Intentional Infliction of Emotional Distress in the Employment at Will Setting: Limiting the Employer's Manner of Discharge

INTRODUCTION

For most of this century private sector employees in the United States have had little or no legal protection of their job security because of the common law 'employment at will' rule which allows an employer to discharge an employee for a good reason, a bad reason, or no reason at all.[1] This rule has been criticized harshly in recent years by a host of commentators who have asserted that it gives employers too much discretion and allows them to take unfair advantage of employees.[2] In response to this criticism, many state courts have used public policy, tort, and contract principles to create exceptions to the traditional rule. These exceptions attempt to provide some protection against abusive or retaliatory discharges for these otherwise vulnerable employees.[3] The legal justification of the traditional employment at will rule rests upon the premise that under the contract the employee is not bound for any specific period of time; therefore the employer also should be free to terminate the relationship at any time.[4] Many modern courts now reject, at least in part, this mutuality principle in favor of the more realistic

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1. The rule was formulated by H.G. Wood in his 1877 treatise on master-servant relationships. H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134 (1877). Its rapid adoption by many state courts in the late 1800's has been attributed by many commentators to the attempt to facilitate economic and industrial development during the industrial revolution. *See, e.g.*, Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976); Note, *Job Security for the At Will Employee: Contractual Right of Discharge for Cause*, 57 CHI.-KENT L. REV. 697, 700 (1981); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1824-28 (1980) [hereinafter cited as *Good Faith*]; Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 342-43, 346-47 (1974) [hereinafter cited as *Job Security*].

2. *See, e.g.*, Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1404-05 (1967); Peck, *Unjust Discharges From Employment: A Necessary Change In the Law*, 40 OHIO ST. L.J. 1, 8-9; Weyand, *Present Status of Individual Employee Rights*, N.Y.U. 22D ANNUAL CONFERENCE ON LABOR 171 (1970); Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435 (1975) [hereinafter cited as *Abusive Discharge*]; *Job Security, supra* note 1; Summers, *supra* note 1 (advocating statutory reform); Comment, *Wrongful Discharge of Employees Terminable at Will—A New Theory of Liability in Arkansas*, 34 ARK. L. REV. 729 (1981) [hereinafter cited as *Wrongful Discharge*]; Comment, *Limiting the Employer's Absolute Right of Discharge: Can Kansas Courts Meet the Challenge?*, 29 U. KAN. L. REV. 267 (1981); Note, *Limiting the Right to Terminate At Will—Have the Courts Forgotten the Employer?*, 35 VAND. L. REV. 201 (1982).

3. *See* Annot., 12 A.L.R.4TH 544 (1982).

4. *Good Faith, supra* note 1, at 1819; Note, *supra* note 2, at 208.

view that, despite the employee's ability to change jobs, the employer's obvious bargaining power advantage necessitates some job protection for the employee.[5] Judicial recognition of this inequality of power in the employment relationship also serves as the underpinning for another relatively new creation of the courts—the action for intentional infliction of emotional distress.[6]

Even more than the wrongful discharge exceptions to the at will doctrine, the tort of intentional infliction of emotional distress is a response by the courts to academic commentary and suggestions.[7] The action, as defined in the 1965 *Restatement (Second) of Torts*,[8] has been adopted in most jurisdictions,[9] and allows recovery for intentionally inflicted severe emotional

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5. Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981); Blades, *supra* note 2, at 1408-13; *Abusive Discharge, supra* note 2, at 1443-44; *Job Security, supra* note 1, at 337-39.

6. *See* Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 43 (1982).

7. The predominant articles which fostered adoption of this tort were Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939); and Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40 (1956).

8. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

9. The following cases have adopted the Restatement (Second) § 46 formulation of the tort of intentional infliction of emotional distress: American Road Serv. Co. v. Inmon, 394 So. 2d 361 (Ala. 1980); Savage v. Boies, 77 Ariz. 355, 272 P.2d 349 (1954); M.B.M. Co. v. Counce, 268 Ark. 269, 596 S.W.2d 681 (1980); State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952); Rugg v. McCarty, 173 Colo. 170, 476 P.2d 753 (1970); Knierim v. Izzo, 22 Ill. 2d 73, 174 N.E.2d 157 (1961); Amsden v. Grinnell Mutual Reinsurance Co., 203 N.W.2d 252 (Iowa 1972); Dawson v. Associates Financial Serv. Co., 215 Kan. 814, 529 P.2d 104 (1974); Vicnire v. Ford Motor Credit Co., 401 A.2d 148 (Me. 1979); George v. Jordan Marsh Co., 359 Mass. 244, 268 N.E.2d 915 (1971); Warren v. June's Mobile Home Village & Sales, 66 Mich. App. 386, 239 N.W.2d 380 (1976); Hubbard v. United Press Int'l, 330 N.W.2d 428 (Minn. 1983); Pretsky v. Southwestern Bell Tel., 396 S.W.2d 566 (Mo. 1965) (§ 46 language cited approvingly, but without discussion); Paasch v. Brown, 193 Neb. 368, 227 N.W.2d 402 (1975); Hume v. Bayer, 157 N.J. Super. 310, 428 A.2d 966 (1981); Fischer v. Maloney, 43 N.Y.2d 553, 373 N.E.2d 1215, 402 N.Y.S.2d 991 (1978); Dickens v. Puryear, 302 N.C. 437, 276 S.E.2d 325 (1981); Breeden v. League Servs. Corp., 575 P.2d 1374 (Okla. 1978); Pakos v. Clark, 253 Or. 113, 453 P.2d 682 (1969); Papieves v. Lawrence, 437 Pa. 373, 263 A.2d 118 (1970); Hudson v. Zenith Engraving Co., 273 S.C. 766, 259 S.E.2d 812 (1979); Medlin v. Allied Inv. Co., 217 Tenn. 469, 398 S.W.2d 270 (1966); Samms v. Eccles, 11 Utah 2d 289, 358 P.2d 344 (1961); Womack v. Eldridge, 215 Va. 338, 210 S.E.2d 145 (1974); Sheltra v. Smith, 136 Vt. 472, 392 A.2d 431 (1978); Grimsby v. Samson, 85 Wash. 2d 52, 530 P.2d 291 (1975); Alsteen v. Gehl, 21 Wis. 2d 349, 124 N.W.2d 312 (1963) (adopting § 46 formulation except as to "reckless" actions).

The following jurisdictions recognize an independent tort for intentional infliction of emotional harm without adopting the § 46 formulation: Clark v. Associated Retail Credit Men of Washington, D.C., 70 App. D.C. 183, 105 F.2d 62 (1939) (adopting first Restatement formulation); Pack v. Wise, 155 So. 2d 909 (La. App. 1963); First Nat'l Bank v. Bragdon, 84 S.D. 89, 167 N.W.2d 381 (1969).

Other jurisdictions are split on the question of adopting § 46, *see* Ford Motor Credit Co. v. Sheehan, 373 So. 2d 956 (Fla. Dist. Ct. App.), *cert. dismissed*, 379 So. 2d 204 (1979); Gellert v. Eastern Air Lines, 370 So. 2d 802 (Fla. Dist. Ct. App. 1979), or have explicitly rejected § 46, Browning v. Browning, 584 S.W.2d 406 (Ky. App. 1979) (in the narrow case of interspousal suits); Fisher v. Carrousel Motor Hotel, 424 S.W.2d 627 (Tex. 1967).

distress when it results from extreme and outrageous conduct. This tort has been used most effectively where the dominant party in an unequal legal relationship has outrageously abused his position to the emotional detriment of the weaker party.[10] These same concerns provided the foundation for the wrongful discharge action, and therefore it is not surprising that claims for intentional infliction of emotional distress often accompany suits for wrongful discharge. Both wrongful discharge and intentional infliction of emotional distress are still in their infancy.[11] As these two doctrines change and mature, sound adjudication of cases that involve both causes of action will depend upon an understanding of how the two doctrines interact. The purpose of this Note is to facilitate that understanding by determining the proper role for intentional infliction of emotional distress in the context of firings from at will contracts.

The first part of the Note examines the effects that the wrongful discharge exception to the at will doctrine has had upon the behavior of employers, and argues that the potential liability for wrongful discharge has led to procedures that reduce abuses of power by employers. The second part of the Note reveals the difficulties in defining the tort of intentional infliction of emotional distress and emphasizes the abuse of employer authority as a guiding concern in the employment at will context. The third part of the Note discusses the application of intentional infliction of emotional distress in conjunction with the various wrongful discharge rules. This analysis concludes that intentional infliction of emotional distress can serve a useful function in this context by regulating the conduct surrounding the discharge, while the wrongful discharge action regulates the motivation for the firing.

