

Examining the Efficacy of the Common Law Tort of Intentional Infliction of Emotional Distress and Bullying in the Context of the Employment Relationship

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Abstract

The common law tort of intentional infliction of emotional distress (IIED) is a frequently occurring lawsuit. It seems that in almost every wrongful discharge suit by a terminated employee at-will, or lawsuit to redress bullying-like conduct at work, or lawsuit pursuant to civil rights act for discrimination or harassment there appears a count for the IIED tort. As such, there are many, many IIED cases; however, this article demonstrates that there are only a handful of cases that are successful due to the various elements to the tort as well as the high evidentiary hurdles to sustain those elements. This article explicates the elements of the tort and illustrates those elements in the context of wrongful discharge, bullying, and discrimination/harassment lawsuits. The authors discuss the implications of the tort, particularly for management; and provide recommendations to employers on how to avoid liability, especially by bully-proofing the organization, and also to employees on how to sustain an IIED cause of action.

Keywords: tort, intentional infliction, emotional distress, mental anguish, harassment, bullying, discharge, employment, employer, employee, management.

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I. Introduction

The competitive modern work environment often pushes employees and managers to put undue pressure on themselves and their colleagues to increase productivity. During this process, some abuse their authority and power in repeatedly bullying others through extreme, outrageous and inappropriate behaviors. Of course, bullying behavior can be difficult term to define, but in essence it is conduct that leaves the victim feeling humiliated and threatened (Powers, *et al.*, 2013). The Society of Human Resource Management in its proposed "Company Bully Policy" defines bullying as "repeated inappropriate behavior, either direct or indirect, whether verbal, physical or otherwise, conducted by one or more persons against another or others, at the place of work and/or in the course of employment (Hellner and Atwood, 2017: 30-31). The state of California law defines bullying as any "abusive" verbal and non-verbal conducts such as derogatory remarks, insults or epithets as well as inappropriate physical conducts that a reasonable person would find threatening, intimidating, or humiliating (Hellner and Atwood, 2017).

In the State of Florida, Broward County has their own comprehensive view of bullying which is defined as "systematically and chronically inflicting physical hurt or psychological distress on one or more students or employees" (see Broward County Policy 5.9: Anti-Bullying, 2008: 1-2). In Broward County, bullying is seen as any unwanted purposeful written, verbal, nonverbal, or physical behavior that is threatening, insulting, or dehumanizing gesture, by an adult or student, that has the potential to create an intimidating, hostile, or offensive learning environment or cause long term damage. Bullying can include any behavior that cause discomfort or humiliation; or conducts that unreasonably interfere with a person's performance or

participation. Bullying is often carried out repeatedly in some workplaces and can be characterized by an imbalance of power. In Broward County, bullying can include such repeated behaviors as:

1. unwanted teasing;
2. threatening;
3. intimidating;
4. stalking;
5. cyberstalking;
6. cyberbullying;
7. physical violence;
8. theft;
9. sexual, religious, or racial harassment;
10. public humiliation;
11. destruction of school or personal property;
12. social exclusion, including incitement and/or coercion;
13. rumor or spreading of falsehoods.

Broward County defined “*cyberbullying*” as the willful and repeated harassment and intimidation of an individual using digital technologies, including, but not limited to, email, blogs, social media websites, chat rooms, and instant messaging (Broward County, 2008). Bullying, emotional distress, shock, and other forms of harassment due to generational differences, political motives, and lack of professionalism skills are widespread in the modern day workplace. Consequently, they all present an ethical dilemma that managers and employers must deal with effectively and in a timely manner (Edelman & van Knippenberg, 2017; Hood, Cruz & Bachrach, 2017; King, Dawson, Jensen & Jones, 2017; Zabel, Biermeier-Hanson, Baltes, Early & Shepard, 2017; Chen, Mujtaba and Heron, 2011; Mujtaba, Tajaddini and Chen, 2011; and Mujtaba, 2011).

For the purpose of this paper, we would like to emphasize the Workplace Bullying Institute’s comprehensive definition since they see bullying as “repeated, health harming mistreatment of one or more persons...by one or more perpetrators”, including “abusive conduct” that is “threatening, humiliating and or intimidating”, conduct “which prevents work from getting done”, as well as verbal abuse and sabotage (Hellner and Atwood, 2017: 31; Namie and Yamada, 2017: 1). This article examines the common law (that is, judicially created) tort (that is, civil legal wrong) of IIED in the context of the modern-day employment relationship. The focus is to examine the efficaciousness of the tort as a cause of action by an employee, especially a discharged at-will employee, against his or her boss, colleagues and employer. The paper examines the efficacy of the tort as a means of legal redress for employees who suffer bullying behavior in the workplace.

II. Workplace Bullying and Tort Liability

Bullying can arise in a variety of contexts; the focus herein is the workplace in the United States. Morris (2016: 259) notes that the first time the term “workplace bullying” was used by a court in the United States was by the Indiana Supreme Court in the 2008 case of *Raess V. Doescher* (though the case was decided on other grounds). The Workplace Bullying Institute conducted a workplace bullying survey in 2017 which found that: 1) 19% of people in the U.S. are bullied in the workplace; 2) 19% witness bullying; 3) 61% of people in the U.S. are aware of abusive conduct in the workplace; 4) 61% of bullies are bosses, the majority of which, 63%, operate alone; 5) 40% of bullied targets are believed to suffer adverse health consequences; and 6) 29% of target remain silent about their treatment (Workplace Bullying Institute, Workplace Bullying Survey, 2017). Hellner and Atwood (2017: 28-29), reporting on various other bullying studies, point to the extent of bullying in the U.S. workplace, to wit: 27% of people in the United States report experiencing abusive conduct in the workplace; 72% report being aware of workplace bullying; 28% of private sector employees report having experienced or were currently experiencing bullying in the workplace; 45% of bullies were identified as bosses and 46% were co-workers; 32% of employees victimized by bullying felt compelled to contact the human resources department regarding the bullying, but, significantly, and perhaps surprising, employers responded to these bullying disclosures only about one-half of the time. Namie (2003: 2), citing other studies showing the “typical” lack of employer response, or worse, the employer’s managers compounding the problem, and states that this employer conduct is “quite puzzling” indeed. Richardson, Hall, and Joiner (2016: 6-7) pointed to three revealing studies: 1) a 2014 study that found that the number of workers in the U.S. who were affected by bullying, that is, those employees directly victimized as well as those who witnessed bullying conduct, was 65.6 million; 2) another 2014 study which found that least 7 out of 10 adults in the workplace were familiar

with or aware of bullying in the workplace; and 3) a 2013 study indicated that almost 40% of employees utilized a personal day or a sick day due to a stressful relationship at work.

Bullying in the workplace unfortunately is not just a phenomenon in the U.S.; other countries are also negatively impacted by bullying, particularly workplaces in those countries with high performance, less humane, and present-oriented as opposed to future-oriented cultures (Powers, *et al.*, 2013). Morris (2016: 261) points to a 2010 international study which indicated that 14.6% of workers are bullied at work. Langos and Giancaspro (2017) discuss Australian studies which indicate the prevalence of workplace bullying, including cyberbullying and verbal abuse; and they note that as a result of a national inquiry into workplace bullying the legislature in that country passed a law in 2009 called the Fair Work Act, which among other provisions indirectly prohibits bullying in the workplace by sanctioning "unreasonable" behavior in the Australian workplace. Of course, what is "unreasonable" is the seminal issue. Namie and Yamda (2017: 2-3) point out that the Scandinavian countries, among other nations have explicit anti-bullying laws, Great Britain has a broad anti-harassment law that covers bullying, and that Ireland's health and safety code addresses bullying. Morris (2016: 264) relates that Belgium and France have banned bullying in the workplace; and notes that in France bullying is called "moral harassment". Namie and Yamada (2017: 2) assert that "the U.S. is the last of the western democracies to not have a law forbidding-like conduct in the workplace".

