THE AMERICAN LAW INSTITUTE

Restatement of the Law Third
Employment Law

Preliminary Draft No. 9

(September 4, 2012)

SUBJECTS COVERED

CHAPTER 4 Principles of Employer Liability for Harm to Employees (revised)
CHAPTER 7 Employee Privacy and Autonomy (revised)
TOPIC 2 Protection of Employee Personal Autonomy
CHAPTER 9 Remedies (black letter and Comments only)
APPENDIX Black Letter of Preliminary Draft No. 9

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Employment Law
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For a history of the project, go to http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=31.

Earlier versions of some of the black letter and commentary contained in Chapter 4 of this Draft can be found in Chapter 5 of Preliminary Draft No. 7 (2010) and Preliminary Draft No. 5 (2008). Earlier versions of Topic 2 of Chapter 7 of this Draft are contained in Council Draft No. 7 (2012), Council Draft No. 6 (2011), and Preliminary Draft No. 8 (2011). Topic 1 of Chapter 7 was approved at the 2012 ALI Annual Meeting. An outline of Chapter 9's remedies Sections is contained in Preliminary Draft No. 6 (2009).

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REPORTERS' MEMORANDUM (August 24, 2012)

PRELIMINARY DRAFT NO. 9

RESTATEMENT OF THE LAW THIRD
EMPLOYMENT LAW

CHAPTERS 4, 7, and 9

Chapter 4

Principles of Employer Liability for Harm to Employees (MCH)

The primary purpose of this Chapter is to set forth principles to govern employer liability for torts committed on employees. These principles are drawn from the law of agency and are in accord with those expressed in the Restatement Third of Agency. The principles govern the torts treated in subsequent Chapters of this Restatement, including wrongful discipline and discharge in Chapter 5; defamation, interference with contractual relations, and intentional and negligent misrepresentation in Chapter 6; and invasion of privacy in Chapter 7. The principles also govern employer liability for other torts, such as the intentional torts listed in § 4.05.

This Chapter recognizes the importance of the exclusive remedies provided by workers'-compensation laws in all jurisdictions to employees for most employment-related physical harms. The Chapter focuses on employer liability for those harms for which no workers'-compensation remedy is available

Section 4.01 provides a summary of the bases for employer liability. These include actions directly taken by the employer or the controlling owner of the employer, often denominated an employer's "alter ego." The bases for employer liability also include responsibility for the actions of employees and other agents, as specified in § 4.02, and the failure to discharge nondelegable duties, including the common-law duties treated in §§ 4.03 and 4.04.

Section 4.02 sets forth the principles governing an employer's liability for the acts of its agents. This Section is especially important for the modern economy because most employers are corporations or other legal entities that act through human agents. Section 4.02 provides for employer liability for authorized or ratified employment-related wrongful conduct of agents and for the wrongful conduct of employees taken within the scope of employment. The Section does not expand these categories beyond the bounds set by the Restatement Third of Agency. The Section, however, does state the additional basis for employer liability for wrongful conduct by supervisors outside the scope of employment provided by the Supreme Court in 1998 for the federal antidiscrimination laws.

Sections 4.03 and 4.04 state nondelegable duties of employers toward employees imposed by the common law. The breach of one of these duties can provide a basis for employer liability independently of the wrongful conduct which is the basis for liability under § 4.02. This

is true because the failure to act or to have an agent act can constitute a breach of a duty. Section 4.03 states the employer's duty to exercise reasonable care in selecting, retaining, or supervising its employees or other agents. Section 4.04 states the employer's duty to provide a reasonably safe workplace and instrumentalities of work, and to warn of the risk of dangerous working conditions of which the employer but not the harmed employee was or should have been aware.

Section 4.05 provides further clarification that the principles of employer liability set forth in §§ 4.01 and 4.02 apply to torts to recover for all kinds of harms suffered by employees, including physical harms for which the employees do not have exclusive remedies under a workers'-compensation law. It does so in part by treatment of the most important intentional torts that often are not precluded by workers'-compensation laws and that are not treated elsewhere in this Restatement. These include false imprisonment, assault and battery, and intentional infliction of emotional distress. This list is intended to be illustrative rather than exclusive. The treatment of these torts in § 4.05 is not intended to provide special doctrine for the context of employment law, but rather to apply general tort doctrine to illustrate how employers may become liable for these torts through principles otherwise set forth in this Chapter.

Chapter 7, Topic 2

Employee Privacy and Autonomy (MTB)

This Chapter addresses the common-law protections for employee privacy and autonomy interests. The common law has protected privacy through the four well-known privacy torts developed in the Restatement Second of Torts. These protections extend to people in a variety of different situations, and their development in the context of employment warrants specific elucidation. Autonomy protections, on the other hand, are primarily a matter of employment law developed as a variant of the public-policy protections accorded to employees against certain adverse employer actions, such as termination, that interfere with public policy.

Topic 2—§§ 7.08 and 7.09—sets forth the protections for employee autonomy. Section 7.08 identifies the protected employee autonomy interests: conduct, activities, or behavior that occurs outside of the workplace or does not interfere with the employer's legitimate workplace interests as well as moral, ethical, or other personal beliefs that do not interfere with the employee's workplace responsibilities. This Section also recognizes that an employee is protected as to those activities which the employer has agreed or promised to treat as separate from and irrelevant to the employment relationship. Section 7.09 provides that the employee is protected against discharge or other material adverse action based solely on the employee's exercise of protected autonomy interests, as long as the employer does not have a good-faith, reasonable belief that those interests interfere with the employee's workplace responsibilities.

Chapter 9

Remedies (SE)

This Chapter treats the remedies available in actions seeking redress for violations of the rules stated elsewhere in this Restatement. It builds on and incorporates the treatment of remedial questions in the Restatement Second of Contracts, the Restatement Second of Torts, the Restatement Third of Agency, and the Restatement Third of Unfair Competition. Where an aspect of remedies is not covered in this Chapter, the provisions of the other Restatements should be consulted. This Restatement covers only the nonstatutory law of the employment relationship (see Chapter 1).

This Chapter is divided into two Parts. Part 1 considers claims against employers. Part 2 considers claims against employees. Each Part is, in turn, divided between claims for damages and claims for injunctive relief.

The broad range of remedies allowed generally in civil actions is recognized here. Under Part 1, remedies for contract claims against employers tracks much of Chapter 2's framework of agreements, employer promises (where enforced by promissory estoppel), and unilateral employer policy statements. Under § 9.01(c), the parties can provide for a reasonable liquidated damages provision that reflects likely damages. Under subsection (d), breach of promises of at-will employment (where backed by promissory estoppel) receive only narrow reliance damages (e.g., relocations expenses); breach of promises of employment terminable only for a cause (where backed by promissory estoppel) are treated the same as agreements under § 2.03.

Employees bringing actions for employer breach of tort-based duties can seek to recover, to the extent provided by law, reasonably certain future economic loss, less mitigation through alternative employment (§ 9.05(b)).

Under Part 2, contract claims for damages against employees are available only for actionable obligations, including actionable common-law obligations, in the employment agreement. Actionable obligations are those obligations of employees the parties reasonably expect can result in liability for tort damages. The parties can alter the rule of § 9.08 in their agreement. Under § 9.09, tort claims for damages against employees are limited to tort-based duties, as in the case of such claims against employers. The full range of remedies for proven losses is recognized in § 9.09(b). Under § 9.09(c), the employer has the alternative of denying compensation owed (and regaining compensation paid) a disloyal employee but only where the disloyalty is pervasive and cannot be apportioned to specific tasks of employment, and the nature of the disloyalty renders it infeasible to reasonably calculate harm caused the employer. Injunctions sought by employers are recognized for obligations enforceable under Chapter 8 and where the traditional requirements for injunctive relief are satisfied.

TABLE OF CONTENTS

Section *Page*

Reporters' Memorandum…….. xi
Projected Overall Table of Contents……...…….xvii

CHAPTER 4
PRINCIPLES OF EMPLOYER LIABILITY FOR HARM TO EMPLOYEES

Introductory Note 1
§ 4.01. Principles of Employer's Liability to Employees Generally 2
§ 4.02. Employer's Liability to Employees for Acts of Agents 9
§ 4.03. Employer's Duty to Exercise Care in Selecting, Retaining, and Supervising Agents and Employees 23
§ 4.04. Employer's Duty to Provide Safe Conditions and to Warn of Risk 32
§ 4.05. Employer's Liability for Intentional Torts Committed Against Employees 42

CHAPTER 7
EMPLOYEE PRIVACY AND AUTONOMY

Introductory Note 57

TOPIC 2
PROTECTION OF EMPLOYEE PERSONAL AUTONOMY

§ 7.08. Employee Personal Autonomy Interests.....58
§ 7.09. Liability for Intrusions on Employee Autonomy 62

CHAPTER 9
REMEDIES

Introductory Note 67

PART 1
CLAIMS AGAINST EMPLOYERS
A. CONTRACT

§ 9.01. Damages – Employer Breach of an Agreement for a Definite or Indefinite Term or of an Employer Promise 68
§ 9.02. Damages – Employer Breach of Binding Policy Statement 71

§ 9.03. Damages – Employer Breach Other than Termination of Employment.....71
§ 9.04. Injunctive Relief.....72

B. TORT

§ 9.05. Damages – Employer Breach of Tort-Based Duty 74
§ 9.06. Injunctive Relief – Employer Breach of Tort Duty 77

PART 2. CLAIMS AGAINST EMPLOYEES

§ 9.07. Damages – Employee Breach of Agreement.....78
§ 9.08. Injunctive Relief – Employee Breach of Agreement.....80
§ 9.09. Damages – Employee Breach of Tort-Based Duty 80
§ 9.10. Injunctive Relief – Employee Breach of Tort-Based Duty.....83

Appendix. Black Letter of Preliminary Draft No. 9 85

RESTATEMENT OF THE LAW THIRD, EMPLOYMENT LAW
PROJECTED OVERALL TABLE OF CONTENTS

Ch. 1 Existence of an Employment Relationship (MCH)

Ch. 2 Employment Contracts: Termination (SE)

Ch. 3 Employment Contracts: Compensation and Benefits (SE)

Ch. 4 Principles of Employer Liability for Harm to Employees (MCH)

Ch. 5 Tort of Wrongful Discipline in Violation of Public Policy (SJS)

Ch. 6 Other Torts Affecting the Formation or Continuation of the Employment Relationship (MCH)

Ch. 7 Employee Privacy and Autonomy (MTB)

Ch. 8 Employee Obligations and Restrictive Covenants (SJS)

Ch. 9 Remedies (SE)

CHAPTER 4

PRINCIPLES OF EMPLOYER LIABILITY FOR HARM TO EMPLOYEES

Introductory Note: The primary purpose of this Chapter is to state the principles governing employer liability for torts committed on employees. The liability principles stated in this Chapter are derived from and are consistent with the law of agency, as set forth in the Restatement Third of Agency. The principles of employer responsibility for the tortious acts of agents and employees stated in §§ 4.01 and 4.02 are especially important because most employers are corporations, or other legal entities, that act through human agents. Sections 4.03 and 4.04 in turn address additional bases for employer liability for harms to employees arising from the employment relationship.

The liability principles stated in this Chapter apply to the torts considered in Chapter 5 on wrongful discipline in violation of public policy, Chapter 6 on defamation, interference with contractual relations, and fraudulent or negligent misrepresentation, and Chapter 7 on invasion of privacy. They also apply to other workplace torts, including the intentional torts treated in § 4.05.

The tort law liability principles set forth in this Chapter are qualified by workers' compensation laws in all American jurisdictions. These laws provide an exclusive basis for an employer's liability to its employees for many harms, especially of a physical nature, that arise out of the employment relationship. Thus, employees cannot recover from their employers in a common law action for injuries that are compensable exclusively through a workers' compensation remedy.

§ 4.01. Principles of Employer's Liability to Employees Generally

Unless otherwise provided by a workers' compensation law or by other law, an employer is subject to liability to the employer's employee for harm caused by

(a) the employment-related wrongful conduct of the employer;

(b) the employment-related wrongful conduct of the employer's agents, as set forth in § 4.02; or

(c) the employer's failure to perform a tort-based, employment-related duty, including those set forth in §§ 4.03 and 4.04.

Comment:

a. Workers' compensation law or other law. The exclusivity provision of a state worker's compensation law may preclude any one of the common law rights of action treated in this Chapter against the employer, its employees, or its other agents for harm compensable by such law. But workers' compensation laws, by and large, are limited in scope; hence, there will be employers and employees or kinds of injuries in every jurisdiction that are not covered by those laws.

The workers' compensation laws of some states exempt from coverage employers who employ one or a few employees. Some states exempt agricultural workers or make the coverage of such workers elective by their employers. A few states exclude domestic workers and others cover only employers who elect to be covered.

In addition, not all workplace injuries to employees are covered by workers' compensation laws. Workers' compensation laws generally cover only physical injuries. The exclusivity provisions of the workers' compensation laws thus generally do not extend to actions for wrongful discharge or discipline in violation of public policy covered in Chapter 5 of this Restatement, actions for defamation or for the other torts covered in Chapter 6, or for the invasion of privacy tort covered in Chapter 6. Whether workers' compensation laws exclude common law actions for the intentional infliction of emotional distress is treated in Comment *d* to § 4.05.

In addition to workers' compensation laws, other state laws, such as laws prohibiting certain forms of employment discrimination, may provide exclusive remedies for particular kinds of injuries that would otherwise be remedial through state common

law tort actions. Also, particular federal statutes, including federal labor laws, may preempt state law actions that would conflict in substance or in reach with the federal regulatory scheme.

b."Employment-related" conduct. This Chapter deals only with the employment-related conduct of the employer, its employees, or its other agents. Such conduct must occur on the employer's premises; or if off-site, be engaged in for the benefit of the employer, or in activity incidental thereto.

Illustration:

1. Y, a controlling owner of PC, a professional corporation, while on vacation, drives through a red light, striking and injuring N while she is crossing a public street. N is a nurse employed by PC. PC is not subject to liability to N for the negligent driving of Y under this Chapter, as Y's negligence was not related in any way to N's employment by PC.

c. Employer liability for employer's own conduct. While most employment relationships are between employees and a legal entity, such as a corporation, that acts through human agents, there are also r employment relationships between employees and individuals or partners. Such employers are subject to direct liability for their wrongful acts that harm their employees. This liability is subject to the exclusivity provision of an applicable workers' compensation law, as well as to possible preclusion by other laws.

Illustration:

2. C operates a small unincorporated construction business, employing several workers including E. E returns to work after suffering a back injury that limits his ability to lift heavy objects. C, frustrated with these limits, criticizes E's work and provokes an argument. After the argument C pushes E from behind and substantially aggravates E's back injury. C is subject to liability to E for the tort of battery.

d. Employer liability for a controlling owner's conduct. A legal employing entity, such as a corporation, also is subject to liability for the employment-related wrongful acts of individuals who as owners control the employing entity (see §1.03). Such controlling owners are treated on the same basis as individuals and partners who act as employers for purposes of employer liability. Employment-related wrongful acts of controlling owners may subject the employing entity to liability regardless of whether the wrongful acts, such as assault or harassment, were authorized or ratified by the legal entity or were committed within the scope of the controlling owners' service to the entity.

Illustrations:

3. Same facts as Illustration 2 except that C had incorporated the construction business before the battery on E. The corporation, as well as C, is subject to liability to E for the battery.

4. O, an older physician, decides to sell half of her practice to a younger physician, Y. O and Y form a professional corporation, PC, owned equally by each, to carry on the practice. Without the knowledge of O, Y repeatedly makes unwanted aggressive sexual overtures toward N, a nurse who regularly assists Y and is employed by PC. Some of the overtures are physical and hostile and many cause N severe emotional distress.

PC is subject to liability to N for any actionable torts committed by Y through his sexual harassment of N. Y's harassment of N was not authorized or ratified by PC and was not intended to serve the interests of PC. As a controlling owner of PC, however, Y was N's employer and the harassment occurred during and was related to PC's employment of N.

e. Employer liability for conduct of agents. An employer also may be liable for harm caused employees by the wrongful conduct of the employer's agents and employees. In most businesses of any significant size, especially publicly-held corporations, operations are carried on by the employer's agents and employees, not by the owners of the businesses. The principles governing the liability of employers to employees for the conduct of the employers' agents are set forth in § 4.02.

f. Employer liability for failure to perform tort-based legal duty. Both the common law and a range of federal and state statutes impose on employers duties toward employees. These duties can be breached not only by wrongful conduct, but also by an employer's failure to act to discharge the duty. These duties are not subject to delegation and cannot be waived by agents or employees. Sections 4.03 and 4.04 set forth tort-based common law duties of employers toward employees. Statutes that establish additional duties often provide their own remedial scheme for violations of such laws.

REPORTERS' NOTES

Comment a. Every American jurisdiction has a workers' compensation law, and in each the law's remedies for covered injuries are exclusive of other remedies against the employer or insurance carrier for the same injuries. See Larson's Workers' Compensation Law, Vol. 6, § 100.01. About a fourth of the jurisdictions exempt from coverage employers who employ only one or fewer than three, four, or five employees. K., Larson's Workers' Compensation Table 2 App A-8 (Matthew Bender, Rev. Ed.) More than half of the jurisdictions limit the coverage of some agricultural employees, and as many as eleven permit agricultural employers to decide whether to be covered. K., Larson's Workers' Compensation Table 3 App A-11 (Matthew Bender, Rev. Ed.) About half of the jurisdictions also permit employers to decide whether to cover domestic employees, a few specifically exclude all domestic employees, and others cover such employees under specified conditions. K., Larson's Workers' Compensation Table 4 App. A-19-21(Matthew Bender, Rev. Ed.) In Texas all employers can elect whether or not to have their employees covered by the state's workers' compensation system. Tex. Labor. Code. Ann. §406.002.

