting a co-worker's drug use and practice of distributing prescription medication to patients without a physician's authorization. The trial court granted defendant's motion for summary judgment, on the grounds that plaintiff failed to state a cognizable claim under Texas law. The court of appeals affirmed, holding that Texas does not recognize a common-law cause of action for retaliatory discharge of a private employee who reports the illegal activities of others in the workplace. The plaintiff appealed to the Texas Supreme Court, urging it to recognize a private whistleblower cause of action. The court refused to create a judicial exception to the employment-at-will doctrine by recognizing a cause of action for private whistleblowers. It explained that the Legislature has been very proactive in promulgating statutes that prohibit retaliation against whistleblowers in many areas of the private sector. Rather than create a one-size-fits-all whistleblower statute, the court stated that the Texas Legislature has instead opted to enact statutes that protect specific classes of employees from various types of retaliation, citing the relevant specific statutes that had been enacted by the Legislature to address the retaliation that plaintiff alleged she had suffered. The court explained that by enacting statutes that prohibit certain conduct in the employment area, the Legislature has carefully balanced competing interests and policies, which results in statutes not only with diverse protections, but also with widely divergent remedies and varying procedural requirements. The court concluded that a broad-based whistleblower cause of action would in large part eviscerate the specific measures the Legislature had already adopted.

**THE LAW OF NEGLIGENT INVESTIGATION TORT CLAIMS
AGAINST EMPLOYERS**

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Negligent investigations conducted by employers can be used against them in a number of contexts, e.g., as part of an employee's "good faith and fair dealing" claim, see, e.g., *Gagliardi v. Denny's Restaurants, Inc.*, 6 I.E.R. Cas. (BNA) 1473 (Wash. 1991), an employer's Title VII sexual harassment claim, see e.g., *Baker v. Weyerhaeuser Co.*, 903 F.2d 1342 (10th Cir. 1990), or as evidence of malice or lack of good faith to overcome a defense of privilege in a defamation case. See e.g., *Purgess v. Sharrock*, 33 F.2d 134 (2nd Cir. 1994).

Some employees, however, have attempted to assert "negligent investigation" against employers as an entirely separate and distinct tort cause of action. Only Montana has specifically recognized a "tort" cause of action for an employer's negligent investigation. See *Crenshaw v. Bozeman Deaconess Hosp.*, 693 P.2d 487, 118 L.R.R.M. (BNA) 2076 (Mont. 1984). In *Crenshaw*, the court affirmed a jury verdict of \$150,000 (consisting of \$125,000 in compensatory damages and \$25,000 in exemplary damages):

Crenshaw offered evidence which raised the question of the Hospital's negligence.

- (1) the former acting director testified he had not interviewed all of the appropriate witnesses;
- (2) the administrator admitted that he had failed to interview key witnesses and that he was not sure he had interviewed a physician before sustaining the discharge; and
- (3) Doctor Vinton, Crenshaw's expert on personnel management, conceded that 'when the discharge was made ... the allegation had not been properly investigated by the Hospital administrator.'

In light of the foregoing, we find the Hospital's conduct showed a 'want of attention to the nature or probably consequence of the act or omission' and that their conduct fell below the 'standard established by law for the protection of others against unreasonable risk' [citations omitted]. The allegation of negligence was clearly established in respondent's complaint.

Id. at 493.

Other courts, however, have rejected "tort" claims of negligent investigation. Illustrative cases rejecting such claims are as follows:

Olive v. City of Scottsdale, 10 I.E.R. Cas. (BNA) 1467, 1995 WL 599186 (D. Ariz.) (not reported in F. Supp.). The plaintiff, a police officer, was terminated following an investigation of alleged misconduct. The officer filed federal and state

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claims, including a claim for grossly negligent investigation. The court granted the employer's motion for judgment on the pleadings, noting that Arizona had not recognized a claim for negligent investigation.

Deura v. Greenwich Hospital, 1995 WL 235036 (Conn. Super.) (not reported in A.2d). The plaintiff allegedly sustained an injury on the job and received workers' compensation benefits. The employer asked for the employee's resignation after investigating the circumstances surrounding the plaintiff's injuries and finding that the employee had not been truthful about the injuries. The plaintiff sued for wrongful discharge arising out of the investigation. The Connecticut Supreme Court had previously ruled that "absent a showing that the discharge involves an impropriety which contravenes some important public policy, an employee may not challenge a dismissal based upon an implied covenant of good faith and fair dealing." Carbone v. Atlantic Richfield Co., 204 Conn. 460, 470-471, 528 A.2d 1137 (1987). In Deura, the court granted the employer's motion to strike, finding that allegations of negligent investigation do not "implicate an important violation of public policy."