Hellner and Atwood (2017: 30) point to studies which indicate that the most common perceived instances of bullying in private sector workplaces include: false accusations of mistakes, rejections of opinions, dismissal of complaints, different standards based on perceived favoritism, and constant criticism. Bullying also can encompass cyber-bullying which, according to Hua (2017), is a broad term encompassing: 1) cyber harassment, that is, persistent online speech or communications which cause distress; 2) cyber-stalking, that is, speech or communications on line which cause a person to fear for his or her safety; and 3) Internet harassment, that is, acts of physical harassment that stem from an online course of conduct. As the use of computers, smart phones, and the Internet grows exponentially and become indispensable to modern life – personal and the workplace – so does the potential for abusive and atrocious bullying on the Internet.

Bullying most certainly can have adverse emotional, psychological, and physical consequences for victimized employees in the workplace. Powers, *et al.* (2013) report on studies that indicate victims report lower well-being and self-esteem, less job satisfaction, depression, anxiety, irritability, more stress than other employees who are not bullied, as well as concomitant health problems. Bullying also engenders higher turnover, more absenteeism, more forced transfers and resignations, less engagement, a decline in morale, and more incivility (Richardson, Hall, and Joiner, 2016; Powers, *et al.*, 2013; Namie, 2003). Witnesses of bullying can be adversely affected too (Powers, *et al.*, 2013). To illustrate, Hellner and Atwood (2017: 30) report on a 2007 British study which found that bullying cost British employers nearly \$22.5 billion annually, mainly due to turnover, absenteeism, and lower productivity.

Empirical evidence, moreover, demonstrates that workplace bullying has harmful health effects both physically and psychologically. Medical professionals raise concerns regarding the work environment and employee health. When employees are bullied, they may feel depressed and hopeless, suffer from loss of appetite, and make poor nutrition choices. The psychological effects of abusive workplace environments on employees are considered to have a negative effect on mental health (Einarsen & Nielsen, 2014). Empirical research data also strongly suggests that stress, depression, feelings of injustice, and anger may be the result for not only the targets of workplace bullying but also their co-workers and families (Einarsen & Nielsen, 2014). Employees may become fearful and less innovative, undergo mood swings, have emotional distress, and difficulty concentrating (Einarsen & Nielsen, 2014).

Exposure to bullying, furthermore, results in the questioning of a person's sense of well-being. According to Williams (1997), repeated hostility involved in bullying is combined with acts of social exclusion and ostracism, that contribute to confusion and anxiety, and over time interfering with the immune system and brain functions relating to aggression and depression in the bullied person. The underlying mechanisms are described in social psychological theories where social exclusion or rejection from important social relationships interfere with a range of basic social needs, including the need to belong, the need for a worthy self and the need to perceive the world as predictable and controllable. In the long run, perceptions of exclusion are seen to cause extreme anxiety, depression and even psychotic reactions. Based on clinical observations, Leymann (1990), described how exposure to social isolation or social ostracism gradually reduces the victim's ability to cope with the demands of daily living. So, plainly, there is a bullying problem in the workplace that causes psychological and physical harm. Yet is there legal redress for such abusive conduct?

One organization that has been pushing for a legislative solution is the Workplace Bullying Institute, which is devoted to eliminating bullying in the workplace and provides anti-bullying research, education, and training. The Institute has also proposed an anti-bullying bill for the various state legislatures, called the Healthy Workplace Bill (Workplace Bullying Institute, Our Organization, 2017), which prohibits an "abusive work environment", and provides a private cause of action for money damages against the bully and in certain circumstances the employer too (Namie and Yamada, 2017; Morris, 2016). However, Morris (2016: 266) points out that the bill limits damages for emotional distress as well as punitive damages to situations where there is an "adverse employment action" or, most interestingly for the purposes herein, to "extreme and outrageous conduct". Today some states have statutes that address bullying in the workplace, including cyber-bullying, as will be seen. And there is a proposed Healthy Workplace Bill, which has been considered by several state legislatures, but it has not yet been promulgated into law by any state or the federal government (Richardson, Hall, and Joiner, 2016), perhaps due to the difficulty of defining illegal bullying conduct. However, even in the absence of specific anti-bullying acts victims of bullying behavior can utilize the court system and use common law torts to seek redress, for example, suing for assault and battery, false imprisonment, defamation, negligent hiring, supervision, and training, and, for the purposes herein, the intentional tort of infliction of emotional distress (Hellner and Atwood, 2017; Rappaport, 2017).

III. The Common Law Tort of Intentional Infliction of Emotional Distress

The tort of IIED is a civil wrong for which civil damages may be recovered. There are no criminal ramifications to the tort in-and-of-itself because society does not consider the harm inflicted to be sufficiently serious to justify the imposition of criminal penalties (Stein, 2017). As such, according to Stein (2017: 600): "The government consequently privatizes law enforcement by granting the victim the power to sue the actor for compensatory damages, and, in appropriate cases, punitive damages are well". Moreover, certain conduct that involves the infliction of emotional distress, such as assault and battery and false imprisonment, are crimes in addition to intentional torts (Cavico, 2014).

In order to analyze the tort of IIED in the employment sector it is first necessary to set forth the elements of this cause of action. Although this body of law is state-specific there are several components to the tort which the plaintiff bringing the lawsuit must establish to prevail: 1) the defendant intended to purposefully inflict emotional distress on a person; 2) the conduct of the defendant (the employer in the context herein) was extreme and outrageous; 3) the actions of the defendant caused the plaintiff to suffer emotional distress; and 4) the resulting emotional distress was severe (*Restatement (Third) of Torts*, Section 46, 2012; Jones and Norwood, 2017; Morris, 2016; Pagnattaro, 2015; Cavico and Mujtaba, 2014; Cavico, 2003).

The burden of proof and persuasion is on the party bringing the lawsuit, the plaintiff employee in the context herein, to establish all the elements of the cause of action (Cavico, 2003). The typical burden of proof in a civil case is the "preponderance of the evidence" standard; however, some courts for IIED cases require that the plaintiff demonstrate the elements of the case by providing "substantial evidence" (Cavico, 2003).

It is also necessary to point out that the tort of IIED often arises in the context of the employment at-will doctrine, specifically when an at-will employee is discharged for reasons that the terminated employee feels are unfair or unjust or when the employee believes that he or she was discharged in a coercive, abusive, or retaliatory manner. Pursuant to the employment at-will doctrine, which the vast majority of states in the United States adhere to, an employee without a contract which limits the circumstances which he or she can be discharged can be terminated at any time for no reason, any reason, even a morally bad one, without any explanation or justification, and without notice or warning; but the employee cannot be discharged for an illegal reason or in an illegal manner (Cavico and Mujtaba, 2014). Discharging the employee for an illegal reason, such as discrimination, or in an illegal manner, such as in the subject matter herein, converts the legal but perhaps immoral discharge into a "wrongful discharge", that is, an illegal one, thereby affording the discharged employee a legal cause of action against his or her employer. Accordingly, the discharged at-will employee will be looking to carve out some sort of "exception" to the employment at-will doctrine to secure legal redress against the employer, such as by presenting evidence that the manner of the discharge was outrageous. The tort of IIED may provide the terminated employee with the legal means to contest the discharge. Moreover, the tort may be the means of legal redress for an employee is subject to bullying behavior in the workplace. First, though, it is necessary to examine the "elements", that is the components, to this common law tort.

A. Extreme and Outrageous Conduct

The conduct necessary to support a cause of action of IIED must be extreme and outrageous; consequently, the conduct must go beyond the bounds of decency recognized by a civil society; the conduct must be intolerable in a civilized society; it must be atrocious (*Thomas v. Hospital Board of Directors of Lee County*, 2010). Merely demoting an employee to clerical shredding and scanning duties in an office setting will not support a worker's IIED claim against their employer even if the employee felt that the tasks were humiliating and caused the employee to be ostracized by fellow workers since such employer actions are not "utterly intolerable in a civilized community" (*McMiller v. Precision Metal Products, Inc*, 2015: 4).