Workers' compensation laws generally do not provide remedies for the non-physical economic, dignitary, or emotional injuries that may be remedied by the range of actions covered by Chapter 5 (wrongful discharge), Chapter 6 (defamation, intentional interference with contractual relations, fraud), and Chapter 7 (invasion of privacy) of this Restatement. See, e.g., Foley v. Polaroid Co., 381 Mass. 545, 550, 413 N.E.2d 711, 715 (1980) (the Massachusetts workers compensation act encompasses "physical and mental injuries arising out of employment, whereas the gist of an action for defamation is injury to reputation, irrespective of any physical or mental harm"). Claims for the intentional infliction of emotional distress that are not derivative of physical injuries also are not barred by workers compensation in many jurisdictions. See, e.g., Sisco v. Fabrication Technologies, Inc., 350 F.Supp. 2d 932, 941-42 (D. Wyo. 2004) (applying Wyoming law to claims of emotional distress deriving from sexual harassment from supervisors); Kerans v. Porter Paint Co., 61 Ohio St.3d 486, 489, 575 N.E.2d 428, 431 (1991) (Ohio's workers' compensation law does not provide exclusive remedy for victims of workplace harassment because "psychological disturbances arising solely from emotional stress" do not fit within act's definition of injury). But see, e.g., Green v. Wyman-Gordon Co., 442 Mass. 551, 559 (1996) (since mental harm is compensable under Massachusetts workers' compensation law, claim for intentional infliction of emotional distress is barred). For further treatment, see the Reporters' Notes to comment d. to § 4.05.

Most workers' compensation laws limit compensable injuries to those "arising out of and in the course of employment." See Larson's Workers' Compensation Law, Volume 1A § 29.00. The courts' interpretations of these words vary somewhat by jurisdiction. Id. Generally, however, "arising out of" refers to the "origin or cause of the accident," while "in the course of" refers to the "time, place, and circumstances under which the accident occurs." See Strother v. Morrison Cafeteria, 383 So.2d 623, 624 (Fl. S. Ct. 1980). In accord with the suggestion of the Larson treatise and other jurisdictions, the court in *Strother* interpreted "arising" to modify "in the course of" as well as "out of" to ensure coverage of injuries whose "originating cause" "occurred during working hours and on the employment premises." Id. at 626. See also, e.g., Bender v. Dakota Resorts Mgt. Group, Inc., 700 N.W.2d 739, 742 (S.D. 2005) (employee who operated ski lift could recover under workers' compensation for injury sustained while skiing on

break); Graybeal v. Bd. of Sup'rs of Montgomery County, 216 S.E.2d 52, 53-54 (Va. 1975) (finding compensable county prosecutor's injuries sustained due to a bomb explosion at his home because bomb was set off by an individual the prosecutor had tried in the course of his employment).

Based on language like that interpreted in *Strother*, some courts have held injuries deriving from sexual and other forms of discriminatory harassment not to be covered by workers' compensation remedies because such harassment does not arise out of employment disputes, but is rather motivated by personal feelings or animosity. See, e.g., Horodyskyj v. Karanian, 32 P.3d 470, 474 (Colo. S. Ct. 2001) ("in the usual case, injuries resulting from workplace sexual harassment do not arise out of an employee's employment for purposes of the Workers' Compensation Act" of Colorado); King v. Consolidated Freightways Corp., 763 F. Supp. 1014, 1017 (W.D. Ark. 1991) (sexual harassment not covered by Arkansas workers' compensation law because not a risk to which employee is exposed because of nature of employment); Byrd v. Richardson-Greenshields Securities, Inc. 552 So.2d 1099 n.7 (1989) (sexual harassment does not fall within scope of Florida's workers' compensation act as interpreted in *Strother* in part because it does not "arise out of employment"); Hogan v. Forsyth Country Club. Co., 79 N.C. App. 483, 489, 340 S.E.2d 116, 120 (injuries from sexual harassment do not arise out of employment and are not compensable under workers' compensation act). But see, e.g., Konstantopoulos v. Westvaco Corp., 690 A.2d 936, 937 (S. Ct. Del. 1996) (Delaware workers' compensation act "precludes an employee from asserting a common law tort claim against her employer for … sexual harassment on the job by fellow employees," even when employee was not physically injured); Doe v. Purity Supreme, Inc., 422 Mass. 563, 566, 664 N.E.2d 815, 819 (1996) (workers' compensation act bars claim against employer for sexual assault occurring at the workplace). For further treatment, see the Reporters Notes to comment d. to § 4.05.

The absence of a workers' compensation remedy for a work place injury, such as those deriving from discriminatory harassment, of course does not necessarily result in employer liability for that injury under the principles of § 4.02. For instance, if an injury is not compensable through a workers' compensation remedy because the injuring conduct was personally motivated and thus did not arise out of employment, it was not within the scope of employment and thus cannot be the basis for vicarious employer liability. See, e.g., Chambers v. Amick 1987 U.S. Dist. LEXIS 5197 (N.D. Ala. 1987) (no assault and battery action based on vicarious liability for sexual harassment). But see Butler v. Southern States Cooperative Inc., 270 Va. 459, 466, 620 S.E.2d 768, 772 (2005) (employer could be vicariously liable for employee's sexual assault on co-employee because it was "in course of employment", but no workers' compensation bar because it did not "arise out of employment").

In any event, there are other possible bases for employer common law liability for work place injuries that are not remedial by a workers' compensation law because the injuries do not arise out of the employment relationship. These include the principles set forth in § 4.03, and in § 4.02(c).

Furthermore, in many jurisdictions the workers' compensation exclusivity principle does not apply even to physical injuries arising from the employment relationship if the injuries were caused by the intentional acts of employers, employers' alter egos, or employers' authorized agents. See, e.g., Quebedeaux v. Dow Chemical Co., 820 So.2d 542, 546 (2002) (applying LSA-R.S. 23:1032(B)); Baker v. Westinghouse Electric Corp., 637 N.E.2d 1271 (Ind. S. Ct. 1994) (employers' intentional torts are not included within Indiana act's coverage, but intent must come from employer directly or through authorization); Meerbrey v. Marshall Field & Co., Inc., 564 N.E.2d 1222, 1226 (Ill. 1990) ("exclusivity provision will not bar a common law cause of action against an employer, however, for injuries which the employer or its alter ego intentionally inflicts upon an employee or which were commanded or expressly authorized by the employer").

Section 301 of the Labor Management Relations Act provides federal courts with jurisdiction to develop federal law governing the interpretation of collective bargaining agreements. See Textile Workers v. Lincoln Mills, 353 U.S. 448, 451 (1957). Since this law preempts any inconsistent state law, the Court has held that any state actions that are dependent upon an interpretation of a collective bargaining agreement must be precluded. See Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 406 (1988); Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 212 (1985). Section 301 thus precludes a range of state common law tort-based as well as contract-based actions against employers by employees covered by collective bargaining agreements. Compare, e.g., Retherford v. AT & T Communications of Mountain States, Inc., 844 P.2d 949, 972 (Utah S. Ct. 1992) (claims for intentional infliction of emotional distress preempted by § 301 of LMRA to the extent they require determination of employer's authority under collective bargaining agreement), with Blankenship v. Bridgestone Americas Holding, Inc., 467 F. Supp. 2d 886, 896-897 (C.D. Ill. 2006) (no preemption of fraudulent concealment and battery claims that are

independent of terms of collective bargaining agreement). See also, e.g., Briggs v. General Motors Corp., 754 F.Supp. 107, 109 (W.D. Mich. 190) (§ 301 preempts intentional interference with contractual relations claim, but not independent assault and battery and intentional infliction of emotional distress claims)

State statutory and common law remedies against discrimination prohibited by federal anti-discrimination laws are not preempted by the federal laws. See generally California Federal Savs. and Loan Ass'n. v. Guerra, 479 U.S. 272, 284-85 (1987) (confirming Title VII of the 1964 Civil Rights Act preempts only state laws that directly conflict with the federal law's prohibition of discrimination). State anti-discrimination laws, however, may preclude additional common law actions. See, e.g., Burns v. Winroc, 565 F.Supp.2d 1056, 1068 (D.Minn. 2008) (Minnesota Human Rights Act preempts common law claims based on employer's duty to address discrimination proscribed under the Act); Greenland v. Fairtron Corp., 500 N.W.2d 36, 38-39 (S.Ct. Ia. 1993) (Iowa employment discrimination statue provides exclusive remedies for any claim requiring proof of discrimination, as for infliction of intentional distress in this case, but discrimination was not an element of assault and battery action for sexual harassment); Preston v. City of Danville, 2000 U.S. Dist. LEXIS 20565 (E.D. Ken. 2000) (Kentucky actions for emotional distress and wrongful discharge not available when remedies for same wrongs are available under anti-discrimination laws).

Other state laws providing employees a remedy for particular kinds of injuries also may preclude additional common law remedies for the same injuries. See, e.g., Indiana Occupational Diseases Act., Ind. Code Ann. § 22-3-7-6 (West. 1991) (provides exclusive recovery for occupational diseases arising out of employment).

Comment c. An individual's status as an employer of course does not absolve that individual of the general duties toward the individual's employees imposed by tort law. Workers' compensation laws, however, generally provide exclusive remedies for physical injuries caused by employment-related unintentional torts committed even by unincorporated employers on their employees. See, e.g., Hillman v. McCaughtrey, 56 Ohio App. 3d 100, 101, 564 N.E.2d 1123, 1125 (1989); Wilkinson v. Achber, 101 N.H. 7, 9, 131 A.2d 51, 53 (1957). In some jurisdictions, the workers' compensation law also provides an exclusive remedy even for employment-related intentional torts. See, e.g., Searway v. Rainey, 1998 Me. 86, 87, 709 A.2d 735, 736 (S.J. Ct. of Me. 1998); Diaz v. Darmet Corp., 694 A.2d 736, 737 (R.I. 1997); Miller v. CBC Cos., 908 F.Supp. 1054, 1068 (D. N.H. 1995); Baldwin v. Roberts, 212 Ga. App. 546, 547 442 S.E.2d 272, 274 (1994).

The workers' compensation laws of many jurisdictions, however, do not provide an exclusive remedy for intentional torts committed by employers, see, e.g., Idaho Code, § 72-209(3) (2011); La. Rev. Stat. Ann. § 23:1032 (2011); Md. Code Ann., Lab & Empl. § 9-509(d) (West 2011); Rafferty v. Hartman Walsh Painting Co., 760 A.2d 157, 159 (Del. 2000); Williams v. Mammoth of Alaska, 890 P.2d 581, 585 (Alaska 1995); Gonzales v. Alman Constr. Co., 857 S.W.2d 42, 46 (Tenn. Ct. App. 1993); see generally Larson's Workers Compensation Law, Vol. 6, § 103 at fn. 4-6.

Illustration 2 is based on Kennedy v. Parrino, 555 So.2d 990 (La. Ct. App. 1989). For another example of an unincorporated employer's direct liability for an intentional tort on his employee, see Sutzman v. Shumaker, 221 Mont. 304, 718 P.2d 657 (1986) (rancher is liable for assault and battery on his employee with a pipe).

Comment d. Workers' compensation laws that allow common law actions against employers for their intentional torts also normally allow such suits against employers based on the intentional torts of their controlling owners, who are termed "alter egos" of the legal entities they control. See Larson's Workers Compensation Law, Vol. 6, § 103 and cases cited therein. See also cases cited below.

Illustration 4, for instance, is based on Sutton v. Overcash, 251 Ill. App. 3d 737, 623 N.E.2d 820 (1993). The court in *Sutton* found the harassment victim not to be limited to a workers' compensation remedy because the harassing owner was an alter ego of the employer. The owner's harassment thus could subject the employer to tort liability even though it was not authorized by the employer or within the scope of the harasser's employment. See also, e.g., Randall v. Tod-Nik Audiology, Inc., 270 A.D.2d 38, 39 704 N.Y.S.2d 228, 230 (Sup. Ct. App. Div. 1st Dept. 2000) (claims for sexual assault, battery, and intentional infliction of emotional distress may proceed against corporate employer when committed by possible "proxy" who was President and 50% owner along with wife who owned other 50%); Cox v. Simeon, 668 So.2d 706, 707 (Fla Dist. Ct. App. 1996) (workers' compensation exclusivity may not apply because manager and part owner of video store may have been alter ego of employer); Woodson v. Rowland, 329 N.C. 330, 337, 407 S.E.2d 222, 226 (N.C. S. Ct. 1991) (conduct of employer's chief executive and sole shareholder that is "tantamount to an intentional tort" can subject employer to liability); Magiliulo v.

Superior Court, 47 Cal. App. 3d 760, 778, 121 Cal. Rptr. 621, 635 (Cal. Ct. App. 1975) (workers' compensation remedy not exclusive of tort claim where assaulter of injured employee was co-owner and partner).

Generally, courts have not treated managers or corporate officers as alter egos or proxies of the corporation without those managers also being controlling owners. See, e.g., Eichstadt v. Frisch's Restaurants, Inc., 879 N.E.2d 1207, 1211 (Ind. Ct. App. 2008) (employee must show that both ownership and control of the corporation are in the hands of the tortfeasor); McClain v. Pactiv Corp., 360 S.C. 480, 484 602 S.E.2d 87, 89 (2004) (managers who were not "dominant" corporate owners or officers are not alter egos of corporate employer); Benson v. Goble, 593 N.W.2d 402, 406 (S.D. 1999) (to qualify as alter ego, employee must be "so dominant in the corporation that he could be deemed" to be the employer under the general standard for disregarding corporate entity); Martin-Martinez v. 6001, Inc., 126 N.M. 319, 324, 968 P.2d 1182, 1187 (1998) (non-shareholder manager of a night club who assaulted dancer-employee was not alter ego); Coble v. Joseph Motors, Inc., 695 N.E.2d 129, 135 (Ind. App. 1998) ('[t]o prevail on the alter ego theory, the employee must show that both ownership and control of the corporation are in the tortfeasor's hand"); Baker v. Westinghouse Elec. Corp., 637 N.E.2d 1271, 1275 (Ind. 1994) ("it must be the employer who harbors the intent and not merely a supervisor, manager, or foreman"); Peterson v. Rtm Mid-America, Inc., 209 Ga. App. 691, 694, 434 S.E.2d 521, 525 (1993) (manager of restaurant not an alter ego because not in a position of ownership or control); Daniels v. Swofford, 286 S.E.2d 582, 561 (N.C. App. 1982) (company president who kicked employee in leg not an alter ego); Continental Casualty Co. v. Mirabile, 52 Md. App. 387, 395, 449 A.2d 1176, 1182 (1982) (managerial-supervisory position not sufficient for alter ego status); Jett v. Dunlap, 179 Conn. 215, 219, 425 A.2d 1263, 1265 (1979) (to be alter ago, tortfeasor must be deemed "the alter ego of the corporation under the standards governing disregard of the corporate entity"). See also Allen v. McPhee, 240 S.W.3d 803, 818 (Tenn. S. Ct. 2007) (President of University not an alter ego of employer for purposes of imposing liability for sexual harassment under state anti-discrimination law).

Some Title VII courts have taken a broader view of the alter ego concept in order to hold employers liable for corporate officers' sexual harassment of subordinate employees. See, e.g., Johnson v. West, 218 F.3d 725, 730 (7th Cir. 2000) (dicta in Title VII case stating that "the following officials may be treated as an employer's proxy: a president, owner, proprietor, partner, corporate officer, or supervisor" if they hold "a sufficiently high position in the management hierarchy of the company for their actions to be imputed automatically to the employer"); Ackel v. Nat'l Communications, Inc., 339 F.3d 1224, 1232-33 (5th Cir. 2003) (for purposes of employer liability under Title VII President and Board member could be "proxy" of corporation without owning stock); Haught v. The Louis Berkman, LLC, 377 F.Supp.2d 543, 555 (N.D. W.Va. 2005) (Title VII case holding that harasser's "position as president of the company made him the defendant's proxy and, therefore, his actions can be directly imputed to the defendant"). These cases, however, can be better explained as a broad interpretation of Supreme Court-created doctrine governing Title VII. See the Reporters' Notes to *comment d.* of § 4.02.

The standard for determining corporate liability for the acts of controlling owners taken outside the scope of their duties to the corporation need not be identical to that for determining the limits on workers' compensation exclusivity. Usually when courts have treated non-controlling owners as alter egos, the torts were committed within the scope of employment, or even authorized as corporate acts, and thus would have imposed liability on the employer through other doctrine once the workers' compensation exclusivity barrier was cleared. See, e.g., Toothman v. Hardee's Food Systems, Inc., 304 Ill. App. 3d 521, 529, 710 N.E.2d 880, 886 (1991) (store manager with delegated discretion to restrain employees suspected of theft treated as alter ago of corporation).

§ 4.02. Employer's Liability to Employees for Acts of Agents

Unless otherwise provided by a workers' compensation law or by other law, an employer is subject to liability to the employer's employee for harm caused by

(a) the employment-related wrongful conduct of an agent to whom the employer has delegated general or particular authority to act for the employer and for such conduct ratified by the employer;

(b) the employment-related wrongful conduct of an employee of the employer that was undertaken within the scope of that employee's employment; or

(c) to the extent provided by applicable law, the employment-related wrongful conduct of an employee that is not within the scope of that employee's employment, if that employee has the authority to direct, reward, or discipline the harmed employee, unless the employer can demonstrate that

(1) it took reasonable steps to prevent and promptly remedy any such wrongful conduct, and

(2) the wrongful conduct could have been avoided had the employee not unreasonably failed either

(i) to take advantage of any preventive or corrective opportunities provided by the employer, or

(ii) otherwise to avoid the harm.

Comment:

a. Workers' compensation law or other law. See Comment *a*, § 4.01.

b. "Employment-related" conduct. See Comment *b*, § 4.01.

c. Liability through authorized conduct of employees or other agents. An individual employer or a controlling owner of a legal-entity employer can authorize an agent to act for the employer. A a legal entity also can authorize agents to act for the entity, and to delegate to other agents all or some of their authority to act for the employer.

An employer, like any other principal, can delegate authority by authorizing particular acts, like the hiring or discharge of a particular employee, or it can delegate general authority to take particular kinds of actions, such as the hiring or discharging of employees, in behalf of the employer.