I. Potential Impact on Employer Behavior—A Look at the Effects of the Wrongful Discharge Limitation on Employer Power

Courts have created wrongful discharge exceptions to the at will doctrine to protect at will employees from abuses of an employer's right to discharge his employees.[12] Before analyzing the utility of further limiting employer behavior through application of the tort of intentional infliction of emotional distress, it is helpful to examine the positive and negative effects of the wrongful discharge action as a limitation of employer power. Initially, the wrongful discharge action provides individual justice through damage awards to unfairly discharged employees. At will employees as a group also benefit indirectly through changes in employer behavior to avoid such damage judgments.

10. Givelber, *supra* note 6, at 43.
11. *Palmateer,* 421 N.E.2d at 884 (Ryan, J., dissenting).
12. *See supra* notes 4 & 5 and accompanying text.

As employers have become aware of the potential for liability for wrongful discharge, their legal advisers have responded by publishing bulletins and pamphlets to help employers decrease their exposure to both civil litigation and liability in this area.[13] The warnings contained in these pamphlets normally focus on three general tactics to avoid the costs of litigation and the potential liability resulting from discharges. First, the employer should avoid implying that the job will be permanent by omitting any references to job security from job applications, employee handbooks, and job interviews.[14] Second, employers periodically should conduct honest and forthright performance appraisals. Each employee should be made aware of the results of such evaluations.[15] This procedure provides evidence of the employee's performance, while giving fair warning to the employee of any potential problems. Finally, employers should provide procedures before and after discipline and discharge situations to ensure that the employee's performance was the primary basis for his termination, and that the evaluation of his performance was arrived at fairly and not through the personal bias or prejudice of the immediate supervisor.[16]

While these employer measures have been designed to protect the employer from liability for wrongful discharge, they also provide some de facto protection for the nearly three quarters of the work force[17] employed at will. In fact, if properly applied, these procedures can provide protection similar to the just cause provisions that unionized employees possess under collective bargaining agreements. These in-house procedures are likely to expose a high percentage of unjust discharges at a time when they can be rectified by the employer, thereby greatly reducing the high litigation costs that have provoked much of the criticism of the wrongful discharge action. However, the expense of administering such procedures and the potential for unfounded claims by disgruntled employees will continue to be unattractive costs for the critics of the wrongful discharge action. These costs are not an unreasonable burden, given the importance of job security to the average employee[18] in today's increasingly specialized job market.[19] Furthermore, the costs of

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13. *Employment-at-Will: Reducing Liability,* BULLETIN TO MANAGEMENT (BNA), No. 1666, at 1, Feb. 25, 1982; HUMAN RESOURCES DIV., INDIANA STATE CHAMBER OF COMMERCE, CHECKLIST OF MEASURES TO MINIMIZE EMPLOYER EXPOSURE TO CIVIL LITIGATION BY AND LIABILITY TO AT-WILL EMPLOYEES (1983) [hereinafter cited as CHECKLIST].

14. CHECKLIST, *supra* note 13.

15. *Id.* These frank evaluations may be unpleasant and even harmful to employee morale in some instances. But the possible detrimental effects are outweighed by the need for fairness to a worker who may not realize his precarious position regarding continued employment.

16. *Id.*

17. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1984, at 440.

18. C. BRAINERD, M. HERMAN, G. PALMER, H. PARNES & R. WILCOX, THE RELUCTANT JOB CHANGER: STUDIES IN WORK ATTACHMENTS AND ASPIRATIONS 61-68 (1962).

19. *Id.* at 153-57. Job security is particularly important to the middle-aged managerial employees who are most commonly involved in these cases. The effects of being fired can be particularly devastating because it is often difficult for these people to secure other employment. *The Employment-at-Will Issue,* PERSONNEL MGT. (BNA) No. 544-2, at 21-25 (Dec. 2, 1982).

these procedures and of wrongful discharge liability will certainly be passed on to the consumer in many instances, thereby apportioning the risks of the individual employee throughout the entire economy.[20]

Despite its critics, it appears that the wrongful discharge exception is succeeding in bringing a greater degree of job security to the workplace. Moreover, contrary to what one might expect, courts are not likely to be deluged with wrongful discharge claims if employers continue to respond by instituting internal measures to assure fairness and resolve disputes without recourse to the courts.[21] The apparent successes of the wrongful discharge limitation suggest that proper application of intentional infliction of emotional distress can provide even greater incentive for employers not to abuse their authority, especially in this inherently stressful discharge situation.

II. THE DILEMMA OF DEFINING THE TORT OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Before delving into the judicial uses of the tort of intentional infliction of emotional distress in the at will employment context, it is necessary to define this cause of action. Normally, constructing a definition entails little more than reference to the *Restatement,* and the use of cases to illustrate each of the necessary elements. However, a recent article by Daniel Givelber correctly concludes that this traditional analysis does not yield a satisfactory definition of this unique tort.[22]

A. "The Tort of Outrage"

The *Restatement* definition of intentional infliction of emotional distress consists of four elements:[23] "(1) the defendant must act intentionally or recklessly, (2) the conduct must be extreme and outrageous, and (3) the

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20. The existence of such proceedings can also provide a means for speedy disposition of frivolous claims. A court can quickly review the facts revealed in the record of such hearings. In fact, in at least one case the existence of a three-tier appeals procedure has been found to preclude a finding of outrageousness in a claim for intentional infliction of emotional distress. Lekich v. International Business Machs., 469 F. Supp. 485, 488 (E.D. Pa. 1979).

21. *Good Faith, supra* note 1, at 1834.

22. Givelber, *supra* note 6, at 46.

23. This section of the Restatement (Second) reads as follows:

> Outrageous Conduct Causing Severe Emotional Distress
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> (1) 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.
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> (2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress
>
> (a) to any member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or
>
> (b) to any other person who is present at the time, if such distress results in bodily harm.

conduct must be the cause, (4) of severe emotional distress."[24] Givelber argues that these requirements tend to distill to a single element: "extreme and outrageous conduct."[25] The intent requirement merges into the defendant's conduct, as it does in most intentional torts which look not to subjective intent, but rather to whether the defendant intended to commit an act from which some injury is substantially certain to result. Fulfillment of the causation and injury requirements also seems to depend heavily upon the outrageous character of the defendant's conduct, because of the difficulty of proving the existence of an actual emotional injury or its cause. Most courts avoid these dilemmas by inferring an injury from conduct that is so outrageous that the reasonable person would suffer extreme emotional distress.[26] The merger of these elements is foreshadowed in comment j to section 46, which states: "severe distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed."[27]

Because of its heavy emphasis on the severity of the defendant's behavior, intentional infliction of emotional distress, also called the "tort of outrage," is a unique and somewhat amorphous cause of action. Unlike most intentional torts, the relative ease of establishing injury is not counterbalanced by any specific definition of the behavior which will lead to liability.[28] Instead, liability for intentional infliction of emotional distress will arise whenever the defendant's conduct is found to be outrageous. The *Restatement*'s description of the prohibited conduct provides very little guidance to the potential defendant: "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."[29] However, unpredictable standards can be justified where they provide necessary protection to potential litigants, as is evident from the unpredictable but well-recognized reasonableness standard in negligence actions.

