# INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS: A WORKPLACE PERSPECTIVE

## Marina Sorkina Amendola\*

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#### INTRODUCTION

The concept of inequality of bargaining power in the employeremployee relationship has been continuously developing since the end of the Lochner era.<sup>1</sup> The employee no longer has the absolute "freedom" to

<sup>\*</sup> Belgian attorney, member of the California State Bar, L.L.M. Graduate, Class of 2018, University of California at Davis, School of Law, msamendola@ucdavis.edu.

<sup>1.</sup> The Lochner era is a period in U.S. history from the late 19th century to 1937, where the U.S. Supreme Court had a strict laissez-faire policy in favor of absolute individual freedoms and against government regulation. See, e.g., Michael J. Philips, How Many Times Was Lochner Era Substantive Due Process Effective?, 48 MERCER L. REV. 1049, 1052 (1997) ("[M]any people say that the doctrine's practical effect was to knock out progressive social legislation designed to protect workers against the hazards of industrialization and their employers' superior bargaining power."); Sujit Choudhry, The Lochner Era and Comparative Constitutionalism, 2 INT'L J. OF CONST. L. 1, 12 (2004) ("[T]he doctrinal categories employed by the Lochner Court reflected and furthered a normative commitment to the

accept extremely long hours, low wages, and horrendous working conditions.<sup>2</sup> The modern American society accepts that an employer has duties toward his employees.3 Such duties include providing a safe workplace<sup>4</sup> and refraining from discrimination based on protected status, such as age, color, disability, race, religion, national origin, and sex.<sup>5</sup> Additionally, some private employers take the initiative to introduce antiharassment policies in their workplaces. However, as of this writing, no state has passed a general statute prohibiting workplace bullying.<sup>7</sup>

Thus, workers with protected status, and those with a claim of unsafe workplace who suffered harm, may sue their employer for compensation.8 However, workers who have a workplace free of serious recognized hazards, and do not belong to a protected group, but are emotionally and physically bullied and harassed in the workplace have limited recourse to legal action. In this situation, the tort of intentional infliction of emotional distress (IIED) serves as a basis for recovery of damages. This tort claim contains strict threshold requirements, and as a result, very few plaintiffs succeed in proving their case.<sup>10</sup>

principles of freedom of contract and property, and to strict limits on the scope of state intervention in market relations.").

- 2. See Lochner v. New York, 198 U.S. 45, 46, 59 (1905) (striking down a state statute limiting bakery workers to a maximum of ten hours a day and sixty hours a week), overruled by W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1936).
- 3. See W. Coast Hotel Co., 300 U.S. at 393 (emphasizing that the legislature has broad discretion to ensure that employers provide employees a workplace that is safe, healthy, and free from unjust treatment).
- 4. See infra note 92 and accompanying text (referring to the Occupational Health & Safety Act and explaining that the law subjects employers to liability for failing to provide a safe working environment).
- 5. See infra notes 22, 93 (referring to the various federal statutes that prohibit status-based workplace discrimination).
- 6. See infra note 245 and accompanying text (noting that Facebook and Exxon Mobil have developed anti-harassment policies).
- Healthy Workplace Bill, HEALTHY WORKPLACE See http://healthyworkplacebill.org (last visited Nov. 25, 2018) [hereinafter Healthy Workplace Bill] (noting that several states have *proposed* healthy workplace legislation).
- 8. See, e.g., Lopez v. Burris Logistics Co., 952 F. Supp. 2d 396, 414 n.22 (D. Conn. 2013) ("The Court herein finds the incident regarding removal of the water and ice on the date of the water main break sufficient to constitute an unsafe workplace condition . . . "); Heinze v. S. Ill. Healthcare, No. 08-672-GPM, 2010 WL 276722, at \*3 (S.D. Ill. Jan. 19, 2010) ("The Court concludes that [Plaintiff] has pled enough facts to show that her claim of gender discrimination and age discrimination indeed is plausible . . . . ").
- 9. See RESTATEMENT (SECOND) OF TORTS: SEVERE EMOTIONAL DISTRESS § 46 cmt. j (AM. LAW INST. 1965) ("Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people.").
- 10. See Russell Fraker, Reforming Outrage: A Critical Analysis of the Problematic Tort IIED, 61 VAND. L. REV. 983, 994 (2008) ("[C]ourts routinely hear cases of indecent and intolerable behavior and reject the resulting IIED claims.").

"61% of Americans are aware of abusive conduct in the workplace." 11 "61% of bullies are bosses, the majority (63%) operate alone." 12 "40% of bullied targets are believed to suffer adverse health effects." 13 "To stop it, 65% of targets lose their original jobs." 14 These statistics are the result of an employment culture with the prevalence of at-will contracts. 15 Both employers and employees are free to terminate the relationship at any time and for any reason. 16 This would sound reasonable were it not for the stark contrast in bargaining power between the employer and the employee. 17 Employees are forced to endure unpleasant working environments to maintain their livelihoods. 18

Bullying in the workplace is a slowly growing, silent epidemic affecting the wellbeing of many Americans. Workplace bullying is defined as "repeated, health-harming mistreatment of a person by one or more workers that takes the form of verbal abuse; conduct or behaviors that are threatening, intimidating, or humiliating; sabotage that prevents work from getting done; or some combination of the three." Freedom from workplace bullying is not yet a generally accepted legally protected interest. That is not to say there is no protection at all: certain groups of people are protected from workplace discrimination based on their race, color, religion, national origin, sex, age, and disability. 22

<sup>11. 2017</sup> WBI U.S. Workplace Bullying Survey, WORKPLACE BULLYING INST. (June 2017), http://www.workplacebullying.org/wbiresearch/wbi-2017-survey/.

<sup>12.</sup> Id.

<sup>13.</sup> Id.

<sup>14.</sup> *Id*.

<sup>15.</sup> RESTATEMENT OF EMPLOYMENT LAW § 2.01 (AM. LAW INST. 2015).

<sup>16.</sup> *Id.* cmt. b ("The at-will presumption states a default rule that...does not provide for a definite term or contain a limit on the employer's power to terminate the relationship. The default rule is also subject to contrary statute, law, or public policy.").

<sup>17.</sup> See Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 141 (2005) ("In contrast to the complex and sophisticated real-world understanding of power, American contract law rarely acknowledges power explicitly and typically assesses the legal consequences of relational power asymmetries from a two-dimensional, status-based perspective.").

<sup>18.</sup> Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL'Y REV. 479, 501 (2016) ("[R]elationships characterized by economic dependence or grossly unequal bargaining power . . . strip workers of important aspects of their freedom, or even turn them into second-class citizens.").

<sup>19.</sup> Gary Namie & Ruth Namie, Workplace Bullying: How to Address America's Silent Epidemic, 8 EMP. RTS. & EMP. POL'Y J. 315, 334 (2004).

<sup>20.</sup> GARY NAMIE & RUTH NAMIE, THE BULLY AT WORK: WHAT YOU CAN DO TO STOP THE HURT AND RECLAIM YOUR DIGNITY ON THE JOB 3 (2d ed. 2009).

<sup>21.</sup> See Healthy Workplace Bill, supra note 7 (identifying the states that have proposed healthy workplace legislation).

<sup>22.</sup> See Laws Enforced by EEOC, U.S. EEOC, https://www.eeoc.gov/laws/statutes/index.cfm (last visited Nov. 25, 2018) (listing federal laws that prohibit workplace discrimination on the basis of race, color, religion, national origin, sex, pregnancy, age, disability, and genetics).

It took the American society decades to formulate responses, in and out of courtrooms, to the plight of vulnerable workers.<sup>23</sup> Scholars in law and psychology have undertaken important initiatives to bring awareness and redress to the issue of workplace bullying.<sup>24</sup> This movement pioneered the Healthy Workplace Bill initiative, now introduced in 30 states and two territories.<sup>25</sup> While comprehensive state-sponsored solutions are in the making, this paper focuses on one of the avenues of legal redress currently available for workplace bullying—the tort claim of IIED.

Although IIED can be used in many different lawsuits, its application is especially interesting where the parties have unequal powers, such as most employment relationships.<sup>26</sup> The spectra of conduct and context range from employer's daily management decisions—negative job evaluations or dismissals—to extreme and outrageous conduct; from the acceptable daily stresses of a workplace to severe emotional distress.<sup>27</sup>

This paper first addresses the historical background of the tort of IIED as an innovation in tort law. Then, this paper defines and discusses each element of the tort, identifying the threshold requirements of *extreme and outrageous conduct* and *severe emotional distress*. Subsequently, the discussion focuses on the notion of control in employer-employee relationships and its consequences for IIED claims, using *Pollard v. DuPont* as the central example. The paper further investigates the notion of scope of employment and its effect on plaintiff's IIED claims, referring to *Richards v. U.S. Steel* for comparison and discussion. The goal of this inquiry is to ascertain whether the application of control and/or scope tests create predictable outcomes in favor of either the employer or the employee, and to discuss the possibility of context-neutral outcomes for both the employer and the employee, as well as to identify the dominant approach.

<sup>23.</sup> David C. Yamada, Workplace Bullying and American Employment Law: A Ten-Year Progress Report and Assessment, 32 COMP. LAB. L. & POL'Y J. 251, 256 (2010).

<sup>24.</sup> See History of the Workplace Bullying Institute, WORKPLACE BULLYING INST. http://www.workplacebullying.org/history-of-wbi/ (last visited Nov. 25, 2018) (documenting the institute's historical work on the issue of workplace bullying).

<sup>25.</sup> Healthy Workplace Bill, supra note 7.

<sup>26.</sup> Meredith B. Stewart, Outrage in the Workplace: Using the Tort of Intentional Infliction of Emotional Distress to Combat Employer Abuse of Immigrant Workers, 41 U. MEM. L. REV. 187, 203 (2010).