Bagwell v. Peninsula Regional Medical Center, 665 A.2d 297 (Md. Ct. App. 1995). Plaintiff, a police officer, was terminated from his employment with a hospital after he struck a patient during a dispute in the emergency room. The court dismissed the plaintiff's negligent investigation claim, finding that the employer has no duty to investigate allegations of employee misconduct prior to discharge in an employment-at-will relationship. In any event, the court found that the employer interviewed witnesses to the incident and prepared written summaries which were signed by those interviewed. The court rejected the plaintiff's argument that the employer should have hired an outside agency to investigate, noting that plaintiff offered no authority in support of the position.

Butler v. Westinghouse Electric Corp., 690 F. Supp. 42 (D. Md. 1987). The plaintiff, an African American employee, alleged that he was discriminatorily discharged when he was terminated for allegedly sleeping on the job. Plaintiff filed suit alleging violations of Title VII of the Civil Rights Act of 1964 and state law claims for breach of contract, abusive discharge, intentional infliction of emotional distress and negligence. The case was before the Court on summary judgment. The Court granted summary judgment on plaintiff's claim that defendant had breached "a duty of ordinary care to investigate the violation of company policy and knew that the discharge was racially motivated which caused additional damages of humiliation, embarrassment, anxiety and emotional distress." The Court held that to establish a claim for negligence, the plaintiff must show a duty of care owed by the defendant to him, the defendant's violation of that duty, and that it caused him to suffer injuries and damages. The Court agreed with the defendant that plaintiff identified no source of the duty and without citation to authority, the Court stated that it was unaware of any duty to investigate.

Alford v. Life Savers, Inc., 315 N.W.2d 260, L.R.R.M. 4066 (Neb. 1982). The court rejected plaintiff's claim that his employer was negligent "in failing to ascertain whether the reasons given for the termination of plaintiff's employment were truthful; in failing to ascertain whether the termination of the plaintiff's employment violated company policy; in failing to ascertain whether a valid reason existed for termination of the plaintiff's employment."

Rice v. Comtek Manufacturing Organ, Inc., 766 F. Supp. 1544 (D. Ore 1990). Plaintiff asserted wrongful and discriminatory discharge in retaliation for his complaint of a racial joke in the work place. Employer contended that the plaintiff had been terminated for dealing drugs in the work place. The case was presented to the district court through a magistrate judge's finding and recommendation. The magistrate judge found and the district judge agreed that because the plaintiff was an at-will employee, he could be discharged at any time for any reason, unless prohibited by contract, statute or the Constitution. Thus, the employer had no duty to further investigate allegations prior to termination.

Bookman v. Shakespeare Co., 442 S.E. 2d 183 (App. S.C. 1994). Plaintiff and a co-worker were terminated after a fight in the work place. The employer's employee handbook specified that "engaging in physical violence and fighting" was grounds for "immediate termination." It was undisputed that the handbook did not alter the at-will employment relationship. Only the plaintiff and her co-worker were interviewed before the decision to terminate for fighting was made. The plaintiff did not claim that she was fired in retaliation for sexual harassment. Instead, she alleged that the employer had a duty under

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the sexual harassment policy to investigate her claims, that it breached this duty in failing to adequately investigate, and that this breach caused her termination. The employer's sexual harassment policy promised to "carefully" investigate harassment claims. The Court agreed that the employer may have breached this promise but held that the employer's duty to investigate carefully did not alter the at-will relationship and the employer was free to terminate her for any reason or no reason, except in retaliation for filing a sexual harassment complaint.

Lambert v. Morehouse, 843 P.2d 1116, 8 I.E.R. Cas. (BNA) 442 (Wash. Ap. 1993). Plaintiff was discharged as manager of supply and distribution as a result of his employer's investigation into several allegations of sexual harassment made against him. Plaintiff brought suit alleging, among other claims, that the employer had negligently investigated the sexual harassment allegations. The trial court granted summary judgment, and the appellate court affirmed. The court held Washington does not recognize the claim because tort liability for negligent investigation is inappropriate in the employment context. The court stated tort liability would merely duplicate liability that exists through contract law, and any other holding would defeat an employer's right to discharge an employee-at-will.

Lawson v. Boeing Co., 792 P.2d 545, 61 F.E.P. Cas. (BNA) 101 (Wash. App. 1990). The Plaintiff was demoted after a company investigation revealed he had engaged in sexual harassment. The court held: "There was insufficient evidence of negligence to create a material issue of act as to negligent investigation. Assuming, without deciding, that Boeing owed Lawson a duty to conduct a reasonable investigation, there is no evidence either to establish the standard of reasonable investigation or to show a breach thereof."