B. Punitive Character of the Tort of Outrage

The outrageousness standard also gives the tort of outrage an unusual punitive nature.[30] Unlike other torts which compensate victims for their injuries, damages for the tort of outrage often depend more on the character of the defendant's conduct than the extent of the plaintiff's injury.[31] The

24. Givelber, *supra* note 6, at 46.
25. *Id.* at 42-43.
26. *Id.* at 46-49.
27. RESTATEMENT (SECOND) OF TORTS § 46 comment j (1965).
28. Givelber, *supra* note 6, at 51.
29. RESTATEMENT (SECOND) OF TORTS § 46 comment d (1965).
30. Givelber, *supra* note 6, at 54.
31. *Id.*

emotional damages awarded normally exceed both the plaintiff's out-of-pocket expenses due to the injury and any economic goal which the defendant may have sought through his outrageous conduct.[32] Therefore, in many cases emotional damages serve the policy of deterrence which also underlies punitive damages.[33] This punitive character of intentional infliction of emotional distress is critical to understanding the way some courts apply this tort in the wrongful discharge situation.[34]

C. *Guideposts for Use of the Tort of Outrage in the Employment at Will Setting*

The task of applying the vague standard of this often punitive tort falls primarily upon judges. The comments to *Restatement* section 46 provide an important gate-keeping role to the judge who must "determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, or whether it is necessarily so."[35] Most courts have actively exercised their discretion in keeping such suits away from a jury.[36] This activism probably can be attributed to judicial recognition of the emotionalism inherent in these cases, and a fear that sympathetic juries will be too willing to punish defendants for behavior that is distasteful but not outrageous.[37] In this attempt to avoid jury verdicts based on passion and prejudice, the courts can find little help in the circular comments to section 46.[38] Judges are therefore left with the unenviable task of applying a very general term to the infinite variety of conduct that may cause emotional distress.

Despite their failure to clearly define outrageousness, the *Restatement*'s comments do suggest the contexts in which a suit for intentional infliction of emotional distress is most appropriate. Comment e states: "The extreme and outrageous character of the conduct may arise from an abuse by the

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32. *Id.* at 54 n.63.

33. *Id.* at 52.

34. *See, e.g.,* Harless v. First Nat'l Bank, 289 S.E.2d 692, 702-03 (W. Va. 1982).

35. RESTATEMENT (SECOND) OF TORTS § 46 comment h (1965).

36. *See, e.g.,* Lekich v. International Business Machs., 469 F. Supp. 485, 488 (E.D. Pa. 1979); Novosel v. Sears, Roebuck & Co., 495 F. Supp. 344, 347 (E.D. Mich. 1980); Food Fair, Inc. v. Anderson, 382 So. 2d 150, 153 (Fla. App. 1980).

37. *See* Givelber, *supra* note 6, at 52. Also courts recognize that "[t]he rough edges of society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one's feelings are hurt." RESTATEMENT (SECOND) OF TORTS § 46 comment d (1965).

38. For example, the comment on extreme and outrageous conduct states that "[t]he liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." The comment also gives the following ephemeral guidance: "Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim 'Outrageous!' " RESTATEMENT (SECOND) OF TORTS § 46 comment d (1965).

actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests."[39] Even though the comments and illustrations in the *Restatement* do not specifically mention the employer-employee relationship, commentators and courts alike have cited this comment to justify use of this tort in the employment at will context.[40] In fact, 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.[41]

Courts that refuse to weigh the coercive element of the employer's behavior commonly cite comment g which states: "The actor is never liable . . . where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress."[42] This language has led some courts to conclude that the employer could not be liable for intentional infliction of emotional distress unless he was also liable for wrongful discharge, since by firing the employee the employer did no more than exercise his legal rights.[43] This argument has been rejected by other courts that recognize that the tort of outrage also can arise from conduct surrounding the discharge.[44]

The final relevant comment to the employment at will situation focuses not on the employer's position to inflict stress but on the employee's susceptibility to that stress. Comment f states: "The extreme and outrageous character of the conduct may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity."[45] This comment has been used only sparingly in at will firings,[46] but it should be given more emphasis in light of the employer's knowledge that the employee already has sustained the emotional trauma of a discharge. Each of these comments should be considered to help provide some structure to the otherwise amoeba-like concept of outrageousness as it is applied in the employment at will context.

III. Motive vs. Manner: The Distinction Between Wrongful Discharge and Intentional Infliction of Emotional Distress

A determination of the proper role for the tort of outrage in the at will employment context requires a careful comparison to the wrongful discharge

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39. *Id.* at comment e.

40. Givelber, *supra* note 6, at 43; Alcorn v. Anbro Eng'g, 2 Cal. 3d 493, 498, 468 P.2d 216, 218, 86 Cal. Rptr. 88, 90 (1970); Contreras v. Crown Zellerbach Corp., 88 Wash. 2d 735, 741, 565 P.2d 1173, 1176 (1977).

41. *See infra* notes 83-86 and accompanying text.

42. Restatement (Second) of Torts § 46 comment g (1965).

43. *Novosel,* 495 F. Supp. at 346-47; Brooks v. Carolina Tel. & Tel., 56 N.C. App. 801, 805, 290 S.E.2d 370, 372 (1982).

44. M.B.M. Co. v. Counce, 596 S.W.2d 681, 688 (Ark. 1980). *See infra* notes 104-12 and accompanying text.

45. Restatement (Second) of Torts § 46 comment f (1965).

46. *See, e.g., Alcorn,* 468 P.2d at 218-19 (involving susceptibility due to racial status); *Contreras,* 565 P.2d at 1177 (involving susceptibility due to national origin).

action, which is the primary protection for at will employees. The use of intentional infliction of emotional distress by at will employees originated as a response either to the lack of a wrongful discharge remedy, or to the limits on damages for wrongful discharge. Despite these origins as an attempt to circumvent the limits of the wrongful discharge doctrine, a close analysis of the two actions reveals a subtle distinction that must be understood to assure proper adjudication of cases involving both causes of action. The wrongful discharge exceptions to the at will doctrine limit the reasons or motives for which an employee may be terminated, while the claim for intentional infliction of emotional distress limits the manner in which a discharge may be effectuated.

This distinction between the two causes of action has been explained most clearly in cases involving federal legislative preemption of state tort claims for intentional infliction of emotional distress.[47] In these preemption cases, the plaintiff has either failed to recover under the statute,[48] or is seeking a remedy beyond that allowed by the statute.[49] The United States Supreme Court decided this preemption issue with regard to the National Labor Relations Act in *Farmer v. United Brotherhood of Carpenters Local 25*.[50] In that case, the plaintiff Richard T. Hill was a member of Local 25 of the United Brotherhood of Carpenters and Joiners of America. Hill sued the union in state court for damages for breach of contract and alleged discrimination against him because of his dissident intra-union political activities. The intentional infliction of emotional distress claim was based on the union's alleged campaign against him. Hill alleged that the campaign included "frequent public ridicule," "incessant verbal abuse," threats, intimidation, and "refusals to refer him to jobs in accordance with the rules of the hiring hall."[51] The state court sustained a demurrer to discrimination and contract

47. There are several federal statutes which limit the employer's right to discharge employees in areas where abuses have been common: for example, the National Labor Relations Act of 1935, 29 U.S.C. §§ 157, 158(a)(3) (1982), prohibits discharges in retaliation for union organizing activity. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1982), prohibits employee terminations which discriminate on the basis of race, color, religion, sex, or national origin. Specific federal protections against retaliatory discharges include the Consumer Credit Protection Act, 15 U.S.C. § 1674(a) (1982) (prohibiting discharges of those whose wages are garnished for indebtedness); the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) (1982) (discharge of those exercising rights under the Act is illegal); the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a) (1982) (protecting older workers from retaliatory discharge); the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(c) (1982) (illegal to discharge anyone exercising rights under the Act); 38 U.S.C. § 2021 (1982) (granting returning veterans the right to return to their former jobs and prohibiting discharge for one year).

48. This situation is analogous to the application of intentional infliction of emotional distress in states which refuse to recognize the wrongful discharge action, or even where the plaintiff has failed to win a wrongful discharge claim in states which recognize the action. *See infra* text accompanying notes 78-117.

49. This situation is analogous to cases where the plaintiff has won under one of the wrongful discharge theories, and is seeking further damages by claiming intentional infliction of emotional distress. *See infra* text accompanying notes 118-61.

50. 430 U.S. 290 (1977).

51. *Id.* at 293.

claims on the ground that federal law preempted state jurisdiction over them, but allowed the intentional infliction of emotional distress claim to go to trial.[52]

The union appealed the plaintiff's verdict, alleging that the jurisdiction of the National Labor Relations Act preempted the plaintiff's state tort action.[53] The Court focused on whether concurrent state court jurisdiction posed a realistic threat of interference with the federal regulatory scheme.[54] To decide that issue, the Court had to determine whether intentional infliction of emotional distress regulated conduct that was already protected by the National Labor Relations Act.[55] The Court concluded that Congress did not intend to preempt state court jurisdiction for this tort because: (1) the state has a substantial interest in regulating the challenged conduct,[56] and (2) it is possible that "the state tort [could] be either unrelated to employment discrimination or a *function of the particularly abusive manner in which the discrimination is accomplished or threatened* rather than a function of the actual or threatened discrimination itself."[57] Thus, the Supreme Court recognized that two separate actions could arise from the course of employment discrimination alleged in *Farmer.* The first action would involve the employment discrimination itself. The second action, for intentional infliction of emotional distress, would be based on the outrageous *manner* in which the discrimination was implemented.