<sup>27.</sup> See David C. Yamada, The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection, 88 GEO. L.J. 475, 494 (2000) (analyzing IIED claims in common "factual scenarios," including "garden variety" workplace bullying;" "status-based discrimination or harassment;" and "discipline for poor job performance").

#### I. BACKGROUND

The tort of IIED is a relatively recent phenomenon: "It proceeded quickly from a concept proposed by scholars to ultimate recognition and inclusion in the 1948 *Restatement of Torts*."<sup>28</sup>

## A. IIED was an Inconceivable Notion in Tort Law Before the 1930s

English common law of torts focused on damage to persons or property and on keeping the King's peace.<sup>29</sup> The law allowed for recovery of harmed reputation at the most.<sup>30</sup> The interests in bodily integrity and protection of property and reputation, however, are of a very different nature than the interest in freedom from emotional harm.<sup>31</sup> The dominant view was that the law cannot protect the interest in emotional peace and redress claims based solely on emotional harm.<sup>32</sup> Emotional distress was thought to be too vague for the law to measure and determine damages.<sup>33</sup>

In the 19th century, however, the case law had started to evolve. In 1936, Professor Calvert Magruder studied case law of the 19th century, and demonstrated that the courts had been protecting emotions and feelings all along, even though the courts denied it, and the cases were not consistent.<sup>34</sup> He predicted the emergence of a broad principle:

[O]ne who, without just cause or excuse, and beyond all the bounds of decency, purposely causes a disturbance of another's mental and emotional tranquility of so acute a nature that harmful physical consequences might be not unlikely to result, is subject

<sup>28.</sup> Diane A. Lebedeff, *Intentional Infliction of Emotional Distress: A Trial Perspective*, LITIG., 1992–1993, at 5, 5 (emphasis in original) (citations omitted) (first citing Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1033 (1936); then citing William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 874 (1939)).

<sup>29.</sup> Joshua Stein, *Privatizing Violence: A Transformation in the Jurisprudence of Assault*, 30 L. & HIST. REV. 423, 428 (2012).

<sup>30.</sup> MARK A. GEISTFELD, TORT LAW (ESSENTIALS) 134 (3d ed. 2008).

<sup>31.</sup> Elizabeth M. Jaffe, Sticks and Stones May Break My Bones but Extreme and Outrageous Conduct Will Never Hurt Me: The Demise of Intentional Infliction of Emotional Distress Claims in the Aftermath of Snyder v. Phelps, 57 WAYNE L. REV. 473, 476–77 (2011).

<sup>32.</sup> Id.

<sup>33.</sup> See Magruder, supra note 28, at 1033 (discussing the early judicial rhetoric dismissing the interest in emotional peace and eloquently suggesting that in law, phrases that sound impressive are often accepted without criticism).

<sup>34.</sup> *Id.* at 1064; see also Frank J. Cavico, *The Tort of Intentional Infliction of Emotional Distress in the Private Employment Sector*, 21 HOFSTRA LAB. & EMP. L.J. 109, 111 (2003) ("The tort of intentional infliction of emotional distress, as a standalone legal wrong, has had a difficult journey in the history of the common law.").

to liability in damages for such mental and emotional disturbance even though no demonstrable physical consequences actually ensue.<sup>35</sup>

Magruder added, this formula would have a similar application as the standard of reasonable care in negligence cases, and the courts would avoid the unease of fabricating arguments to fit other tort actions in the absence of the protection of emotional tranquility.<sup>36</sup>

## B. 1930–1948: Legal Protection of Emotional Tranquility Gains Traction

Magruder's authoritative stance on the judicial reality of protecting emotions and feelings invited a slow revolution in torts. Cases dealing with claims of mental distress started emerging with the central notion of extreme and outrageous conduct.<sup>37</sup> A subsequent landmark in the direction of independent protection of emotions and feelings was Dean William Prosser's invitation to leave the technicalities behind and recognize a clear independent standard for intentional infliction of severe mental suffering by outrageous conduct: "There is every indication that this will henceforth be done, and that [it] will be treated as a separate and independent tort." <sup>38</sup>

# C. From 1948 Onwards: IIED is Officially Recognized as an Independent Tort

In the 1948 supplement to the Restatement of Torts (1934), the American Law Institute first recognized IIED as an independent tort. The American Law Institute further refined this definition: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." This definition is now widely accepted. In order to prevent suits

<sup>35.</sup> Magruder, supra note 28, at 1058.

<sup>36.</sup> Id. at 1058-59.

<sup>37.</sup> See W. PAGE KEETON ET AL, PROSSER AND KEETON ON TORTS 60 (5th ed. 1984) ("So far as it is possible to generalize from the cases, the rule, which seems to have emerged is that there is liability for conduct exceeding all bounds usually tolerated by decent society . . . .").

<sup>38.</sup> Prosser, supra note 28, at 892.

<sup>39. &</sup>quot;One who, without a privilege to do so, intentionally causes severe emotional distress to another is liable (a) for such emotional distress, and (b) for bodily harm resulting from it." RESTATEMENT OF THE LAW: 1948 SUPPLEMENT § 46 (AM. LAW INST. 1949).

<sup>40.</sup> Restatement (Second) of Torts: Severe Emotional Distress  $\S$  46(1) (Am. Law Inst. 1965).

<sup>41.</sup> Fraker, supra note 10, at 994.

on fabricated grounds, or based on trivial conduct, the threshold that a plaintiff needs to meet to prove his case is set very high, especially regarding the defendant's conduct.<sup>42</sup>

#### II. ELEMENTS OF IIED

## A. Extreme and Outrageous Conduct

There is no clear standard to measure extreme and outrageous conduct. It depends on the facts of the case. He judge guards the threshold of extreme and outrageous conduct more closely than in other factual matters where the jury decides upon sufficient evidence. He words "extreme" and "outrageous" are not synonymous. Rather, they function as a double threshold for the nature of the conduct and how unusual it is. Defendant's actions have to go "beyond the bounds of human decency such that it would be regarded as intolerable in a civilized community."

#### B. Intentional or Reckless

Plaintiff has to prove the defendant had the purpose to cause severe emotional harm or that defendant knowingly disregarded an obvious risk of severe emotional harm, even though he could have easily prevented it.<sup>49</sup> The former is a subjective requirement, and the latter is an objective one.<sup>50</sup> As a counterbalance for the high threshold of proving outrageous and extreme conduct, the inclusion of reckless mental state makes it easier for the plaintiff to carry the burden of proof.<sup>51</sup> Additionally, and important in the employment context, the recklessness standard allows a plaintiff to

<sup>42.</sup> Cavico, supra note 34, at 112-13 (citing KEETON ET AL., supra note 37, at 56, 60-61).

<sup>43.</sup> See Fraker, supra note 10, at 989 (explaining that the standard of extreme and outrageous conduct "provides little guidance to either courts or potential defendants as to the forms of conduct that produce liability").

<sup>44.</sup> Id. at 992.

 $<sup>45.\,</sup>$  Restatement (Third) of Torts: Liability for Physical and Emotional Harm  $\S~46$  cmt. g (Am. Law Inst. 2012).

<sup>46.</sup> Id. § 46 cmt. d.

<sup>47.</sup> Id.

<sup>48.</sup> Id.

<sup>49.</sup> Id. § 46 cmt. h.

<sup>50.</sup> See James A. Henderson, Jr. & Aaron D. Twerski, Intent and Recklessness in Tort: The Practical Craft of Restating Law, 54 VAND. L. REV. 1133, 1143 (2001) (explaining that "intent involves subjective states of mind" while recklessness involves "both a subjective . . . and an objective component").

<sup>51.</sup> Stewart, supra note 26, at 205-06.

bring this action directly against a corporation based on agency, rather than on vicarious, liability:<sup>52</sup> "The liability is not based on vicarious liability, but on 'the entity's failure to act in the face of outrageous conduct by persons under its immediate control who are causing serious harm within the general scope of employment and within the knowledge of its officials."<sup>53</sup>

#### C. Causation

The harm suffered by the plaintiff must be the factual consequence of a defendant's outrageous and extreme conduct.<sup>54</sup> In other words, but for the defendant's conduct, the plaintiff would not have suffered the severe mental harm.<sup>55</sup> As opposed to the tort of negligence, where a scope analysis (also known as proximate cause) is required, factual causation is the only causal link required in IIED.<sup>56</sup> Negligence is a non-intentional tort and requires not only a cause in fact, but also a scope analysis as a safeguard against holding a defendant liable for other harms than those that result from risks created by his tortious conduct.<sup>57</sup> This would be disproportionate and unfair.<sup>58</sup> Conversely, the *intent* in IIED already brings the harm within the scope of the risk created by the tortious conduct.<sup>59</sup>

#### D. Severe Emotional Distress

Some level of mental harm is accepted as bearable and trivial as a compromise of living in a complicated, modern society and legal protection from emotional harm. <sup>60</sup> The requirement that the mental harm be *severe* is another threshold ensuring only genuine claims are brought. <sup>61</sup> The judge is,

<sup>52.</sup> *Id.* at 206 (citing Pollard v. E.I. Dupont De Nemours, Inc., 412 F.3d 657, 665 (6th Cir. 2005)).

<sup>53.</sup> Estrada v. First Transit, Inc., No. 07-CV-02013-WYD-KMT, 2009 WL 598259, at \*16 (D. Colo. Mar. 6, 2009) (citing *Pollard*, 412 F.3d at 665).

 $<sup>\,</sup>$  54. Restatement (Third) of Torts: Liability for Physical and Emotional Harm  $\,$  § 46 cmt. k.

<sup>55</sup> Id

<sup>56.</sup> *Id.* ("The rule stated . . . applies only when the actor's extreme and outrageous conduct is a factual cause of the plaintiff's severe emotional distress.").

<sup>57.</sup> RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM  $\S$  29 cmt. d (Am. Law Inst., Council Draft No. 9, 2010).