Mere verbal abuse, insults, indignities, bad manners, rudeness, or insensitivity typically will not be sufficient to be deemed "extreme" and "outrageous" and thus support a cause of action for IIED (*Koutsouradis v. Delta Airlines, Inc.*, 2005; Cavico, 2003). Jones and Norwood (2017: 2065) provide a graphic example of a "mere" indignity: ignoring a minority or foreigner woman in a store, "following her because you think she is going to steal, assuming she is not professional, calling her an animal... would not provide a basis for redress. In effect, the law's response to 'the minority or foreigner' women is "Suck it up"! Everyone has to deal with 'minor insults'". False accusations can also form the basis for extreme and outrageous conduct (Morris, 2006).

The test to determine if the misconduct is outrageous or atrocious is an objective, and not a subjective, one. That is, outrageousness is measured by the standard of a reasonable and prudent person and not the subjective feelings of the aggrieved party (*Liberty Mutual Insurance Company v. Steadman*, 2007). In granting a remitter to a jury award but denying a defendant employer's appeal challenging a jury's judgement in favor of a teenage workers for his IIED claim, Delaware's superior court stated it was not surprised of the jury's \$500,000.00 award, because on multiple occasions the business owners drugged and sexually assaulted him at their house over an eight month period (*DeLucia v. Great Stuff, Inc*. 2017). The teenager worker testified that he felt disgusted and in a state of turmoil, and he became resentful, confused, and more reclusive and hated himself because of the sexual assaults that occurred to him by his employer's principals, all of which the court held could be a reasonable basis by the jury to conclude the conduct was outrageous and atrocious (*DeLucia v. Great Stuff, Inc*. 2017).

In determining whether certain conduct is extreme and outrageous the courts will look at the totality of the circumstances involved, particularly if certain objectionable conduct is repeated, ongoing, and regular (Morris, 2016; Pagnattaro, 2015; Cavico, 2003). As such, conduct which is isolated in the form of a single incident or standing alone may not be sufficient to establish a case but if the conduct is repetitive and forms a larger regular pattern of offensive conduct the actions in total could rise to the level of extreme and outrageous behavior (Morris, 2016; Pagnattaro, 2015; Cavico, 2003). However, one single act could be so egregiously severe or objectionable that it could amount to extreme and outrageous conduct (Morris, 2016; Pagnattaro; Cavico, 2003). Furthermore, Morris (2016: 275) states: "Courts tend to view IIED claims favorably in single-incident cases involving employer false accusations against an employee. The more damaging the accusation, the more likely an employee's claim is to survive summary judgment or dismissal motion".

Since the context of this article is the workplace it is important to also point out that the fact that the offending or abusive party is a manager or supervisor of the employee or someone in a "position of power" over the employee may worsen the offensive nature of the actions to render them extreme and outrageous as well as exacerbate the severity of the emotional response (Cavico, 2003). The Federal Tenth Circuit Court of Appeals in *Hasen v. Skywest Airlines* (2016) recognized that the Wyoming Supreme Court precedent specifically addressing IIED claims in the context of employer-employee relationships. This certain relationship between the parties is a significant factor in determining outrageousness and it is only natural that an employer's position of power over an employee may enhance the employer's ability to do harm to the worker. In *Hansen*, the employee suffered from PTSD and his fellow male supervisors and managers sexually harassed him in the workplace in the form of physical unwanted touching; rubbing and pressing their genitals against him when passing him; conditioning promotions based on sexual interactions with them; sending unsolicited explicit e-mails to him; engaging in ongoing graphic "sex" talk at work to him; soliciting sexual conduct from him on occasions during work periods; and retaliating when he would not share hotel rooms or a hot tub with them during travel periods for training. The federal court felt that these allegations were sufficient to allow a jury to decide his IIED claim against his employer because reasonable persons could determine that the conduct was extreme and outrageous, compounded by the fact that the conduct was from those in a position of power and direct authority over the worker (*Hasen v. Skywest Airlines*, 2016).

An elementary teacher's allegations that her school's employer's principal conduct rose to the level of "extreme and outrageous" to avoid dismissal of her complaint against her employer in the case of *Brown v. Kourentsos* (2016). In that federal trial court case a principal continually mocked and berated the plaintiff for missing days off when she was recovering from a suicide attempt. The principal also accused her, in front of other educators of stealing yarn from classroom supplies and smoking illegal substances on school premises, all of which were untrue. The principal continued the mistreatment of the teacher in front of her peers, making fun of her alleged inability to write, slamming a door near her after a meeting had ended nearly missing her, inappropriately conducting classroom observation visits, and mocking her for hiring an attorney to deal with this workplace mistreatment. The court held that these allegations were beyond the "garden variety" workplace complaints and unpleasantries typical in an employer/employee dispute and the potential harm of the accusations against the teacher was considerable to her continued professional career (*Brown v. Kourentsos*, 2016).

B. Intent

As with any intentional tort cause of action intent is required to sustain a lawsuit. That is, the defendant wrongdoer must have acted intentionally and purposefully to inflict emotional distress on the aggrieved plaintiff (Morris, 2016; Pagnattaro, 2015; Cavico, 2003). The intent requirement is also satisfied when the evidence indicates that the defendant has acted recklessly, that is, with a deliberate or conscious or reckless disregard or indifference that emotional distress would follow from certain conduct (*Restatement (Third) of Torts*, Section 46, 2012; Borstein, 2017; Cavico, 2003). Yet, as emphasized, mere negligence is insufficient; that is, even if the emotional distress caused was severe there will be no liability if the distress was only negligently caused (Cavico, 2003). In *McClellan v. Pine Eagle School District No. 61* (2016), the defendant school conducted an announced "active shooter" drill in which the plaintiff teacher suffered mental anguish and suffering when masked gunmen actors roomed the school hallways, lighting firecrackers and firing starter pistols loaded with blanks at school employees including directly at the plaintiff. The school defended itself against the teacher's IIED action, by claiming they did not intend to inflict emotional distress on the plaintiff. The court rejected the school's summary judgment motion based on this rationale because the general intent of the exercise was to place the workers in a stressful situation or at least the employer knew with substantial certainty that its agent's conduct would cause such distress. Therefore, the court concluded that a reasonable jury also could find that defendants' actions were intended, extreme and outrageous (*McClellan v. Pine Eagle School District No. 61*, 2016).

C. Causation

Causation is another element to the legal wrong of IIED. That is, there must be a causal connection between the defendant's intentional conduct and the plaintiff's subsequent emotional distress (Cavico, 2003). Causation can be found when the distress was the primary consequence of the intended actions, where there is a probability that the conduct would cause distress, or when the distress was a reasonably foreseeable consequence of the intentional conduct (Cavico, 2003). In the case of *Malphurs v. Cooling Towers Systems, Inc.* (2017), the plaintiff worked for the employer for thirty days and the jury found in favor of her IIED claim against the company. In that case, the jury believed the plaintiff's testimony that the company's owner constantly made comments about wanting to have sex with her and that he took her hand and forced it to touch his erect penis. She also testified that on "four or five" occasions he brushed his groin against her so that she would feel his erect penis on her shoulder. Further the plaintiff said that the company owner was always touching her butt, boobs and inner thigh and shoulders and he squeezed her nipple, and on two other occasions reached up beneath her shirt and touching her bare breast. The court upheld the jury finding in favor of the plaintiff's IIED claim against the employer because a reasonable jury could, and did, conclude that the owner's actions caused the worker's emotional distress because such actions would naturally humiliate, embarrass, frighten, or outrage an employee in the workplace (*Malphurs v. Cooling Towers Systems, Inc.* (2017)).