This distinction between the motive and manner of discharge has also been applied in relation to wrongful discharge actions. In *Magnuson v. Burlington Northern, Inc.,*[58] the plaintiff was fired for his alleged negligence in causing a head-on train collision.[59] Magnuson attempted to avoid the limited wrongful discharge remedies under the Railway Labor Act by basing his suit on intentional infliction of emotional distress,[60] thereby fitting his

52. *Id.* The jury rendered a verdict for plaintiff for $7,500 actual damages and $175,000 punitive damages. *Id.* at 294.

53. *Id.* at 295.

54. *Id.* at 305.

55. Discrimination in hiring hall referrals constitutes an unfair labor practice under § 8(b)(1)(A) and 8(b)(2) of the NLRA. *Farmer,* 430 U.S. at 303 n.11.

56. *Farmer,* 430 U.S. at 304.

57. *Id.* at 305 (emphasis added). The jury's verdict in favor of the plaintiff was vacated, however, because there was no appropriate instruction distinguishing between the evidence relevant to the employer's discriminatory labor practices (which are preempted by the NLRB) and the harassment, public ridicule, and verbal abuse relevant to the outrageousness claim. It was therefore impossible to determine on which evidence the damages were based. The Court remanded the case to decide whether the manner of defendant's discriminatory practices was outrageous. *Id.* at 307. On remand, the court of appeals reversed and judgment was rendered for defendant because the conduct on which the outrageousness claim depended was a series of threats that he would be deprived of his ability to earn a living as a carpenter. As such, these were matters within the exclusive jurisdiction of the NLRB. Hill v. United Brotherhood of Carpenters Local 25, 49 Cal. App. 3d 614, 122 Cal. Rptr. 722 (1975).

58. 576 F.2d 1367 (9th Cir.), *cert. denied,* 439 U.S. 930 (1978).

59. *Magnuson,* 576 F.2d at 1368.

60. The plaintiff claimed that he was the victim of a conspiracy among railroad personnel to place responsibility for the crash on him. The conspiracy was allegedly effected through abuse of the railroad's investigatory process.

claim within the exception created by *Farmer*.[61] The court, however, found that the tort claim was preempted by the Railway Labor Act because the plaintiff's "emotional distress was an incident of the wrongful discharge, rather than a result of an alleged conspiracy."[62] The court also stated "[t]he alleged evil motivation of the defendants would have caused him no legal injury if he had either not been discharged or if his discharge was not wrongful."[63]

Judge Bonsal, in his dissent, did not agree that the plaintiff's emotional distress resulted solely from his discharge. Judge Bonsal apparently felt that the acts of the defendant's employees in blaming the plaintiff for this tragedy, even without the discharge, were sufficient to avoid a directed verdict on the claim for intentional infliction of emotional distress.[64] His dissent emphasized the distinction made in *Farmer:* "The gist of appellant's case is not that he was wrongfully discharged but the 'particularly abusive manner in which it was accomplished.' "[65] While they reached different factual conclusions, both opinions in *Magnuson* clearly recognized the difference between the employer's *motivation* for the discharge, which is the issue in wrongful discharge actions, and the *manner* used by the employer to carry out the termination, which is the basis of suits for intentional infliction of emotional distress.

A further illustration of this distinction is presented by *Viestenz v. Fleming Cos.*[66] In *Viestenz,* the plaintiff alleged that he was pressured into admitting that he stole merchandise from the employer's store, and then was discharged for that admission.[67] The district court dismissed the plaintiff's action for wrongful discharge because, as a unionized employee, he could bring such an action only under the collective bargaining agreement.[68] Unlike the courts in some states,[69] however, neither the trial court nor the appellate court concluded its analysis at this point. Instead, both courts went on to consider whether the emotional distress claimed by the plaintiff resulted from the actual or threatened loss of employment, or from the particularly abusive

61. *Magnuson,* 576 F.2d at 1368-69.

62. *Id.* at 1369.

63. *Id.* The court also states: "Every employee who believes he has a legitimate grievance will doubtless have some emotional anguish occasioned by his belief that he has been wronged. Artful pleading cannot conceal the reality that the gravamen of the complaint is wrongful discharge." *Id.*

64. *Id.* at 1371-72.

65. *Id.* at 1371.

66. 681 F.2d 699 (10th Cir.), *cert. denied,* 459 U.S. 972 (1982).

67. *Viestenz,* 681 F.2d at 700-01. The alleged pressure tactics included threats of discharge, union black balling, and subjection to a court-ordered polygraph if the plaintiff did not admit to the thefts. *Id.* at 701.

68. *Id.* at 701.

69. *E.g.,* Novosel v. Sears, Roebuck & Co., 495 F. Supp. 344 (E.D. Mich. 1980); Daniel v. Magma Copper Co., 127 Ariz. 320, 620 P.2d 699 (Ct. App. 1980); Brooks v. Carolina Tel. & Tel., 56 N.C. App. 801, 290 S.E.2d 370 (1982).

manner in which the discharge was accomplished or threatened.[70] The district court allowed a jury verdict on the claim of outrage to stand.[71] The appellate court reversed, reasoning that the plaintiff's harm "resulted from the fact of his discharge, rather than from any improper conduct of [the defendant]."[72] The emotional distress suffered by the plaintiff was due to the embarrassment and financial concerns caused by the discharge itself. Had the plaintiff's distress resulted from the outrageous manner of the discharge, however, he probably would have recovered under the tort of outrage. While none of these three cases actually resulted in liability for intentional infliction of emotional distress, each court distinguished between the conduct that is relevant in a wrongful discharge action and the conduct that underlies the tort of outrage. The wrongful discharge action depends solely on the validity of the employer's *motivation* or reason for the discharge. Therefore, any other conduct which surrounds the dismissal should be weighed to determine whether the employer's *manner* of executing the discharge was outrageous.

The importance of this distinction between the motivation and the manner of the discharge cannot be overemphasized. The outrageousness standard is vague and very difficult to meet.[73] In the at will employment setting courts must closely scrutinize each allegedly improper act by the employer in light of the employer's position of authority over the plaintiff if any employee is to have a fair chance of meeting the stringent standard.[74] When courts make conclusory decisions concerning ourtageousness without considering what specific conduct should enter the calculation, they often fail to analyze the most stressful and most outrageous aspects of the employer's conduct.[75]

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70. *Viestenz,* 681 F.2d at 703.

71. However, the judge did reduce by one half the actual and punitive damages awarded from $5,000 and $50,000 to $2,500 and $25,000. *Id.* at 702.

72. *Id.* at 704. The court actually based its reversal on a lack of jurisdiction, because the alleged conduct (excluding the wrongful discharge) was not sufficiently outrageous to justify the potential for interference with the federal regulatory scheme. *Id.*

73. While the application of the standard varies from state to state, normally courts require the conduct to be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." RESTATEMENT (SECOND) OF TORTS § 46 comment d (1965).

74. *See supra* notes 39-41 and accompanying text.

75. A good example of conclusory decision-making in this area is Food Fair, Inc. v. Anderson, 382 So. 2d 150 (Fla. Dist. Ct. App. 1980). In that case a woman who had worked for Food Fair for six years was required by a security officer to submit to a polygraph examination in connection with his investigation of cash shortages at the store. Company policy required her to take the test or be fired. The employee also was told that it was company policy for her to admit to prior thefts, and failure to confess would lead to her discharge for untrustworthiness. The employee tearfully protested her innocence but finally signed a statement admitting the theft of $150, a figure suggested by the officer, because she needed the job to support her family. When her admission of theft did not clear a polygraph test, she was told to return the next day for another test. The next day she was told to admit a theft of $500; again the polygraph did not clear. She was then discharged for her admissions of stealing company cash. *Id.* at 151-52.

The trial court entered judgment on verdicts for the plaintiff totaling $407,500 in compensatory and punitive damages. The appellate court simply cited to the outrageousness requirement in comment d of the Restatement, and then, without any analysis of the facts, stated: "We conclude that the evidence of the conduct of the defendant England [the security officer] in the instant case does not meet the test of outrageousness." *Id.* at 153.