<sup>58.</sup> *Id.* § 29 cmt. e ("The risk standard appeals to intuitive notions of fairness and proportionality by limiting liability to harms that result from risks created by the actor's wrongful conduct....").

<sup>59.</sup> See id. § 1 cmt. a (explaining that the definition of intent is "one that relates to the defendant's purpose to cause harm").

 $<sup>60.\,</sup>$  Restatement (Third) of Torts: Liability for Physical and Emotional Harm  $\S$  46 cmt. j (Am. Law. Inst. 2012).

<sup>61.</sup> Id.

as with the requirement of outrageous and extreme conduct, the screener of the factual evidence. Emotional distress includes all highly unpleasant mental reactions such as embarrassment, fright, horror, grief, shame, humiliation, and worry. Severe emotional distress is distress that is so severe that no reasonable person could be expected to endure it."

## E. Are All Elements Equally Important?

Courts screen the access to this tort via strict interpretation of the requirements of "extreme and outrageous' conduct and 'severe' emotional harm." [T]he standard . . . is very high, and focuses on the defendant's conduct rather than on the plaintiff's emotional condition." The primary threshold is the conduct requirement. In case the circumstances are not clear, the severity of mental harm requirement allows the courts to determine whether the defendant is liable.

## III. IIED IN THE WORKPLACE

Work is stressful and emotionally draining for most people.<sup>68</sup> Nowadays, the pace is quick, and the demands are high. The law does not require employers and their managers to act with courtesy and respect.<sup>69</sup> Personal frictions, negative evaluations,<sup>70</sup> and dismissals<sup>71</sup> are part of the race. Yet, they do not amount to causes of action for emotional distress

<sup>62.</sup> Id.

<sup>63.</sup> GTE Sw., Inc. v. Bruce, 998 S.W.2d 605, 618 (Tex. 1999) (citations omitted).

 $<sup>\,</sup>$  64. Restatement (Third) of Torts: Liability for Physical and Emotional Harm  $\S$  46 cmt. a (Am. Law. Inst. 2012).

<sup>65.</sup> Funderburk v. Johnson, 2004-CA-014460-COA (¶ 40) (Miss. Ct. App. 2006).

 $<sup>66.\;</sup>$  Restatement (Third) Of Torts: Liability For Physical And Emotional Harm  $\S$  46 cmt. h (Am. Law. Inst. 2012).

<sup>67.</sup> Id. § 46 cmt. j.

<sup>68.</sup> Cf. Sheldon Cohen & Denise Janicki-Deverts, Who's Stressed? Distributions of Psychological Stress in the United States in Probability Samples From 1983, 2006, and 2009, 42 J. APPLIED SOC. PSYCHOL. 1320, 1329 (2012) ("[A]cross all three surveys, retirees reported less stress than did individuals in any other employment category.").

<sup>69.</sup> See, e.g., Katz v. City of New York, No. 94 Civ. 8319 (RPP), 1996 WL 599668, at \*11 (S.D.N.Y. Oct. 17, 1996) ("The alleged actions...include subjecting plaintiff to loud music..., failing to provide her with a computer,...[and] excluding her from staff meetings.... Such allegations, while troubling, do not amount to the extreme conduct required to show [IIED].").

<sup>70.</sup> See Kalil v. Johanns, 407 F. Supp. 2d 94, 97–98 (D.D.C. 2005) (concluding that negative evaluations and suspension of employee were within the scope of the supervisors' employment).

<sup>71.</sup> See Graham v. Commonwealth Edison Co., 742 N.E.2d 858, 868 (Ill. App. Ct. 2000) (rejecting retaliatory discharge claim based on demotion, but finding that employer's sham investigation was "sufficient to constitute extreme and outrageous behavior").

unless the conduct and consequences in question rise to the level required by IIED.<sup>72</sup>

## A. Limited Scope of IIED in the Workplace

Through the civil rights movement and emancipation of different groups that have historically been repressed, American society has been through a monumental journey. This ongoing journey is reflected, *inter alia*, in the extent to which states have integrated equality values in their tort systems. The intersection of civil rights protection and tort law is unclear and not yet developed. The art of the disconnect between torts and civil rights stems from the fact that the older intentional tort causes of action—particularly battery, assault, and defamation—were designed to address harms far removed from the injuries caused by discrimination and are ill-suited to fit the prototypical bias injury."

In 1999, the Supreme Court of New Mexico integrated equality values and IIED when it found sexual harassment in the workplace to be outrageous and extreme conduct.<sup>77</sup> The integration of anti-discrimination rights, however, is not a universally accepted approach.<sup>78</sup> The majority of states refuse to accept discrimination as a *per se* outrageous conduct.<sup>79</sup> On the one hand, state legislatures adopt statutes that preempt the application of IIED, creating a separate opportunity for redress.<sup>80</sup> On the other hand, judges use IIED as a gap filler when they categorize the most peculiar

<sup>72.</sup> Id.

<sup>73.</sup> William N. Eskridge, Jr., Channeling: Identity-Based Social Movements and Public Law, 150 U. PA. L. REV. 419, 423–25 nn.12–15 (2001).

<sup>74.</sup> For a thorough discussion of how states have integrated equality values into tort law, *see* Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV 2115, 2122, 2124 (2007).

<sup>75.</sup> Id. at 2124.

<sup>76.</sup> Id. at 2124-25.

<sup>77.</sup> See Coates v. Wal-Mart Stores, Inc., 976 P.2d 999, 1005 (N.M. 1999) ("Allowing a worker subjected to sexual harassment to seek civil damages 'not only vindicates the state's interest in enforcing public policy but also adequately redresses the harm to the individual naturally flowing from the violation of public policy." (quoting Michaels v. Anglo Am. Auto Auctions, Inc., 869 P.2d 279, 281 (N.M. 1994))).

<sup>78.</sup> See Sara Ruliffson, R.I.P. I.I.E.D.: The Supreme Court of Texas Severely Limits the Tort of Intentional Infliction of Emotional Distress, 58 BAYLOR L. REV. 587, 607 (2006) (providing a detailed description of IIED's limited application in the employment context in Texas).

<sup>79.</sup> See Chamallas, supra note 74, at 2127 & n.50 ("With the notable exception of California, courts have refused to classify discrimination as per se outrageous and have even hesitated to declare the 'severe' or 'pervasive' harassment required to prove a Title VII claim of hostile environment sufficient to satisfy the threshold tort requirement of 'extreme and outrageous' conduct.").

<sup>80.</sup> Id. at 2136.

cases, which do not entirely fit in other causes of action.<sup>81</sup> Amongst the situations where IIED is most likely limited in application are claims based on wrongful termination,<sup>82</sup> workers' compensation,<sup>83</sup> civil rights (discrimination),<sup>84</sup> federal labor law,<sup>85</sup> and arbitration agreements.<sup>86</sup>

B. Does the Workplace Setting Affect the Outcome in Either Party's Favor?

# 1. Favoring the Employee

One of the central tenets of American common law is freedom of choice, which translates into freedom of contract.<sup>87</sup> The extensive view of freedom of contract and laissez-faire philosophy culminated in the *Lochner* case, in which the U.S. Supreme Court struck down a New York statute that sought to limit working hours in bakeries: "[T]he freedom of master and employee to contract with each other . . . cannot be prohibited or interfered with, without violating the Federal Constitution."

Pure proceduralist equality between the employer and employee is no longer the reigning view. <sup>89</sup> The parallel developments in contract law <sup>90</sup> and

<sup>81.</sup> Id. at 2135-36.

<sup>82.</sup> See Lawrence v. Dixon Ticonderoga Co., 305 F. Supp. 2d 806, 812–13 (N.D. Ohio 2004) (holding that the plaintiff's IIED claim, which arose out of wrongful termination, was preempted).

<sup>83.</sup> See, e.g., Onelum v. Best Buy Stores L.P., 948 F. Supp. 2d 1048, 1054 (C.D. Cal. 2013) (explaining that California workers' compensation statutes preempt IIED claims except "if the conduct of the employer has a 'questionable' relationship to the employment or where the employer steps out of his proper role").

<sup>84.</sup> Nischan v. Stratosphere Quality, LLC, 865 F.3d 922, 934 (7th Cir. 2017) (holding that IIED claim was preempted by Illinois Human Rights Act).

<sup>85.</sup> Rael v. Smith's Food & Drug Ctrs., Inc., No. 1:15-CV-000983-SCY/KK, 2016 WL 10179339, at \*1, \*3 (D.N.M. Sept. 19, 2016) (finding that plaintiff's IIED claim was preempted by the Labor Management Relations Act), *aff'd*, 2016 WL 9488772 (D.N.M. Dec. 1, 2016), *aff'd*, 712 F. App'x 802 (10th Cir. 2017).

<sup>86.</sup> Booker v. Beauty Express Salons, Inc., 2018-Ohio-581, No. CV-16-867751, 2018 WL 899075, at ¶¶ 3-5, 17-19.

<sup>87.</sup> See Samuel Williston, Freedom of Contract, 6 CORNELL L.Q. 365, 366–67 (1921) ("Jeffersonian democracy finds its cardinal tenet in restricting governmental activities and allowing the individual free play.").

<sup>88.</sup> Lochner v. New York, 198 U.S. 45, 64 (1905), abrogated by W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), as recognized in Day-Brite Lighting Inc. v. Missouri, 342 U.S. 421 (1952), and Ferguson v. Skrupa, 372 U.S. 726 (1963).

<sup>89.</sup> Barnhizer, supra note 17, at 194.

<sup>90.</sup> Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965) (recognizing that courts will refuse to enforce contracts that are *unconscionable*, reasoning that "[i]n many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power"). For a broad view on the history of courts recognizing unequal bargaining power in contract law, see Barnhizer, *supra* note 17, at 194–98.

in the organized labor movement<sup>91</sup> testify that in reality there is very often a weaker party who had no choice but to accept the terms of the stronger party to a contract. Thus, the power dynamic between an individual and a corporation is skewed in favor of the latter.