Wilder v. Cody Country Chamber of Commerce, 9 I.E.R. Cas. (BNA) 225, 868 P.2d 211 (Wyo. 1994). Wilder served as executive director of the local chamber of commerce until he was forced to resign. Prior to his resignation, Wilder was advised that he had failed to adequately manage the chamber's finances. Wilder claimed that the chamber negligently terminated his employment before a financial audit was completed. More specifically, "a duty of reasonable care was breached by the failure to properly investigate the financial problems at the Chamber." The court affirmed summary judgment in favor of the employer, refusing to recognize a claim for negligent investigation in employment relationships: "[E]mployment creates a contractual relationship. If that contract is breached, relief lies with an action for breach of contract."

RECENT DEVELOPMENTS IN REMEDIES FOR EMPLOYMENT TORTS

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INTRODUCTION

As it has become clear that the litigation-driven mentality of the country is firmly entrenched, both the Courts and Congress have directed more attention towards and expended more energy on limiting the damages which can be awarded in lawsuits, particularly those involving employment claims.

This section will address significant pending legislation and include an update on bills that were introduced in the wake of the passage of the Small Business Jobs Protection Act. In addition, this section will address judicial interpretation of certain remedies as they pertain to employment claims.

LEGISLATIVE DEVELOPMENTS

Interpretation of the Small Business Jobs Protection Act of 1996

In 1996, with the passage of the Small Business Protection Act (the “Act”), Congress amended 26 U.S.C. § 104(a) to limit the gross income exclusion from taxability to damages received “on account of personal physical injury or physical sickness.” This amendment to the federal tax code made all punitive damages taxable as gross income, including both damages obtained through a settlement agreement and those obtained through a jury verdict.

At the turn of the year, the Fifth Circuit held that payments to an employee related to her separation and paid in exchange for a release of potential but unidentified claims against the employer were taxable and not protected by the exclusion for personal injury under § 104(a). Ball v. Commissioner of Internal Revenue, 163 F.3d 308 (5th Cir. 1998). The employee, Ball, had entered into a Separation Agreement with her former employer at the time of her termination. The Separation Agreement provided for a lump sum separation and severance payment. Ball took the position with the Tax Court that the half of the lump sum payment attributable to her separation, as distinguished from severance, was excludable from gross income under § 104(a)(2). Ball contended that the separation portion of the payment was in settlement of potential tort-like claims Ball might have had against her employer, such as for personal injury or sickness, and was thus excludable from gross income.

The Fifth Circuit affirmed the Tax Court’s ruling that the entire payment was taxable compensation. The ruling was based on the fact that (1) at the time Ball was terminated and signed the Separation Agreement, she had no asserted or unasserted claims against her former employer; and (2) the “laundry list” of federal, state, and local claims that were being released by Ball, including Title VII, ADEA, and ADA, ERISA, and FMLA, did not convert the Release Agreement into a settlement of one or more actual claims for personal injury or sickness. The court held that the exclusion in § 104(a) requires the existence of a justiciable claim of the type identified in the separation agreement, as well as an express settlement and disposition of such an extant claim. Payments made in connection to releases of the broad, generic type signed by Ball at the time of her termination do not fall within the exclusion of § 104(a) and thus are taxable.

Update on Recent Proposed (But Unsuccessful) Legislation

Since the amendment of § 104, at least two bills have been introduced which sought to counter the effects of the Small Business Job Protection Act on awards in employment discrimination cases.

On November 4, 1997, H.R. 2792 was introduced which was co-sponsored by Representatives Spencer Bachus (R-Ala) and Philip S. English (R-Pa). The bill sought to amend the Internal Revenue Code to exempt from tax most monetary awards and settlements of employment discrimination claims. The bill also had a provision which defined back pay and allowed income averaging so that an individual who received an award of back pay that represented several years of past compensation would be taxed at a lower rate than if he had received the entire award in one year. In addition, the bill sought to add an allowable deduction for attorneys fees and other costs incurred in pursuing a discrimination award or settlement. The bill, however, was limited to discrimination claims, and did not cover retaliation claims or severance pay. The bill was referred to the House Ways and Means Committee, and was considered by an ad hoc committee of the American Bar Association's Section of Labor and Employment Law's Equal Employment Opportunity Committee. Congress ultimately adjourned without taking action on the bill and the bill was not carried-over.