Under the general law of agency, an employer as a principal is subject to liability for harm caused by the wrongful acts of its agent where the employer has authorized those acts.. An employer, whatever its organizational form or size, gains benefit from the delegation of authority to agents and can monitor the exercise of that authority. The employer therefore bears responsibility for an agent's exercise of delegated authority.

An employer's liability for authorized acts does not depend on the employer authorizing or ratifying an agent's wrongful motivation for the actions. Thus, an employer is liable for an authorized agent's wrongful discriminatory or retaliatory discharge of an employee if the agent had authority to impose the discharge, regardless of whether the employer maintained policies and practices seeking to curb such discrimination or retaliation.

Illustrations:

1. P, a lumber company, hires A, a security guard service business, to provide security around its lumber yard. O, the controlling owner and chief executive of P, discharges E after an argument about missing lumber and directs A to have A's guards remove E physically from P's property. O knows that E is recovering from an injury that physical removal might aggravate. The guards aggravate E's injury by physically removing him from the lumber yard.

O, and O's controlling owner, P, are subject to liability to E for authorizing the guards' removal of E. The guards, though not the employees of P, but only of A, acted as P's authorized agents. The fact that neither A nor its guards knew of E's condition is not relevant to O's or P's liability.

2. Same facts as Illustration 1 except that O does not tell A to physically remove E. Instead, F, one of A's employees, after she hears O discharging E, acts on her own initiative in removing E from P's property. P is not subject to liability to E for the guard's actions. P did not authorize the physical removal of E, either by granting F the general authority to physically remove discharged employees or by directing the physical removal of E in particular. A may be subject to liability to E as an employer of the guard acting within the scope of her employment.

3. P, a large incorporated retailer, delegates authority to the managers of each of its stores to hire and fire sales clerks. M, a manager of one of its stores, discharges E, a sales clerk at the store, only because E refuses M's demands that she engage in sexual acts with M. P has clear policies against sexual discrimination and sexual harassment and no other supervisor or manager of P is aware of M's demands on E or M's motivation for firing E. Applicable law prohibits employment discrimination on the basis of sex and has been interpreted to cover discrimination against employees who refuse a supervisor's sexual demands.

P may be subject to liability under these antidiscrimination laws for M's termination of E. M's discriminatory motivation may be imputed to P because P granted M authority to discharge employees from P's employ.

4. E is an executive vice president and special assistant to the President of P, a paper company. E has worked as an executive at P for ten years and in the industry as an executive for thirty years. After P hires M as P's new president, M transfers E to a position as the manager of P's warehouse. The transfer involves a substantial reduction of responsibilities and pay. M's motivation for the transfer is to obtain a new, younger special assistant. M does not discharge E because he fears a lawsuit. P has a longstanding policy against age discrimination. Applicable law prohibits employment discrimination on account of age.

P may be subject to liability to E. As President of P, M had authority to reassign E and P is responsible for M's exercise of this authority irrespective of any violation by M of the company policy against age discrimination.

d. Liability through employer's ratification of the conduct of the employee or other agent. Under the law of agency, an employer also may be subject to liability if the employer or an agent with actual authority later ratifies a harmful act that an agent without authority to so act purported to take on the employer's behalf. Sections 4.01 and 4.03 of the Restatement Third of Agency, however, state that there can be ratification of an actor's tortious conduct only "if the actor acted or purported to act as an agent" of the

ratifying principal. Thus, an employer's failure to discipline or otherwise attempt to control a tortfeasor-employee cannot constitute ratification of the torts unless the employee purports to be acting on behalf of the employer when committing the torts.

Illustration:

5. M, E, and F are employees of P. M is E's and F's superior. M is also the general manager of the facility in which E and F work. M has authority to discipline employees in this facility for P. F subjects E to numerous aggressive unwanted verbal and physical sexual advances. These advances disrupt E's work and cause her severe emotional harm. E reports all of this to M. M tells E that F's actions are contrary to company policies against harassment and that M will address the problem. M fails to take adequate corrective action.

Neither M nor P are subject to liability to E for F's conduct. M has not ratified F's conduct on behalf of P. F did not purport to be acting as an agent of P when engaging in the harassment of E. On whether P may be subject to liability for negligent supervision of F, see § 4.03.

e. Liability through employee or other agent's conduct within scope of employment. Under the general law of agency, an employer may be liable for unauthorized and unratified acts of its employees if those acts are taken as part of or incident to work assigned by the employer or subject to the employer's control. Such acts are said to be within the scope of employment and the liability is said to be "vicarious" or based on "*respondeat superior*." Section 7.07 of the Restatement Third of Agency states that an "employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer." Thus, an employee's tortious acts while at work, whether intentional or negligent, may be within the scope of employment even if contrary to express employer instructions to not engage in those acts -- so long as the employee is not engaged in independent conduct not intended to serve the purposes of the employer.

Just as an employer gains benefit from and can monitor the delegation of authority to agents, so does an employer have the opportunity both to gain benefits from

and also monitor employees acting incident to assigned work or within the employer's control, rather than in an independent course of conduct not intended to benefit the employer. The employer therefore bears responsibility for harm caused by acts within the scope of employment.

Illustrations:

6. P employs S as a supervisor in a supply warehouse. S regularly yells screams, and uses curse words when giving work-related directions to his subordinates E, F, G, and H at the warehouse. S also regularly yells and curses and uses vulgar insults when evaluating the work of these subordinates. To express his displeasure with his subordinates' work, S charges at them with his head down and his fists clenched, and threatens them with violence. S uses this conduct to motivate his subordinates to work harder. P's managers have told S not to curse and threaten his subordinates.

If S's behavior is tortious under applicable law, P may be subject to liability to E, F, G, and H. P did not direct or otherwise authorize S to yell, curse, insult, and threaten S's subordinates. P, however, did assign S the work of supervising these workers and S's behavior was part of this work and undertaken at least in part to serve the interests of P in having the warehouse operations supervised.

7. E is employed as a sales clerk at P, a department store. F, another sales clerk, thought he saw E take some jewelry merchandise from a case and put it in E's purse. F informs the store manager, M, who calls E into M's office with the store detective, D. While D stands against the door out of M's office, M tells E that she will have to stay in his office until she signs a confession for stealing the jewelry, although he cannot find any in her purse. P has not authorized M or D to prevent employees from leaving the store.

P may be subject to liability to E for the acts of M and N if those acts are tortious under applicable law. Although P did not authorize M and N to hold E against her will in M's office, M and N were acting incident to their employment by P as store manager and store detective.

8. P employs A, B, C, and D as workers on an oil rig. A, B, and C dislike D because of D's eccentric personality and interests. For fun and because of their animosity toward D, A, B, and C repeatedly assault and threaten D. Doing so causes D severe emotional harm.

A, B, and C's conduct, whether or not tortious under applicable law, was not within the scope of their employment and thus does not subject P to vicarious liability. A, B, and C engaged in an independent course of conduct not intended to serve any interest of P.

9. P employs A and B. A, holding a grudge against B, falsely reports to P's managers that B sexually assaulted her on a business trip. A's defamation of B was an independent course of conduct not intended to serve the employer and thus was not within the scope of A's employment.

f. Liability for supervisors' misuse of power outside scope of employment. Particular statutory schemes may impose liability on employers for misconduct by supervisory employees even when they are acting beyond the scope of their authority. The Supreme Court in Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775 (1998), interpreted the federal antidiscrimination laws to impose under certain circumstances employer vicarious employer liability for the wrongful acts of supervisors committed outside the scope of their authority. The Court held that employers are subject to liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), for their supervisors' discriminatory harassment of subordinate employees unless the employers can demonstrate: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Subsection 4.02(c) recognizes this alternative basis for employer liability under particular antidiscrimination laws for the wrongful misuse of supervisory power whether or not within the scope of employment.

Illustrations:

10. P employs E as a salesperson and M as a sales manager. M directs and evaluates E's work. M extends numerous sexual propositions to E and tells E that if she does not "loosen up" and "play nice" with him, he will see that she is fired. E asks M to stop, but M continues to make physical and coarse verbal advances. M also treats E rudely and continues to threaten her with unfavorable evaluations. P has a formal policy against sexual discrimination and harassment at the workplace, but P does not offer its employees any way to report harassment except by complaining to their supervisor. M's superiors never learn of M's harassment of E before E resigns her position with P because of M's misconduct.

P is subject to liability to E for M's conduct, if actionable sexual harassment of E. M did not discharge or take any other action against E that was authorized or ratified by P. M's harassment of E was outside his scope of employment as it was not undertaken in service of P. M, however, did use his power as E's supervisor to subject E to verbal and physical advances and to threaten E with adverse personnel action if E did not submit to those advances. P did not have a reasonable policy to prevent E's harassment because E had to report initially through her supervisor-harasser, M.

11. Same facts as Illustration 10 except that P designates a corporate officer to hear complaints of supervisory harassment. P also conducts seminars at which it explains both how it will protect from retaliation employees who report supervisory harassment. . E does not report M's harassment before resigning.

P is not subject to liability for M's harassment of E. P took reasonable steps to prevent the harassment and E failed to take advantage of P's reasonable prevention scheme.

12. Same facts as Illustration 11 except that the harasser is F, not E's supervisor, but only another salesperson in the same office as E. F makes coarse verbal and physical advances toward E both inside and outside the office. Neither F's supervisor or any other manager of P knew, or should have known, of F's harassment of E.

P is not subject to liability for F's harassment of E. F's harassment of E was not within F's scope of employment. F as a co-worker did not have delegated power to direct, reward or discipline E. E could have reported on F without fear that F would retaliate against her as her supervisor.

g. Fellow servant rule not applicable. The fellow servant rule or doctrine was an exception to employer vicarious liability to employees for the negligent acts of fellow employees within the scope of their common employment. The rule was first formulated in the nineteenth century during a period of rapid industrial development. Employees were said to have assumed the risk of the negligence of their fellow employees. The rule's importance was eclipsed by the passage of workers' compensation statutes in all jurisdictions, however, as it provides no defense for recovery of benefits under these statutes. A majority of modern decisions that have considered the continuing viability of the doctrine for common law actions by employees not covered by workers' compensation statutes have found the doctrine to be inconsistent with applicable principles of enterprise liability.

REPORTERS' NOTES

Comment c. As stated in the Restatement Third of Agency, § 7.04, comment b.: "an agent acts with actual authority when the agent reasonably believes, on the basis of a manifestation of the principal, that the principal wishes the agent so to act." As stated in the Restatement Third of Agency, § 7.04, comment b.: "an agent acts with actual authority when the agent reasonably believes, on the basis of a manifestation of the principal, that the principal wishes the agent so to act."

An employer's liability for authorized acts does not necessarily depend on the agent's liability for those acts. A principal may be liable, as stated in § 7.04(2) of the Restatement Third of Agency where "the agent's conduct, if that of the principal, would subject the principal to tort liability." For instance, if an individual employer, a controlling owner, or an authorized agent with knowledge that a defamatory reference letter is false directs a subordinate agent to send the letter on behalf of the employer, it does not matter that the subordinate agent does not know that the defamation is false and would not be subject to liability for the defamation.

Judicial opinions sometimes do not recognize the formal distinction made by the law of agency between a principal's direct liability for the authorized conduct of its agents and a principal's vicarious or indirect liability for an employee-agent's conduct within the scope of employment. See, e.g., United States v. Dye Construction Co., 510 F.2d 78, 82 (10th Cir. 1975) ("corporations are responsible for the acts and omissions of their authorized agents acting in the scope of their employment"); Sandman v. Hagan, 261 Iowa 560, 567, 154 N.W.2d 113, 117 (Iowa 1967) (equating within scope of employment with authorized conduct). In most cases, the distinction does not make a difference in determining employer liability. In a case like Illustration 1, however, where the employer's agent is not an employee of the employer, the employer's liability must be based on the employer's authorization of the agent's wrongful conduct. See, e.g., Halpert v. Manhattan Apartments, Inc., 580 F.3d 86, 88 (2d Cir. 2009) (employer may be liable for discriminatory hiring decision made by independent contractor authorized to act as employer's hiring

agent); Jensen v. Medley, 82 P.3d 149, 154 (Or. 2003) ("a principal can be liable for the actions of a non-servant agent only if those actions are within the actual or apparent authorization of the principal"); Givens v. Mullikin, 75 S.W.3d 383, 396 (Tenn. 2002) ("an insurer can be held vicariously liable for the acts or omissions of an attorney hired to represent an insured when those acts or omissions were directed, commanded, or knowingly authorized by the insurer").

Furthermore, if an agent, whether or not an employee, wrongfully acts solely to serve the agent's own interests rather than those of the employer, and thus outside the scope of any possible employment relationship, the employer is only liable if it has authorized those particular acts. Thus, in a case like Illustration 3, where the employee-agent uses his authority to discharge employees only to serve his own sexual desires rather than the employer's business interests, the employer is directly liable only because of the grant of authority. See, e.g., Henson v. City of Dundee, 682 F.2d 897, 910 (11th Cir. 1982) (differentiating case where employer's agent uses authority to "hire, fire, discipline or promote" for personal sexual purposes, from other work-place actions taken for personal sexual reasons). Illustration 4, another example of an authorized discharge not made to serve the interests of the discharging agent, is based on Wilson v. Monarch Paper Co., 939 F.2d 1138 (5th Cir. 1991).

The distinction between direct employer liability through authorization and vicarious employer liability based on the torts of an employee also is important for rare cases in which the agent is not herself subject to tort liability, perhaps because she did not have the same intent or knowledge as the employer. Cf. Coleman v. Houston Ind. Sch. Dist., 113 F.3d 528, 534 (5th Cir. 1997) ("The court concluded that Hornsby's alleged discriminatory intent could properly be imputed to Ellis, his subordinate, for purposes of the qualified immunity inquiry. This conclusion, which would create a rule of *respondeat inferior*, was both unprecedented and erroneous."); Brownlee v. Lear Siegler Management services corp., 15 F.3d 976, 978 (10th Cir. 1994) ("we know of no authority for imputing a principal's *discriminatory intent* to an agent to make the agent liable for his otherwise neutral business decision"). In a case like Illustration 1, for instance, F's ignorance of E's prior injury may insulate her from liability without also insulating P from liability based on O's authorization of F's actions.

Finally, the distinction between direct liability through authorized wrongful conduct and vicarious liability for employee conduct within the scope of employment may be relevant to whether a workers' compensation system provides an exclusive remedy. Workers' compensation laws often allow for actions against an employer for employer-authorized intentional torts, but not for the torts of co-employees acting within the scope of employment. See, e.g., Damato v. Jack Phelan Chevrolet Geo, Inc., 927 F. Supp. 283, 291 (N.D. Ill. 1996) (workplace assaults covered by exclusive workers' compensation remedy, but not where employer authorized conduct); Meerbrey v. Marshall Field, 139 Ill.2d 455, 465, 564 N.E.2d 1222, 1227 (1990) (allegation that guard was acting within the scope of employment is not equivalent to an allegation that Marshall Field authorized guard to commit the specific acts of false imprisonment); Thompson v. Maimonides Medical Ctr., 86 A.D.2d 867, 868 447 N.Y.S.2d 308, 310 (1982) (causes of action based on *respondeat superior* barred by workers' compensation remedy, but not those based on authorization of tortious conduct); Singer Shop-Rite, Inc. v. Rangel, 174 N.J. Super. 442, 447, 416 A.2d 965, 968 (App. Div. 1980) (allowing claim against employer where authorized agents committed assault and battery). Thus, the liability of P in Illustration 1 might not be excluded, while the liability of A, the employer of F, in either Illustration 1 or Illustration 2, would be.

Comment d. Section 4.01 of the Restatement Third of Agency states that a "person ratifies an act by (a) manifesting assent that the act shall affect the person's legal relations, or (b) conduct that justifies a reasonable assumption that the person so consents."

For a case like Illustration 5, see Pruitt & Associates, P.C. v. Hooper, 277 Ga. App. 1, 625 S.E.2d 445 (Ga. Ct. App. 2005). The *Pruitt* court recognized that "an act cannot be subject to ratification unless done in behalf of the person adopting it and attempting to ratify it. . . . Thus, where an employee is acting exclusively for himself and is not acting at all for the employer and does not profess to be acting for the employer, there is no such thing as a master assuming by ratification liability for the personal act of his employee." Id. at 4 (quoting earlier Georgia decisions).

Similarly, in Fretland v. County of Humboldt, 63 Cal. App. 4th 897, 905, 74 Cal. Rptr. 2d 379, 384 (Cal. Ct. App. 1998), the court found no evidence of ratification of an assault by employees on another employee, stating: "Ratification is the voluntary election by a person to adopt in some manner as his own an act which was purportedly done on his behalf by another person, the effect of which, as to some or all persons, is to treat the act as if originally authorized by him." See also Lee v. Pfeifer, 916 F. Supp. 501, 509 (D. Md. 1996) ("An employer can only ratify an action if he knows of the material facts concerning that

action and specifically approves."); Smith v. American Express Travel Related Services Co., 179 Ariz, 131, 137, 876 P.2d 1166, 1172 (1994); Costa v. Able Distributors, Inc., 3 Haw. App. 486, 490, 653 P.2d 101, 105 (Haw. Ct. App. 1982) (both asserting plaintiff claiming ratification must show that employee acted "on behalf of or under authority of employer," and there must be clear evidence of employer's approval of employee's conduct).

Decisions in some jurisdictions have treated as tantamount to ratification an employer's negligent supervision of employees known to be engaging in tortious conduct, regardless of whether those acting wrongfully purported to be acting on behalf of the employer. See, e.g., Simon v. Morehouse School of Medicine, 908 F. Supp. 959, 973 (N.D. Ga. 1995) (characterizing negligent supervision as ratification under Georgia law); Watson v. Dixon, 130 N.C. App. 47, 53, 502 S.E.2d 15, 20 (N.C. Ct. App. 1998) (ratification of agent's unauthorized acts may include a failure to act after being apprised of the material facts and circumstances of the wrongful conduct); Jones v. B. L. Dev. Corp., 940 So. 2d 961, 966 (Miss. Ct. App. 2006) (an employer's learning of past wrongful intentional conduct and doing nothing to reprimand the employee-wrongdoer acts as a ratification).