Whereas a corporation has the legal duty to provide a safe<sup>92</sup> and discrimination-free<sup>93</sup> workplace to its employees, the duty to provide a respectful workplace is merely an ethical one.<sup>94</sup> IIED claims arise in this space outside of these legal duties, when the conduct rises to the level proscribed by a state's tort laws.<sup>95</sup>

An example of blatant disregard of employee's safety and wellbeing can be found in *Pollard v. DuPont.* Sharon Pollard braved a ten-year legal struggle after years of harassment at work to prevail on her IIED claim against her employer, DuPont de Nemours. Pollard had worked at the factory for 19 years; she did her job well; and she was successful and organized. After she got fired, she became depressed and lost her sense of self. She was no longer able to concentrate or do daily chores. 100

104

<sup>91.</sup> See National Labor Relations Act of 1935 § 1, 29 U.S.C § 151 (2018) ("The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce . . . ." (emphasis added)).

<sup>92.</sup> Occupational Safety and Health Act of 1970 § 5, 29 U.S.C. § 654 (2012); see also RESTATEMENT OF EMPLOYMENT LAW § 4.05 ("[A]n employer is subject to liability for harm caused to an employee by failing: (a) to provide a reasonably safe workplace...; or (b) to warn of the risk of dangerous working conditions that the employer, but not the harmed employee, knew or should have known.").

<sup>93.</sup> See, e.g., Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2(a) (2017) ("It shall be an unlawful employment practice for an employer... to discriminate against any individual... because of such individual's race, color, religion, sex, or national origin..."); Age Discrimination in Employment Act of 1967 § 4, 29 U.S.C. § 623(a) (2017) ("It shall be unlawful for an employer... [to] discriminate against any individual... because of such individual's age..."); Americans with Disabilities Act of 1990 § 102, 42 U.S.C. § 12112(a) (2017) ("No covered entity shall discriminate against a qualified individual on the basis of disability in regards to [employment].").

<sup>94.</sup> See Michael Josephson, Ethical Responsibilities in the Employer-Employee Relationship – Applying Ethical Principles, JOSEPHSON INST.'S EXEMPLARY LEADERSHIP & BUS. ETHICS (Dec. 17, 2016), http://josephsononbusinessethics.com/2010/12/responsibilities-employer-employee-relationship/ ("Employers have a moral obligation to look out for the welfare of employees.").

<sup>95.</sup> See Fraker, supra note 10, at 988 ("Courts and commentators consistently have observed that emotional distress is common, and the vast majority of it . . . cannot be a basis for tort liability.").

<sup>96.</sup> Pollard v. E.I. DuPont De Nemours, Inc., 412 F.3d 657, 661-62 (6th Cir. 2005).

<sup>97.</sup> Id. at 660, 667.

<sup>98.</sup> Pollard v. E.I. DuPont de Nemours, Inc., 338 F. Supp. 2d 865, 86970 (W.D. Tenn. 2003), *aff'd*, 412 F.3d 657 (6th Cir. 2005).

<sup>99.</sup> Id. at 870.

<sup>100.</sup> Id.

The male members of Pollard's shift subjected her to continued sexual harassment between 1992 and 1996. One of them "placed a Bible on her desk open to the passage 'I do not permit a woman to teach or have authority over man. She must be silent." She was ostracized. The men agreed not to talk to her, not to eat with her, not to spend any time with her during the break, and not to follow her instructions. The court detailed the harassment Pollard faced:

Plaintiff and Mark Cobb testified that Carney would go so far as to set off false alarms in plaintiff's area, misdirecting her and causing her to search for a non-existent problem. Cobb testified that Carney bragged to the other men that this was his way of showing that he, a man, was in control. If a false alarm was set while Pollard was on break cooking her dinner, the men would turn up the stove to burn her food while she was searching for the problem. In addition, Cobb testified that there were numerous incidents during which Carney would not tell plaintiff about actual alarms in her area. Plaintiff would therefore not respond to the problem, and it would appear to the operator on the next shift that she was not doing her job.

Many grave incidents happened; all the while, Pollard was asking for help and attending DuPont's women's support group. <sup>106</sup> Her supervisor was aware of the situation; so was the company. <sup>107</sup> Yet, nothing was done to improve the working environment. <sup>108</sup> When she was about to come back from a short disability leave, the company told her they might schedule her to work with the same people again. <sup>109</sup> When she refused, they fired her. <sup>110</sup> The court summarized the trauma Pollard had faced:

Defendant has taken away Plaintiff's sense of self-esteem. Plaintiff, formerly an outgoing, confident, self-assured, and professionally successful individual, has to a large degree lost each of these attributes due to the humiliating and degrading

<sup>101.</sup> Pollard v. E.I. DuPont de Nemours Co., 213 F.3d 933, 938–41 (6th Cir. 2000), rev'd, 532 U.S. 843 (2001).

<sup>102.</sup> Id. at 938.

<sup>103.</sup> Pollard v. E.I. DuPont de Nemours Co., 412 F.3d 657, 660 (6th Cir. 2005).

<sup>104.</sup> *Id*.

<sup>105.</sup> Id. at 661.

<sup>106.</sup> Id. at 661-62.

<sup>107.</sup> Id. at 662, 664.

<sup>108.</sup> Id. at 662.

<sup>109.</sup> Id. at 663.

<sup>110.</sup> Id.

sexual harassment she suffered at DuPont and which her supervisors repeatedly failed to stop despite her requests for help.<sup>111</sup>

The court awarded her \$2.2 million in compensatory damages, to make her whole, and \$2.5 million in punitive damages. While the abusive conduct was directed at Pollard and no one else, and the causal link is clear, this case offers an opportunity to look into the components of what the court accepted as *outrageous* behavior on the part of the employer. Had the behavior of Pollard's co-workers been one single incident, it may not have risen to that level where a member of the community would exclaim: *It's outrageous*! A prank or a practical joke would have likely been an acceptable stressor as a consequence of working in an all-male shift. However, here, the specific repetitive incidents taken together, as a whole, collectively escalate to the level of egregious behavior that brought the claim over the threshold of outrageousness.

Further, DuPont's repetitive failure to address the complaints and requests for help speaks to the element of intent. Employers cannot deny knowledge of the situation and by their inaction knowingly subject

<sup>111.</sup> Pollard v. E.I. DuPont de Nemours, Inc., 338 F. Supp. 2d 865, 884 (W.D. Tenn. 2003), aff'd, 412 F.3d 657 (6th Cir. 2005).

<sup>112.</sup> Pollard v. E.I. DuPont de Nemours, Inc., 412 F.3d 657, 659 (6th Cir. 2005).

<sup>113.</sup> Tennessee common law does not require the conduct to be "extreme," only "outrageous." Bain v. Wells, 936 S.W.2d. 618, 622 (Tenn. 1997).

<sup>114.</sup> Compare Curran v. JP Morgan Chase, N.A., 633 F. Supp. 2d 639, 644 (N.D. Ill. 2009) ("[P]laintiff's terse allegations that she was 'publicly scolded'...and 'shouted at'—without any contextual clues, such as the content or frequency of the scolding... evoke conduct that has been held to be short of IIED...."), with Pollard v. E.I. DuPont de Nemours, Co., 213 F.3d 933, 947 (6th Cir. 2000) ("We found ourselves, after reviewing the record, proclaiming a sense of moral outrage that DuPont managers allowed the conduct of the men in the peroxide area to persist for years in silence, and therefore silent approval."), rev'd on other grounds, 532 U.S. 843 (2001).

<sup>115.</sup> See, e.g., Meagher v. Lamb-Weston, Inc., 839 F. Supp. 1403, 1410 (D. Or. 1993) (explaining that jokes and insults are only "sufficiently egregious [if] plaintiff is particularly sensitive, and defendant is aware of those sensitivities and seeks to exploit them").

<sup>116.</sup> *Cf.* Thai v. Cayre Grp., Ltd., 726 F. Supp. 2d 323, 336 (S.D.N.Y. 2010) ("What is essentially a discrimination dispute between Thai and her former employers cannot be transformed into an IIED claim without a *specific allegation* that Defendants' conduct that reasonably may be deemed 'atrocious,' 'outrageous,' or 'utterly intolerable,' as the law requires." (emphasis added)).

<sup>117.</sup> *Cf.* Cunningham v. Richeson Mgmt. Corp., 230 F. App'x 369, 372 (5th Cir. 2007) ("The memorandum sent to Cunningham was a *lone incident* that is not actionable for [IIED] under Texas law." (emphasis added)).

<sup>118.</sup> See GTE Sw., Inc., v. Bruce, 998 S.W.2d 605, 615 (Tex. 1999) ("When such repeated or ongoing harassment is alleged, the offensive conduct is evaluated as a whole.").

<sup>119.</sup> Pollard v. E.I. DuPont de Nemours, Co., 213 F.3d 933, 947 (6th Cir. 2000), rev'g 16 F. Supp. 2d 913 (W.D. Tenn. 1998), rev'd on other grounds, 532 U.S. 843 (2001).