The second bill which was introduced, H.R. 2802, sponsored by Representative Barney Frank (D-Mass), sought to amend the Internal Revenue Code to allow monetary damages for emotional distress to be excluded from income. H.R. 2802 was also referred to the House Ways and Means Committee and Congress likewise adjourned without taking action on the bill.

One bill also "died" in Congress which would have lessened the punitive damages awards available to successful claimants. The Fairness in Punitive Damages Award Act, S 1554, sought to limit punitive damages that were grossly excessive in relation to the harm suffered. It capped the maximum recovery of punitive damages by each claimant to the greater of three times the amount of economic loss or \$250,000.00. Congress adjourned without taking action on the bill, which was introduced on November 13, 1997.

A single bill, the Small Businesses Against Government Bureaucracy Act, consolidating four previously introduced bills, was designed to improve "fairness" for small employers. One of the bills provisions, formerly the Fair Access to Indemnity and Reimbursement Act, would have required the National Labor Relations Board to pay attorneys' fees and expenses to small employers, including businesses and labor organizations, that were successful in cases before the board. The provision was limited to businesses and unions with not more than 100 employees and a net worth of not more than \$1.4 million. The limits were calculated to be 20% of the 500 employee/\$7 million limits under the Equal Access to Justice Act. The entire single bill was favorably recommended by the House Committee on Education and the Workforce and the Committee's recommendation was adopted on the House floor. The bill was passed to the Senate, but no action on it was taken by the Senate before Congress adjourned.

Bills on the other end of the spectrum also suffered the same fate. For example, the Equal Remedies Act of 1997 (S 516) would have removed the damages caps currently in place for claims of intentional discrimination on the basis of sex, religion or disability. The proponents of the bill noted the inequity in allowing unlimited recovery for claims on the basis of national origin or race, but limiting the recovery of those suffering other forms of discrimination to \$300,000.00. The bill, which was introduced on April 7, 1997, and referred to the Senate Committee on Labor and Human Resources, was extinguished when Congress adjourned without voting on the bill.

CHALLENGES TO STATUTORY CAPS

One Party Rule

In any given employment discrimination action, plaintiffs assert multiple claims for which they seek relief. In Hudson v. Reno, 130 F.3d 1193 (6th Cir. 1997), cert. denied, _____ U.S. _____, 119 S.Ct. 64, 142 L. Ed. 2d 50 (1998), however, the court clarified that statutory caps on damages apply to the action as a whole, not each and every separate claim asserted in the lawsuit. The court found that the language of the damage caps provisions under the Civil Rights Act of 1991 unambiguously states that such caps apply to each complaining party in an “action.” Hudson v. Reno, 130 F.3d at 1199. Therefore, all claims for relief alleged in a single lawsuit constitute an action under which the caps apply. Likewise, if a single lawsuit is asserted on behalf of multiple claimants, each individual is entitled to recover up to the statutory damages cap. E.E.O.C. v. Moser Foods, Inc., 75 Fair Empl. Prac. Cas. (BNA) 532 (D.Ariz.1997).

Front Pay

The question of whether the statutory cap on damages applies to front pay, however, has led to a split among the Circuit Courts of Appeals. The pertinent language of § 1981a(b)(3) states that the damage cap applies to “future pecuniary losses.” 42 U.S.C. § 1981a(b)(3). Relying upon the “common, ordinary meaning” of this language, the Sixth Circuit ruled that front pay is “an amount of money which will be lost at a later time” and is therefore subject to the statutory cap. Hudson v. Reno, 130 F.3d at 1203-04. The Eighth Circuit, however, specifically rejected this reasoning and held that front pay is an equitable remedy that is excluded from the statutory limit on compensatory damages. Kramer v. Logan County School District No. R-1, 157 F.3d 620, 625-26 (8th Cir. 1998). The court in Kramer determined that “front pay is not so much a monetary award for the salary that the employee would have received but for the discrimination, but rather the monetary equivalent of reinstatement, to be given in situations where reinstatement is impracticable or impossible.” Id. at 626.

Concurrent State Claims

On the other hand, several state anti-discrimination statutes do not impose statutory damage caps as applied in federal actions. Therefore, employment discrimination claims asserted under state law often yield higher damage awards. In this regard, employment lawyers may continue to see more state claims filed in this area and should recognize that such cases may pose a higher level of potential liability. For example, in Weeks v. Baker & McKenzie, 74 Cal. Rptr.2d 510 (Cal. Ct. App. 1998), a California appeals court upheld an award of \$3.7 million in a sexual harassment claim brought under the Fair Employment and Housing Act and California state law. This amount represented a reduction of the jury’s original award of nearly \$6.6 million. In another case, a federal jury in Ohio awarded the plaintiff \$6.5 million in a discrimination case brought under the Americans with Disabilities Act and the Ohio disability statute. Mitchell v. AK Steel Corp., No. C-1-96-124 (S.D. Ohio Jan. 20, 1998).