The tort of negligent supervision, rather than agency doctrine on ratification, however, better addresses an employer's culpability in cases where responsible agents fail to respond appropriately to reports of wrongful actions. Ratification through negligent supervision should not be used as a basis for avoiding proof of the elements of negligence, including causation. But see, e.g., Mardis v. Robbins Tire & Rubber Co., 669 So.2d 885, 889-90 (Ala. S. Ct. 1995) (finding ratification cause of action may proceed to jury, but negligent supervision cause of action could not because of lack of proof that employer's negligence caused injury). Ratification through negligent supervision also should not be used to circumvent the exclusivity of remedies for physical injuries provided by a workers' compensation law. Cf. Bakker v. Baza's, Inc., 275 Or. 245, 254 551 P.2d 1269, 1274 (1976) ("ratification" of battery by employer's "carelessness or negligence" does not constitute employer's "deliberate intention to produce the injury" necessary for remedy beyond that of workers' compensation).

Comment e. Illustration 6 is based on GTE Southwest, Inc. v. Bruce, 998 S.W.2d 605, 42 Tex. Sup. Ct. J. 907 (1999). See also King v. Brooks, 788 P.2d 707 (Alaska 1990); McLachlan v. Bell, 261 F.3d 908, 911 (9th Cir. 2001) (under California law even willful and malicious torts in violation of employer's express rules can be within the scope of employment if incident to performance of employee's job).

Illustration 7 is based on Skelton v. W.T. Grant Co., 331 F.2d 593 (5th Cir. 1964). In Skelton, the court held that Georgia's workers' compensation law did not provide an exclusive remedy for the alleged torts because the detention of the employee to elicit her confession to shoplifting "was in no way connected with the course of [the employee's] employment or the performance of her duties for the company." Id. at 594. The court did not rule on the employer's vicarious liability

Intentional torts, even when not authorized by the employer, may be committed within the scope of employment if they are committed incident to work assigned by the employer rather than in an independent course of conduct not intended to serve the employer. One employee, for instance, may assault another employee within the scope of the first employee's employment if the assault grows out of an argument about how to perform work or how to control the working environment. See, e.g., Benoit v. Capitol Manufacturing Co., 617 So.2d 477, 479 (S. Ct. of La. 1993) (assault in quarrel over whether door should be closed to warm work-place was "employment-rooted" and thus within scope).

If the assault is committed for personal reasons having nothing to do with assigned work, however, it is an independent course of conduct outside the scope of employment. Thus, most courts considering employer liability for common law torts based on sexual assaults or other forms of harassment have found such acts to be outside the scope of employment because they are not related to an employment dispute and are not done for the benefit of the employer. See, e.g., Wyatt v. Hunt Plywood Co., 297 F.3d 414, 415 (5th Cir 2002) (applying Louisiana law; sexual harassment not related to duties but instead "rooted in personal motives unrelated to employment"); Wood v. United States, 995 F.2d 1122, 1123 (1st Cir. 1993) (Breyer, C.J.) (sexual assault and battery "clearly outside the scope of employment"); Dee v. Marriot International, Inc., 1999 U.S. Dist. LEXIS 16159 (E.D. Pa. 1999) (applying Pennsylvania law); Murphy v. Robert Burgess & Norwalk Economic Opportunity Now, Inc., 1997 U.S. Dist. LEXIS 22750 (D. Conn. 1997) (applying Connecticut law); Smith v. American Express Travel Related Services Co, 179 Ariz. 131, 136, 876 P.2d 1166, 1171 (Ct. of App. of Ariz. 1994) (and cases cited therein). See also Note, "Scope of Employment" Redefined: Holding Employees Vicariously Liable for Sexual Assaults Committed by Their Employees, 76 Minn. L. Rev. 1513, 1521-22 and nn, 33, 34 (1992).

In some cases, however, as in Illustration 6, harassment may be incidental to the harasser's assigned employment supervisory duties. A supervisor may intend both to humiliate and also to direct a subordinate through the same set of orders or directions. In some cases, harassment by co-workers also may occur incident to the assigned work of the co-workers. See, e.g., Burns v. Mayer, 175 F.Supp.2d 1259, 1267 (D. Nev. 2001) (co-workers in café's kitchen made lewd gestures and assaulted employee with food in course of meal preparation).

Some courts have stretched or modified the meaning of scope of employment, sometimes by suggesting any foreseeable employee conduct is within the scope of employment, in order to impose liability on employers for sexual assaults on their employees. See, e.g., State of Arizona v. Schallock, 189 Ariz. 250, 260, 941 P.2d 1275, 1285 (1997) (sexual assaults by supervisor at work place, during working hours were "foreseeable" because of employer's knowledge and thus within scope of employment). This interpretation of the scope of employment standard for vicarious liability, however, renders it "indefinite and malleable." See Faragher v. City of Boca Raton, 524 U.S. 775, 795-97 (1998) (acknowledging decisions holding employers vicariously liable for sexual assaults and using the quoted phrase to describe mechanical judicial application of the scope of employment rule set forth in the Second Restatement of Agency). Section 7.07(2) of the Restatement Third of Agency thus wisely adheres to the principal that an "employee's act is not within the scope of employment when it [is] not intended by the employee to serve any purpose of the employer." Without the "indefinite and malleable" expansion of general vicarious liability, employer liability for tortious harassment can be well delineated by the tort of negligent supervision set forth in § 7.05 of the Restatement Third of Agency and in § 4.03 of this Restatement, and by the doctrine set forth by the Court in *Faragher* and Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998), and stated in § 4.02(c) for actionable discriminatory harassment.

Illustration 8 is based loosely on the facts in Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998), though the issue in the case was whether there was actionable discrimination under Title VII, not whether there was employer liability for employee harassment of other employees. In subsequent cases the Supreme Court expressed approval of the unanimous holding in the lower courts that an employer is liable for discriminatory harassment of employees by co-workers only on the basis of negligent supervision, rather than through some theory of vicarious liability. See *Faragher*, supra, 524 U.S. at 799; *Ellerth*, supra, 524 U.S. at 760. In these same decisions, however, the Court postulated another basis for employer vicarious liability under Title VII for actionable discriminatory harassment by supervisors. See *comment d*.

Illustration 9 is based on Rausman v. Baugh, 248 A.D.2d 8, 682 N.Y.S.2d 42 (1998). The court in *Rausman* held that an employee's use of an employer's procedures for the reporting of harassment is not within the scope of her employment for that employer.

Under the general law of agency, an employer as a principal also is subject to vicarious liability for harm to an employee, as it is for harm to other third parties, when the employee's harm is caused by the employee's reasonable belief that an "agent or other actor has authority to act on behalf of the principal and that belief is traceable to manifestations made by the principal." Restatement Third of Agency, § 7.08, comment b. Imposing liability based on authority that is "apparent" in this sense rather than "actual" is appropriate where the employer or its authorized agent leads an employee or a third party reasonably to believe that a tort-committing actor has authority to act for the employer and where that reasonable belief causes or aggravates harm to the employee. The doctrine of apparent authority, however, is of limited marginal relevance for imposing liability on employers for harm suffered by their employees. Employers are not likely to aggravate harm to employees by leading the employees or third parties to believe that agents have authority to act for the employer in ways that are outside the scope of the agents' employment. For instance, an employer that accepts the sexual harassment of some of its employees by others may be directly liable to the harassed employees for negligent supervision of the harassers, see, e.g., Blankenship v. Parke Care Centers, Inc. 123 F.3d 868, 872 (6th Cir. 1997) (imposing direct not vicarious liability when employer knew or should have known of harassment and failed to respond appropriately), but the employer's lax supervision does not communicate that the harassers are acting for the employer rather than for themselves.

The Supreme Court in its decisions in both *Ellerth*, 524 U.S. at 760-63, and *Faragher*, 524 U.S. at 801-803, considered ambiguous language in § 219(2)(d) of the Restatement Second of Agency as another basis, in addition to apparent authority, for an employer's liability for wrongful acts outside the scope of employment. Section 219(2)(d) states that an employer may be liable for an employee's acts not within the scope of employment if the employee "purported to act or to speak on behalf of the principal and there was

reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation." Because of the placement (or misplacement) of the comma after "authority" rather than after "principal", some courts have interpreted this language to mean that an employer may be vicariously liable for an employee's acts outside the scope of employment if the employee was "aided in accomplishing the tort by the existence of the agency relation," regardless of whether the employee "purported to act or to speak on behalf of the principal." See, e.g., Sparks v. Pilot Freight Carriers, Inc. 830 F.2d 1554, 1559 (11th Cir. 1987) (Title VII case); Rauh v. Coyne, 744 F. Supp. 1186, 1191 (D.D.C. 1990) (sexual assault claim). Justice Souter and Justice Kennedy also interpret § 219(2)(d) broadly in their respective opinions in *Ellerth*, see 524 U.S. at 760-763, and *Faragher*, see 524 U.S. at 801-803, although neither ultimately bases the joint holding of the cases on this interpretation.

The broad reading of § 219(2)(d) seems incorrect. This reading renders the scope of employment limitation largely nugatory, or at least superfluous, because almost all torts resulting from the employment relationship are "aided" by the existence of that relationship, regardless of the tortfeasor's independent course of conduct and motivation for committing the torts. The Illustrations in Comment *e* to § 219 clarify that the "aided . . . by the existence of the agency relationship" clause, like the apparent authority clause, was meant to qualify "purported to act or to speak on behalf of the principal." Those Illustrations indicate that the tortfeasing employee must claim to be speaking or acting with authority delegated from some principal. In comment a. to § 228 of the Restatement Second of Agency, the proper placement of the comma after "principal" makes this intent more clear: "a master may be liable if a servant speaks or acts, purporting to do so on behalf of his principal, and there is reliance upon his apparent authority or he is aided in accomplishing the tort by the existence of the agency relation." See Paula J. Dalley, All in a Day's Work: Employers' Vicarious Liability for Sexual Harassment, 104 W. Va. L. Rev. 517, 550 (2002).

The Restatement Third of Agency thus "does not include "aided in accomplishing" as a distinct basis for an employer's (or principal's) vicarious liability . . . [because] the purposes likely intended to be met by the "aided in accomplishing" basis are satisfied by a more fully elaborated treatment of apparent authority and by the duty of reasonable care that a principal owes to third parties . . . ." Section 7.08, Restatement Third of Agency, comment b.

Comment f. As recognized in *Ellerth* and *Faragher*, the rationale for imposing liability on employers for the wrongful acts of their employees may extend in some cases to the misuse of employer-delegated supervisory power by supervisory employees for their own ends outside the scope of employment. Employers do not benefit when employees to whom the employers have delegated power or discretion to direct, reward, and discipline other employees use that power for the employees' own purposes rather than for the purpose of serving their employer. Employers, however, do benefit from the delegation of supervisory power or discretion generally and employers can foresee that such power sometimes will be misused in the interests of the supervisors rather than of the employers. Employers therefore can weigh against the benefits of delegated supervisory power the costs of the increased risks of harm that could be visited upon subordinate employees through the misuse of such power. Employers generally are in a better position than are employees injured by supervisory abuses to minimize such harm by monitoring and channeling the use of supervisory power.

If an employer, however, has taken reasonable steps to monitor, prevent, and correct the possible wrongful misuse of delegated supervisory power, an employee victim of the misuse may be in a better position than is the employer to minimize harm. If such an employee fails to act reasonably in attempting to do so, the rationale for making the employer liable for the supervisor's wrongful misuse of employer-delegated supervisory power for the supervisor's own purposes is much weaker than for making the employer liable for the supervisor's wrongful misuse of power in service to the employer. Without warning or complaints, employers cannot be expected to monitor their supervisors pursuing independent courses of conduct for their own ends as closely as supervisors acting within the scope of their employment.

Illustration 10 is based on the facts in *Ellerth*. In the actual case, however, the Court remanded to give the employer an opportunity to assert its affirmative defense, as the harasser was not the immediate supervisor of the victim and the employer had not yet attempted to defend the reasonable adequacy of its anti-harassment reporting procedures. 524 U.S. at 766. In *Faragher* the Court held "as a matter of law" that the employer did not take reasonable care to prevent harassment because its anti-harassment policy was not widely disseminated and it "did not include any assurance that the harassing supervisors could be bypassed in registering complaints." 524 U.S at 808.

Illustration 11 is supported by numerous decisions holding that employers are not liable to harassment victims for harassment that could have been avoided had the harassment victims utilized the

employer's reasonable reporting procedures. See, e.g., Baldwin v. BlueCross/Blue Shield of Ala., 480 F.3d 1287, 1306 (11th Cir. 2007); Jackson v. County of Racine, 474 F.3d 493, 501 (7th Cir 2007); Phillips v. Taco Bell Corp., 156 F.3d 884, 888-89 (8th Cir. 1998).

The *Faragher-Ellerth* affirmative defense requires the employer to prove both the reasonableness of its own preventive and corrective efforts and also the unreasonable failure of the victimized employee to take advantage of preventive or corrective opportunities. In some cases, the courts have treated as reasonable an employee's failure to utilize an employer's generally reasonable system to control harassment. See, e.g., Monteagudo v. Asociacion de Empleados del Estado Libre Asociado, 554 F.3d 164 (1st Cir. 2009); Johnson v. West, 218 F.3d 725 (7th Cir.) (reasonable employer may still be liable if employee reasonably did not take advantage of corrective system because of intimidation and threats from harasser); see also Greene v. Dalton, 164 F.3d 671 (D.C. Cir. 1999) (employer may be liable for sudden rape). Assuming reasonableness on the part of the employee, these cases can be justified as assigning the costs of the harassment to that party with the lower prevention costs. See Michael C/ Harper, Employer Liability for Harassment Under Title VII: A Functional Rational for *Faragher* and *Ellerth*, 6 San Diego L. Rev. 101 (1999).

The *Faragher-Ellerth* extension of vicarious employer liability for discriminatory harassment is not applicable to harassment by co-employees who do not have power to direct, reward, or discipline the harassed employees. Thus, in cases like Illustration 12, courts impose liability on employers only under a theory of negligent supervision as set forth in § 4.03. See, e.g., Chalout v. Interstate Brands Corp., 540 F.3d 64, 74 (1st Cir. 2008); Diaz v. Swift-Eckrich, Inc., 318 F.3d 796, 800 (8th Cir. 2003); Ferris v. Delta Air Lines, Inc., 277 F.3d 128, 136 (2d Cir. 2001); Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 878 (9th Cir. 2001). As in the *Ellerth* case, the extension of liability is not just for harassment by immediate supervisors, however, as other superior employees may have power to direct, reward, or discipline the victim. See, e.g., Mack v. Otis Elevator Co., 326 F.3d 116, 125 (2d Cir. 2003) (alleged harasser had authority over victim that "materially augmented his ability, to impose a hostile work environment"); Mikels v. City of Durham, 183 F.3d 323, 333 (4th Cir. 1999) (applicability of doctrine turns on whether the harasser's position of authority makes him a "continuing threat" to victim).

Some Title VII courts have held that employers may not assert the *Faragher-Ellerth* defense to liability for sexual harassment by senior officers outside the scope of the officers' employment. See, e.g., Johnson v. West, 218 F.3d 725, 730 (7th Cir. 2000) (dicta stating defense is not available for sexual harassment by "a president, owner, proprietor, partner, corporate officer, or supervisor" if they hold "a sufficiently high position in the management hierarchy of the company for their actions to be imputed automatically to the employer"); Ackel v. Nat'l Communications, Inc., 339 F.3d 1224, 1232-33 (5th Cir. 2003) (for purposes of employer liability for harassment under Title VII President and Board member who owned little stock could be "proxy" of corporation without owning stock); Mallinson–Montague v. Pocrnick, 224 F.3d 1224, 1232-33 (10th Cir. 2000) (defense not available for harassment by senior vice-president); Haught v. The Louis Berkman, LLC, 377 F.Supp.2d 543, 555 (N.D. W.Va. 2005) (Title VII case holding that harasser's "position as president of the company made him the defendant's proxy and, therefore, his actions can be directly imputed to the defendant"). These cases, which seem to expand the concept of corporate alter ego or proxy beyond that set forth in § 4.01, perhaps can be best understood as holding that a senior officer's engagement in sexual harassment disproves the employer's reasonable care in preventing such harassment.

The Court in *Ellerth* and *Faragher* apparently intended its holding to apply to all forms of discriminatory harassment covered by Title VII. The lower courts and the Equal Employment Opportunity Commission have interpreted it to do so. See, e.g., Kang v. U. Lim America, Inc., 296 F.3d 810, 817 (9th Cir. 2002) (national origin discrimination); Wright-Simmons v. City of Oklahoma City, 155 F.3d 1264, 1270 (10th Cir. 1998) (race). See also EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999) (making clear that *Faragher* and *Ellerth* apply to all forms of Title VII-proscribed discriminatory harassment). Moreover, both the EEOC and the lower courts have applied the *Faragher/Ellerth* holding to statutes other than Title VII. *See, e.g.*, EEOC Enforcement Guidance, see (holding applies to harassment based on age and disability as well as Title VII claims); Williams v. U.S. Dept. of Lab., Williams v. Administrative Review Board, 376 F.3d 471 (5th Cir. 2004) (whistleblower protection provision of Energy Reorganization Act of 1974); Whidbee v. Garzarelli Food Specialties, Inc., 223 F.3d 62, 75 (2d Cir. 2000) (§ 1981 racial harassment claim); Breeding v. Arthur J. Gallagher and Co., 164 F.3d 1151, 1158 (8th Cir. 1999) (Age Discrimination in Employment Act claim as

well as sex discrimination claim); Wallin v. Minnesota Dept. of Corrections, 153 F.3d 681, 688 n.7 (8th Cir. 1998) (Americans with Disabilities Act) (dicta).