The most important factor that has been overlooked is the coercion involved when an employer attempts to force an employee to commit morally repugnant or illegal acts by threatening to discharge him.[76] The failure of some courts to consider the employer's abuse of his powerful position effectively strips intentional infliction of emotional distress of its most salient protective feature.

IV. JUDICIAL APPLICATION OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS IN FIRINGS AT WILL

Claims for intentional infliction of emotional distress in the employment setting nearly always arise from the employee's feeling that he was discharged unfairly.[77] Because such firings also generate actions for wrongful discharge, judicial application of outrageousness principles depends greatly upon the court's approach to wrongful discharges. Judicial interpretations of intentional infliction of emotional distress in the employment relationship can be divided into three categories: courts that do not recognize any wrongful discharge action; courts that allow liability for wrongful discharge under a tort or public policy theory; and courts that have adopted an action for wrongful discharge based on contract principles.

A. Application of the Tort of Outrage in the Absence of a Wrongful Discharge Cause of Action

Despite the trend in many states toward limiting the absolute right of employers to fire at will, several courts still refuse to compromise that traditional rule.[78] Some of these courts have based their refusal to recognize any wrongful discharge exceptions upon judicial restraint and deference to

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76. *See supra* notes 39-41 and accompanying text. The possibility for coercion through abuse of a position of authority is greater in the employment setting than in the other contexts in which it has been applied to find outrageousness (i.e. police officers, school authorities, landlords, and collecting creditors). The employer has control over the very livelihood of his employees, and the potential use of this power as a weapon is immense. *See* Bodewig v. K-Mart, Inc., 54 Or. App. 480, 635 P.2d 657 (1981); Gomez v. Hug, 7 Kan. App. 2d 603, 645 P.2d 916 (1982). At least one court has held that the relationship between an employer and an employee imposes upon the employer a higher duty to refrain from inflicting emotional affronts than exists between two strangers. Hall v. May Dep't Stores, 292 Or. 131, 138, 637 P.2d 126, 131 (1981).

77. The fact that such suits normally arise only following the employee's discharge can be explained by the employee's natural fear that any suit for improper employer conduct while still employed may result in immediate discharge. Some employees have nonetheless brought suit for intentional infliction of emotional distress while still employed by the defendant. *See* Milton v. Illinois Bell Tel., 101 Ill. App. 3d 75, 427 N.E.2d 829 (1981); Bodewig v. K-Mart, Inc., 54 Or. App. 480, 635 P.2d 657 (1981).

78. *See* Annot., 12 A.L.R.4TH 544 (1982).

the legislature to enact such public policy decisions.[79] Other courts seem quite comfortable with the absolute right of the employer to discharge employees, and appear determined to retain the traditional rule despite its often harsh results.[80] Litigants faced with this staunch opposition to the wrongful discharge action have sought to circumvent this rule through use of the tort of intentional infliction of emotional distress.[81] Predictably, these courts have been unimpressed by this attempt to avoid the employment at will doctrine.[82]

Some courts have emphasized these potential ignoble uses of the tort of outrage to conclude incorrectly that the failure to win the wrongful discharge claim necessitates dismissal of the outrageousness claim.[83] Such a conclusory ruling overlooks the important motive/manner distinction between the two causes of action. Three recent cases demonstrate the differing analyses that result when courts recognize, or fail to recognize, the distinction between the employer's motive for discharge and the manner in which the discharge was implemented.[84]

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79. Murphy v. American Home Prods., 58 N.Y.2d 293, 301-02, 448 N.E.2d 86, 89-90, 461 N.Y.S.2d 232, 235-36 (1983). In support of its deference to the legislature in this area the court noted that employees in New York have already been given statutory protection from firings for engaging in certain protected activities, including: absence from employment for jury service, opposing unlawful discriminatory practices or filing a complaint under the Human Rights Law, and complaining about violations of the Labor Law. The court also noted that legislation has been proposed but not adopted which would protect employees from termination for (1) taking actions which benefit the general public or society in general, (2) disclosure of violations of laws or regulations which pose a substantial and impending danger to public health and safety, or (3) disclosure of certain illegal or hazardous activities of their employers. *Id.* at 302 n.1, 448 N.E.2d at 90 n.1, 461 N.Y.S.2d at 236 n.1.

80. *See* Annot., 86 A.L.R.3D 454 (1978); Daniel v. Magma Copper Co., 127 Ariz. 320, 620 P.2d 699 (1980); Catania v. Eastern Airlines, 381 So. 2d 265 (Fla. Dist. Ct. App. 1980); Segal v. Arrow Indus. Corp., 364 So. 2d 89 (Fla. Dist. Ct. App. 1978); Demarco v. Publix Super Markets, 360 So. 2d 134 (Fla. Dist. Ct. App. 1978).

81. More recently, four employees in Minnesota circumvented that state's lack of a wrongful discharge action by successfully suing their employer for defamation, even though the workers themselves revealed the charges. Lewis v. Equitable Life Assurance Soc'y of the United States, 361 N.W.2d 875 (Minn. App. 1985).

82. The *Murphy* court stated: "Further, in light of our holding above that there is now no cause of action in tort in New York for abusive or wrongful discharge of an at-will employee, plaintiff should not be allowed to evade that conclusion or to subvert the traditional at-will contract rule by casting his cause of action in terms of a tort of intentional infliction of emotional distress." 58 N.Y.2d at 303, 448 N.E.2d at 90, 461 N.Y.S.2d at 236.

83. For example, in *Daniel,* where the employee was fired for refusing to drop the company's name as a defendant in a malpractice suit against the company-owned hospital, the court stated: "We conclude that Magma was neither liable in tort nor in contract for discharging Mr. Daniel. Since his termination was lawful, any recovery for intentional infliction of mental distress based upon the wrongful discharge must also fail." 127 Ariz. at 324, 620 P.2d at 703. It is interesting to note the stakes involved in such a decision: the jury verdict had awarded the plaintiff and his wife $150,000 for breach of employment contract and unlawful discharge, $26,000 for intentional infliction of emotional distress and $500,000 punitive damages. The court of appeals reversed, and the plaintiffs recovered nothing. *Id. See also* Brooks v. Carolina Tel., 56 N.C. App. 801, 290 S.E.2d 370 (1982).

84. Mundy v. Southern Bell Tel. & Tel., 676 F.2d 503 (11th Cir. 1982); Milton v. Illinois Bell Tel., 101 Ill. App. 3d 75, 427 N.E.2d 829 (1981); M.B.M. Co. v. Counce, 268 Ark. 269, 596 S.W.2d 681 (1980).

In *Mundy v. Southern Bell Telephone & Telegraph,*[85] the plaintiff alleged that management personnel of the telephone company had attempted to force him to participate in a scheme of falsifying reports in order to embezzle money from the utility and its ratepayers.[86] The plaintiff's refusal to engage in this illicit scheme allegedly precipitated a pattern of harassment which included: giving the plaintiff less desirable assignments than those who participated in the scheme; inaccurate and nnfair evaluations of the plaintiff's work; arbitrary denial of business expenses incurred; and attempts to damage the plaintiff's credibility among his peers and subordinates.[87] The plaintiff eventually resigned because of this harrassment.

After resigning, the plaintiff brought suit against his employer claiming in part wrongful discharge and intentional infliction of emotional distress.[88] The wrongful discharge claim was dismissed immediately because Florida strictly adheres to the employment at will doctrine.[89] The Florida appellate court also summarily upheld the dismissal of the outrageousness claim.[90] The court found it unnecessary or improper to consider either the employer's blatant coercion or the result that the court's decision might have on the continuation of such employer practices. The court in *Mundy* correctly decided that the outrageousness claim did not fail automatically when the wrongful discharge action was lost.[91] However, the court effectively gutted the plaintiff's case by failing to give proper emphasis to the extremely stressful impact of the employer's coercion.