AFTER-ACQUIRED EVIDENCE DOCTRINE

The federal courts have used the after-acquired evidence doctrine to determine the amount of damages a plaintiff is entitled to receive once evidence of wrongdoing or inappropriateness is found after the time of termination. In McKennon v. National Banner Publishing Co., 513 U.S. 352, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995), the Supreme Court explained that damages can be reduced if there is evidence that the employee committed an act which would have caused the employee to be terminated. If evidence of employee wrongdoing would have led to the employee’s discharge, then a plaintiff’s entitlement to lost wages ends on the date the employer is made aware of this information. Thus, if an employee is discriminated against in violation of Title VII, after-acquired information is relevant in determining the appropriate amount of damages.

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The federal courts have applied the after-acquired evidence doctrine in numerous types of employment cases. In McConathy v. Dr. Pepper/Seven Up Corp., 131 F.3d 558 (5th Cir. 1998), the plaintiff was judicially estopped from claiming that she was a qualified person with a disability under the Americans with Disabilities Act based upon after-acquired evidence of statements within the plaintiff's Social Security Administration application. Similarly, in Anaeme v. Diagnostek, Inc., 1999 WL 3364 (10th Cir. Jan. 6, 1999), the defendant was permitted to utilize after-acquired evidence to challenge Plaintiff's qualifications for a position to which he applied and was not hired. In Medlock v. Ortho Biotech, Inc., 1999 WL 2474 (10th Cir. Jan. 5, 1999), the 10th Circuit refused to extend the after-acquired evidence doctrine to permit the defendant to utilize evidence of post-termination conduct. However, the court nevertheless observed that in appropriate circumstances the after-acquired evidence doctrine may allow for certain limitations on damages based upon post-termination conduct. Id. at *9.

After-acquired evidence has also found its way into state law claims. Some of those cases are as follows:

- O'Day v. McDonnell Douglas Helicopter Co., 959 P.2d 792 (Ariz. 1998): The Arizona Supreme Court held that the after-acquired evidence doctrine may serve as a complete bar to recovery in a discharge action based upon breach of contract. However, the court determined that the after-acquired evidence doctrine is not a defense to a tortious wrongful termination action, but rather is relevant only to the question of remedies.
- Murillo v. Rite Stuff Foods, Inc., 77 Cal. Rptr.2d 12 (Cal. Ct. App. 1998): The California appellate court recognized that the after-acquired evidence doctrine may serve as either a complete or partial defense to an employee's claim of wrongful discharge. The court further distinguished the after-acquired evidence doctrine from the defense of "unclean hands."
- Gassmann v. Evangelical Lutheran Good Samaritan Society, Inc., 933 P.2d 743 (Kan. 1997): The Kansas Supreme Court determined that after-acquired evidence could completely bar a breach of employment contract claim where public policy concerns are not involved.
- Union Underwear Co., Inc. v. Barnhart, 1998 WL 650862 (Ky. App. Sep. 18, 1998): The Kentucky appellate court declined to extend the after-acquired evidence doctrine to include post-termination conduct.
- San v. Scherer, 1998 WL 53934 (Ohio App. 1998), appeal dismissed in part, 693 N.E. 2d 805, cause dismissed, 696 N.E. 2d 220 (Ohio 1998): The Ohio appellate court applied the after-acquired evidence doctrine to Ohio state law claims.
- Lewis v. Fisher Service Co., 495 S.E.2d 440 (S.C. 1998): The South Carolina Supreme Court recognized the after-acquired evidence doctrine as a defense to an action brought by an employee terminated in violation of an employee handbook.