Some state courts also have adopted the *Faragher/Ellerth* doctrine for state anti-discrimination employment law statutes. See, e.g., Frieler v. Carlson Marketing Group, 751 N.W.2D 558, 563 (Minn. S. Ct. 2008) (Minnesota anti-discrimination law); Ocana v. American Furniture Co., 135 N.M. 539, 551, 91 P.23d 58, 70 (2004) (New Mexico anti-discrimination law); Bank One, Kentucky v. Murphy, 52 S.W.3d 540, 544 (Ky. 2001) (Kentucky anti-discrimination law); Brentlinger v. Highlights for Children, 142 Ohio App. 3d 25, 32 (2001) (Ohio anti-discrimination law); Parker v. Warren County Utility District, 2 S.W.3d 170, 174 (Tenn. 1999) (Tennessee anti-discrimination law); see also Farmland Foods, Inc. v. Dubuque Human Rights Comm'n, 672 N.W.2d 733, 744 (S.Ct. Iowa 2003) (dicta; Iowa city ordinance); Boudreaux v. Louisiana Casino Cruises, Inc., 762 So. 2d 1200, 1205 (La. App. 2000) (Louisiana's repealed anti-discrimination law); State Dept. of Health Services v. Superior Court of Sacramento County, 79 P.3d 556 (Cal. 2003) (adopting variation on *Faragher/Ellerth* as avoidable consequences doctrine under California Fair Employment and Housing Act). But see Zakrzewska v. New School, 14 N.Y.3d 469, 479-480, 928 N.E.2d 1035, 1039, 902 N.Y.S.2D 838, 842 (Ct. of App. N.Y. 2010) (*Fargaher/Ellerth* affirmative defense not available under Administrative Code of City of New York because statutory language covers all exercises of "managerial or supervisory responsibility"); Pollock v. Wetterau Food Distribution Group, 11 S.W.3d 754, 767 (Mo. Ct. of App. 1999) (applying regulation to make employer strictly liable for supervisory harassment under Missouri law); Myrick v. GTE Main Street Inc., 73 F. Supp. 2d 94, 98 (D. Mass. 1999) (relying on College-Town v. Massachusetts Commission Against Discrimination, 400 Mass. 156 (1987)) (under Massachusetts anti-discrimination law employer is strictly liable for supervisory harassment without *Faragher/Ellerth* affirmative defense); Chambers v. Trettco, Inc., 463 Mich. 297, 307, 614 N.W.2d 910, 914 (Mich. 2000) (declining to adopt *Faragher/Ellerth* for Michigan anti-discrimination law; plaintiff must prove the employer failed to take prompt and adequate remedial action).

Comment g. The fellow servant rule was first asserted in Great Britain as a corollary to the assumption of risk doctrine and then adopted in the United States, in part based on the dubious proposition that it encouraged employees to avoid negligent acts. See Priestly v. Fowler, 150 Eng. Rep. 1030, 1033 (1837); Farwell v. Boston and Worcester Railroad Corp., 45 Mass. (4 Met.) 49, 57 (1842); Murray v. South Carolina Railroad Co., 26 S.C.L. (1 Mc.Mul.) 385 (1841). See generally Comment, The Creation of a Common Law Rule: the Fellow Servant Rule 1837-1860, 132 U. Pa. L. Rev. 579 (1984); L. Friedman and J. Ladinsky, Social Change and the Law of Industrial Accidents, 67 Colum. L. Rev. 50 (1967).

For modern cases rejecting the doctrine, see, e.g, Glass v. City of Chattanooga, 858 S.W.2d 312, 314 (1993) (Tenn. S. Ct. 1993) ("doctrine works as an inherently unjust rule that denies a party, free of fault, the right to recover for injuries sustained through the negligence of another . . . merely because of a fortuitous circumstance of employment"); Buckley v. City of New York, 56 N.Y.2d 300, 305, 437 N.E.2d 1088, 1090 (1982) ("The fellow servant rule serves no continuing valid purpose in New York, but instead merely works an unjustifiable hardship upon individuals injured in the workplace . . . ."); Gutierrez v. Kent Nowlin Construction Co., 99 N.M. 394, 402, 658 P.2d 1121, 1129 (Ct. of App. 1981) (fellow servant doctrine as a species of assumption of risk abolished in New Mexico). Cf. also Marques v. Bellofram Corp., 28 Mass. App. Ct. 277, 284, 550 N.E.2d 145, 150 (1990) ("[T]he defense because of its iniquities" has "been deplored for a century or more. It may be found, when occasion arises, to be extinct in the Commonwealth, like the flightless bird called the dodo."). But see, Mayor and Board of Alderman v. Young, 616 So.2d 883, 885 (Miss. 1993) (rule continues to apply in Mississippi, but not in case where negligent party is supervisor or foreman performing managerial acts).

The fellow servant rule also has been abrogated by statute in some jurisdictions. See, e.g., 39 Maine Rev. Stat. Ann. § 3.

§ 4.03. Employer's Duty to Exercise Care in Selecting, Retaining, and Supervising Agents and Employees

Unless otherwise provided by a workers' compensation law or by other law, an employer is subject to liability for harm to an employee caused by breach of the employer's duty to exercise reasonable care in selecting, retaining, or supervising its agents and employees.

Comment:

a. Overview. An employer owes its employees a duty of reasonable care in selecting, retaining, and supervising its agents. This duty derives from the employer's responsibility for the operation of its business and for personnel selection and retention decisions that may expose employees to risks of harm through interaction with other employees and agents. The duty, as stated in § 7.05 of the Restatement Third of Agency, extends to the selection and control of all agents through whom the employer conducts its activities. The duty is that of the employer itself and cannot be delegated to other agents. The duty does not depend on an agent committing a tort within the scope of employment.

b. Workers' compensation law or other law. See Comment *a*, § 4.01.

c. Negligent selection or retention. An employer has a duty to its employees to exercise reasonable care in selecting and retaining its agents and employees. Breach of this duty can subject an employer to liability for reasonably foreseeable harm to employees caused by incompetence or unfitness of the agent for an assigned task if the employer knew or should have known about this incompetence or unfitness.

The level of competence or fitness an employer has a duty to require of agents depends in part on the risk of harm to others posed by the agents' activities. An employer has a duty to exercise greater care to the extent the risks posed by the agents' activities are greater.

An employer thus has a duty reasonably to investigate the past conduct of agents before selecting them for positions posing significant special risks to employees. A position may pose significant special risks because of the instrumentalities, such as dangerous equipment or firearms, that are used by or available to an employer agent occupying the position. A position also may pose special risks because of the power it

gives the agent to control employees of the employer, or because it gives the agent unsupervised access to those employees.

An employer also has a duty to exercise greater care in deciding whether to retain agents whose past conduct while in its employ indicates they may pose special dangers to the employer's employees. Thus, if an employer knows or should know that an agent currently in its service has been engaging in conduct dangerous to the employer's employees, the employer may have a duty not to retain that agent in a position in which there is an unreasonable risk that the agent will engage in such conduct.

An employer does not necessarily breach its duty of reasonable care to employees by selecting and retaining agents whose past conduct includes criminal or other improper activity. An individual's past conduct may indicate unfitness for some tasks, but not necessarily for others. An employer should consider the nature of the job, the nature and severity of the past conduct, and the length of time that has transpired since that conduct.

Illustrations:

1. P, a telemarketing company, employs E and F to make telephone solicitations from one of its offices. The office consists of open desks observable by supervisors who sit behind glass partitions. Five years before being employed by P, F was convicted of indecent exposure while at his previous employer. P did not discover F's criminal record, however, because P did not require such information from job applicants. Now employed at P, during a cigarette break, F exposes himself to E. P discharges F after investigating the incident.

P is not subject to liability to E for the hiring of of F. P did not have a duty to inquire into any criminal record of F, as the position for which F applied did not pose special dangers.

2. P is a trucking company that hires E and F to take multi-day long distance trips together. P hired F just after he had served a sentence for sexual assault. P did not inquire into any criminal record of F before hiring him. During E and F's first trip, F physically attacks E causing bodily injury to E.

P may be subject to liability to E for any injury caused E by the negligent selection of F for the long distance driving position. P had a duty to investigate,

consistent with applicable law, the fitness of F for this position, as special dangers would be posed to co-employees if the position was occupied by someone with a violent background.

d. Negligent supervision. The care that a reasonable employer exercises in the supervision and training of agents and employees also varies with the nature of the agents' positions. Positions requiring greater responsibility or involving greater discretion may require more training. Positions posing greater dangers to employees and other parties may require closer supervision.

What constitutes reasonable care in the supervision of employees also may vary with what an employer knows or should know about the employee's past and current behavior. Employers generally must take greater care in the supervision of employees whose past or current behavior indicates they pose greater risks of harm to others.

Illustrations:

3. P employs E as a customer service representative and S as E's supervisor. S repeatedly swears and makes crude comments directed at E. S also harasses E when she becomes pregnant, telling her she should be sterilized. E becomes very disturbed by S's treatment of her, causing her to deliver her baby prematurely. E makes several complaints about S to personnel officers of P. These officers do not discipline or otherwise attempt to control S. S's harassment of E continues to escalate. After S invades E's car in the parking lot to yell at her and physically grab her, E resigns.

P may be subject to liability to E for any injury to E caused by P's negligent supervision and retention of S. Whether or not S's harassment of E was within the scope of his employment, P's officers' knowledge of this harassment required some reasonable supervisory response. S demonstrated he was not fit to be a supervisor, and P had a duty not to retain him in that position without greater supervision or additional training.

4. Same facts as Illustration 3 except that after hearing E's reports concerning S, P's officers conduct an investigation. The officers then suspend S

and require him to take a training course as a condition of returning to his job. Without waiting for that return, E resigns, complaining S should have been fired.

P is not subject to liability to E for negligent retention. P's officers made a reasonable attempt to supervise S more strictly, after which no further harassment occurred.

e. Proximate cause. Employer liability for harm under this section, like other liability for negligence, requires that a breach of duty be a proximate cause of the harm. This requires that the risk that an agent or employee of the employer will do harm to others was increased by the employer's breach of its duty of care; it is not enough that the harm would not have occurred had the employer not breached its duty in hiring,retaining, or supervising the tortfeasor-agent/employee. Furthermore, the test of proximate cause is not satisfied if the attribute of the agent that the employer knew or should have known was likely to cause harm did not cause the harm suffered by the complaining employee. Typically, if an employee commits a tort on a fellow employee while away from the workplace and not involved in activity related to the employment, any negligence of the employer in hiring or supervising the tortfeasor-employee would not be the proximate cause of any harm suffered by the fellow employee.

Illustrations:

5. W works for P, a construction company. S, P's general supervisor at W's worksite, observes W continually cursing and berating employees under W's authority. S also observes W repeatedly directing these employees to engage in unsafe work in violation of P's safety guidelines. S does not attempt to correct W's misuse of his authority. One night at a bar away from the worksite W argues with E, one of P's employees whom W regularly cursed at work. W, after several drinks, pulls out a gun and shoots and kills E.

P is not subject to liability for the wrongful death of E. W's shooting of E was not within the scope of his employment. S, as P's agent, was negligent in supervising and perhaps retaining W. This negligence was not the proximate cause of the shooting of E, however. It was reasonably foreseeable that W's

unfitness for his position as foreman would result in an accident at the worksite or in the infliction of emotional harm on other employees. It was not reasonably foreseeable, however, that it would result in a shooting at a bar away from the worksite.

6. P, a manufacturing company, hires F as a maintenance custodian. F is sent to prison for the strangulation death of a co-employee with whom he had been romantically involved. Upon his release from prison five years later, P rehires F for a similar maintenance position. While working in this position, F threatens several other employees with violence during arguments. F then threatens to kill E if she spurns F's romantic advances. P's management knows of these incidents, but nonetheless retains F. F kills E with a shotgun blast in one of P's parking lots.

P is subject to liability to E's heirs for the negligent retention of F. Whether or not P was negligent in rehiring F, P was negligent in continuing to expose its employees to the risk of F's violence when F continued to display violent proclivities after being rehired. Given F's history, F's shooting of E was reasonably foreseeable.

REPORTERS NOTES

Comment a. Section 7.05(1) of the Restatement Third of Agency states that a "principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent's conduct if the harm was caused by the principal's conduct in selecting, training, retaining, supervising, or otherwise controlling the agent." See also § 213 Restatement Second of Agency. Section 213 states:

> "A person conducting activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:
>
> (a) in giving improper or ambiguous order of[sic] in failing to make proper regulations; or
>
> (b) in the employment of improper persons or instrumentalities in work involving risk of harm to other: [sic]
>
> (c) in the supervision of the activity; or
>
> (d) in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control."

For the general proposition that a party owes a duty of reasonable care to others with whom the party has a special relationship such as employment, see Restatement Third of Torts: Liability for Physical Harm § 41. Section 7.05 of the Restatement Third of Agency imposes a duty of care on an employer toward others who may be harmed by the employer's negligent personnel policies. Like other duties of reasonable care imposed by negligence law, this duty is limited to care in the avoidance of physical rather than economic harm.

Comment *b* to § 7.05 of the Restatement Third of Agency states that "[i]t is not a defense to liability under this rule that the actor whose conduct harms a third party does not have a relationship of

agency as defined in § 1.01 [of the Restatement Third of Agency] with the person who conducted an activity through the actor." See also Restatement Second of Agency § 213, Comment *a*.

All jurisdictions recognize the duty of employers expressed in § 4.03, often in cases brought by employees against their employers. See, e.g., Davis v. United Parcel Service, Inc., 234 Fed. Appx. 430, 432 (9th Cir. 2007) (applying Nevada law in case with employee plaintiff; finding reasonable training, supervision, and retention); Sisco v. Fabrication Technologies, Inc., 350 F. Supp. 2d 932, 942 (D. Wyo. 2004) (interpreting Wyoming law for case with employee plaintiff); Machen v. Childersburg Bancorporation, Inc., 761 So.2d 981, 987 (S. Ct. Ala. 1999) ("master" is responsible to employee for "servant's incompetency when notice or knowledge, either actual or presumed, of such unfitness has been brought" to the master); Retherford v. AT & T Communications of Mountain States, Inc., 844 P.2d 949, 973 (1992) (adopting the tort of negligent employment); Kerans v. Porter Paint Co., 61 Ohio St.3d 486, 491, 575 N.E.2d 428, 432 (1991) ("an employer may be liable for failing to take appropriate action where that employer knows or has reason to know that one of its employees poses an unreasonable risk of harm to other employees"); Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 494, 340 S.E.2d 116, 123 (1986) ("North Carolina recognizes the existence of a claim against an employer for negligence in employing or retaining an employee")

Only one modern decision, based on older precedent in the jurisdiction, has rejected the duty as applied to employer liability for torts of one employee on another. See Beam v. Concord Hospitality, Inc., 920 F. Supp. 1165, 1168 (D. Kan. 1996).

Some courts state a claim for negligent hiring, retention, training, or supervision is not available based on the commission by employees of a tort within the scope of their employment, which would provide a basis for holding the employer vicariously liable for the same damages as would the employer's direct negligence. See, e.g., Tindall v. Enderle, 162 Ind. App. 524, 529-30, 320 N.E.2d 764, 767-68 (Ct. of App. 1974). This limitation was also adopted in § 317 of the Restatement Second of Torts, which states that "[a] master is under a duty to exercise reasonable care to control his servant while acting outside the scope of his employment … ." The primary reason for the limitation is to avoid the admission of evidence of the tortious employee's past behavior that would be relevant to a negligence claim against the employer, but could prejudice the employer's defense against a vicarious liability claim. See Scroggins v. Yellow Freight Systems, Inc., 98 F.Supp.2d 928, 931 (E.D. Tenn. 2000) (applying Georgia law). Where a plaintiff may recover punitive damages from an employer through proof of the employer's direct negligence, even jurisdictions that otherwise limit the negligence cause of action allow it to proceed in tandem with a claim of vicarious liability. Id.

Comment b. Employers subject to a workers' compensation law may be subject to direct liability for some injuries caused by agents acting for their own personal reasons outside the scope of employment, but in a manner enabled by an employer's negligent selection, retention, or supervision. Such injuries may not be compensable under a workers' compensation law because they did not both "arise out of" and also occur "in the course of" employment. Furthermore, an employer's negligent selection or supervision may result in non-physical injuries to employees that are not compensable under a workers' compensation law. This may be true for mental or emotional distress not caused by or incident to any physical injury.

For cases finding no preclusive workers' compensation remedy for harm caused by negligent supervision or hiring or retention, see, e.g., Sisco v. Fabrication Technologies, Inc., 350 F. Supp.2d 932, 943 (D. Wyo. 2004) (the emotional distress of which the plaintiff complained "was not caused by a physical injury, but by the alleged harassment he endured"); Gerber v. Vincent's Men's Hairstyling, Inc., 57 So. 3d 935, 937 (Fla. Dist. Ct. App. 2011) (negligent retention and supervision claim in harassment case not precluded by workers' compensation law because it did not arise out of employment); Gasper v. Ruffin Hotel Corp. of Maryland, 183 Md. App. 211, 230, 960 A.2d 1228, 1239 (Md. Ct. Spec. App. 2008) (negligent hiring and retention claims in harassment case not preempted by workers' compensation statute); Patterson v. Augat Wiring Systems, Inc. 944 F. Supp. 1509, 1528 (N.D. Ala. 1996) (harassment and verbal abuse caused purely psychological injuries not compensable under Alabama workers' compensation law); Kerans v. Porter Paint Co., 61 Ohio St.3d 486, 490, 575 N.E.2d 428, 431 (1991) (Ohio's workers' compensation law does not provide exclusive remedy for victims of workplace harassment, so claim for negligent retention of harassing employee is not barred by act); Hogan v. Forsyth Country Club. Co., 79 N.C. App. 483, 495, 340 S.E.2d 116, 124 (N.C. Ct. App. 1986) (injuries from sexual harassment do not arise out of employment and are not compensable under workers' compensation act, so claim for negligent retention of harassing employee is not barred by act).