<sup>120.</sup> Id. at 947.

employees to substantial and unjustifiable risk, since this risk was easily preventable. 121 As the Sixth Circuit explained in *Dupont*:

It may be true that the DuPont plant manager in Memphis and that upper management at its Wilmington headquarters did not deliberately set out to harm Pollard, but there can be no doubt that supervisors and management officials in both Memphis and Wilmington made no real effort to intervene to stop the harassment that had been brought to their attention on numerous occasions. The District Court found that no one from DuPont ever reprimanded, suspended, transferred, demoted or terminated Carney. Supervisors and other management officials stood idly by as the harassment continued day after day, week after week, month after month. Swartz, Pollard's immediate supervisor, watched the entire process unfold, and when Pollard left the unit he attended a party celebrating her departure—an act that raises a strong inference of the intent to cause emotional distress, as the District Court rightly concluded. 122

The severity of emotional distress caused by the employer's reckless conduct seems undeniable in this case. 123 The continuous abuse, hostility, and repeated lack of protection broke Pollard's character and personality. 124 Treating psychologists and psychiatrist documented Pollard's post-traumatic-stress disorder, and other witnesses testified to changes in Pollard's personality. 125

"[T]he right to control and supervise . . . is the most important factor for determining whether an employer-employee relationship exists." Courts have regularly applied the control test. In an employment

<sup>121.</sup> *Id.* ("Inaction by an employer, or another actor in a position to exercise control, in the face of continuous, deliberate, degrading treatment of another may rise to the level of intentional infliction of emotional distress.").

<sup>122.</sup> Pollard v. E.I. DuPont de Nemours, Inc., 412 F.3d 657, 664-65 (6th Cir. 2005).

<sup>123.</sup> Id. at 664, 667.

<sup>124.</sup> *Id.* at 664; *see also* Pollard v. E.I. DuPont de Nemours, Inc., 16 F. Supp. 2d 913, 923 (W.D. Tenn. 1998) ("Plaintiff testified that she suffered from nightmares, fear of crowds, nausea, anxiety, and sleeplessness.").

<sup>125.</sup> Pollard, 16 F. Supp. 2d at 923.

<sup>126.</sup> Nischan v. Stratosphere Quality, LLC, 865 F.3d 922, 929 (7th Cir. 2017).

<sup>127.</sup> See id. at 931 ("Because Sabbah was not Nischan's direct supervisor, [the defendant] is not strictly liable under Title VII."); McKee Foods Corp. v. Lawrence, 712 S.E.2d 79, 81 (Ga. Ct. App. 2011) ("Although an employer may be held vicariously liable for the torts of an employee, such liability does not extend to torts committed by an independent contractor."); GKN Co. v. Magness, 744 N.E.2d 397, 402 (Ind. 2001) (explaining that in "[d]etermining whether an employer-employee relationship exists[,]" courts should "give the greatest weight to the right of the employer to exercise control over the employee"); *In re* Corrente, 31 N.Y.S.3d 681, 682–83 (App. Div. 2016) ("Where, as here, 'the details of

relationship, as opposed to that with an independent contractor, the employer controls and directs the behavior of its employees to attain its corporate goal. Supervisors and managers are closer to the top of the corporate structure than standard employees. Arguably, the closer the employer controls the managers, the more likely it is that the employer is responsible for their actions. This proportionality enhances the employees' protection from managers' tortious acts in the workplace. 131

DuPont did not use its power to control and discipline its managers and supervisors, thereby *de facto* authorizing the "slow torture" inflicted upon Pollard. This case hinges on the employer's knowledge of the ongoing harassment, its official denial, and the lack of effective measures taken to correct the situation. Had Pollard been suffering silently, without asking her immediate supervisor for help or telling others how she felt, DuPont would not have known there was a need to control or discipline any behavior and would, therefore, not be liable. The employer's knowledge of the abusive situation and disregard for her safety played an important role in the success of Pollard's claim in court.

Subsequently, a 2011 Illinois case confirmed this view.<sup>136</sup> There, an employee alleged that the employer knew of the battery, assault, and harassment the employee received from a co-worker and could have prevented it.<sup>137</sup> It is not unthinkable that the employee was ashamed of what happened to him and wanted to wait it out, deal with the abuse himself, or was simply hoping it would go away. However, it was documented that the harassment started in August 2008, but the employee only told his supervisor about it in January 2009.<sup>138</sup> This gap in time was the reason the

the work performed are difficult to control ..., courts have applied the overall control test, which requires that the employer exercise control over important aspects of the services performed." (quoting *In re* Wright, 20 N.Y.S.3d 252, 254 (App. Div. 2015))). One author, however, in 1949, argued that the control test is outdated and inadequate, and called for a new approach. Edwin R. Teple, *The Employer-Employee Relationship*, 10 OHIO ST. L.J. 153, 175, 177 (1949). The control test is still the predominant approach, but not the only one. RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW INST. 1958).

<sup>128.</sup> Alayne B. Adams, Sexual Harassment and the Employer-Employee Relationship, 84 W. VA. L. REV. 789, 800 (1982).

<sup>129.</sup> Id. at 807.

<sup>130.</sup> Id.

<sup>131.</sup> Id.

<sup>132.</sup> See Pollard v. E.I. DuPont de Nemours, Co., 213 F.3d 933, 947 (6th Cir. 2000) ("Dupont managers allowed the conduct of the men in the peroxide area to persist for years in silence . . . .").

<sup>133.</sup> Pollard v. E.I. DuPont de Nemours, Inc., 412 F.3d 657, 664-65 (6th Cir. 2005).

<sup>134.</sup> Id. at 665.

<sup>135.</sup> Id. at 664-65.

<sup>136.</sup> Carr v. Avon Prods., Inc., No. 10C3124, 2011 WL 43033, at \*1, \*3 (N.D. Ill. Jan. 6, 2011).

<sup>137.</sup> Id. at \*3.

<sup>138.</sup> Id. at \*1, \*3.

employee failed to prove the intent on the part of the employer.<sup>139</sup> The employer had no knowledge of the conduct between August 2008 and January 2009 and therefore, had no opportunity to take action to protect the employee.<sup>140</sup> Consequently, there was no period of time in which the employer knowingly failed to protect him.

Also noteworthy is the case law that supports two other theories of an employer liability for managerial conduct. On the one hand, is the situation where the employer leaves the manager in full control of a territory, without any further directions. The manager is seen as the "alter ego" of the employer. The employer is then liable for the manager's tortious conduct in the scope of employment. On the other hand, an employer can be liable when a manager abuses their power in a way that goes far beyond usual job frictions. These abuses can amount to a knowing infliction of severe emotional distress. Examples of such conduct are:

[F]orcing [the employee] to climb up an unstable metal stairway to hook up computer equipment during her pregnancy; sabotaging [the employee]'s computer to deny her access and alter her files; ... moving her office and her transportation files, causing her to be unable to locate necessary paperwork; and increasing the amount of work due... knowing that [the employee] would not be able to meet the deadlines.

To conclude, the workplace setting, and thus the control of the employer, serves in the employee's favor when the outrageous conduct committed by co-workers was known by the company management or when the management clearly abused its power over the employee. In cases of workplace abuse, one would not advise the employee to be strong, to wait it out, or to suffer in silence—all incidents need to be documented and brought to the management and beyond. 146

<sup>139.</sup> Id. at \*3.

<sup>140.</sup> See id. ("[P]laintiff's allegations do not support the inference that his alleged injuries were intentional.").

<sup>141.</sup> Toothman v. Hardee's Food Sys., Inc., 710 N.E.2d 880, 885–86 (Ill. App. Ct. 1999).

<sup>142.</sup> See id. ("[A]n employee can be considered the alter ego of a corporation by having authority to control the policies and procedures of the corporation as an officer, shareholder, or manager ....").

<sup>143.</sup> Id.

<sup>144.</sup> Naeem v. McKesson Drug Co., 444 F.3d 593, 605 (7th Cir. 2006).

<sup>145.</sup> Id. at 606.

<sup>146.</sup> The Workplace Bullying Institute has an empowering and useful Action Plan, which includes strategies for "[d]ocumenting [the] bullying experience," that teaches victims how to deal with the emotional and practical aspects of bullying. *Documenting Your Bullying Experience*, WORKPLACE BULLYING INST., http://www.workplacebullying.org/individuals/solutions/documentation/ (last visited

# 2. Favoring the Employer

The nature of an employment relationship is such that emotional stress cannot be avoided in the workplace. The employer needs room to manage their business and to discipline the employees. The employer's ability to manage their employees is protected because an employee's claim of IIED is only accepted when "the employer's conduct had been truly egregious." The employer's conduct had been truly egregious.

A 2017 case, *Richards v. U.S. Steel*, is an example of this approach. <sup>150</sup> Mary Richards had been bullied and harassed for nine months: her supervisor, Byrd, humiliated her in front of other male workers and told sexist jokes in her presence. <sup>151</sup> Byrd also once approached Richards, tore open her jacket, stared at her, and said "I like that." When Richards was performing first aid on a co-worker who was suffering as a result of overheating, Byrd screamed at her. <sup>153</sup> On a different occasion, Byrd's supervisor approached Richards without notice and snapped the radio that was on her chest, attached to her bra, to make a call. <sup>154</sup> Byrd also had threatened to fire her and refused to issue her the tools necessary to do her job. <sup>155</sup>

Richards filed an internal discrimination complaint against Byrd. <sup>156</sup> At the meeting with human resources personnel to address this complaint, Richards was told that Byrd must have opened her jacket to look for an inside pocket and that Richards should "adjust to Byrd's rough management style." There was no further investigation. <sup>158</sup> Richards sought out different people at the Human Resources (HR) Department and told them

Nov. 25, 2018) (outlining various ways to document workplace bullying); *The WBI 3-Step Target Action Plan*, WORKPLACE BULLYING INST., https://www.workplacebullying.org/individuals/solutions/wbi-action-plan (last visited Nov. 25, 2018).

<sup>147.</sup> See Honaker v. Smith, 256 F.3d 477, 491 (7th Cir. 2001) ("[C]ourts have recognized that employers will often take actions that may cause their employees serious upset, but such actions have not been classified as 'extreme and outrageous' when they did not go well beyond the parameters of the typical workplace dispute.").

<sup>148.</sup> Tex. Farm Bureau Mut. Ins. v. Sears, 84 S.W.3d 604, 611 (Tex. 2002).

<sup>149.</sup> Richards v. U.S. Steel, 869 F.3d 557, 567 (7th Cir. 2017) (quoting Van Stan v. Fancy Colours & Co., 125 F.3d 563, 568 (7th Cir. 1997)).