CALCULATING DAMAGES IN NON-COMPETE/BREACH OF CONTRACT CASES

The question of how to calculate damages when an employee breaches a non-compete arrangement continues to yield creative methods of valuation within the judiciary. In Advanced Marine Enterprises, Inc. v. PRC Inc., 501 S.E.2d 148 (Va. 1998), an entire section of twenty-one engineering managers and employees were found to have breached the non-competition clause contained within their employment contracts. The Virginia Supreme Court upheld the trial court's award of \$925,123 in lost goodwill damages calculated by using a "variation of the market value approach." Id. at 156-57. The conventional market value approach for computing goodwill damages is based upon the difference between the price a business would sell for and the value of its non-goodwill assets. In the PRC case, however, there was no sale associated with the transfer of the section of engineering employees. Therefore, the trial court utilized a variation of the conventional approach by determining the value of goodwill associated with comparable sales of other sections within the company and

then adjusting the figure to approximate the loss of the engineering section. *Id.* Further, the trial court did not perform a separate analysis of lost profits because it determined that lost profits damages were “subsumed” within the goodwill calculation. *Id.* at 156. The Virginia Supreme Court refused to disturb this finding upon appeal, ruling that the damages calculations were supported by credible evidence. *Id.* at 157.

EMPLOYMENT DAMAGES UNDER RICO?

Courts have issued mixed judgments in employment disputes brought under the Racketeering Influenced and Corrupt Organization Act (“RICO”), which allows recovery to “any person injured in his business or property by reason of a violation.” 18 U.S.C. § 1984. In *Mruz v. Caring, Inc.*, 991 F.Supp. 701 (D.N.J. 1998), former employees of a non-profit organization brought an action under the False Claims Act, RICO, and various state tort laws. The employees claimed that they were intimidated and harassed by the organization after reporting possible Medicaid and tax fraud violations. In denying Defendant’s motion to dismiss the RICO claims, the trial court ruled that the plaintiffs sufficiently alleged all requisite elements of the RICO statute. Similarly, in *Archer v. Economic Opportunity Commission of Nassau County, Inc.*, 1998 WL 901653 (E.D.N.Y. December, 23, 1998), the New York district court denied Defendants’ motion for summary judgment regarding RICO conspiracy claims brought by former employees. In *Archer*, Plaintiffs claimed that Defendants conspired to extort money from them by requiring all employees to contribute to various charity and fund raising events. The trial court determined that Plaintiffs had raised a factual issue as to the existence of an extortion agreement among the defendants, and thus allowed the RICO claims to proceed.

The First Circuit Court of Appeals, however, has taken a much more stringent view of RICO claims arising from employment disputes. In *Camelio v. American Federation*, 137 F.3d 666 (1st Cir. 1998), the former general counsel of a labor union alleged that he had been wrongfully terminated and forced out of the union after he allegedly uncovered evidence of the misappropriation of union funds. In upholding the district court’s dismissal of Plaintiff’s RICO claims, the First Circuit observed that this was the fourth time in recent years that it had been called upon to evaluate the sufficiency of a RICO claim arising from an employment dispute. *Id.* at 672. Moreover, in all four cases the RICO claim had failed to survive a motion to dismiss. *Id.* Thus, although the Court stopped short of addressing the issue in a categorical fashion, it nevertheless emphasized:

While it may be theoretically possible to allege a wrongful discharge which results directly from the commission of a RICO predicate act, any such safe harbor would be severely circumscribed.

Id. (quoting *Miranda v. Ponce Federal Bank*, 948 F.2d 41, 41(1st Cir. 1991)).

AVAILABILITY OF AND LIMITS ON PUNITIVE DAMAGES

As always, numerous employment cases in recent months have dealt with the issues of when punitive damages are available and in what amount. One significant decision out of the Ninth Circuit held that mere evidence of an intentional civil rights violation, without more proof of wrongdoing, will not suffice to support a punitive award under Title VII. *Ngo v. Reno Hilton Resort Corp.*, 140 F.3d 1299, amended by 156 F.3d 988 (9th Cir. 1998). In *Ngo*, an Asian-American waitress was denied medical leave under the employer’s mistaken belief that she did not qualify for leave, while a white employee under similar circumstances was granted leave. The waitress filed a race bias suit under Title VII, and the jury awarded her compensatory damages; however, the district court granted the employer’s motion for judgment as a matter of law on the issue of punitive damages. On appeal, the Ninth Circuit upheld the denial of punitive damages, and joined five other circuits by adopting a heightened standard for awarding such damages, beyond the showing of intentional discrimination required for compensatory liability. *Id.* at 1304. The court stated that only acts that are “willful and egregious, or display reckless indifference to the plaintiff’s federal rights” may be subject to punitive damages. *Id.* Because the employer’s acts did not

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“evinced an evil motive or conscious and deliberate disregard” for the employee’s federally protected rights, punitive damages were inappropriate. *Id.* at 1305

Whistleblower complaints fetched large punitive awards that were upheld on appeal, as demonstrated in *Darghous v. Johnson Controls*, Calif. Super. Ct. No. BC 134624, 8/28/98 (\$17 million) and *Fort Worth v. Zimlich*, 975 S.W.2d 399 (Tex. App.--Austin 1998) (\$1.5 in punitive damages in addition to over \$600,000 in future lost earnings and mental anguish damages).