But see, e.g., Peterson v. Arlington Hospitality Staffing, Inc., 276 Wis.2d 746, 752 689 N.W.2D 61, 64 (2004) (Wisconsin workers' compensation law provides exclusive remedy for sexual assaults committed by co-employee, and thus precludes claims for negligent hiring, training and supervision); Konstantopoulos v. Westvaco Corp., 690 A.2d 936, 937 (S. Ct. Del. 1996) (Delaware workers' compensation Act "precludes an employee from asserting a common law tort claim against her employer for … sexual harassment on the job by fellow employees," even when employee is not physically injured); Fields v. Cummins Employees Fed. Credit Union, 540 N.E.2d 631, 640 (Ind. Ct. App. 1989) (preemption of claim for negligent supervision resulting in sexual harassment that occurred in the course of employment).

Comment c. Illustration 1 is based on Collins v. Flowers, 2005 Ohio 3797 (Ct. of App. 9th Dist. 2005). The court stated that the employer had no duty to perform a criminal background check on the culpable employee before hiring him. Id.

As noted by the court in Yunker v. Honeywell, Inc., 496 N.W.2d 419, 422 (Ct. of App. Minn. 1993), "a number of jurisdictions have expressly defined the scope of an employer's duty of reasonable care in hiring as largely dependent upon the type of responsibilities associated with the particular job." Id. at 422. See, e.g., Connes v. Molalla Transp.. Sys., 831 P.2d 1316, 1321 (Colo. 1992) (employer's duty in hiring varies with type of anticipated contact with others); Tallahassee Furniture Co. v. Harrison, 583 So.2d 744, 750 (Fla. Dist. Ct. App. 1991) (employer's duty to investigate applicant's background varies with type of work to be done by applicant); Keibler v. Cramer, Pa. D. & C. 4th 193, 196-97 (1988) (necessary to do criminal background check on employee who reads gas meters in home); Welsh Mfg. v. Pinkerton's Inc., 474 A.2d 436, 439 (R. I. S.Ct.) (employer has higher duty of care to investigate criminal record of applicant for employment as security guard).

Courts have not required employers to investigate a prospective employee's criminal record for all jobs. "[T]here is no common law duty to institute specific procedures for hiring employees unless the employer knows of facts that would lead a reasonably prudent person to investigate the prospective employee." Kennneth R. v. Roman Catholic Diocese of Brooklyn, 229 AD 2d 159, 161, 654 NYS2d 791, 793 (1997). "[A]n employer ordinarily has no duty to inquire concerning the possible criminal record of a prospective employee." Evans v. Morsell, 284 Md. 160, 167, 395 A.2d 480, 484 (Ct. of App. Md. 1978). The critical question is whether holding the job would significantly enhance an employee's opportunity for mischief against fellow employees or others. See, e.g, Smith v. Orkin, 540 So.2d 363, 368 (Ct. of App. La. 1989) ("Because Orkin sends employees into homes, it is subjected to a higher standard of duty to protect against intentional torts than is a regular business."); Ponticas v. K.M.S. Inv., 331 N.W.2d 907, 913 (Minn. 1983) ("the scope of the investigation is directly related to the severity of the risk third parties are subjected to by an incompetent employee").

State legislatures and courts have recognized strong policy arguments against doctrine that would make an employer subject to liability for any harm that resulted from the hiring of an ex-felon for any position. See, e.g., HAW. REV. STAT. § 378-2 (Bender 1993) (protecting ex-offenders seeking employment); WIS. STAT. ANN. § 111.321 (West 2003) (forbidding consideration of all types of criminal histories in employment situations); N.Y. CORRECT. LAW § 753 (McKinney 1987) (stating public policy encourages opportunities of employment for previously convicted individuals); N.J. STAT. ANN. § 2A: 168A-1 (West 1985) (declaring public interest in rehabilitating ex-offenders through employment opportunities); Soto-Lopez v. N.Y. City Civil Serv. Comm'n, 713 F. Supp. 677, 679 (S.D.N.Y. 1989) (holding public policy requires court to ensure enforcement of city regulations promoting ex-offender employment). But cf. Haddock v. City of New York, 75 N.Y.2d 478, 485, 553 N.E.2d 987.,992, 554 N.Y. 2D 439, 444 (N.Y. 1990) (city ignored its own policies for placement of ex-felons).

Moreover, subjecting employers to liability for the harm resulting from any hiring of those with criminal records could be inconsistent with employers' responsibilities under Title VII of the 1964 Civil Rights Act to avoid employment practices that have a disparate impact on racial or ethnic minorities not justified by business necessity. See, e.g., Green v. Missouri Pacific Railroad, 523 F.2d 1290 (8th Cir. 1975) (finding illegal railroad's policy against hiring all those with criminal convictions, regardless of nature and severity and date of crime and nature of job)

Comment d. Illustration 3 is based on Patterson v. Augat Wiring Systems, Inc. 944 F. Supp. 1509 (N.D. Ala. 1996) (applying Alabama law). For other cases holding employers may be subject to liability for failure reasonably to supervise, see, e.g., Baker v. Weyerhaeuser Co., 903 F.2d 1342, 1348 (10th Cir 1990) (applying Oklahoma law; jury found employer knew of sexual harassment, but did not act to stop it); Kerans v. Porter Paint Co., 61 Ohio St.3d 486, 493, 575 N.E.2d 428, 431 (1991) (employer "may be

independently liable for failing to take corrective action against an employee who poses a threat of harm to fellow employees"); Cox v. Brazo, 165 Ga. App. 888, 889, 303 S.E.2d 71, 73 (1983) (same).

For cases, like Illustration 4, in which courts decline to find an employer liable for negligent supervision or training, see, e.g., Mardis v. Robbins Tire & Rubber Co., 669 So.2d 885, 890 (S. Ct. Ala. 1995) (employer did not receive notice of harassment until the day the victim of harassment resigned); Collins v. Flowers, 2005 Ohio 3797 (Ct. of App. 9th Dist.2005) (employer reasonably investigated inappropriate behavior and monitored the offending employee).

Plaintiffs often combine claims for negligent supervision and for discriminatory harassment. For instance, in *Patterson*, *supra*, in addition to her negligent supervision and retention claims, the plaintiff also filed claims for race and sex discrimination and retaliation under Title VII. Title VII courts apply a reasonableness standard when assessing an employer's supervisory response to discriminatory harassment. The courts hold an employer liable under Title VII for the discriminatory harassment of employees by co-workers when the employer knew or should have known of the harassment and failed to take prompt and appropriate remedial action. See, e.g., Crowley v. L.L. Bean, Inc., 303 F.3d 387, 401 (1st Cir. 2002); E.E.O.C. v. Hacienda Hotel, 881 F.2d 1504, 1516 (9th Cir. 1989); Brooms v. Regal Tube Co., 881 F.2d 412, 421 (7th Cir. 1989); Steele v. Offshore Shipbuilding, Inc., 867 F.3d 1311, 1316 (11th Cir. 1989); cf. also Hunter v. Allis-Chalmers Corp. Engine Division, 797 F.2d 1417, 1422 (7th Cir. 1986) (racial harassment actionable under § 1981 if management knew, or in the exercise of reasonable care should have known, of such harassment, but failed to take reasonable steps to prevent the harassing conduct). The Supreme Court implicitly approved this negligence standard for employer liability for co-worker discriminatory harassment in its *Faragher* decision. See 524 U.S. at 799-800.

State courts also have applied the same negligence standard to determine employer liability for co-worker discriminatory harassment under state anti-discrimination laws. See, e.g., Corrections v. Butland, 147 N.H. 676, 680, 797A.2d 860, 863 (2002); Brittell v. Dept. of Correction, 247 Conn. 148, 168, 717 A.2d 1254, 1266 (1998); Lehmann v. Toys'R'Us, Inc., 132 N.J. 587, 621, 626 A.2d 445, 463 (1993); Glasgow v. Georgia-Pacific Corp., 103 Wn.2d 401, 406, 693 P.2d 708, 712 (1985); Holien v. Sears, Roebuck and Co., 298 Or. 76, 89, 689 P.2d 1292, 1299 (1984). In *Lehmann*, the court stated: "In light of the known prevalence of sexual harassment, a plaintiff may show that an employer was negligent by its failure to have in place well-publicized and enforced anti-harassment policies, effective formal and informal complaint structures, training, and/or monitoring mechanisms. " 132 N.J. at 621.

Claims of negligent training are usually asserted in tandem with claims for negligent supervision, as a failure to train can be considered one type of a failure to supervise. In Stone v. Von Eye Farms, 207 SD 115, 741 N.W.2d 767 (2007), for instance, the court found that a plaintiff injured in a farm accident could assert claims for both negligent training and negligent supervision against the plaintiff's employer for its failure to adequately train and supervise an incompetent co-worker who operated the farm tractor that injured the plaintiff.

Minnesota courts state that they recognize only claims for negligent hiring, retention, and supervision, but not negligent training. See, e.g., Mandy v. Minnesota Mining and Mfg., 940 F. Supp. 1463, 1473 (D. Minn. 1996); M.L. v. Magnuson, 531 N.W.2d 849, 856 (Minn. Ct. App. 1995). This formal doctrine would not seem to make a difference in any cases, however; employees who are allowed to continue in a job for which they are incompetent or unfit because they have not been reasonably trained also have not been reasonably supervised or retained. For instance, in *Mandy*, supra, an employee alleged being sexually harassed by a negligently supervised and retained employee who might have been better supervised had he been required to undergo an anti-harassment training program.

Comment e. Illustration 5 is based on Escobar v. Watkins, 226 Ill. App.3d 92, 589 N.E.2d 638 (Ill. App. Ct. 1st Dist. 1992). In the actual case the court held that evidence that the employer knew the foreman used drugs and once threatened at work to get his gun from his car was not sufficient to demonstrate that a shooting was a foreseeable consequence of the failure reasonably to supervise and retain the foreman. For another case rejecting claims that an employer's alleged negligent hiring and retention of a convicted murderer caused a second murder of a co-employee, see MacDonald v. Hinton, 361 Ill. App.3d 378, 836 N.E.2d 893 (Ill. App. Ct. 2005). The court in *MacDonald* stressed that the second murder occurred away from the work place and that the victim could have become acquainted with the murderer under other circumstances. See also Schmidt v. HTG, Inc., 961 P.2d 677 (Kan. 1998) (refusing to impose liability simply because the attacker met the victim as a co-employee, since the attack occurred away from the work place after the victim was no longer an employee).

Illustration 6 is based on the facts of Yunker v. Honeywell, Inc., 496 N.W.2d 419 (Ct. of App. Minn. 1993). In the actual case of *Yunker*, however, the second murder occurred in the victim's parking lot, rather than in the employer's parking lot. The court stated that it found only that the employer had a duty toward the murdered employee, and that the questions of whether that duty was breached by the failure to terminate or discipline the murderer before the murder occurred and whether such a breach was a proximate cause of death were questions to be decided by a jury. The question of causation in Illustration 6 should turn in part on whether the retention of the violent employee increased the risks of his harming others.

Courts have consistently required plaintiffs to demonstrate proximate causation in order to claim damages for injuries deriving from an employer's negligent hiring or supervision, whether or not the plaintiffs were employees of that employer. See, e.g., Barton v. Whataburger, Inc., 276 S.W.3d 456, 463-464 (Tex. App. 2008) (restaurant's negligence in hiring restaurant manager with criminal convictions for drug dealing and failure to pay child support was not proximate cause of his unforeseeable involvement in felony murder at the restaurant); Reed v. Kelly, 37 S.W.3d 274, 277 (Mo. Ct. App. E.D. 2000) (security guard business managers could not have reasonably foreseen a negligently employed guard's sexual assault on a stranger based on guard's prior slapping of his wife and his fisticuffs with former co-employee); McGuiness v. Brink's Inc., 60 F. Supp. 2d 496, 501 (D. Md. 1999) (even if armored car service should have known of employee's drug use and not hired her, its officers could not have foreseen the criminal acts of third party to whom employee loaned gun); Strickland v. Communications and Cable of Chicago, Inc., 304 Ill. App. 3d 679, 683, 237 Ill. Dec. 632, 710 N.E.2d 55 (1st Dist. 1999) (adequate background check would have revealed cable television installer's proclivity to commit traffic violations, but would not have predicted sexual assault); Island City Flying Service v. General Electric Credit Corp., 585 So.2d 274, 277 (Fla. S. Ct. 1991) (employee's discharge from army due to a drug offense did not predict that he would steal and crash an airplane).

§ 4.04. Employer's Duty to Provide Safe Conditions and to Warn of Risk

Unless otherwise provided by a workers' compensation or other law, an employer is subject to liability for harm to an employee caused by breach of its duty

(a) to provide both a reasonably safe workplace and instrumentalities of work, and

(b) to warn of the risk of dangerous working conditions of which the employer but not the harmed employee was or should have been aware.

Comment:

a. Overview. Employers have a duty to their employees to make reasonable efforts to provide their employees reasonably safe working conditions and to warn of dangerous conditions which the employers, but not the employees, wasor should have been aware. This duty is not delegable. Employers can breach the duty both by actions and by failures to act.

b. Workers' compensation law or other laws. Common law actions in this area are largely precluded by state workers' compensation laws. A common law action may be available under this Section, however, where the employers have opted out of the workers' compensation law (an option permitted in certain jurisdictions) or where the employees in question or their injuries are not covered by that law.

Illustration:

1. P, a television cable company, employs E to install cable wire. P has elected not to be covered by the state's workers' compensation system. P does not supply E with reasonable and proper lifting equipment and E injures her back while unloading wire from her truck. E sues P for negligence.

` P may be subject to liability to E for breach of its duty to provide reasonably safe working conditions.

c. Duty to make reasonable efforts to provide reasonably safe working conditions. Employers have a duty to exercise ordinary reasonable care in providing their employees with a reasonably safe working environment and instrumentalities. Employers are

obligated to make only reasonable efforts to provide a reasonably safe workplace, however; they are not obligated to guarantee safety or to insure the instrumentalities of work that they furnish.

The level of safety that employees reasonably can expect varies with the nature of the work and the work place. Employees assume the risks of dangers ordinarily incident to the work they accept. Employees do not accept the risks of an employer augmenting dangers through a failure to exercise reasonable care.

Illustrations:

2. P employs E to work on P's farm. P directs E to plow a field using a tractor that P knows is much older than the useful life of most tractors and has had a leak in its gas tank unsuccessfully repaired numerous times. While E is plowing a field, the tractor catches on fire and E is crushed and killed by the tractor while attempting to put out the fire.

On the assumption that E was not negligent in attempting to put out the tractor fire (or that any contributory negligence is not a complete bar to recovery), P is subject to liability for the wrongful death of E. P did not make reasonable efforts to provide E with a reasonably safe instrumentality of work.

3. Same facts as Illustration 2 except that the tractor supplied to E was not older than the normal useful life of a tractor and had no defect known to P. P is not liable for the wrongful death of E. Even on the assumption E was not negligent in attempting to put out the tractor fire, E accepted the normal risks incident to farm labor and working with a powerful piece of machinery. P did not fail to take any reasonable steps to provide E with a safe work place.

4. P, a hospital, employs E as a nurse's aide in a rehabilitation ward. Early one morning before patients normally arise E is working at a sink in a bathroom in the ward with her back to the door. There is a large metal hook on the door to assist in opening. A patient in a wheel chair unexpectedly pushes into the bathroom, forcing the hook into E's back and causing a serious injury.

On the assumption that E was not negligent in thinking no one would push unannounced into the bathroom (or that any contributory negligence is not a complete bar to recovery), P is subject to liability to E for the unsafe placement of the hook on the back of the bathroom door. E's own knowledge of the location of the hook on the door does not insulate P from liability for any negligence in increasing the risks of injury by having the hook placed in an unnecessarily dangerous location.

d. Duty to exercise care to protect employees from wrongful conduct by third parties subject to employer's control. The duty of an employer to make reasonable efforts to provide its employees with reasonably safe working environments includes the duty to make reasonable efforts to protect employees from the dangerous conduct of others. Thus, an employer is obligated to make reasonable efforts to control conduct that the employer or its agents know or reasonably should know could place employees in positions of unnecessary danger. In order to avoid unnecessary danger, an employer has an obligation to make reasonable efforts to control the dangerous conduct of not only employees or other agents, but also other invited or uninvited visitors to a work site under the employer's control.

Employers do not have a general duty to protect their employees from all criminal attacks by third parties. Employers, like others, may rely on public authorities to protect the safety of citizens. Employers, however, do have a duty not to augment the risk of criminal attacks on their employees by conducting their business in an unreasonably safe manner. Thus, employers must make reasonable efforts to protect employees at work sites, such as banks or retail establishments open late at night in high-crime areas not adequately protected by public authorities. Employers also have a duty to make reasonable efforts to protect employees at work sites under the employer's control from the known danger of imminent serious harm from third parties.

Illustrations:

5. P owns and operates a liquor store in a district of town with relatively high crime rates, but well patrolled by police. P employs E and F as sales clerks

on a night shift that lasts until midnight. Knowing of several robberies in the district, P tells E and F not to resist if they are robbed, but to call the police as soon as possible. E is shot during a night robbery of the store after accurately telling a robber that a police car is parked in front of the store.

P is not subject to liability to E. P did not augment the risks of a criminal attack on E by an unreasonably unsafe operation of the liquor store.

6. P employs E as a bank teller at a branch that has been robbed several times in the past year. Contrary to the advice of law enforcement agents, P does not install relatively inexpensive bullet-proof glass in front of the teller stations at the branch. A robber shoots E during a robbery.

On the assumption that P's unreasonably unsafe operation of the branch was the proximate cause of the shooting of E, P is subject to liability to E.

7. P employs A and B in different shifts in a manufacturing facility. B believes that A is having an affair with B's spouse. B, while not working, comes to the facility during A's shift and confronts A. B becomes very loud and animated, and is overheard by two of P's supervisors threatening A with death. The supervisors also notice that B has a gun in a pocket. Rather than contacting security or the police or warning A, the supervisors tell B and A to take their argument into the company parking lot. B and A walk outside and B shoots and kills A.

On the assumption that P's breach of its duty was a proximate cause of A's death, P is subject to liability for its failure to make reasonable efforts to protect A from a known danger of imminent serious harm.

e. Duty to warn. An employer has a duty to warn its employees of dangerous working conditions, including dangerous instrumentalities of work, whenever the employer, but not the employee, knew or should have known of the danger of injury. The duty to warn is thus dependent upon the employer's greater knowledge of a non-obvious danger. An employer has no duty to warn an employee of an obvious danger of which the employee was aware or should have been aware.