D. Distress

The fact that the intentional extreme and outrageous conduct in fact caused emotional distress is obviously an essential component to the legal wrong of IIED (Jones and Norwood, 2017; Cavico, 2003). Emotional distress means that a person is harmed, injured, disturbed, or impaired in his or her tranquility (*Restatement (Third) of Torts*, Section 45, 2012). Moreover, the distress caused must be severe or serious (Jones, and Norwood, 2017; Morris, 2016; Pagnattaro, 2015; Cavico, 2003). Jones and Norwood (2017: 2065) explain that plaintiffs

seeking to recover for emotional distress must "...demonstrate that their distress was particularly acute in that it extended beyond passing upset".

Many workplace actions can cause distress to the employee. However, a plaintiff employee must allege more than the fact that he or she was caused distress, even intentionally, by certain workplace conduct; rather, the plaintiff employee must demonstrate that the distress was in fact severe and that such distress would be considered severe to a reasonable person or a person of ordinary sensibilities (Jones and Norwood, 2017; Cavico, 2003). The facts alleged by the plaintiff in *Grost M.D. vs. United States* (2015: 18-19) fell short in this regard when the court granted the employer's summary judgement against her IIED claim because the plaintiff failed to offer any proof regarding the severity of her alleged mental anguish beyond mere allegations that her work place conditions caused "grief, severe disappointment, indignation, wounded pride, shame, despair or public humiliation or a combination of any of these".

Medical testimony or any expert testimony is not necessarily required for there to be a finding of severe distress. However, as Jones and Norwood (2017: 2065) warn: "The problem is that stand-alone claims for emotional harm, i.e., claims unaccompanied by any physical injury, are difficult to win. Plaintiffs in these cases are typically required to prove that their emotional injury is severe and serious, i.e., distress beyond that which a reasonable person would be expected to endure" (Jones and Norwood, 2017: 2065). As such, the conduct could be so outrageous and extreme so as to give credence to the assertion that the plaintiff employee suffered severe distress (Morris, 2016; Pagnattaro, 2015; Cavico, 2003). Of course, having an expert witness to testify as to the presence and severity of the distress will naturally help the aggrieved plaintiff employee to establish his or her case for IIED.

However, even if the plaintiff employee can show that his or her distress was severe he or she still must demonstrate that the distress would be construed as severe to a reasonable person, that is, a reasonable employee in the same or similar circumstances (Morris, 2016; Pagnattaro, 2015; Cavico, 2003). In the case of *Cruz v. English Nanny & Governess School, Inc.*, (2017), the plaintiff was attending courses at a prestigious trade school which was teaching students on how to be professional nannies and governesses. Upon graduation, she was placed by the school's employment agency at a residential site for a weekend. While working at the site, she observed a father sexually abusing one of his young daughters which she reported to the school upon her return. The school authorities put tremendous pressure upon her not to report the child sexual abuse allegations to authorities and tried to convince her she did not really see what she thought she saw. The school officials also blackballed her and placed undue influence over her in order to force her to participate in an alleged cover-up of the sexual child abuse she had personally observed. The plaintiff sued the school and its work placement agency for IIED and the jury awarded her considerable damages which was ultimately reduced to about \$194,000.00 plus recovery of an additional \$125,500.00 in attorneys' fees and costs. The appeals court upheld the jury award since the plaintiff had established she suffered anxiety, low self-esteem and sleepiness (*Cruz vs. English Nanny & Governess School, Inc.*, (2017)). The appeals court felt that the jury could rightfully conclude she suffered duress after hearing from a medical expert supporting her claim of distress and her direct testimony as follows:

They made me think I was crazy...I literally thought maybe I was schizophrenic. Thinking irrational thoughts about myself because I thought that maybe if all these people are saying you are crazy, what's the common denominator? They made me feel like I'm not even human because I'm — I was on antidepressants:...that I had no right to be around children...You shouldn't have to always go around feeling ashamed of yourself because people basically used that as an excuse for getting rid of you" (*Cruz vs. English Nanny & Governess School, Inc.*, 2017: 29).

Evidence of any physical impact or harm is not required to sustain a lawsuit for IIED, as opposed to a lawsuit for negligent infliction of emotional distress, as noted. However, if there is evidence of objective manifestations of physical harm, such as shock or illness, then naturally such evidence will make it easier for the plaintiff employee to prove that the distress caused was severe (Jones and Norwood, 2017; Cavico, 2003).

A legal and practical problem arises in IIED law when the aggrieved party is a person of particular sensitivity or susceptibility to mental anguish. According to an old common law maxim, "the plaintiff takes the defendant as it finds him", and thus the plaintiff may be liable to the distress caused to a person who is emotionally vulnerable. However, the aggrieved party bringing the lawsuit still must show that the severe distress caused would be reasonable to a person with that same sensitivity and susceptibility (Cavico, 2003).

E. Damages

Compensatory damages are available to the aggrieved plaintiff pursuant to the tort of IIED. Compensatory damages are broadly construed and thus can encompass pecuniary awards for mental and emotional pain and anguish, humiliation, ridicule, indignation, shock, grief, rage, shame, fright, despair, anxiety, stress, depression as well as for any physical harm caused by the defendant's extreme and outrageous conduct (Cavico, 2003). The practical problem, however, is that most of the aforementioned harms are difficult to estimate and to prove. Damages, moreover, can include medical expenses, economic losses, lost income or wages, lessening of earning capacity or future profits, as well as loss of consortium. However, additional damages in the form of punitive damages generally cannot be recovered since the outrageous action itself forms the basis for the cause of action and consequently an award of compensatory damages is deemed to be sufficiently punitive and deterrent (Cavico, 2003).

F. Vicarious Liability

Pursuant to traditional principles of agency law an employer can be held vicariously liable for the tort of IIED. Vicarious liability means that the legal wrong is imputed to the employer even though the employer did not act in a wrongful purposeful manner and even when the employer did not act in a negligent or careless manner (Cavico, 2014). Vicarious liability arises when the distress is inflicted by a manager, supervisor, or fellow employee acting within the course or scope of his or her employment and there is evidence that shows that the manager, supervisor, or employee was seeking to further the interests of his or her employer, at least in part, and not serve any personal motive or vindictive interests (Cavico, 2003). The fact that the conduct was intentional, it is important to note, does not take the action out of the course or scope of employment, but there must be evidence that the wrongdoer was attempting to fulfill some type of work duty or responsibility or performing or fulfilling job functions and not acting out of pure personal animosity (Morris, 2016; Cavico, 2003). Moreover, even if a manager, supervisor, or employee was not acting within the course or scope of employment and was serving his or her own personal interests in inflicting emotional distress the employer still can be held liable if it authorized or ratified the wrongful conduct (Morris, 2016; Cavico, 2003). One court ruled that an employee's allegations could constitute extreme and outrageous behavior when an employer became aware of its supervisor's slipping a cell phone under a bathroom partition to video tape an employee's private parts and then uploading the graphic video to the internet and adding vulgar and degrading comments (*Oliver v. Walmart Stores East, LP et al.*, 2017). The court ruled that the plaintiff's IIED claim against the employer should not be struck from the pleadings since the employer continued to employ the supervisor after knowing of these atrocious actions and continued to allow the supervisor to manage the same worker in the workplace causing emotional distress to the employee (*Oliver v. Walmart Stores East, LP et al.*, 2017).

G. Burdens of Proof and Persuasion and Roles of Court and Jury

In some states, the issue of whether conduct is sufficiently "outrageous" is a question of fact for the jury to determine, whereas in other states the issue is deemed to be a question of law for the judge to determine (See, e.g., *De La Campa v. Grifols America, Inc.*, 2002, applying Florida law). In *Grost M.D. v. United States* (2015: 16-17), the court held that even though the employee's supervisor refused on one occasion to shake her hand at work, failed to include her in social gatherings outside of work, and at one time called her "neurotic", and twice yelled at her in the workplace, and listed her deficiencies to other fellow doctors, these occurrences, though rude and insulting, did not raise a genuine issue of fact as to whether the supervisor engaged in the level of "terrorizing, threatening, and assaultive conduct" necessary to elevate those employer actions outside the context of an ordinary employment dispute. Thus, the court granted summary judgment against the plaintiff on her IIED before it reached a jury (*Grost M.D. vs. United States*, 2015).