<sup>150.</sup> Id. at 567-68.

<sup>151.</sup> Id. at 560-61.

<sup>152.</sup> Id. at 560.

<sup>153.</sup> *Id*.

<sup>154.</sup> Id.

<sup>155.</sup> Id. at 561.

<sup>156.</sup> Id.

<sup>157.</sup> *Id*.

<sup>158.</sup> *Id*.

her story.<sup>159</sup> Richards was told "she was too emotional and should see a psychiatrist."<sup>160</sup> Richards was examined by a psychologist.<sup>161</sup> The psychologist determined that Richards suffered from post-traumatic-stress and dysthymic disorder, and that the symptoms were the consequence of her experiences at work.<sup>162</sup>

Richards went through several proceedings before state and federal courts and a federal appeal. Richards's initial complaint included three claims: retaliation, sexual harassment, and IIED. He statute of limitations barred her first two claims, and the third claim was struck down as preempted by the Human Rights Act because it was *inextricably* linked to her sexual discrimination claim, which was time-barred. Consequently, after nine months of being bullied, two HR complaints that pointed the finger back at Richards, and two years of litigation, Richards's IIED claim did not even survive summary judgment.

On appeal, the Seventh Circuit affirmed the district court's decision, finding that Byrd's conduct was not attributable to U.S. Steel and considered an acceptable part of the daily working routine—not outrageous enough to make it over the high threshold required by Illinois common law. The court also mentioned that the behavior of the HR personnel was an acceptable everyday stressor in the workplace. By comparison to Pollard, had Richards asked for help several times, and had the HR personnel been ignorant and insensitive in the same way, the court might have interpreted the conduct of the HR personnel as a knowing subjection of the employee to a substantial and unreasonable risk. 170

The court emphasized that "[1]iability for emotional distress, as a common-law tort, is even more constrained in the employment context .... This is because 'personality conflicts and questioning of job performance are unavoidable aspects of employment and ... frequently,

<sup>159.</sup> Id.

<sup>160.</sup> Id.

<sup>161.</sup> Id.

<sup>162.</sup> Id. at 561-62.

<sup>163.</sup> Id. at 562.

<sup>164.</sup> *Id*.

<sup>165.</sup> Richards v. U.S. Steel, No. 12-CV-01195-JPG-DGW, 2015 WL 1598081, at \*3, \*10 (S.D. III. Apr. 9, 2015).

<sup>166.</sup> Richards v. U.S. Steel, No. 15-CV-00646-JPG-SCW, 2015 WL 2755003, at \*2 (S.D. III. May 12, 2016).

<sup>167.</sup> Richards, 869 F.3d at 568.

<sup>168.</sup> Id. at 566, 568.

<sup>169.</sup> Id.

<sup>170.</sup> *Cf.* Pollard v. E.I. DuPont de Nemours, Co., 213 F.3d 933, 942 (6th Cir. 2000) (describing Pollard's frequent notice to her company regarding the abusive behavior she experienced while on the job).

they produce concern and distress.""<sup>171</sup> One wonders whether the court here merely restates the requirement of *extreme and outrageous* conduct or adds another layer of protection for the employer.

Whereas the Illinois Human Rights Act makes the employer strictly liable for a supervisor's conduct, the common law in Illinois does not.<sup>172</sup> Common law of agency allows for the employer's vicarious liability only if the supervisor's tortious act was committed within the scope of employment.<sup>173</sup> Unfortunately for the plaintiffs in Illinois, sexual harassment is viewed as an act committed purely for the private benefit of the supervisor and, therefore, makes the supervisor no longer the agent or the alter ego of the employer.<sup>174</sup> "[I]n the specific context of sexual assault, the sexual nature of the misconduct generally disqualifies the employee's act as being taken in furtherance of the employer's interest."<sup>175</sup>

The Illinois court took a different approach to determining the employer's vicarious liability for the tortious acts of a supervisor as compared to the control-test approach discussed in the previous section. Whereas the courts in the previous section aim to determine the existence of the employer-employee relationship by using the control test, this court looks at the scope of the employment and whether the actions of the tortfeasor-employee are within that scope. The *benefit-theory* is used to determine whether the employee acted within the scope of employment, and thus for the benefit of the employer, or outside the scope, and for employee's own benefit. The Restatements (Second) of Agency explains:

Proof that the actor was in the general employment of the master does not of itself create an inference that a given act done by him was within the scope of employment. If, however, it is also proved that the act tended to accomplish an authorized purpose

<sup>171.</sup> *Richards*, 869 F.3d at 567 (second alteration in original) (quoting Van Stan v. Fancy Colours & Co., 125 F.3d 563, 567 (7th Cir. 1997)).

<sup>172.</sup> Id. at 565.

<sup>173.</sup> *Id*.

<sup>174.</sup> Id. at 565-66.

<sup>175.</sup> Id. at 565.

<sup>176.</sup> RESTATEMENT (THIRD) OF AGENCY § 7.07(1) ("An employer is subject to vicarious liability for a tort committed by its employee acting within the scope of employment."); see also RESTATEMENT (SECOND) OF AGENCY § 228 cmt. d ("The question whether or not the act done is so different from the act authorized that it is not within the scope of the employment is decided by the court if the answer is clearly indicated; otherwise, it is decided by the jury.").

<sup>177.</sup> RESTATEMENT (SECOND) OF AGENCY § 229 cmt. c.

and was done at an authorized place and time, there is an inference that it was within the scope of employment. 178

In comparison, the control approach is much broader, and the employer is more likely to be held liable for the tortious act of its employee.<sup>179</sup> Correspondingly, the benefit approach is more nuanced.<sup>180</sup> It assumes the existence of the employment relationship, but distinguishes the conduct based on its character and on the factual circumstances.<sup>181</sup>

Illinois courts look to the criteria identified in Section 228 of the Restatement (Second) of Agency to determine whether an employee's conduct is within the scope of employment:

- (1) Conduct of servant is within the scope of employment if, *but* only if:
  - (a) it is of the kind he is employed to perform;
  - (b) it occurs substantially within the authorized time and space limits;
  - (c) it is actuated, *at least in part*, by a purpose to serve the master, and
  - (d) if force is *intentionally* used by the servant against another, the use of force is not *unexpectable* by the master.
- (2) Conduct of a servant is not within the scope of employment *if it is different in kind* from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master. <sup>182</sup>

Applying this provision to most situations of IIED, the following can be concluded. First, a company will rarely hire a supervisor or a co-worker with the purpose of committing an IIED on a co-worker. Section (1)(a) limits the conduct within the scope only to conduct which is in the job description; most forms of bullying, assault, harassment, excommunication, and work sabotage do not readily fit into this category. It follows that the only way this category can be used as a basis for outrageous conduct is

<sup>178.</sup> Id. § 228 cmt. b.

<sup>179.</sup> *Id.* § 220(1) ("A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control."); *see also id.* § 229(2) (listing the factors to consider when determining the scope of employment).

<sup>180.</sup> Id. § 229.

<sup>181.</sup> See, e.g., id. § 229(2) (enumerating the many specific factual circumstances determining the scope of an assumed employment).

<sup>182.</sup> Richards v. U. S. Steel, 869 F.3d 557, 565 (7th Cir. 2017) (emphasis added) (quoting RESTATEMENT (SECOND) OF AGENCY  $\S$  228).

<sup>183.</sup> RESTATEMENT (SECOND) OF AGENCY § 228(1)(a).

when the tortfeasor clearly abuses their discretion in performing the tasks they were hired to do.<sup>184</sup> Second, Section (1)(c) seems less restrictive because it puts only the purely personal conduct out of the scope of employment, leaving the actions committed for both the benefit of the employer and that of the employee within the ambit of this provision.<sup>185</sup> Third, Section (1)(d) seems to include intentional conduct within the scope, but, at the same time, it is limited to conduct foreseeable by the employer.<sup>186</sup> Finally, Section (2) seems to echo the situation alleged by Richards, where sexual harassment is found to always be for purely personal benefit and thus outside the scope of employment.<sup>187</sup> The Restatement provides:

The fact that an act is done in an outrageous or abnormal manner has value in indicating that the servant is not actuated by an intent to perform the employer's business. In such cases, the facts may indicate that the servant is merely using the opportunity afforded by the circumstances to do the harm.<sup>188</sup>

In a 2011 case from the District of Columbia, a hotel employee working in room service alleged he had been suffering ongoing threats of physical violence and death from his co-workers, spread over a three-year period. The District Court stated that although the conduct could have been found extreme and outrageous, there was no vicarious liability of the employer because the conduct was outside the scope of the tortfeasors' employment. 190

In another 2011 case from the same jurisdiction, the District Court declined to hold an employer vicariously liable for a manager's rape of an employee because the conduct was outside the scope of employment. <sup>191</sup> In that case, the plaintiff alleged another basis of liability—the aided-by-

<sup>184.</sup> See, e.g., Naeem v. McKesson Drug Co., 444 F.3d 593, 606 (7th Cir. 2006) ("[T]he actions taken against [the plaintiff] clearly go far beyond typical on-the-job disagreements..." (emphasis added)).

<sup>185.</sup> RESTATEMENT (SECOND) OF AGENCY § 236 ("Conduct may be within the scope of employment, although done in part to serve the purposes of the servant or of a third person.").

<sup>186.</sup> *Id.* § 231 cmt. a ("The fact that the servant intends a crime, especially if the crime is of some magnitude, is considered in determining whether or not the act is within the employment, since the master is not responsible for acts which are clearly inappropriate to or unforeseeable in the accomplishment of the authorized result.").

<sup>187.</sup> Richards, 869 F.3d at 565-66.

<sup>188.</sup> RESTATEMENT (SECOND) OF AGENCY § 235 cmt. c (citation omitted).