An employer may breach its duty to warn of dangerous conditions without also breaching its duty to make reasonable efforts to provide a reasonably safe working environment. Some non-obvious dangers that cannot be avoided by an employer's reasonable efforts to secure a safe working environment may be avoided by employees who have been adequately warned of the dangers.

Illustrations:

8. P, a farmer, employs E as a hired hand. P provides E with a skid loader to assist in the feeding of cattle on the farm. The manual for the skid loader includes a bold warning: "Never stand or lean on loader; doing so may cause boom to drop and crush you." P has read the manual, but does not advise E of the warning. When E stands on the loader to try to tip it through a patch of snow, the boom drops and crushes E's feet.

P is subject to liability to E for failing to warn E of the specific non-obvious danger posed by the skid loader. Without being warned by P, E had no reason to be aware of the particular danger posed by standing on the loader.

9. Same facts as Illustration 8 except that the skid loader's control panel includes a large label with the warning against standing or leaning on the loader. P is not subject to liability for failing to warn E of a danger of which E should have been aware.

An employer that breaches its duty to make reasonable efforts to provide a reasonably safe working environment may be subject to liability to employees harmed by the breach even when the employer has warned the employees of the danger caused by the breach. This may be the case when the employer or the employer's agents require the employees to engage in work that is made unreasonably dangerous because of the breach. Directing employees to risk unreasonably unsafe working conditions may itself constitute actionable negligence. Employees do not assume the risk of a known unreasonably unsafe working condition that their employer requires them to accept. On the other hand, the working condition itself may not have been unreasonably dangerous if the employees

had complied with the employer's warning. In such circumstances, the employees' own negligence was the proximate cause of their injuries.

Illustrations:

10. P, a manufacturing company, employs E as a laborer. O, an officer of P assigns E and other employees to the task of unloading from a truck steel beams to be used in the construction of an addition to one of P's plants. High power electrical wires overhang the spot where the truck is to be unloaded by use of a crane. Because of its height, the crane poses special risks of electrocution to the workers during the unloading. Those risks would not have been present had O elected to use a shorter crane at no extra cost to P. Instead O warns E and the other laborers to be careful using the higher crane around the wire. E exercises care, but one of the beams slips and he is electrocuted and killed.

P, as well as O, may be subject to liability for the wrongful death of E. O's decision to direct E to use the high crane was negligent and within the scope of O's employment. E was not negligent in following O's direction and did not assume the risk of O's negligence simply because O warned him to be careful.

11. Same facts as Illustration 10 except that O not only warns E of the risks of using the tall crane, but tells E that he can wait to unload the beams until a shorter crane is brought to the work site. E nonetheless decides to take the risk of using the higher crane so that he can enlarge his later break time.

P and O are not subject to liability for the wrongful death of E. E's own negligence was the proximate cause of his death.

REPORTERS' NOTES

Comment a. The employer's special duty to provide safe working conditions and to warn of risk is generally stated in § 492 and elaborated in subsequent sections of the Restatement Second of Agency. Section 492 states: "A master is subject to a duty that care be used either to provide working conditions which are reasonably safe for his servants and subservants, considering the nature of the employment, or to warn them of risks of unsafe conditions which he should realize they may not discover by the exercise of due care."

The duty has been recognized in all jurisdictions. No decision seems to have questioned the general doctrine expressed in § 4.04. See, e.g., Jackson v. Murphy Farm and Ranch, Inc., 982 So. 2d 1000, 1002 (Ct. of App. Miss. 2008) ("master has the duty to use reasonable care to furnish his servant with a reasonably safe place in which to work, and with suitable and reasonably safe instrumentalities to do his

work"); Foote v. Simek, 139 P.3d 455, 462 (Wyo. 2006) (the issue in case is "[w]hether the owner breached his duty to provide the employee a reasonably safe workplace or to warn the employee of unsafe working conditions"); Wenimont v. Wenimont, 686 N.W.2d 186, 190 (Iowa 2004) ("employers must use reasonable care to provide and maintain for their employees reasonably suitable and safe machinery and tools with which to work, and a reasonably safe place to work"); Logsdon v. Killinger, 69 S.W.3d 529, 532 (Mo. App. 2002) ("employer has a duty to provide a safe working environment and this duty is not delegable"); Smith v. Massey-Ferguson, Inc., 256 Kan. 90, 95, 883 P.2d 1120, 1125 (1994) ("It is the duty of the master to furnish his servant with a safe place in which to work and with safe and reasonably suitable machinery, tools, implements and appliances with which to perform the work in which the servant is engaged."); Church v. SMS Enterprises, 186 Ga. App. 791, 792, 368 S.E.2d 554, 555 (1988) ("It is the duty of the employer to provide its employees with a safe workplace and to warn them of any unusual conditions that may exist, or of any conditions of which employees may have no knowledge."); Wallace v. Kentucky Fried Chicken of Lawton, Oklahoma, Inc., 526 P.2d 504, 506-507 (Okla.Civ.App.Div.2 1974) ("To his servant a master owes nondelegable duties to furnish: (1) a reasonably safe place to work; (2) reasonably safe materials and equipment with which to work; and (3) reasonably safe methods by which to work").

Comment b. Illustration 1 is based on Leitch v. Hornsby, 935 S.W. 2d 114, 40 Tex. Sup. J. 159 (1996). In the actual case the court found that even if the employer, which had elected not to be covered by workers' compensation, had breached its "nondelegable duty" to provide "proper lifting equipment", there was no probative evidence that the breach was the proximate cause of the employee's injury. 935 S.W. 2d at 118-119. The *Letich* court's analysis confirms that causation of harm must be demonstrated as a condition of liability for an employer's breach of the duty of care stated in § 4.04 as it is for liability for any breach of a duty of care. The court's analysis also confirms that employer liability is based on a non-delegable duty and is thus not dependent on the liability of a particular negligent agent.

Comment c. For a case similar to Illustrations 2 and 3, see West v. Sonke, 132 Idaho 133, 968 P.2d 228 (1998). The court in Sonke upheld the grant of a summary judgment motion for the defendant based on the negligence of the employee in trying to dismount and remount a moving tractor. Id. at 143.The court, however, confirmed that the employer had a duty to make reasonable efforts to provide the employee with a tractor that was not defective or unreasonably old and to warn and train the employee to avoid foreseeable dangers. Id. at 142.

Illustration 4 is based on Siragusa v. Swedish Hospital, 60 Wash.2d 310, 319-321 (S. Ct. Wash. 1962). The court held that if an employer fails "to exercise reasonable care to furnish … a reasonably safe place to work …, he may not assert, as a defense to an action based upon such a breach of duty, that the injured employee is barred from recovery merely because he was aware or should have known of the dangerous condition negligently created or maintained." Id at 319.

As the *Siragusa* court recognized, see id. at 317-318, its holding narrowed the traditional defense of assumption of risk, which was developed in the nineteenth century in both Great Britain and the United States to encourage industrialization. See Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 58-62 (1943) (Black, J.) (holding that the assumption of risk defense was "discarded" by a 1939 amendment to the Federal Employers' Liability Act). Indeed, the Restatement Second of Agency continued to adhere to a broad assumption of risk defense as late as 1957: "Although a master has neither used care to make the premises safe nor care to warn his employees that they are not safe, and although he has no reason to believe that the employees know of the lack of safety, he is not liable to employees who in fact know of the conditions and realize the danger therefrom …." Comment a. to § 521.

The assumption of risk defense, at least as broadly construed in § 521, however, has long been subject to strong criticism. See, e.g. Tiller v. Atlantic Coast Line R. Co., supra, at 68, 69 (Frankfurter, J.); 3 Labatt, Master and Servant, § 960 (2nd ed. 1913); Prosser, Law of Torts, § 67 at 467 (3rd ed. 1964). After the adoption of the Restatement Second of Agency, moreover, most jurisdictions that have considered the issue, have agreed with the Washington Supreme Court in *Siragusa* that employees who do not have a remedy under a workers' compensation law and who were not themselves negligent should not be barred from asserting their employer's negligence because they have assumed the risks of that negligence. See, e.g., Williamson v. Smith, 83 N.M. 336, 337, 341, 491 P.2d 1147, 1148, 1152 (1972) (holding in an employment case that assumption of risk should no "longer be recognized as a defense in New Mexico"); Hines v. Continental Baking Co., 334 S.W.2d 140, 146-147 (Mo. 1962) ("the servant assumes only such risks as are inherent in his work after the master has exercised such care in providing a safe place to work"); Ritter v. Beals, 225 Or. 504, 518-519, 358 P.2d 1080, 1086-1087 (1961) (finding employee not subject to assumption of risk defense because "in cases in which assumption of risk [has been] recognized

as a defense [the] workman did not as a matter of law assume risks created by the negligence of the employer"). See also, e.g., Ingalls Shipbuidling Corp. v. McDougald, Jr., 228 So.2d 365, 367 (Miss. 1969) (holding employer may be liable for failing to furnish adequate light in workplace notwithstanding injured employee's acceptance of work in the dark).

Comment d. Illustration 5 is based on Parham v. Taylor, 402 So.2d 884 (Ala. S.Ct. 1981). The *Parham* court, quoting Thoni Oil Magic Benzol Gas Station, Inc. v. Johnson, 488 S.W.2d 355, 357 (Ct. of App. Ken. 1972), stated:

> "When the conditions of employment are such that they invite attack upon employees by creating highly unusual and unreasonable exposure to danger without the employment of reasonable protective measures there is justification for imposing liability upon the employer when injury results ….
>
> "But even so, the employer of the night watchman, the bank teller, or the service station attendant is not the insurer of his safety from attack. Even in those circumstances which ordinarily entail a substantial risk of exposure to criminal acts of third persons, we think liability should not attach to the employer unless it is clearly shown that the employer in some manner greatly and unreasonably increased that risk without taking reasonable precautions for the safety of the employee."

488 S.W.2d at 357. In *Thoni* the court held that the owner of a previously robbed all- night gas station was not liable for the murder of a sole night attendant at the station, which was located on a "principal thoroughfare … patrolled hourly by city police." 488 S.W.2d at 356.

In Barton v. Whataburger, 276 S.W.3d 456 (Tex App. 2008), an employee at an all-night fast food restaurant was murdered by a robber who had crawled through the drive-through window. The court recognized the nondelegable duty of employers to take "reasonable security measures to prevent" … "criminal conduct … foreseeable … in light of what the … owner knew or should have known before the criminal act occurred.," id. at 466, but found in light of the relative infrequency of crime in the proximate area, the murder was not foreseeable. Id. at 469.

Illustration 6 is based on Grillo v. National Bank of Washington, 540 A.2d 743 (Ct. of App. of D.C. 1988). The court assumed the defendant bank's conduct was negligent, but held that the plaintiff's exclusive remedy was under the District of Columbia's workers' compensation act because the shooting occurred in the course of the plaintiff's employment and was not the result of the employer's intent to injure. Id. at 750-754. The court's decision in *Grillo* explains why employees bring few tort actions against their employer for the negligent failure to protect against the criminal or other wrongful conduct of third parties: In most cases the employees would have an exclusive remedy under a workers' compensation law.

See also Lillie v. Thompson, 332 U.S. 459, 461 (1947), a case brought under the Federal Employers' Liability Act, 45 U.S.C. § 51, which provided that "[e]very common carrier by railroad … shall be liable in damages to any person suffering injury while he is employed by such carrier … for such injury … resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier." The Court in *Lillie* held that an employer's duty under this provision to make reasonable efforts to provide a reasonably safe working environment included the duty to avoid unnecessary risks of harm from the dangerous conduct of others. Id at 461. The Court held that an employer might be liable for injuries sustained by a telegraph operator from a criminal's assault because she was required to work alone at night in a one-room frame building in a dangerous unlighted and unpatrolled railroad yard. The building did not have windows and it was necessary for her to open her door to those who could not be identified after knocking. Id. at 461-462.

Illustration 7 is based on DuPont v. Aavid Thermal Technologies, Inc., 147 N.H. 706, 798 A.2d 587 (2002). The *Dupont* court did not address "whether the plaintiff's claims are preempted by the exclusive remedy provisions of the Workers' Compensation Law" as the employer did not argue the issue. Id. at 714. It may be relevant that while the shooting occurred "during the course of employment," it did not "arise out of employment." The *DuPont* court held the plaintiff, the administrator of the estate of the murdered employee, sufficiently alleged that the defendants owed the murdered employee a duty to protect him because "the supervisors knew that [the murderer] was armed and agitated, and thus they allegedly knew that the decedent was in a 'position of imminent danger of serious harm.'" Id. at 714.

The *DuPont* court relied in part on § 314B, Restatement Second of Torts, and § 512(1), Restatement Second of Agency, both of which in identical language provide:

> If a servant, while acting within the scope of his employment, comes into a position of imminent danger of serious harm and this is known to the master or to a person who has duties of

management, the master is subject to liability for a failure by himself or by such person to exercise reasonable care to avert the threatened harm.

Courts also apply a negligence standard to determine employer liability under anti-discrimination laws for discriminatory harassment by third parties who are subject to the employer's control. See, e.g., Freitag v. Ayers, 463 F.3d 838, 849 (9th Cir. 2006) (prison may be liable under Title VII for failure "to take prompt and effective remedial action to address" sexual harassment of female guards by prisoners); Dunn v. Washington County Hosp., 429 F.3d 689, 691 (7th Cir. 2005) (employer may be liable under Title VII for harassment by independent contractor because employer's failure to take "reasonable care" to provide nondiscriminatory work environment). See generally Noah D. Zatz, Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent, 109 Colum. L. Rev. 1357 (2009).

Comment e. Illustrations 8 and 9 are based generally on Wenimont v. Wenimont, 686 N.W.2d 186, 190 (Iowa 2004). Quoting Krueger v. Noel, 318 N.W.2d 220, 225 (Iowa 1982), the *Wenimont* court stressed the "common-law duty to warn "is dependent upon superior knowledge and arises when one may reasonably foresee danger or injury or damage to one less knowledgeable unless forewarned of the danger."" Id. at 192. The court denied defendant's motion for summary judgment because "the reasonable inference is that [the defendant] had superior knowledge of the danger to [the plaintiff] that the skid loader presented when he directed [the plaintiff] to climb on it." Id.

For a similar case applying the same doctrine to differing facts, see Green v. Allendale Planting Co., 954 So.2d 1032, 1039 (Miss. 2007). The court concluded that "Green needed no warning to understand the danger of coming into close proximity with the moving chains attached to the mule boy. Green was an experienced farm hand and testified that he thoroughly understood the dangers associated with operating and repairing farm equipment. He operated the mule boy daily and performed the required maintenance to the machine. Thus, it is highly likely that Green had more knowledge about the mule boy than this employer." Id.

See also, e.g., Griffin Warehouse, Inc. v. Sanders, 349 Ark. 94, 106, 76 S.W.3d 254, 262 (Ark. 2002) ("employees were aware that the skylights posed an obvious hazard or danger that was an integral part of the work . . .However, the issue becomes whether there were latent dangers or defects known, or reasonably should have been known, to [defendant] about which it should have warned …"); Phenning v. Silansky, 144 Conn. 223, 226 129 A.2d 224, 226 (1957) ("Proof of either actual or constructive notice of the defective condition of the plank was necessary before [defendant's] negligence could be logically and legally established. … To be sure, the defendant testified that, prior to the accident, he had not inspected the plank. But negligence may not be ascribed to an individual by reason of his failure to inspect where the inspection, if it had been made, would not have disclosed the particular condition occasioning the ultimate injury."); Mergel v. Colgate-Palmolive-Peet Co., 41 N.J. Super. 372, 379 (1956) ("decedent was a millwright for 20 years, and the work being done was in his line; he was familiar with the surroundings … The condition or danger complained of was not latent, but open and apparent to any man of ordinary intelligence.")

Illustration 10 is based on Jones v. Brubacher, 242 So.2d 627 (La. 1970). The court stated: "the obligation of an employer and, within the limits of their authority, of its supervisory personnel towards workmen is to provide them with a working place and conditions which are reasonably safe considering the nature of the work. … The nature of the work might not have permitted complete safety from the falling of an iron beam (due to another employee's negligence), but it would not have prevented complete safety from electrocution by use of the reasonable available means …. [The officer] had the obligation and the obligation is not fulfilled by providing an unnecessarily unsafe place and conditions and warning the workmen of the danger, especially when safety could so easily and inexpensively have been had." Id. at 631-632.

The principle that warnings do not insulate an employer from liability for directing employees to subject themselves to the risks of the employer's negligence is a corollary of the principle that an employer cannot assert that its employees assume the risk of the employer's negligence. See comment c. supra. In adopting the now disfavored broad assumption of risk defense, the Restatement Second of Agency in 1957 also stated that an adequate warning insulates an employee from liability for ordering its employees to perform unreasonably unsafe work: "A servant who remains at work under conditions which he knows to be dangerous is barred from recovery although he is coerced into remaining at such work by economic pressure. Thus, the fact that the servant knows that he cannot obtain other employment if he fails to

continue or that his refusal to do a dangerous act will cause his discharge is immaterial." Comment *a* to § 523.