In other states, the lack of a valid wrongful discharge claim has not precipitated such a summary dismissal of the claim for intentional infliction of emotional distress.[92] Instead, these courts closely examine the *manner* in which the employer effectuated the valid discharge, with particular emphasis on attempted coercion by the employer.[93] This approach was used by the Appellate Court of Illinois in *Milton v. Illinois Bell Telephone.*[94]

In *Milton,* as in *Mundy,* the plaintiff claimed that management personnel had repeatedly demanded that he falsify work reports in order to overcharge customers.[95] When the plaintiff refused to succumb to these demands, he was subjected to an extensive course of retaliation.[96] The plaintiff in *Milton,*

85. 676 F.2d 503.
86. *Id.* at 503-04.
87. *Id.* at 504.
88. *Id.* at 504 n.1.
89. *Id.*
90. The court stated that no Florida case had upheld such a claim against a former employee despite the existence of "claims no less compelling than Mundy's." *Id.* at 505-06.
91. *Cf. supra* notes 43, 69 & 83 and accompanying text.
92. *Milton,* 101 Ill. App. 3d 75, 427 N.E.2d 829; *Counce,* 268 Ark. 269, 596 S.W.2d 681.
93. *Id.*
94. 101 Ill. App. 3d 75, 427 N.E.2d 829.
95. *Id.* at 77, 427 N.E.2d at 831.
96. This harrassment included, among other things, giving the plaintiff undesirable and unprofitable assignments, criticizing plaintiff's work, arbitrarily transferring plaintiff from job to job to fatigue him, misleading customers about plaintiff's capability and integrity, and arbitrarily denying plaintiff "distress leave" and reserve week leave. *Id.* at 77-78, 427 N.E.2d at 831.

unlike the one in *Mundy,* chose not to resign. Milton continued to work for Illinois Bell, but sued the company for intentional infliction of emotional distress. Since the plaintiff was still employed by Illinois Bell, no wrongful discharge remedy was available.[97]

Unlike the court in *Mundy,* the Appellate Court of Illinois did not balk at the absence of the wrongful discharge action. Instead, the court undertook a probing analysis of the outrageousness of the employer's conduct. The court recognized that the defendant's evil motive alone was insufficient to show the requisite degree of outrageousness. But the court also discerned the importance of the potentially coercive context in which the employer's retaliatory conduct occurred.[98] In examining the employer's behavior the court gave proper emphasis to its coercive effect:

> As Dean Prosser pointed out, "The extreme and outrageous nature of the conduct may arise not so much from what is done as from abuse by the defendant of some relation or position which gives him actual or apparent power to damage the plaintiff's interests. The result is something very like extortion." . . . The Supreme Court acknowledged that "relatively immobile workers who often have no other place to market their skills," do not stand on equal footing with the large corporations which employ them. . . . It is the alleged abuse of power by a large corporation over one of its front-line employees which aggravates the outrageousness of the conduct alleged in this case.[99]

The court then weighed the employer's conduct[100] against the employer's interest in demanding that an employee falsify reports, and found that the employer's interest merited no legal deference.[101] This analysis led the court to conclude that a jury could reasonably find that the coercion and retaliation in this case were outrageous enough to be intolerable in a civilized community.[102] The court emphasized the need for the tort of outrage to protect employees who have not been discharged: "[I]f employers were permitted to intentionally inflict severe emotional distress on employees who refuse to violate clearly mandated public policies, the protection afforded by the

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97. Had the employee been discharged or forced to resign, a wrongful discharge action probably would have been successful in light of the Illinois Supreme Court decision in Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981).

98. 101 Ill. App. 3d at 79, 427 N.E.2d at 832. Had the employer simply requested the plaintiff to join in this scheme, but engaged in no retaliation upon his refusal, the plaintiff would have had no cause of action. Therefore, the court focused on the *manner* through which the employer sought to implement the scheme, not the *motive* for his behavior. Implicit in the court's willingness to consider the coercive context of this situation is its recognition that the motive for the employer's coercion was improper, and therefore not within the manager's prerogative.

99. *Id.* (citations omitted).

100. *See supra* note 96.

101. 101 Ill. App. 3d at 80, 427 N.E.2d at 833. This balancing of the employer's interest may lead to different results when actions for intentional infliction of emotional distress accompany rightful discharges, since the employer's motive for the coercion may then be entitled to deference as part of his managerial function.

102. *Id.* at 81, 427 N.E.2d at 833.

Supreme Court's decision in *Palmateer* [adopting the public policy exception to the at will rule] would be undermined."[103]

The *Milton* court recognized that a valid claim for intentional infliction of emotional distress could arise from an employer's coercion which *preceded* any discharge of the employee. Other courts similarly have found that even when the plaintiff's discharge was valid, intentional infliction of emotional distress can result from the employer's conduct *after* the firing.[104] In *M.B.M. Co. v. Counce,*[105] the plaintiff purportedly was laid off because her services as a waitress were no longer needed. There was some question about the real reason for the discharge since the employer was advertising for counter help when the plaintiff was released.[106] The court found no wrongful discharge because the reason (or motive) for the discharge did not violate any well-established public policy.[107] After the plaintiff had been fired, her supervisor forced her to submit to a polygraph test concerning a money shortage on her last day of work. Even though she passed the polygraph test, her employer deducted part of the cash shortage from her last paycheck.[108] The plaintiff was later denied unemployment benefits because her employer told the Employment Security Division that she had been laid off due to numerous customer complaints.[109]

The Arkansas Supreme Court found that summary judgment should not have been granted on the plaintiff's tort of outrage claim. The court stated:

> Ms. Counce has no cause of action for intentional infliction of emotional distress because of [the employer's] action in discharging her, because [the employer] is not liable for doing that which it had the legal right to do. . . .
>
> *M.B.M.'s conduct subsequent to her discharge is a different matter.*[110]

The court emphasized the employer's position of power which continued after the discharge with respect to the plaintiff's entitlement to backpay and unemployment compensation.[111] The court concluded that a reasonable jury could find that the employer's conduct in this coercive context was outrageous.[112]

The courts in *Milton* and *Counce* gave proper emphasis to the employer's coercive conduct before and after the discharge, thereby making possible recovery for intentional infliction of emotional distress in the absence of a

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103. *Id.* (citing Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 816 (1981)).

104. *Counce,* 268 Ark. 269, 596 S.W.2d 681; Agarwal v. Johnson, 25 Cal. 3d 932, 603 P.2d 58, 160 Cal. Rptr. 141 (1979).

105. 268 Ark. 269, 596 S.W.2d 681.

106. *Id.* at 272, 596 S.W.2d at 683.

107. *Id.* at 273, 596 S.W.2d at 683-84.

108. *Id.* at 271-72, 596 S.W.2d at 683.

109. *Id.* at 272, 596 S.W.2d at 683.

110. *Id.* at 280-81, 596 S.W.2d at 688 (citations omitted, emphasis added).

111. *Id.* at 281, 596 S.W.2d at 688.

112. *Id.*

wrongful discharge action. However, even if all courts used this approach, the usefulness of the tort of outrage would continue to vary greatly from state to state, because courts differ in their views of what is outrageous. State courts that strictly adhere to the traditional at will doctrine also tend to have very tough standards for outrageousness.[113] In those states, the difficult outrageousness standard can be expected to leave employees equally vulnerable to an employer's abusive manner of discharge as they are to an employer's improper motive for termination. On the other hand, states that have adopted some form of wrongful discharge exception tend to have more lenient outrageousness standards.[114] In these states, an action for intentional infliction of emotional distress is more likely to provide compensation to and protection for employees who are discharged in an outrageous manner. Even in the absence of a wrongful discharge, the tort of outrage can assure for employees in these states at least "minimal levels of civility"[115] in the employer's conduct surrounding the discharge.[116] Intentional infliction of emotional distress assumes even greater importance in situations where the employer's pattern of harassment and coercion has stopped short of the ultimate discharge sanction.[117] In these instances, the tort of outrage provides the employee's only protection from the employer's coercive abuse of his position of authority.

B. Application of the Tort of Outrage in Conjunction with Wrongful Discharges Based on Tort and Public Policy Theories

The discussion above has demonstrated that intentional infliction of emotional distress may provide employees some protection from outrageous conduct surrounding a discharge even where no wrongful discharge action is available, and may be especially useful in cases where no discharge has yet occurred. The complexion of the situation changes if the courts already provide a remedy under a public policy exception to the at will doctrine. In states that have adopted the public policy exception, the resulting tort remedy brings into serious question the need for an additional action for intentional infliction of emotional distress.