However, in other states the court first makes a determination as to whether the conduct is outrageous; and if there is a judicial determination that reasonable minds could disagree as to the outrageous nature of the defendant's conduct, the issue becomes one for the jury to resolve (Cavico, 2003). In *Gillespie v. City of Battle Creek* (2015), the federal trial court refused to dismiss the IIED claims against a city police force that installed a video recorder in the female locker room that recorded a partially nude female plaintiff police officer. The female officer sued; and the court held that "reasonable minds could differ" as to whether recording and playing the video during an investigation conducted by male colleagues was sufficiently extreme and outrageous to result in liability. This was the same result reached in *Kubler v. Heritage Automotive Group, Inc.* (2017), where a male coworker routinely assaulted a female worker and who would "stomp his foot at her", and would lean into her while simultaneously tell her to get the "fuck out' of his way" and causing her to continually shake

with fear in the workplace. The court concluded that a reasonable jury could find this conduct sufficiently extreme and outrageous and felt that this behavior easily transcended the normal ignoble unpleasant workplace conduct. To compare, in *Guobadia v. Irowa*, (2015), a federal trial court rejected the defendant employer's summary judgment motion relative to the plaintiff's IIED claims because, there was evidence that the live-in domestic worker was physically abused by the employer who kept her isolated from others and who threatened to have her arrested or deported if she spoke to people outside the home. This created a genuine issue of fact for the jury to decide if the employer's actions were extreme and outrageous. In another case, *McManus v. Auchincloss* (2015), the plaintiff was a full-time live in house personal assistant whose job duties included cooking, serving meals, housecleaning, laundry, pet care, yard work, grocery shopping, and organizing defendant's personal affairs. Throughout the employment, the home owner employer constantly exposed the worker to his viewing of child pornography and when the worker cooperated with the police for the home owner's arrest, the worker was fired and barred from retrieving his belongings from the house. The appeals court reversed the trial court's granting the defendant's motion for summary judgment as to the employee's IIED claim. In doing so, the appeals court held that the plaintiff made a *prima facie* case of IIED and that a reasonable jury could find that defendant's actions violated social norms in the workplace beyond all tolerable bounds of civilized behavior (*McManus v. Auchincloss*, 2015).

H. Defenses, Privileges, and Preemption

There are no affirmative defenses to the tort of IIED though the traditional tort defenses to intentional torts – consent and self-defense – could be applicable (Cavico, 2014). Moreover, the IIED cause of action could be preempted by a statute, for example, by means of the exclusivity provisions of state Workers' Compensation acts if the act in question is a normal aspect of the employer relationship, as explained in *Thomas vs. Starz Entertainment LLC* (2016). In *Thomas*, the plaintiff's IIED claim was preempted by California's Workers Compensation Statutes even though the actions by the employer allegedly caused the worker to feel ridiculed and caused him to suffer depression and anxiety because of the work environment. The same result was reached in the case of *Van v. Language Line Services, Inc* (2016), where the employee attempted to recover damages for emotional distress by way of filing an IIED against the employer for failure to pay overtime, provide breaks and meal periods, and provide accurate itemized wage statements. That court held that the plaintiff's claims all fell within the exclusivity provisions of the California's Workers Compensation Statutes and was thus preempted.

However, if the employer's actions fall outside the confines of a state's workers compensation statutes, IIED claims are viable against an employer. To illustrate, in the case of *Lee v. West Kern Water Dist.* (2016), the court upheld the jury verdict in the amount of \$360,000.00 against the employer based on several of the worker's causes of action, including IIED stemming from an unannounced "mock" robbery of the business conducted by manager, Mr. Hamilton. Mr. Hamilton entered the district cashier's office where customers pay their utility bills in cash. To conceal his identity, he wore a ski mask, hat and sunglasses. He approached the plaintiff clerk at her payment window where he then shoved a bag through the opening of the glass partition and pointed to the message written on it: "I have a gun. Give me your money". The plaintiff was terrified and thought it was a real robbery. "When she reached under the counter for the alarm button, Hamilton saw, pounded on the counter, and pointed again to the message. Shaking, Lee fumbled while taking the money out of the drawer and putting it in the bag. Hamilton pounded the counter again. She gave him the bag and he ran out the front door... After the event was concluded, the plaintiff left work early crying, suffered from fears, depression, nightmares, headaches, loss of appetite, and ongoing nausea. She sought psychological treatment and had to use all her accrued sick leave and vacation time during her extended absence from work" (*Lee v. West Kern Water Dist.*, 2016: 611-612). The court held that such workplace trauma was not related to an "industrial causation" and thus was not preempted by the State of California worker's compensation statutes.

IIED claims could be preempted by federal labor law, for example, the National Labor Relations Act, if the matter comes within the purview of a collective bargaining agreement (CBA) (Hellner and Atwood, 2017; Morris, 2016; Cavico, 2003). Such was the case in *Marzano v. Struthers City School District of Education* (2017: 2) where a paraprofessional attendant for special needs children filed a one count complaint of IIED against her local school district employer alleging extreme and outrageous conduct causing serious emotional and psychological harm and seeking punitive damages. The plaintiff was a member of The Ohio Association of Public School Employees (OAPSE), Ohio Local AFL-CIO affiliated union which had a CBA that defined a grievance as "a disagreement involving a work situation or employee(s) belief that there has been a violation, misinterpretation, or misapplication of the written contract entered into between the Board and OAPSE, or

regulations regarding working conditions". Both the trial court and appellate court held that the case had to be dismissed because the CBA dictated the grievance procedure which was the exclusive remedy available to the union member against their employer (*Marzano v. Struthers City School District of Education*, 2017).

IV. Statutory Redress

A. Anti-Discrimination, Harassment, and Retaliation Statutes

Bullying conduct in the workplace certainly can encompass discrimination, harassment, and/or retaliation against classes of employees protected by civil rights law, particularly Title VII of the Civil Rights Act in the United States. As such, the civil rights act will provide the means of legal redress for types of bullying behavior for employees in protected categories who are bullied at work. Moreover, IIED cases often can arise and then become intertwined with lawsuits pursuant to Title VII for discrimination, harassment, and/or retaliation as well as state civil rights laws. Certainly, a victim of the aforementioned wrongful conduct can suffer distress; and such conduct can create of inference of emotional distress for evidentiary purposes. However, mere isolated incidents of race discrimination generally will not qualify as "extreme and outrageous" conduct for purposes of a claim of IIED (*Burnett v. AFGE*, 2015).

Moreover, the courts do not automatically extend liability for the tort merely because of the employer's discriminatory, harassing, and/or retaliatory behavior (Cavico, 2003). Typically, something more than the aforementioned conduct, though intentional and reprehensible, will be required – something more in the form of extreme and outrageous conduct, particularly a pattern of conduct or conduct that continues for a period-of-time, will be required for intentional tort liability. Consequently, Namie and Yamda (2017: 3) "...worry that employees will conflate bullying (abusive conduct) with illegal forms of harassment, including exposure to a hostile work environment. They will falsely believe that abusive conduct is currently illegal because of the pairing with illegal forms of discrimination that violate state and federal laws". This concern is exacerbated due to preemption, the need for additional evidence, as well as the critical fact that civil rights statutes only cover members of the protected classes.

Nevertheless, allegations of a pervasive discriminatory work environment can defeat an employer's motion to dismiss an IIED claim against them as was the case in the case of *Burnett vs. AFGE* (2015). In that case, the court held that the creation of a hostile work environment by racial or sexual harassment may, upon sufficient evidence, constitute a *prima facie* case of IIED and that repeated ongoing racial harassment may compound the outrageousness of incidents which, taken individually, might not be sufficiently extreme to warrant liability (*Burnett vs. AFGE*, 2015).