Other, recent cases of note that dealt with punitive damages issues are as follows:

- *Provencher v. CVS Pharmacy*, 145 F.3d 5 (1st Cir. 1998) - Punitive damages of \$8,000 were upheld where the jury awarded no compensatory damages in a retaliatory discharge case involving a gay male employee who alleged he was sexually harassed by his female boss and then discharged after complaining. Although the jury found the plaintiff was entitled to no compensation for emotional pain and suffering, mental anguish, or loss of enjoyment resulting from the retaliation, the court noted that the employer could still meet the reckless or willful standard required for an award of punitive damages, based solely on the court’s award of back pay to the plaintiff.
- *Odom Antennas, Inc. v. Stevens*, 77 Fair Empl. Prac. Cas. (BNA) 673 (Ark. App. 1998) - An unlawfully discharged employee was properly awarded punitive damages under the Arkansas Civil Rights Act, where, contrary to the employer’s contention that she was not awarded compensatory damages and was thus ineligible to obtain punitive damages, she was awarded compensatory damages under alternative theories of breach of contract and retaliation. The court held that it was of no consequence that the plaintiff was awarded compensatory damages on alternative theories.
- *Siko v. Kassab, Archbold & O’Brien*, 77 Fair Empl. Prac. Cas. (BNA) 1032 (E.D. Pa. 1998) - An employer was entitled to have stricken paragraphs of a complaint in which a former employee sought \$100,000 in compensatory and punitive damages under Title VII, where the maximum damage award that could be awarded was \$50,000, based on the number of persons employed by the employer. The court granted the employer’s motion to strike the challenged paragraphs as impertinent to the case, because they had no relationship to the cause of action pleaded and would cause unnecessary confusion. See also *Spinks v. City of St. Louis Water Div.*, 77 Fair Empl. Prac. Cas. (BNA) 1251 (E.D. Mo. 1997) (prayer for punitive damages stricken as to city under 42 U.S.C. §§ 1981 and 1983).
- *Denesha v. Farmers Ins. Exchange*, 161 F.3d 491 (8th Cir. 1998) - A jury award of \$4 million in punitive damages to a discharged employee under the Missouri Human Rights Act was held to be excessive, even though the ratio of punitive damages to net worth was appropriate when calculated according to the company’s net surplus. Because the amount of the defendant-insurer’s net surplus was only slightly more than the \$1.65 billion amount required to be retained by state insurance regulations, the court reduced the award to one-half of one percent of the insurance company’s “excess surplus,” or \$700,000.

PREEMPTION ISSUES

Preemption issues continue to be heavily litigated in cases involving employment law tort claims. Some of the most prominent areas dealing with preemption are ERISA, state workers compensation statutes, and federal labor law. Some recent cases are as follows:

Workers Compensation Statutes

The California Supreme Court, overturning decisions by several courts of appeals, held that the state's workers compensation anti-retaliation statute is no longer the exclusive remedy for employees suffering work-related injuries and claiming physical disability discrimination by employers. Rather, the employee may sue under either disability discrimination laws, workers compensation laws, or both. City of Moorpark v. Superior Court, 959 P.2d 752 (Cal. 1998).

Arkansas' workers compensation statute does not preempt tort claims for outrage, or intentional infliction of emotional distress, because such a claim is an exception to the exclusive-remedy provision of the worker's compensation act, as it alleges "a deliberate act by the employer with a desire to bring about the consequences of the act." Unicare Homes, Inc. v. Gribble, 977 S.W.2d 490, 491 (Ark. App. 1998).

ERISA Preemption

A former employee's negligent representation claim that his employer misrepresented the terms of his job, although having ramifications for his pension benefits, was not preempted by ERISA, because the alleged misrepresentation did not misstate facts about the pension benefits themselves, but rather the terms and lengths of employment. Where, however, the same employee claimed wrongful discharge, ERISA preempted his state law cause of action, because his claim that the discharge was an attempt on the part of the employer to evade paying benefits brought the claim squarely within the scope of § 510 of ERISA. MacKay v. Rayonier, Inc., 25 F. Supp. 2d 47, 52-53 (D. Conn. 1998).