<sup>189.</sup> Beyene v. Hilton Hotels Corp., 815 F. Supp. 2d 235, 239-40 (D.D.C. 2011).

<sup>190.</sup> Id. at 250-51.

<sup>191.</sup> Doe v. Sipper, 821 F. Supp. 2d 384, 390 (D.D.C. 2011).

agency concept.<sup>192</sup> Although the court did not address this issue, it acknowledged that the United States Supreme Court used this approach in determining vicarious liability for a sexual harassment claim.<sup>193</sup> One of the clearest examples of aided-by-agency liability, although outside the employment context, is a prison guard's abuse of his status and power to sexually assault female inmates.<sup>194</sup> The guard exercised full authority over the inmates at any time of day or night: he could enter anywhere unannounced; command the inmates to do whatever he wanted; and discipline them.<sup>195</sup> The inmates were afraid of retaliation and therefore obeyed his commands.<sup>196</sup> While ruling in favor of the inmates, the Supreme Court of New Mexico:

[A]cknowledge[d] the concerns of other courts "that aided-inagency as a theory independent of apparent authority risks an unjustified expansion of employer tort liability for acts of employees." [The Court] agree[d] that the theory should not apply to all situations in which the commission of a tort is facilitated by the tortfeasor's employment. <sup>197</sup>

Drawing from the case law discussed in this section, one may conclude that when courts use the criterion of *scope of employment* to determine the employer's vicarious liability, the plaintiff is less likely to prevail on the IIED claim in the workplace. The *workplace* setting in this case disadvantages the plaintiff because courts are reluctant to limit the employers' freedom to organize their businesses. Many examples of daily stressors are accepted as incidental to being employed and are not outrageous or extreme. On Science 1999 Considering a wide range of conduct is accepted

<sup>192.</sup> Id.; see also RESTATEMENT (SECOND) OF AGENCY § 219(2)(d).

<sup>193.</sup> *Doe*, 821 F. Supp. 2d at 391 ("The United States Supreme Court, conversely, has employed [§ 219(2)(d)] in analyzing vicarious liability for federal Title VII sexual-harassment claims." (citing Faragher v. City of Boca Raton, 524 U.S. 775, 802 (1998))).

<sup>194.</sup> Spurlock v. Townes, 2016-NMSC-014, ¶¶ 18, 20–21, 368 P.3d 1213.

<sup>195.</sup> Id. ¶ 20.

<sup>196.</sup> *Id*.

<sup>197.</sup> *Id.* ¶ 12, 16 (citation omitted) (quoting Ayuluk v. Red Oaks Assisted Living, Inc., 201 P.3d 1183, 1199 (Alaska 2009)).

<sup>198.</sup> See Richards v. U.S. Steel, 869 F.3d 557, 567 (7th Cir. 2017) ("[T]here is general hesitation 'to find intentional infliction of emotional distress in the workplace because, if everyday job stresses resulting from discipline, personality conflicts, job transfers or even terminations could give rise to a cause of action... nearly every employee would have a cause of action." (quoting Naeem v. McKesson Drug Co., 444 F.3d 593, 606 (7th Cir. 2006))).

<sup>199.</sup> See, e.g., Honaker v. Smith, 256 F.3d 477, 491 (7th Cir. 2001) (recognizing that "creditors who aggressively request payment" and "legal authorities who assertively carry out their enforcement duties" are not acting extreme or outrageous); Graham v. Commonwealth Edison Co., 742 N.E.2d 858,

as trivial work interaction, minor abuses of power are arguably included in this category. <sup>200</sup>

This, arguably, makes the exception of the clear abuse of power somewhat self-evident. The exception would only apply if the abuse of power is unambiguous. Relating to the abuse of power, the aided-by-agency concept has the potential to undo the scope-of-employment limitation in favor of the employee. However, this concept is not popular, and its advantages to employee plaintiffs are limited. 203

#### 3. Neutral Outcomes

This paper intended to research cases where the situational element of workplace and the employment relationship did not influence the reasoning of the court. This would mean the court would decide on an IIED case in the workplace without according the employment relationship a deciding voice. Soured personal relationships between employees where the employer is not a party to the case could possibly fit in this category, but this seems to be stepping away from the very core of IIED in the workplace. After a review of the case law, neutrality does not seem likely for a number of reasons.

First, the disparity of power is inherent in the typically hierarchical structure of most workplaces.<sup>204</sup> This fundamental disparity shifts the advantage in court either in favor of the employer or the employee. Were the power to be equal, there would no longer be an employment relationship, but possibly a partnership or independent contractor relationship—this is an altogether different context.<sup>205</sup>

<sup>868 (</sup>Ill. App. Ct. 2000) (holding that "temporary reassignment and demotion" were "everyday stress[ors] of the workplace").

<sup>200.</sup> Honaker, 256 F.3d at 491 ("Another factor considered by the courts is whether the defendant reasonably believed that his objective was legitimate; greater latitude is given to a defendant pursuing a reasonable objective even if that pursuit results in some amount of distress for a plaintiff.").

<sup>201.</sup> See, e.g., Naeem, 444 F.3d at 605-06 ("[T]he actions taken against [the plaintiff] clearly go far beyond typical on-the-job disagreements . . . .").

<sup>202.</sup> See Kalley R. Aman, No Remedy for Hostile Environment Sexual Harassment?: Balancing A Plaintiff's Right To Relief Against Protection of Small Business Employers, 4 J. SMALL & EMERGING BUS. L. 319, 324–25 (2000) (outlining the "aided-by-agency-relation standard" in the Title VII context).

<sup>203.</sup> See id. at 325–26 (explaining that the Supreme Court recognized affirmative defenses to aided-by-agency liability because it furthers Title VII's "policies of encouraging prevention of sexual harassment by employers and [reducing lawsuits filed] by employees").

<sup>204.</sup> See supra note 91 (explaining that the National Labor Relations Act recognizes the inherent inequality in bargaining power between employers and employees).

<sup>205.</sup> This distinction is important for tax purposes, amongst other things. See Internal Revenue Serv., Independent Contractor Or Employee?, https://www.irs.gov/pub/irs-

Second, when people are working together for hours over a period of time, <sup>206</sup> any disagreements or grudges have enough opportunity to take root and to explode into outrageous behavior, either in intensity or repetitiveness. <sup>207</sup> This makes a place of employment, where employees do not choose each other's company but have to work together, a very likely place for an escalating situation of bullying. This also makes the low-wage employees who are at the bottom of the hierarchy the most vulnerable to abuses because they have to hold on to their jobs for their day-to-day survival. <sup>208</sup>

Third, the employee suffering the harassment often sues the employer as well as the supervisor and individual co-workers. An employee has a better chance to recover from an employer than from an individual tortfeasor, and the conduct of the tortfeasor needs to be evaluated against the background of his position or job description.

Consequently, an IIED claim in an employment context cannot by its nature have a context-neutral outcome.

## C. What is the Dominant Approach?

In evaluating an IIED claim in an employment context, courts rely on a variety of theories of liability: vicarious liability with different control tests, <sup>212</sup> agency, <sup>213</sup> and aided-by-agency. <sup>214</sup> No matter which liability theory courts apply, a plaintiff has to prove that all elements of the tort IIED are satisfied: the outrageous and extreme conduct, the knowledge thereof,

pdf/p1779.pdf (last visited Nov. 25, 2018) (clarifying the distinction between independent contractors and employees for personal tax filing purposes).

<sup>206.</sup> See supra notes 101–09 and accompanying text (describing Sharon Pollard's daily work environment).

<sup>207.</sup> See E. Christine Reyes Lola, Low-Wage Workers and Bullying in the Workplace: How Current Workplace Harassment Law Makes the Most Vulnerable Invisible, 14 HASTINGS RACE & POVERTY L.J. 231, 233 (2017) (noting that because employees spend a lot of time together, the workplace can provide a ripe environment for bullying).

<sup>208.</sup> See id. at 237 (explaining that low-wage workers face "barriers to asserting their rights").

<sup>209.</sup> See, e.g., Faragher v. City of Boca Raton, 524 U.S. 775, 780 (1998) ("In 1992, Faragher brought an action against [her supervisors] and the City, asserting claims under Title VII . . . and Florida law." (citation omitted)).

<sup>210.</sup> Z.V. v. Cty. of Riverside, 189 Cal. Rptr. 3d 570, 580 (Cal. Ct. App. 2015) ("Respondent superior always helps to assure victim compensation, if only by bringing in another—usually deeper—pocket to provide that compensation.").

<sup>211.</sup> GTE Sw., Inc. v. Bruce, 998 S.W.2d 605, 617-18 (Tex. 1999).

<sup>212.</sup> Id. at 618.

<sup>213.</sup> Richards v. U.S. Steel, 869 F.3d 557, 565 (7th Cir. 2017).

<sup>214.</sup> Doe v. Sipper, 821 F. Supp. 2d 384, 39091 (D.D.C. 2011).

intent, and the resulting severe emotional distress.<sup>215</sup> Every element in an IIED claim is examined through the lens of the employment relationship using the concepts of power, control, scope, and aided-by-agency.<sup>216</sup> Most claims are dismissed on procedural grounds.<sup>217</sup> If a claim makes it to court, the litigation is usually focused on one of the elements of IIED. This is either because the plaintiff fails to prove the outrageous and extreme conduct<sup>218</sup> or the court rules that the conduct, by its nature, is outside the scope of employment.<sup>219</sup>

There are cases using a hybrid approach utilizing the control test and the scope-of-employment test. While the former is more favorable to the plaintiff-employee, the latter is advantageous to the employer. Nevertheless, every case turns on the specific facts and circumstances. Besides the facts of the case, however, the court's view on the use of IIED in the employment context is important. Some courts are reluctant to use this tort in general: "IIED . . . remains a 'highly disfavored [tort] under New York law.' It 'is to be invoked only as a last resort." Other courts are specifically opposed to the use of IIED in the employment context: "North Carolina courts have been particularly hesitant in finding [IIED] claims actionable within an employment claim."