The tort theory of wrongful discharge was created to prevent firings in retaliation for exercising some substantial public policy right.[118] Courts and commentators differ as to whether that right must be explicitly stated in legislation or whether it can be found through a general consideration of

113. *See supra* note 75.
114. *See Agarwal,* 25 Cal. 3d 932, 603 P.2d 58, 160 Cal. Rptr. 141.
115. Givelber, *supra* note 6, at 68.
116. *See Counce,* 268 Ark. 269, 596 S.W.2d 681.
117. *Milton,* 101 Ill. App. 3d 75, 427 N.E.2d 829.
118. *See* Annot., 12 A.L.R.4TH 544 (1982).

the public interest.[119] Under either standard, if the court decides that the employee was wrongfully discharged most courts will provide a tort remedy.[120] The action lies in tort because the employer's obligation to refrain from firing an employee does not depend upon any express or implied promise in the employment contract but rather is imposed by law upon all employers in order to implement the state's public policies.[121] Like any other tort action, the remedy entitles the plaintiff to compensatory damages, including emotional distress, and under proper circumstances, punitive damages.[122] The availability of full tort damages under the wrongful discharge cause of action may make superfluous an additional claim for intentional infliction of emotional distress.

In two separate decisions of the case of *Harless v. First National Bank,*[123] the West Virginia Supreme Court of Appeals undertook a lengthy analysis of the utility of the tort of outrage in light of the similar damages already available through a wrongful discharge suit. In that case a bank employee claimed that he was harrassed, threatened, and later dismissed because of his efforts to alert his employer to the bank's violations of state and federal consumer credit laws.[124] The state supreme court had decided, in a previous decision of the case limited only to the issue of liability, that these facts constituted a wrongful discharge.[125] In that opinion, the court stated that "where the employer's motivation for the discharge contravenes some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by the discharge."[126] The second *Harless* decision discussed only the propriety of the trial court's damages.[127] In determining the correct damages, the court first discussed whether emotional damages were appropriate for a wrongful discharge. It found that under its tort theory of wrongful discharge there was sufficient intent to inflict harm to allow emotional damages even in the absence of any visible physical

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119. *See* O'Neill v. A.R.A. Servs., 457 F. Supp. 182 (E.D. Pa. 1978); Martin v. Platt, 386 N.E.2d 1026 (Ind. Ct. App. 1979); Edwards v. Citibank, 100 Misc. 2d 59, 418 N.Y.S.2d 269 (Sup. Ct. 1979); Brake, *supra* note 2; Note, *Employment at Will: A Proposal to Adopt the Public Policy Exemption in Florida,* 34 U. FLA. L. REV. 614 (1981-82); *Wrongful Discharge, supra* note 2; *cf. Palmateer,* 85 Ill. 2d 124, 421 N.E.2d 876; Harless v. First Nat'l Bank, 246 S.E.2d 270 (W. Va. 1978) [hereinafter cited as Harless (I)].

120. *See* Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); Kelsay v. Motorola Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Harless (I), 246 S.E.2d 270.

121. *Tameny,* 27 Cal. 3d at 176, 610 P.2d at 1335, 164 Cal. Rptr. at 844.

122. *Id.*

123. Harless (I), 246 S.E.2d 270; Harless v. First Nat'l Bank, 289 S.E.2d 692 (W. Va. 1982) [hereinafter cited as Harless (II)].

124. Harless (II), 289 S.E.2d at 696. Plaintiff was fired 18 months after his initial complaint of such violations. While no reason was given for his discharge, plaintiff asserted that it was due solely to his efforts to gain compliance with the consumer credit laws of West Virginia and the United States. *Id.*

125. Harless (I), 246 S.E.2d 270.

126. *Id.* at 275.

127. Harless (II), 289 S.E.2d 692.

injury.[128] The court, however, recognized that emotional damages absent any demonstrable physical trauma left the jury a rather open hand in assessing damages. These damages, as a result, could assume the cloak of punitive damages.[129] Because of this punitive element of emotional damages and the lack of any egregious conduct beyond the firing, the court rejected the punitive damages claim.[130]

Even though the court refused to impose punitive damages on the facts of *Harless,* in dicta, the court did "recognize that where the employer's conduct is wanton, willful or malicious, punitive damages may be appropriate."[131] The court illustrated the conduct to which it referred in a footnote:

> Such a situation may arise where the employer circulates false or malicious rumors about the employee before or after the discharge or engages in a concerted action of harassment to induce the employee to quit or actively interferes with the employee's ability to find other employment.[132]

In deciding whether to award punitive damages, the court did not focus on the motive for the firing, which is the criterion for wrongful discharge liability.[133] Instead, the court looked to the manner of, and the conduct surrounding, the discharge.[134] These are the same considerations that form the basis of the action for intentional infliction of emotional distress.[135] In light of the fact that the court considered the same conduct for punitive damages that it normally would weigh in an outrageousness claim, it is hardly surprising that the court concluded that, "in this jurisdiction, a claim for the tort of outrageous conduct is duplicitous to a claim for retaliatory discharge."[136] The court recognized the need for protection of employees from outrageous conduct surrounding the discharge, but chose to provide compensation via punitive damages rather than through intentional infliction of emotional distress.[137]

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128. *Id.* at 701-02.

129. *Id.* at 702. *See supra* notes 33-34 and accompanying text.

130. *Id.* at 702-03.

131. *Id.* at 703.

132. *Id.* at 703 n.19.

133. Since the motive for the discharge must be contrary to public policy for the discharge to be wrongful, this improper motive cannot constitute the malicious, willful, or wanton conduct required for punitive damages.

134. "The mere existence of a retaliatory discharge will not automatically give rise to the right to punitive damages. The plaintiff must prove further egregious conduct on the part of the employer." Harless (II), 289 S.E.2d at 703.

135. *See supra* notes 70-72 and accompanying text.

136. Harless (II), 289 S.E.2d at 705. "The damages are essentially the same under both claims sinee we recognize that if the employer's conduct is outrageous punitive damages may be recovered in a retaliatory discharge suit as well as compensatory damages including an award for emotional distress." *Id.*

137. The court recognized the fundamental difference between wrongful discharge, which is actionable because the firing itself contravenes a substantial public policy, and the tort of outrageousness, which is based on the socially intolerable conduct of the employer in effectuating the discharge. *Id.* Nevertheless, the court concluded, "the retaliatory discharge cause of action, depending on the facts, is sufficiently accommodating to include outrageous conduct such that there is no need to permit an independent cause of action for outrageous conduct in a retaliatory discharge case." *Id.* The court noted, however, that "[t]here may be situations where the plaintiff has not been discharged or his termination of employment cannot be fitted into a retaliatory discharge cause of action, yet a cause of action will fall within the tort of outrageous conduct as against his employer." *Id.* at 705 n.22. *See supra* notes 30-34 and accompanying text.

Although no other state court has yet adopted this approach,[138] its reasoning and results are persuasive. Other courts applying the tort theory of wrongful discharge also have made punitive damages contingent upon a showing of malicious, willful or wanton conduct by the defendant, but none has stated what conduct would qualify for such punishment.[139] It is possible that these courts intend punitive damages to be automatic in cases involving a willful discharge for an improper motive.[140] Such an approach would be based on a belief that emotional damages will not sufficiently deter employers from discharging employees in violation of the state's public policies, thereby making punitive damages a necessity in every wrongful discharge. However, the allowance of punitive damages for every wrongful discharge may be overly harsh to employers, especially given the fact that they do not always have close control over the individuals who implement the discharge. The *Harless* approach, on the other hand, more closely matches the damages awarded to the approximate harm of the employer's action, while still providing an economic deterrent in the form of emotional damages.[141] The *Harless* approach also provides employees some compensation for any excessive harassment or coercion which may precede or follow the discharge.

The use of punitive damages instead of a separate action for the tort of outrage makes little difference in the remedy since intentional infliction of emotional distress, like punitive damages, commonly computes damages according to the culpability of the defendant's conduct.[142] Application of the punitive damages standard of maliciousness, instead of the more difficult outrageousness test, also may allow more employees to recover. This more lenient standard may indirectly account for the employer's potential to inflict stress on his subservient employees. The *Harless* approach appears to adequately protect the interests of both parties while simplifying the case by making unnecessary the additional action for intentional infliction of emotional distress.