A plaintiff's state law fraud and intentional misrepresentation claims were preempted by ERISA where she alleged that her employer tricked her into voluntarily resigning by misrepresenting her options under the employer's short term and long term disability plans. The court stated the critical question as to whether the plaintiff would have a fraud claim if the employer's benefit plan was not implicated at all. Because the gravamen of plaintiff's fraud complaint was that her employer mislead her regarding the effect that signing a severance package would have on her benefits, the court concluded that separating the existence of the ERISA benefits from her claims would delete the subject of the alleged misrepresentation. Washington v. Occidental Chemical Corp., 24 F. Supp. 2d 713, 730-731 (S.D. Tex. 1998).

The claims of a former employee terminated after returning from short-term disability leave were covered by ERISA and therefore preempted her state law claims for negligence and breach of contract. McMahon v. Digital Equip. Corp., 162 F.3d 28 (1st Cir. 1998).

Federal Labor Law Preemption

Massachusetts age and handicap discrimination claims are not preempted by the Labor Management Relations Act (LMRA) where the claims are based on independent statutory provisions and do not require the interpretation of a collective bargaining agreement (CBA) for the resolution of the claim. Merely referring to the CBA for factual information about essential functions of the employee's job, for purposes of determining whether the employee was a qualified handicapped person under Massachusetts law, did not constitute interpretation of the CBA that would require LMRA preemption. LaRosa v. United Parcel Service, Inc., 23 F. Supp.2d 136, 142-148 (D. Mass. 1998).

Applying case law interpreting the Airline Deregulation Act, the court also held that the Federal Aviation Administration Authorization Act, 49 U.S.C. § 41713(b)(4)(A), did not preempt the plaintiff's state law discrimination claims, as there was no showing that the market efficiency of the employer is dependent on discriminatory conduct.

An employee's retaliation claim under Missouri workers' compensation law was not completely preempted by the LMRA, despite the fact that the employer's defense to the claim might require the court to construe the collective bargaining

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agreement. The court noted that complete preemption occurs only when a plaintiff's claim, and not merely a defendant's argument, is based on rights created directly by, or substantially dependent on an analysis of, a CBA. Johnson v. AGCO Corp., 159 F.3d 1114 (8th Cir. 1998).

Intentional infliction of emotional distress claims brought under Texas law by employees of a subcontractor terminated from a construction project were preempted by the National Labor Relations Act. The claim was related to employment discrimination and could not be adjudicated without reference to the underlying labor issue of whether the termination was justified. Furthermore, the NLRB had already dismissed an unfair labor practices claim based on the same conduct. Volentine v. Bechtel, Inc., 27 F. Supp.2d 728 (E.D. Tex. 1998).

Other Preemption Issues

Washington's Law Against Discrimination did not preempt a common law tort action for wrongful discharge in contravention of public policy against gender discrimination, even where the employer employed fewer than eight persons and the anti-discrimination statute does not apply to employers with fewer than eight employees. The court concluded that the people, the legislature, and the Supreme Court of Washington had established a clear mandate of public policy against gender discrimination that applies to all employers; thus, the common law tort action for wrongful discharge in contravention of public policy was fully applicable. Roberts v. Dudley, 966 P.2d 377, 381 (Wash. App. Div. 2, 1998).

An employee's claim under the Fair Labor Standards Act (FLSA), alleging that her employer reported her to the INS in retaliation for bringing an unpaid wages and overtime claim, was not precluded by a California statute providing that the employer's communications during the course of an official INS proceeding are privileged. The state statute was preempted by the FLSA, as Congress clearly intended the FLSA's anti-retaliation provision to apply to all workers, including undocumented aliens. Contreras v. Corinthian Vigor Ins. Brokerage, Inc., 25 F. Supp.2d 1053, 1055-56 (N.D. Cal. 1998).

The Supreme Court of Kansas certified to the Tenth Circuit that the remedy provided by the federal Occupational Safety and Health Act (OSHA) for employees who allege that they have been discharged in retaliation for filing complaints under that statute is inadequate and therefore does not preclude the a common law wrongful discharge claim under the state's public policy exception to at-will employment for the same allegation. Flenker v. Willamette Industries, Inc., 967 P.2d 295 (Kan. 1998), answer to certified question conformed to 162 F.3d 1083 (10th Cir. 1998).

A West Virginia statute providing that insurance agents can be dismissed only for "good cause" is preempted by Title VII as applied to an agent whose conduct resulted in a hostile work environment. The court noted that where the state statute's list of six valid grounds for discharge did not include creating a hostile and abusive work environment in violation of federal law, an employer must follow federal law prohibiting such behavior in order to avoid creating a no-win situation for the employer. Cutright v. Metropolitan Life Ins. Co., 77 Fair Empl. Prac. Cas. (BNA) 57 (W.Va. 1997).

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