Furthermore, the employer's conduct may not legally rise to Title VII sexual harassment claim, but may sufficiently support an IIED claim against the employer. Such was the case in *Seibert v. Jackson County, Mississippi et.al* (2017: 438) where the Federal Fifth Circuit Court of Appeals upheld a jury award on the plaintiff's deputy's IIED claim in the amount of \$260,000.00 against a sheriff personally. The allegations in that case were that he persistently made advancements to a female deputy and relocated her to a nearby office so that he could have continual access to her. Furthermore, and according to the plaintiff's testimony he placed his face close to hers and said, "You know you want to kiss me". He also placed his hand on the inside of her leg and said he wanted to commit oral sex upon her. Additionally, and he touched her buttocks and repeatedly asking her "When are we going to get together?" Such inappropriate conduct was sufficient for the IIED award to be upheld (*Seibert v. Jackson County, Mississippi et.al*, 2017).

B. Bullying, Sexual Misconduct, and Civil Rights Laws

The focus on this article is on the common law tort of IIED and its efficacy as legal tool to redress bullying behavior in the workplace. The relationship of the IIED tort to statutes generally has been addressed. However, since bullying conduct, as can be seen from the cases herein, can encompass sexual misconduct the authors wish to specifically point out the relationship of bullying to civil rights laws that prohibit sexual harassment, to wit: principally Title VII of the 1964 Civil Rights Act, as amended in 1972, which prohibits discrimination and harassment in employment based on sex as well as other protected categories; and also Title IX of the Education Amendments of 1972, which prohibits discrimination and harassment based on sex in education programs or activities which receive financial assistance from the federal government.

Title VII, which applies to employers with 15 or more employees, makes it unlawful to harass an employee or applicant for employment based on a person's sex. According to the Equal Employment Opportunity Commission sexual harassment can encompass unwelcome sexual advances, requests for sexual favors, and

other types of verbal or physical harassment of a sexual nature (U.S. Equal Employment Opportunity Commission, 2018). Harassment, however, does not have to be of a strictly sexual nature; rather, it can include making offensive comments about a person's gender (U.S. Equal Employment Opportunity Commission, 2018). The conduct must adversely affect a person's employment, interfere with one's work performance, or create an abusive, intimidating, offensive, or hostile work environment (U.S. Equal Employment Opportunity Commission, 2018). The broad definition given to sexual harassment pursuant to Title VII certainly can encompass bullying-like conduct of a sexual nature or with sexual overtones in order rise to the level of a civil rights violation as well as an IIED tort. Yet it is not axiomatic that sexual harassment under Title VII will automatically become an IIED tort, and *vice versa*. The IIED tort will require sexual conduct of an atrocious, egregious, or outrageous nature for intentional tort liability. Moreover, for tort liability the conduct must be deemed atrocious to the "reasonable person". Whereas, for Title VII liability the conduct can be "merely" offensive for civil rights liability. Moreover, though under Title VII the conduct also must be "offensive" to the "reasonable person", the EEOC maintains that "the reasonable person standard should consider the victim's perspective and not stereotyped notions of acceptable behavior" (U.S. Equal Employment Opportunity Commission, 1990: 7). Consequently, for civil rights purposes the EEOC has introduced a subjective and personal element to what is supposed to be an objective "reasonableness" standard. In addition, the EEOC maintains that the victim does not have to be the person harassed; rather, the victim could be anyone adversely affected by the offensive sexual conduct (U.S. Equal Employment Opportunity Commission, 2018). For bullying-like sexual misconduct to rise to the level of the IIED tort the conduct must be directed at the victim, the conduct must be atrocious, and the conduct must be "atrocious" to the reasonable person; but if so, the damages recoverable for the intentional tort could be far greater than damages awarded under Title VII since intentional torts have emotional distress and punitive damages potential.

Title IX applies to all schools – public and private – that receive financial assistance from the federal government; all aspects of a school's educational system are covered by the statute. Title IX holds that no person on the basis of sex should be discriminated against, denied benefits, or excluded from participation in any education program or activity receiving federal financial assistance (U.S. Department of Education, 2015). Sexual harassment of students – male and female – is also illegal under Title IX (U.S. Department of Education, 2018). Sexual harassment is defined as conduct which is sexual in nature, unwelcome, and which denies or limits a student's ability to participate in or benefit from a school's educational program. The harassment can be done by school employees, other students, and non-employee third parties, such as visiting speakers (U.S. Department of Education, 2018). The Office of Civil Rights of the Department of Education provides several examples of sexual conduct that could violate Title IX, to wit: sexual propositions or pressuring students for sexual favors; touching of a sexual nature; writing graffiti of a sexual nature; displaying or distributing sexually explicit drawings, pictures, or written materials; performing sexual gestures or touching oneself sexually in front of others; telling sexual or "dirty" jokes; spreading sexual rumors or rating other students as to sexual activity or performance; or circulating or showing e-mails or websites of a sexual nature (U.S. Department of Education, 2018). Moreover, like Title VII, sexual harassment can occur when a hostile sexual environment is created that is so serious that a student is denied the ability to participate in or benefit from a school's program or activity (U.S. Department of Education, 2018). Title IX also imposes reporting, responding, and instituting grievance procedures regarding sexual harassment as well as discrimination (U.S. Department of Education, 2018). For the purposes of the article herein, the authors simply will point out that certain types of the afore mentioned sexual conduct, especially "pressuring", can be construed as bullying conduct, and, if sufficiently atrocious, can form the basis for an IIED tort by the adversely affected student.

C. Anti-Bullying Statutes

Some international municipalities like Sweden, France, and Quebec have acted to pass specific regulations and laws addressing workplace bullying, and the majority of European Union countries have promulgated substantially more laws that protect employees with respect to bullying as compared to the United States (Lola, 2017). Presently a few states in the United States have begun to address bullying in the workplace by means of statutory enactments. For example, North Dakota has expanded its definition of harassment prohibited by its civil rights act to include bullying (Hellner and Atwood, 2017). California in 2014 passed a law that mandates anti-bullying training for private employers with more than 50 employees in addition to sexual harassment training (Hellner and Atwood, 2017; Namie and Yamada, 2017). The California law defines bullying as "abusive" type conduct which can include verbal abuse, such as derogatory remarks, insults or epithets as well as verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating (Hellner and Atwood, 2017: 31). There are two important limitations to the California law,

however; first, the law states that a single isolated act will not constitute an abusive act unless particularly severe or egregious; and, second, significantly, the law does not create a private "bullying" legal cause of action for the victims of the abusive conduct against the wrongdoers and their employers; rather, "merely" training is mandated (Morris, 2016). Other states, such as Utah, Tennessee, as well as some counties within states, have laws similar to California but these laws too fail to provide a statutory bullying cause of action (Morris, 2016; Richardson, Hall, and Joiner, 2016).

Since as of the writing of this article there are no independent causes of actions created by statute to redress bullying in the workplace at either the federal or state level aggrieved employees must use other statutory and/or common law causes of action, such as the tort of IIED, to sue for bullying behavior in the workplace. This has led to the conclusion by some that the U.S. law falls short in its ability to prevent workplace bullying and reliance on worker's IIED claims are not a practical solution to effectively combat this type of bullying due to the high legal threshold that courts use to determine whether behavior is "outrageous and severe" (Lola 2017).