Courts have the task to square the triangular relationship between the employer, the tortfeasor-employee, and the victim-employee. Courts use

<sup>215.</sup> See RESTATMENT (SECOND) OF TORTS: SEVERE EMOTIONAL DISTRESS § 46 (AM. LAW INST. 1965) (amended 2018) (outlining the elements of IIED).

<sup>216.</sup> See, e.g., Faragher v. City of Boca Raton, 524 U.S. 775, 777, 800 (1998) (examining the plaintiff and defendant's employee-employer relationship using power, control, scope, and aided-by-agency).

<sup>217.</sup> See, e.g., Court Finds Employee's IIED Claim Against Columbia Employer Hopeless, JDSUPRA (Oct. 27, 2017), https://www.jdsupra.com/legalnews/court-finds-employee-s-iied-claim-59560/ (dismissing plaintiff's claim early in proceedings for failure to state a claim upon which relief could be granted).

<sup>218.</sup> See supra notes 69, 116, 147, 199 and accompanying text (outlining several claims that did not meet the high threshold standard of extreme and outrageous conduct).

<sup>219.</sup> Richards v. U.S. Steel, 869 F.3d 557, 566 (7th Cir. 2017).

<sup>220.</sup> See, e.g., Turley v. ISG Lackawanna, Inc., 774 F.3d 140, 161 (2d Cir. 2014) (discussing the application of the scope-of-employment test); GTE Sw., Inc. v. Bruce, 998 S.W.2d 605, 618 (Tex. 1999) (discussing the application of the control test).

<sup>221.</sup> *Compare Bruce*, 998 S.W.2d at 618 (demonstrating the far reach of the control test), *with Turley*, 774 F.3d at 161 (emphasizing that harassment is generally motivated by something personal and thus does not fall under the scope of employment).

<sup>222.</sup> See Bruce, 998 S.W.2d at 616 ("[W]hen repeated or ongoing severe harassment is shown, the conduct should be evaluated as a whole in determining whether it is extreme and outrageous.").

<sup>223.</sup> *Turley*, 774 F.3d at 158 (second alteration in original) (first quoting Nevin v. Citibank, N.A., 107 F. Supp. 2d 333, 345–46 (S.D.N.Y. 2000); then quoting McIntyre v. Manhattan Ford Lincoln-Mercury, Inc., 256 A.D.2d 269, 270 (N.Y. App. Div. 1998)).

<sup>224.</sup> Jackson v. Blue Dolphin Comm. of N.C., LLC, 226 F. Supp. 2d 785, 794 (W.D.N.C. 2002).

different approaches from the theories of torts, contracts, and agency law. Therefore, the outcomes are not consistent enough to identify a dominant approach.

#### CONCLUSION

Sharon Pollard and Mary Richards were in a similar situation:<sup>225</sup> they were women working in factories in male dominated peroxide and steel industries.<sup>226</sup> Pollard, however, underwent bullying for a longer period of time, which was known around the factory.<sup>227</sup> Had Richards experienced more harassment over a longer period of time, she might have succeeded in her claim.

IIED is a fairly new tort, and it is a welcome departure from physicalism in tort law. However, in order to avoid flooding the courts with trivial emotional harm claims, the high threshold requirement of extreme and outrageous behavior and severe emotional harm were put in place. While many cases allege claims for IIED, very few of them survive summary judgment. Thus, the advantage of protecting emotional tranquility in the workplace is limited due to the high thresholds in IIED claims.

A claim of IIED in the workplace presents further challenges to plaintiffs. Whereas the employee has to prove the conduct goes far beyond

<sup>225.</sup> Richards v. U.S. Steel, 869 F.3d 557, 560–62 (7th Cir. 2017); Pollard v. E.I. DuPont De Nemours, Inc., 412 F.3d 657, 660–63 (6th Cir. 2005).

<sup>226.</sup> Richards, 869 F.3d at 559-62; Pollard, 412 F.3d at 660.

<sup>227.</sup> Compare Pollard, 412 F.3d at 664 ("Supervisors and other management officials stood idly by as the harassment continued day after day, week after week, month after month."), with Richards, 869 F.3d at 566 ("U.S. Steel cannot be held liable for two of the instances of misconduct that Richards has alleged....").

<sup>228.</sup> See Fraker, supra note 10, at 987–88 (outlining the emergence of IIED and the abandonment of the physical-injury requirement).

<sup>229.</sup> Cavico, supra note 34, at 174.

<sup>230.</sup> Fraker, *supra* note 10, at 988.

<sup>231.</sup> See, e.g., Mark P. Gergen, A Grudging Defense of the Role of the Collateral Torts in Wrongful Termination Litigation, 74 TEX. L. REV. 1693, 1728 (1996) (explaining that over a five-year period, "[o]ut of seventy-one wrongful termination cases in which a claim of defamation or intentional infliction of emotional distress was pleaded," employers successfully got cases dismissed on summary judgment forty-five times). Besides serving its purpose to protect the plaintiff, creative lawyering gives IIED an alternative function—as a strategy to influence the jury and to set the emotional playing field for outrageousness. Lebedeff, supra note 28, at 5. Strategically, IIED may merely be one of the theories of recovery, and it may be used to influence the outcome based on another theory, even if IIED itself is not accepted. Id. This approach, however, is refuted by a trial judge, writing that juries often lack the emotional response aimed at by lawyers. Id.

the normal workplace interaction with its acceptable stressors, <sup>232</sup> the conduct should not go too far beyond or it will fall outside the employment context. <sup>233</sup> This is a tricky balance to strike.

When courts assess an IIED claim in the employment context, they favor either the control-test approach, <sup>234</sup> the scope approach, <sup>235</sup> or a hybrid of both. <sup>236</sup> This choice does not make the outcome predictable, as this tort is highly context and content dependent.

The power disparity in an employment relationship is central. This means that "the employee's entire case may hinge on a judge's willingness to consider the immense power that the employer holds over the employee's livelihood and the stressful impact on the employee when the employer wields that power as a weapon of coercion."

An unfortunate observation from this survey of the case law is that situations of bullying and harassment often fall between the cracks of discrimination claims and IIED claims. This sends the message that general harassment, as well as sexual assaults in the workplace, are generally acceptable behaviors. In calling for a change, one author puts the responsibility on the judiciary as the guardians of the common law to delineate this tort more precisely and then to apply it more forcefully.... This will provide a viable legal instrument to counterbalance the inherent inequality of economic bargaining power in the typical employment relationship."

Judicial efforts alone may not suffice, as not all cases of bullying and harassment find their way to the courts. Community lobbying efforts for

<sup>232.</sup> See supra notes 70, 115, 198 and accompanying text (explaining that negative job evaluations, practical jokes, demotion, and temporary reassignment are normal workplace stressors).

<sup>233.</sup> Cavico, *supra* note 34, at 152.

<sup>234.</sup> See GTE Sw., Inc. v. Bruce 998 S.W.2d 605, 618 (Tex. 1999) (discussing the control test approach).

<sup>235.</sup> See supra notes 220–21, 236 and accompanying text (analyzing the pros and cons of the scope approach).

<sup>236.</sup> See Bruce, 998 S.W.2d at 612–13 (discussing both the control test and the scope of employment test).

<sup>237.</sup> James F. Bleeke, Intentional Infliction of Emotional Distress in the Employment at Will Setting: Limiting the Employer's Manner of Discharge, 60 IND. L.J. 365, 372 (1985).

<sup>238.</sup> See Lola, supra note 207, at 240 (explaining that neither of the "two types of laws that address harassment or abuse in the workplace" provide a "useful tool for bullying victims").

<sup>239.</sup> *Id.* at 232 ("[W]orkers have no legal protection from harassment or bullying that is not clearly discriminatory. This type of behavior is known as general harassment or bullying, and it constitutes one of the most common and serious problems facing employees in today's workplace.").

<sup>240.</sup> See Doe v. Sipper, 821 F. Supp. 2d 384, 388 (D.D.C. 2011) (recognizing that in many jurisdictions, sexual assault falls outside the scope of employment).

<sup>241.</sup> Chamallas, supra note 74, at 2132.

<sup>242.</sup> Cavico, supra note 34, at 182.

legislation that prohibits general harassment in the workplace have been successful to varying degrees in different jurisdictions.<sup>243</sup> Educating and empowering the community about workplace bullying and its effects is the slow but steady way of instilling values of respect for personal dignity in the workplace.<sup>244</sup> These efforts are strengthened by employers willing to adjust their policies and offer special training.<sup>245</sup> In the meantime, "[t]he tort of outrage should be more than just a repository for the bizarre; it should mark the place where the law struggles to define and redefine the meaning of decency, humanity, and equality."<sup>246</sup>

<sup>243.</sup> See Healthy Workplace Bill, supra note 7 (noting that "32 legislatures . . . have introduced the [Healthy Workplace Bill]").

<sup>244.</sup> See Gary Namie & Ruth Namie, Being Bullied? Start Here, WORKPLACE BULLYING INST., http://www.workplacebullying.org/individuals/problem/being-bullied/ (last visited Nov, 25, 2018) (offering information and trainings to address workplace bullying).

<sup>245.</sup> See, e.g., Managing Unconscious Bias, FACEBOOK, https://managingbias.fb.com (last visited Nov. 25, 2018); Facebook's Harassment Policy, FACEBOOK, https://peoplepractices.fb.com/harassment-policy/ (last visited Nov. 25, 2018); EXXON MOBIL, STANDARDS OF BUSINESS CONDUCT 22 (2017), http://cdn.exxonmobil.com/~/media/global/files/other/2017/standards-of-business-conduct\_apr.pdf.

<sup>246.</sup> Chamallas, supra note 74, at 2187.