C. Application of the Tort of Outrage in Conjunction with Wrongful Discharge Actions Based on Contract Theories

While wrongful discharge cases most commonly arise under a tort theory, some courts allow recovery under a contract theory for breach of an implied

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138. At least one other court has found that no separate action was necessary for emotional distress, given the availability of emotional damages for wrongful discharge under Indiana law. The court did not consider the propriety of punitive damages for the outrageous manner through which the discharge was implemented. Perry v. Hartz Mountain Corp., 537 F. Supp. 1387, 1391 (S.D. Ind. 1982).

139. *Tameny,* 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839; *Kelsay,* 74 Ill. 2d 172, 384 N.E.2d 353. The court in *Kelsay* suggests that absent punitive damages employers would be very willing to wrongfully discharge employees, because compensatory damages alone (not including emotional damages in that case) would be too small to pose any real economic deterrent. *Kelsay,* 74 Ill. 2d at 186-87, 384 N.E.2d at 359. However, in *Kelsay* no punitive damages were awarded because the decision was a novel one, and the defendant was not aware of the potential for such punishment. *Id.* at 187-88, 384 N.E.2d at 360.

140. *See* Cancellier v. Federated Dep't Stores, 672 F.2d 1312 (9th Cir. 1982).

141. *See supra* notes 32-33 and accompanying text.

142. *See supra* notes 30-33 and accompanying text.

contractual provision.[143] Courts have found contractual wrongful discharges under three theories. Some courts recognize a contractual action for a discharge in violation of a substantial public policy.[144] More often courts will imply from general assurances of job security a promise by the employer to discharge only for just cause.[145] More recently, a few courts have expanded the wrongful discharge action to its furthest point by allowing a contract action for a discharge in violation of an implied convenant of good faith and fair dealing.[146] Because contract damages typically do not include either emotional or punitive damages, there appears to be a void that in certain instances could be filled by use of intentional infliction of emotional distress.

These contractual wrongful discharge actions could also be framed as tort actions if courts were willing to label the employer's discharge as a violation of public policy rather than a mere breach of contract.[147] In fact, the California courts have stated that even a violation of the obligation of good faith and fair dealing sounds in both tort and contract, and may give rise to emotional distress and punitive damages.[148] The limitation to a contractual remedy may be a result of judicial caution while exploring the boundaries of the wrongful discharge action. Courts recognize that the standard of good faith and fair dealing is admittedly vague, and that imposition of a just cause requirement through a construction of prior representations also may lead to unforeseeable liability for employers. Also, in light of the unpredictability of recent expansions in this area, the courts are less likely to expose the employer to the full range of liability. Furthermore, the behavior constituting a contractual wrongful discharge may be less deplorable than that which undermines a significant state public policy.

In *Monge v. Beebe Rubber Co.*,[149] which first adopted the contractual remedy for breach of the covenant of good faith and fair dealing, the court had little difficulty adhering to the restricted contractual remedy. The court

143. *See* Annot., 12 A.L.R.4TH 544 (1982).

144. Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980); McNulty v. Borden, Inc., 474 F. Supp. 1111 (E.D. Pa. 1979).

145. Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); Cleary v. American Airlines, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980); Wagner v. Sperry Univac, 458 F. Supp. 505 (E.D. Pa. 1978), *aff'd without op.*, 624 F.2d 1092 (3d Cir. 1980); Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980).

146. Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977); Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974). While some courts have stated that these cases essentially impose a just cause requirement for discharge upon employers, this has been explicitly disavowed, at least in Massachusetts. Gram v. Liberty Mutual Ins. Co., 384 Mass. 659, 429 N.E.2d 21 (1981).

147. In fact, *Monge v. Beebe Rubber Co.* actually phrases its holding in language which could be considered a broad public policy exception: "We hold that a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not in the best interest of the economic system or the public good and constitutes a breach of the employment contract." 114 N.H. 130, 133, 316 A.2d 549, 551 (1974).

148. *Cancellier*, 672 F.2d at 1318.

149. 114 N.H. 130, 316 A.2d 549.

in that case stated that damages for mental suffering are not generally recoverable in contract actions.[150] Yet, the court felt compelled to justify the limited remedy by noting that the employee's mental suffering may have been attributable more to her marital difficulties than to her discharge.[151] Courts may be tempted to abandon the strict contract remedy when confronted with a plaintiff that clearly has suffered substantial emotional distress because of the manner of discharge. For example, the Massachusetts Supreme Court in *Agis v. Howard Johnson Co.*[152] essentially filled the void in the limited contractual remedy by allowing a discharged employee to state a claim for intentional or reckless infliction of severe emotional distress. In that case, the plaintiff and her fellow waitresses were called to a meeting at which their employer informed them that "there was some stealing going on."[153] The employer then stated that since he did not know the identity of the persons responsible, he would begin firing all the present waitresses in alphabetical order, starting with the plaintiff, Debra Agis.[154] The employer then carried out his threat and discharged the plaintiff. The court concluded that the employer's conduct was such that a jury could reasonably find it extreme and outrageous, and the cause of plaintiff's severe emotional distress.[155]

The finding of intentional infliction of emotional distress in *Agis* for this single incident appears to ease the traditionally stringent outrageousness standard.[156] This decision, however, must be viewed in the light of Massachusetts' limited wrongful discharge remedy[157] which would otherwise leave this plaintiff uncompensated for her substantial emotional injuries.[158] Furthermore, the court in *Agis* apparently looked to the manner in which the employer implemented the discharge, rather than any improper motive, since the complaint did not allege any illicit motivation.[159] The discharge was part of a scheme intended to coerce a confession from the guilty party by inflicting stress upon the entire group. The attempted coercion by the employer and the absolute helplessness of the plaintiff greatly exacerbated the outrageousness of the employer's conduct.

The finding in *Agis* demonstrates the potential utility of the intentional infliction of emotional distress remedy in protecting plaintiffs from emotional suffering that may result from the outrageous manner in which a discharge is implemented. While injury from such conduct is already protected by

150. *Id.* at 134, 316 A.2d at 552.
151. *Id.*
152. 371 Mass. 140, 355 N.E.2d 315 (1976).
153. *Id.* at 141, 355 N.E.2d at 317.
154. *Id.*
155. *Id.* at 145, 355 N.E.2d at 319.
156. *See* Givelber, *supra* note 6, at 66.
157. *See* Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977).
158. In states recognizing the tort remedy for wrongful discharge, the firing in *Agis* may have violated the policy against self-help enforcement of criminal statutes.
159. *Agis,* 371 Mass. at 141-42, 355 N.E.2d at 317.

punitive damages under the *Harless* rule,[160] the limited contractual remedy under the new good faith and fair dealing limitation makes the tort of outrage a necessary action to complement that remedy. These courts must maintain the distinction between the manner and motive for the discharge in these cases to avoid discarding the cautious contract remedy which is warranted in the new frontiers of the wrongful discharge action.[161]

CONCLUSION

An overview of the various applications of intentional infliction of emotional distress in the employment at will context has shown that this rather amorphous tort is a useful supplement to the expanding wrongful discharge exceptions. The emphasis of the tort of outrage upon the manner in which the employer effectuates the discharge illuminates the need for protection and compensation for emotional harm which results not from the firing itself, but from the conduct which precedes or follows it. The action's greatest utility exists when it is used to deter the use of extremely stressful coercion by an employer who seeks to undermine state public policy goals at the expense of his employees.

In practice, the tort of outrage may become unnecessary in states which use punitive damages to compensate employees for, and deter employers from, outrageous conduct surrounding the traumatic discharge. Its practical utility may also be limited in strict at will states because of the nearly insurmountable outrageousness standard in those states. However, intentional infliction of emotional distress is a necessary complement to the limited contractual remedy for the breach of the implied covenant of good faith and fair dealing. The action may also provide employees needed protection from coercive conduct surrounding a valid discharge. Most importantly, the availability of the tort of outrage is imperative in cases of coercion and harassment, in which the employee has not been discharged. In such cases intentional infliction of emotional distress ensures that the protections secured by the wrongful discharge action are not circumvented by employer coercion which stops just short of the ultimate discharge sanction.

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160. *See supra* notes 116-22 and accompanying text.

161. The complementary nature of the tort of outrage has been noted in other contexts where the remedy is otherwise limited:

> Since monetary damages under Title VII are limited to recovery of back pay, alternate causes of action under state law may be particularly important where the discriminatee might recover damages other than back pay. . . .
>
> . . . .
>
> In certain factual situations an employee may be able to recover damages for the intentional and unreasonable infliction of mental or emotional distress.

B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 678-80 (1976).