V. Implications for Management

Bullying is not illegal in the workplace; however, bullying-like conduct may violate certain statutory laws or common law legal doctrines. As such, managers and organizational leaders must be prepared to effectively train employees and managers on the form, implication and consequences of bullying and other unprofessional or stressful behaviors (Edelman & van Knippenberg, 2017; Hood, Cruz & Bachrach, 2017; King, Dawson, Jensen & Jones, 2017; Zabel, Biermeier-Hanson, Baltes, Early & Shepard, 2017; Mujtaba, 2014). A principal goal of this article has been to ascertain the efficacy of the common law tort of IIED in the context of the modern employment relationship. Two important areas were addressed; first, the application of the tort to the discharge of at-will employees and thereby the creation of a wrongful discharge situation; and second, the efficacy of the tort in redressing bullying behavior at work. We found that the courts have been reluctant to recognize a cause of action for IIED in the employment context for what the courts deem to be normal and ordinary employment activities or disputes (See, for example, *Hercule v. Wendy's of N.E. Florida, Inc.*, 2010). An "ordinary" dispute, legally at least, would be the discharge of an at-will employee. Thus, the courts have been reluctant to convert the discharge of an at-will employee into a "wrongful", i.e., illegal discharge absent evidence of extreme and outrageous conduct in the manner of the discharge (Morris, 2016). Moreover, the cases indicate that workplace activities, disputes, or discharges must go way beyond these aforementioned actions and rather be disrespectful, degrading, demeaning, and/or humiliating so as to be "extreme" and "outrageous". One can perceive that the courts are attempting to delimit the scope of this tort by requiring extreme and outrageous conduct as well as severe distress. As Jones and Norwood (2017: 2065) emphasize, quoting the *Restatement (Third) of Torts*: "A great deal of conduct may cause emotional harm, but the requisite conduct for this claim – extreme and outrageous – describes a very small slice of human behavior. The requirement that the resulting harm be severe further limits claims".

However, employers must be cognizant of the fact that certain employment actions, such as supervising or investigating, increasing workload or hours, criticizing or reprimanding, transferring or not transferring, not promoting or demoting, suspending or otherwise disciplining, and (surely) discharging employees can and likely will cause mental anguish. Moreover, many employees may feel that these aforementioned actions are "outrageous" in-and-of themselves. Consequently, the employer must be keenly aware that unfavorable employment actions will probably cause some employees to suffer emotional distress. As such, there is even more reason for the employer to conduct these activities and to resolve employment disputes in a respectful, fair, and ethical manner. Nevertheless, when workplace behavior or actions, whether characterized as bullying or otherwise, degenerate into conduct that a reasonable person would find abusive and demeaning, based on the nature and severity and frequency of the behavior, thereby resulting in emotional, psychological, and/or physical harm, the victimized employee may have legal recourse pursuant to the IIED tort. For example, laughing at discharged employees, humiliating them, and making a "spectacle" out of their termination are actions not right morally and not right legally as such atrocious conduct may give the discharged employee the grounds for a lawsuit for IIED even if the discharge itself was permissible under the employment at-will doctrine.

A major problem with bullying in the workplace is the difficulty of precisely defining the term and the concomitant challenge of ascertaining what type and level of bullying conduct will rise to the level of the intentional tort of emotional distress examined herein. Another major problem, however, with this tort in the employment context and otherwise is that the key terms "extreme" and "outrageous" are determined by a discrete body of state law and thus, even on an individual state level, there are no specific definitions of these

critical terms. Due to the lack of clarity in the meaning of these terms employers and their attorneys may be forced to speculate as to what conduct in the workplace is sufficiently egregious to be "extreme" and "outrageous". Another problematic result is a body of law with inconsistent decisions among the states and even among the courts within a state. Due to the aforementioned legal and practical problems, the employer in order to avoid legal difficulties must attempt to create a proper corporate culture to prevent and punish abusive and bullying conduct in the workplace.

VI. Corporate Culture and Bully-Proofing the Organization

The objective for the employer is to create a corporate culture of dignity and respect, ethics and integrity, fairness and justice, and one which values diversity and inclusion. The employer certainly has an egoistic reason to do so since such a culture will prevent bullying behavior as well as discrimination, harassment, and retaliation in the workplace. As such, lawsuits will be minimized and hopefully eliminated, employee turnover should decrease, both of which are costly to the employer, and productivity should be increased too. Corporate culture is a critical factor in bullying-proofing the organization and preventing legal liability. Culture serves here to define the necessary way to behave within an organization consisting of shared beliefs and values established by leaders cascaded through communication and inculcated using various methods to shape and reinforce employee perceptions, behaviors, and understanding regarding a zero tolerance for workplace bullying. Cultural priorities and values clearly state the boundaries of the behavior and how the organization operates (SHRM, 2017). A systemic organizational approach to examine organizational culture that identifies three dimensions of the problem (the environment, the bully, and the bullied) is needed. Consequently, it is recommended to administer an assessment to determine the present organizational climate and the employees' perspective on bullying activity levels and severity in the organization (Harvey, Heims, Richey, and Leonard, 2006).

Research results reveal that effectively handling workplace issues which disrupt employee productivity, morale, and attendance are fundamental to fostering a physically, psychologically, and financially viable work environment and business. Major research conclusions find that business leaders should be proactive in safeguarding healthy work environments by enacting laws and employer policies that prohibit workplace bullying (McDonald, Brown, and Smith, 2015). Even though research on workplace bullying has expanded since the 1990s, state laws and employer policies are not in place to fully counter or address resolutions for workplace bullying. Furthermore, the lack of federal or state workplace bullying laws leave targeted employees without a great deal of legal recourse that is intentionally designed to prosecute or to proceed civilly against offending bullying parties and their employers. Accordingly, a major purpose of this article has been to ascertain if the common law tort of IIED is a viable legal means to redress workplace bullying. Another related and important purpose of this article entails considering the importance of healthy work environments as well as the negative consequences of workplace bullying. From this view, bullying is creating preventable negative impacts on organizations; and consequently we offer strategies and tactics to effectively address bullying in the workplace.

First, develop clear definitions of workplace bullying relying upon the work of respected and renowned researchers, professors, psychologists, the Workplace Bullying Institute, OSHA, SHRM, and other professionals. Careful analysis of workplace bullying incidents has revealed significant commonalities among them. Generally, workplace bullying consists of three essential components: 1) regularity of incidents; 2) consequences to employee health and morale; and 3) business standards for the treatment of personnel. Workplace bullying is a form of abusive behavior that can be categorized into certain types: aggressive communication, manipulation of work, sabotaging work combining the requirements for repetition, deliberateness, and disrespectfulness. Second, clearly define the consequences for non-compliance. Ideally, an employer would incorporate provisions in their work policies with a clear definition of bullying that encompasses any type of harassment, constant disrespectful behavior towards an employee, or unreasonable treatment from supervisors. Further, the same policy might state a zero-tolerance for bullying and harassment. Properly enforce the policies as unenforced policies undermine organizational credibility. Third, implementing specific processes for remediation through the design of informal and formal channels to redress policy violations would provide the context for investigatory processes that could be executed by trained peer or enforcement specialists. According to workplace bullying consultants, employees must be diligent in their responses to workplace bullying. Targets who encounter bullying should be encouraged to maintain detailed documentation of an incident and to relate the occurrence in close proximity to the time of its occurrence. Other suggestions are to avoid being overly accommodating or friendly and thus to find and sustain a solid support system that is not affiliated with the workplace. Ensure, finally, that all involved in the response to workplace bullying are trained

and guided in prevention and response – that is, by fostering greater awareness of workplace bullying and the employer-employee roles in combating bullying and by exploring current and potential legal options for workplace bullying claims. It is thereby critical to address workplace bullying concerns with management with a focus on how these incidents impede productivity in the workplace.

Business leadership and management set the cultural climate for actions fostering worker dignity, respect, and civility in the work environment. To formulate such a cultural climate, organizations must design and create internal policies that promote these desired goals. Places of employment should aim to have annual training on workplace bullying, its impact, and the potential consequences for bullies and their targets through the human resources and/or legal departments (Pagnattaro, 2015). Cross-cultural considerations ensure cultural competency with bullied employees such as differences in communication style, non-verbal, proxemics, and paralanguage- vocal cues other than language (Balcerzak, 2015).

Therefore, the moral as well as ethically egoistic company or organization must raise awareness within the entity about the nature and stages of abuse and harassment, train how to identify them by recognizing the signs in both victims and perpetrators, and then implement appropriate measures for each stage to prevent and redress bullying-conduct. Effectively managing and establishing an anti-bullying corporate culture that values respect, equality, diversity, and inclusion certainly is in the best interest of the employer and its stakeholders (Mujtaba, 2014). Such an appropriate culture will lessen turnover, enhance productivity, and reduce and ideally eliminate lawsuits for abusive behavior in the workplace, and not merely lawsuits for IIED but also for other legal wrongs premised on “bad” behavior, such as common law wrongs for assault and battery and defamation as well as statutory civil rights wrongs for discrimination, harassment, and retaliation. This general corporate culture section to the article has sought to provide some practical suggestions to employers to avoid bullying-like conduct which can result in legal liability. In the next section, the authors supply additional specific recommendations to employers as well as employees regarding the tort of IIED in the context of workplace bullying as well as wrongful discharge of employees.

VII. Recommendations

Based on the legal analysis herein, the legal and management commentary examined, the preceding discussion of corporate culture, as well as the authors’ own knowledge and experience, we offer the following additional recommendations to employers on how to further reduce and eliminate abusive and bullying conduct in the workplace in order to avoid liability. However, if employers and managers do not heed the authors’ counsel, specific recommendations are also offered to employees on how to have an efficacious IIED lawsuit to see redress for abusive and bullying conduct in the workplace, including the discharge of an employee.

A. Employers

- Employers must create a corporate culture of ethics, integrity, diversity, inclusion, and respect, where the employees are valued and treated as worthwhile human beings deserving of dignity and respect.
- Employers must have a “zero-tolerance” policy when it comes to bullying in the workplace.
- Employers should never conduct unannounced “mock” robberies, active shooter, or other similar lie action scenario training in the workplace without prior notification to the employees so they do not undergo emotional trauma thinking the event is real.
- Employers must promulgate codes of ethics and codes of conduct that prohibit bullying and other forms of abusive conduct as well as disrespectful, demeaning, discriminatory, harassing, or retaliatory conduct in the workplace.
- The employer must make it clear that these codes and the prohibitions therein apply to all the employees and not just those employees who are protected by civil rights laws.
- Employers must communicate such codes, train all employees as to their rights and responsibilities pursuant to the codes, “police” the application of the codes, and enforce them.
- The employer should have a fair and objective investigative process to investigate complaints of bullying in the workplace.
- Employers must establish “whistleblowing” and other channels of communication for the employees to report bullying and abusive conduct in the workplace; and employers must make it absolutely clear that no reprisals will be taken against the employees making such disclosures.
- Employers must train managers and supervisors as to appropriate vs. inappropriate conduct in the workplace.

- Employers specifically should instruct managers and supervisors to avoid excessively harsh or “stinging” criticism, as well as yelling, verbal abuse, and belittling employees, especially in front of others, as such conduct could be construed as bullying conduct, which could rise to the level of the intentional infliction of emotional distress tort.
- If there is bullying or abusive conduct by a manager or supervisor the employer should seek evidence that the perpetrator acted out of personal motives and was not attempting, even if in a misguided manner, to do his or her job duties or functions (Morris, 2016).
- Perpetrators of bullying behavior should initially be coached as to the wrongfulness of their bullying behavior and progressively disciplined depending on the severity of the bullying action.

B. Employees

- Employees must be aware that bullying in-and-of-itself is not illegal, and, consequently, the law does not guarantee people a workplace completely free from incivility, offensive language, teasing, criticism, and stress.
- Employees also must be cognizant of the high hurdle of demonstrating “extreme” and “outrageous” conduct to successfully use the intentional infliction of emotional distress tort to remedy workplace bullying.
- Employees should take advantage of any communication and reporting channels provided by the employer and thus should report any threatening, intimidating, humiliating, abusive, demeaning, and/or otherwise bullying conduct; and the employees also must take advantage of any corrective opportunities provided by the employer.
- The employee should note when, where, and to whom the misconduct was reported as well as whether the employer, managers, or supervisors took notice of the disclosure and commenced an investigation.
- The employee should keep a record of any conduct which the employee feels to be inappropriate and which causes him or her distress, particularly if the conduct is part of a pattern of conduct by the employer or co-workers, and especially if committed by a manager or supervisor; and the record should be specific and detailed as to dates, time, and nature of the conduct as well as any witnesses who were present.
- The employee would be well-served to have evidence of physical harm or at least physical symptoms; but if not, the employee would be well-advised to emphasize the extreme and outrageous nature of the offending conduct as well as have evidence of the severity of the distress caused.
- The employee also should keep a record of the adverse consequences of the bullying on him or her, for example, absences and medical problems.
- If the employee is an employee-at will who was terminated the employee must plead and prove specific, additional, and separate facts beyond the discharge itself indicating extreme and outrageous conduct by the employer to convert the discharge into a wrongful discharge by means of the intentional infliction of emotional distress tort.
- If the employee is suing for intentional infliction of emotional distress in addition to civil rights claims for discrimination, harassment, and/or retaliation the employee must again supply specific, additional, and separate facts beyond the civil rights claim to indicate the extreme and outrageous conduct necessary for tort liability.
- Similarly, if the employee’s claim is arguably covered by a Workers’ Compensation or labor law the employee must differentiate the tort claim from the Workers’ Compensation or labor relations dispute; otherwise, the tort claim for intentional infliction of emotional distress may be preempted by a statute.

VIII. Limitations

This article deals with a purposeful legal wrong; that is, the conduct that is the gravamen of the lawsuit must be intended. As such, the article did not treat the tort of negligent infliction of emotional distress which is a variant of the traditional common law tort of negligence and thus based on careless conduct. However, the authors would be remiss in not mentioning that aside from intent factor a critical aspect of the legal wrong of negligent infliction of emotional distress is the finding of some sort of physical impact by an external force on the aggrieved party bringing the lawsuit (*Willis v. Gami Golden Glades, LLC*, 2007; Jones and Norwood, 2017; Cavico and Mujtaba, 2014). What exactly is a sufficient “impact”, as well as the exceptions thereto for people not impacted but who see or hear or arrive at the scene of traumatizing events, though most interesting and obviously possessing important legal and practical concerns, are beyond the scope of this article.

Another limitation of this article is that it will not deal with constitutional law issues, such as the First Amendment protections granted to speech and conduct that may have purposefully caused emotional distress. Yet, again, the authors would be remiss in not mentioning the 2011 Supreme Court case of *Snyder v. Phelps*

where the court threw out a lower court's verdict against a church for intentional infliction of emotional distress based on the church's picketing and protesting peacefully against homosexuality at a military funeral in order to gain publicity, because the speech addressed a matter of public concern (Araiza, 2017; Coenen, 2017).

IX. Conclusion

Bullying in the workplace is wrong and unacceptable behavior; bullying harms the victimized employees, the employer, ultimately society. Reducing and ideally eliminating bullying in the workplace certainly will improve the work-life of the employees, thereby ultimately benefitting the employer and other stakeholders of the company or organization. This article illustrated the relationship and interaction between 1) the organizational environment and its impact on the occurrence of bullying activities; 2) the characteristics of those that bully; and 3) the characteristics of those being bullied (e.g., victims of bullying). We provided a framework to address the negative consequences of workplace bullying. As such, employers must achieve workplace cultures of diversity, dignity, and respect, and promulgate policies and procedures to combat bullying in the workplace. It is simply wrong – legally, morally, and as a practical matter – for aggrieved employees to “suffer in silence”. The problem for victimized employees is to find an efficacious legal means to address bullying in the workplace since no specific and explicit bullying cause of action yet exists. This article dealt with one common law tort remedy – a lawsuit for intentional infliction of emotional distress. Though difficult to sustain, the IIED tort can serve as a remedy to redress bullying conduct in the workplace as well as to provide relief to an at-will employee who is discharged in an abusive manner. Accordingly, employers and employees must be aware that the common law tort of IIED is one legal tool to combat and redress bullying and abusive discharges in the workplace but only when the bullying behavior rises to the requisite level of extreme and outrageous conduct and causes severe emotional distress to the victimized employees.

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