The Restatement Second of Agency's position that economic coercion did not negate the voluntariness that was a condition of an assumption of risk defense was not fully accepted as sensible by the judiciary before 1957 and has been strongly criticized since. See, e.g. Tiller v. Atlantic Coast Line R. Co., supra, at 68, 69 (Frankfurter, J.). ("The notion of assumption of risk as a defense – that is, where the employer concededly failed in his duty of care and nevertheless escaped liability because the employee had agreed to 'assume the risk' of the employer's fault – rested, in the context of our industrial society, upon a pure fiction."); Prosser, Law of Torts, § 67 at 467 (3rd. Ed. 1964) (describing the "harsh" position and the strong criticism of other commentators). Because workers' compensation laws now generally immunize employers from tort actions by their employees for physical harm caused by negligence, there have been few decisions since 1957 that have directly confronted the question of whether adequate warnings negate liability for an unreasonably unsafe work place. It is doubtful, however, that the harsh position set forth in the Restatement of Second of Agency would be accepted by most modern courts. For instance, in Kitchens v. Winter Company Builders, Inc., 161 Ga. App. 701, 289 S.E.2d 807 (1982), the court held that the availability of workers' compensation benefits provided tort immunity to an employer, but concluded that a construction worker did not assume the risk of an improperly constructed ladder provided by his employer: "Under no circumstances can it be held that he deliberately acquiesced in a known danger for his course of conduct was restricted by the circumstances and the coercion of his employment." Id. at 703. Furthermore, in cases brought by an injured worker against a manufacturer of an allegedly defective machine most courts have rejected assertions that an employee assumed the risk of a machine's known dangers by using the machine in accord with an employer's directions. See, e.g., Beacham v. Lee-Norse, 714 F.2d 1010, 1014 (10th Cir. 1983) (applying Utah law; plaintiff "had no choice but to stand close to the bolter and its pinch points in the performance of [his] duties. … Irrespective of whether [he] was aware of the pinch points, he did not voluntarily encounter them simply by performing his duties."); Suter v. San Angelo Foundry & Machine Co., 81 N.J. 150, 167, 406 A.2d 140, 148 (1979) ("In our view an employee engaged at his assigned task on a plant machine, … , has no meaningful choice. Irrespective of the rationale that the employee may have unreasonably and voluntarily encountered a known risk, we hold as a matter of policy that such an employee is not guilty of contributory negligence."); Rhoads v. Service Machine Co., 329 F. Supp. 367, 381 (E.D. Ark. 1971) ("the "voluntariness" with which a worker assigned to a dangerous machine in a factory "assumes the risk of injury" from the machine is illusory.")

§ 4.05. Employer's Liability for Intentional Torts Committed Against Employees

Unless otherwise provided by a workers' compensation law or by other law, an employer is subject to liability under the principles set forth in §§ 4.01 and 4.02 for physical and other harm to an employee caused by conduct actionable as an intentional tort, including

(a) false imprisonment;

(b) assault and battery; and

(c) intentional infliction of emotional harm.

Comments:

a. Overview. The principles determining employer liability set forth in §§ 4.01 and 4.02 apply to all torts that have special relevance for the employment relationship as set forth in subsequent Chapters of this Restatement. These principles also apply to employer liability for physical and other harm to employees caused by any other torts committed within the context of an employment relationship. This section addresses some of the most important of the intentional torts not covered elsewhere in this Restatement.

b. Workers' compensation law or other law. See Comment *a*, § 4.01.

c. False imprisonment. The elements of the tort of false imprisonment include: an act or acts intended to result and resulting in the confinement of another within fixed boundaries; the confined party being conscious of or being harmed by the confinement; the confinement not being consented to by the confined party or being otherwise privileged; and the confinement being imposed by the use or threatened use of some physical force or barrier, or by the assertion of legal authority. Under the principles set forth in §§ 4.01 and 4.02, employers may be subject to liability for physical and other non-economic harm resulting from such confinement of their employees.

Employers may require their employees to work in confined areas without subjecting the employees to actionable imprisonment. Moreover, an employer's threat of discharge or other adverse personnel action does not subject employees to an actionable imprisonment. Similarly, employers may advise their employees that they will be discharged if the employees do not submit to interviews or other investigations of possible theft or other work place malfeasance. Employers also may advise their

employees that the employees will be referred to public authorities for prosecution if the employees do not cooperate with the employer's investigation.

Employers have a privilege to restrain their employees, as they are privileged in restraining third parties, in order to prevent injury to or theft of property. Such restraint must be for a reasonable period of time and must be imposed in a reasonable manner in order to avert a theft which the employer has reasonable cause to believe is occurring or will occur.

Illustrations:

1. P, a corporation operating supermarkets, employs M as a manager of one of its stores and E as a cashier in this store. One day M determines three twenty dollar bills are missing from the cash register operated by E that day. The next day M calls E into her office where S, a security officer employed by P, awaits. S tells E to sit behind M's desk while M and S sit in front of the door to M's office. S accuses E of taking the money. When E stands, S tells E that she cannot leave until she confesses to the theft. S also tells E that she will be sent to jail immediately if she does not confess.

P is subject to liability to E for any cognizable harm caused by M and S's coerced confinement of E in M's office.

2. Same facts as Illustration 1 except that S and M do not block the door to M's office, and when E stands to leave, S tells E only that if she leaves, she will lose her job and S will report the suspected theft to the police. P is not subject to liability to E. S and M did not confine E in M's office; the threats of an adverse personnel action and future prosecution are not sufficient to establish actionable confinement.

3. P employs E, F, and G as sorters at a cotton mill, and M as the manager of the mill. One day F and G report to M that they saw E placing some cloth in her purse. Before E leaves that day, M, and P's security guards, detain E and ask her to open her purse to determine whether it contains P's cloth. When E refuses

to open her purse after about twenty minutes of questioning and the threat of prosecution, M allows E to leave.

P is not subject to liability to E. M acted reasonably with probable cause to avert a theft of P's property.

d. Assault and battery. The elements of the tort of battery include: an act or acts intended to cause either harmful or offensive contact with another person, or an imminent apprehension of such contact; and the causation of harmful contact with the other person. The similar elements of the tort of assault include: an act or acts intended to cause either harmful or offensive contact with another person, or an imminent apprehension of such a contact; and the other person being put in such imminent apprehension. The absence of consent, either to the contact in the case of battery or to the apprehension of contact in the case of assault, also is an element of these torts.

Under the principles set forth in §§ 4.01 and 4.02, employers may be subject to liability for physical and other cognizable harm resulting from the commission of these intentional torts on their employees. Acting with knowledge that a harmful contact or imminent apprehension is substantially certain to result as well as acting with the purpose of producing one of these consequences constitutes acting with intent.

An employer may cause employees to experience harmful contact or the imminent apprehension of such contact either directly by physical force or the threat of force, or indirectly by subjecting the employees to dangerous working conditions. Employees, however, are presumed to consent to the reasonable risks of dangers normally incident to the work they accept. Such consent is not negated by the threat of discharge. Employees do not assume, however, the risks of an employer intentionally augmenting dangers by a refusal to take reasonable measures to eliminate known dangers.

Illustrations:

4. P employs E at an auto parts retail store. The warehouse for the store is infested with bats. M, the manager of the store, is advised by a health official that the bats pose a risk of rabies to the employees. M fails to take reasonable steps to

eradicate the bats and repeatedly orders E to enter the warehouse despite her protests against doing so. E is attacked by the bats several times and eventually is bitten. She receives a vaccine for rabies, which results in her loss of sight.

P is subject to liability to E for the harm caused by being subjected to harmful contact with the bats. M knew that E was substantially certain to be subjected to such contact in the warehouse. E did not assume or consent to the abnormal risks posed by M's failure to take reasonable measures to extinguish the bats.

5. P, a professional football team, employs E as a wide receiver. During a scrimmage at a practice, E is tackled hard by F, a defensive back on P's team. E suffers a career-ending injury to one of the vertebrae in his neck.

P is not subject to liability to E for the intentional contact made by the defensive back on E. In agreeing to play professional football, E consented to being subject to the normal risks of hard physical contact.

e. Intentional or reckless infliction of emotional distress. To establish liability under this tort a plaintiff must prove: (1) the defendant "intentionally or recklessly"; (2) through "extreme and outrageous" conduct; (3) caused the plaintiff emotional distress; (4) that was "severe." Under §§ 4.01 and 4.02, employers may be subject to liability for emotional harm caused by this tort, and if the emotional harm causes bodily harm, also for the bodily harm.

The standards defining the wrongful conduct constituting this tort are the same for conduct arising out of or relating to employment relationships as for other conduct. The tort can consist only of conduct that "goes beyond the bounds of human decency" and that "would be regarded as intolerable in a civilized community." Thus, individuals in their roles as employees, as in other roles, cannot recover for emotional distress caused by ordinary insults and indignities. The conduct must be both extreme and outrageous. To be outrageous, conduct must be clearly contrary to community morals or laws, and to be extreme, the conduct must be far beyond the range of normal human behavior, whether or not within the bounds of morality or law.

Thus, employees cannot recover for emotional distress caused by the ordinary insults and indignities that are within the range of behavior to be expected in the work place. Employers are not liable for the ordinary supervision, criticism, demotion, transfer, discipline or even discharge of workers simply because those actions are certain to cause emotional distress.

Employers, however, may be liable for severe emotional harm intentionally or recklessly caused by the extreme and outrageous manner by which agents implement supervisory or managerial tasks, including the manner by which employees-at-will are disciplined or discharged.

As for other intentional torts, acting with knowledge that conduct is substantially certain to cause actionable harm as well as acting with the purpose of producing such harm constitutes acting with intent. Further, acting with a disregard of or an indifference to the substantial certainty that actionable harm will result is sufficient to constitute recklessness.

The emotional harm that is intended or disregarded must be severe to be actionable. Even extreme and outrageous conduct is not actionable if it is not intended or known or constructively known to be substantially certain to cause emotional stress that is severe. As noted in the Restatement Third of Torts § 46, courts often state, in accord with Restatement Second of Torts § 46, that the "distress inflicted" must be "so severe that no reasonable [person] could be expected to endure it." This standard of severity may be satisfied in the workplace, as elsewhere, by a continuing and developing course of conduct, as well as by a single incident.

In some jurisdictions, workers' compensation laws preclude actions for the intentional infliction of emotional harm arising from workplace incidents. Courts in a few jurisdictions also have precluded recovery in an independent tort action for emotional harm caused by discriminatory harassment prohibited by their state's antidiscrimination law.

Illustrations:

6. P hires C as its new President. C, wanting to employ his daughter-in-law as sales manager, discharges E from this position, which he has held for fifteen years. C knows that E supports a large family, may not have other employment opportunities, and is susceptible to anxiety attacks. E is an employee-at-will without a contract for a definite term. E suffers a debilitating nervous breakdown as a result of his discharge.

C and P are not subject to liability for the intentional infliction of emotional distress on E. C's treatment of E was not extreme and outrageous even if unfair.

7. C, the CEO of P, tells M, the COO of P, that she must resign or accept special assignments. M would not receive severance benefits if she resigns and wants to continue to work. C orders M to sweep the corporate offices, clean its toilets, and wash the cars of the other less senior executives, all of whom are told by C of M's "special assignments." Feeling humiliated, M enters the hospital with severe anxiety.

C and P may be subject to liability for intentionally causing severe emotional distress.

8. With the approval of her Board of Directors, C, the CEO of P privately advises F, the chief financial officer, that he has reached retirement age and will be discharged if he does not resign. F suffers a stroke soon after the meeting.

C and P are not subject to liability for the intentional infliction of emotional distress on F. C's threatened discharge of F on the basis of age was in violation of applicable age discrimination law. C's conduct was not extreme and outrageous, however, and was not intended to create severe emotional distress.

9. P, a chemical manufacturer, hires E to work on a shift at one of its plants. The other five workers dislike E and resent his replacement of one of their friends. They take various actions to make his work life difficult. These include refusing to talk to E about work-related matters, disrupting his work station, calling him by lewd and demeaning names, threatening his family, and slashing

the tires on his bicycle. The shift supervisor, S, and other managers are aware of the extent of the co-workers' harassment of E, but choose to allow it to continue. E eventually suffers a nervous background because of the continuing and escalating harassment.

S and P, as well as the co-workers, may be subject to liability for intentionally causing severe emotional distress. S, acting within the scope of his employment, supervised the workers under his charge in a manner that was at least recklessly indifferent to the likelihood that the workers' harassment of E would cause him severe emotional harm.

REPORTERS' NOTES

Comment c. Section 35 of the Restatement Second of Torts states: "(1) An actor is subject to liability to another for false imprisonment if (a) he acts intending to confine the other or a third person within boundaries fixed by the actor, and (b) his act directly or indirectly results in such confinement of the other, and (c) the other is conscious of the confinement or is harmed by it." As stated by Judge Mosk in Fermino v. Fedco., Inc., 7 Cal.4th 701, 715, 872 P.2d 559, 30 Cal. Rptr.2d 18 (1994), "the tort consists of the 'nonconsensual, intentional confinement of a person, without lawful privilege, for an appreciable length of time, however short.' That length of time can be as brief as 15 minutes. Restraint may be effectuated by means of physical force, threat of force or arrest, confinement by physical barriers, or by any means of any other form of unreasonable duress." Id. at 715 (internal citations omitted). See also, e.g., Richardson v. Costco Wholesale Corp., 169 F.Supp.2d 56, 61 (D. Conn. 2001) (listing elements of false imprisonment tort, including lack of consent to confinement).

Comment *a* to § 36 of the Restatement Second of Torts states that "even though there may be a perfectly safe avenue of escape, the other is not required to take it if the circumstances are such as to make it offensive to a reasonable sense of decency or personal dignity. On the other hand it is unreasonable for one whom the actor intends to imprison to refuse to utilize a means of escape of which he is aware merely because it entails a slight inconvenience . . . ." The *Richardson* court held that the employee-plaintiffs in that case were not confined because they could leave through an employee exit that would cause only the embarrassment of an alarm. 169 F.Supp.2d at 62.

Employees may be confined directly or indirectly by any kind of physical restraint or threatened restraint. See, e.g., McDonald's Corp. v. Ogborn, 309 S.W.2d 274, 290 (Ct. of App. Ky 2009) (plaintiff "was deprived of her clothing, she repeatedly objected to the search and seizure of her body, she was threatened with further police involvement, she was under the impression the door had been locked, and she had a constant guard between herself and the door."); Spears v. Albertson's, Inc., 848 So.2d 1176, 1177 (Ct. of App. Fla. 2003) (manager allegedly blocked door and told employee "you're not going anywhere, we called the police"); Switzer v. Rivera, 174 F.Supp.2d 1097, 1110 (D. Nev. 2001) (employer's agents "pressed their bodies against" the confined employee); Greenbaum v. Brooks, 110 Ga. App. 661, 663, 139 S.E.2d 432, 434 (1964) ("interrogator placed a chair against the door and sat in the chair").

Employees, however, are not confined by being restricted from going on to particular parts of an employer's property as long as the employees are free to leave the property altogether. See, e.g., Smith v. Heritage Salmon, Inc., 180 F.Supp.2d 208, 220 (D. Me 2002); Randall's Food Markets, Inc. v. Johnson, 891 S.W.2d 640, 645 (Tex. 1995). Similarly, an employer's removal or threat to remove an employee from the employer's premises does not confine or imprison an employee. See, e.g., Caldwell v. Linker, 901 F.Supp. 1010, 1015 (M.D. N.C. 1995); Krochalis v. Insurance Co. of N.A., 629 F. Supp. 1360, 1370 (E.D. Pa. 1985).

The courts consistently have held that employees are not imprisoned by their employers when given the choice of relinquishing the right to leave an area or losing their employment. See, e.g.,

Miraliakbari v. Pennicooke, 254 Ga. App. 156, 161, 561 S.E.2d 483, 488-89 (2002) (no Georgia "authority for the proposition that fear of losing one's job constitutes the necessary fear of personal difficulty to support a claim for false imprisonment"); Kelly v. West Cash & Carry Bldg. Materials Store, 745 So.2d 743, 750 (Ct. of App. La. 1999) ("Apprehension that one might in the future lose one's job or be prosecuted for theft is not the force or the threat of force necessary to establish false imprisonment."); Marten v. Yellow Freight System, Inc., 993 F.Supp.822, 830 (D. Kan. 1998) (fear of job loss "is not adequate basis for a false imprisonment claim"); Hanna v. Marshall Field & Co., 665 N.E.2d 343, 349, 216 Ill. Dec. 283, 289 (1996) ("fear of losing his job or belief that he would be fired immediately if he left the room is insufficient as a matter of law to make out a claim of false imprisonment"); Randall's Food Markets, Inc. v. Johnson, supra, at 646 ("an employer must be able to suggest, and even insist that its employees perform certain tasks in certain locations at certain times."); Johnson v. United Parcel Services, Inc., 722 F.Supp. 1282, 1284 (D. Md. 1989) ("restraint that resulted simply from plaintiff's fear of losing his job is insufficient as a matter of law to make out a claim of false imprisonment"); Foley v. Polaroid Corp., 400 Mass. 82, 91 (1987) (employee-at-will who relinquishes his right to move about in return for continued employment. . .is not restrained); Faniel v. Chesapeake and Potomac Tel. Co. of Md., 404 A.2d 147, 151 (D.C.Ct. of App. 1979) ("[t]o constitute imprisonment, the restraint. . . of movement. . . must have been total"); Moen v. Las Vegas International Hotel, Inc., 90 Nev. 176, 177, 521 P.2d 370, 371 (1974) ("[s]ubmission to mere verbal direction of another unaccompanied by force or threats of any character does not constitute false imprisonment").

Illustration 1 is based on Campbell v. Safeway, Inc., 332 F.Supp.2d 1367 (D. Or. 2004) (applying Oregon law). The court stated "the record shows that defendant established a physical barrier to prevent exit," by blocking the closed door to the office with a chair." Id. at 1373. The court also stated that the threat to take the plaintiff "immediately to jail if she did not confess" created the "reasonable apprehension that force" would continue to "be used for the purpose of effectuating the present confinement." Id. at 174 (quoting Roberts v. Coleman, 228 Or. 286, 294, 365 P.2d 79 (1961). See also, e.g., Black v. Kroger Do., 527 S.W.2d 794, 801 (Ct. of Civ. App. of Tex. 1975) (security agent told employee if "she did not confess, she would be handcuffed, taken to jail and would not see her daughter for a long time").

The *Campbell* court also acknowledged, however, that the "mere threat to prosecute in the future" is not sufficient to constitute a confinement." Id. (quoting *Roberts*, 228 Or. at 296). See also Shannon v. Office Max N.A., Inc., 291 Ga. App. 834, 836 (2008) (threats of criminal prosecution, like threats of job loss, "do not constitute detention for purposes of a false imprisonment claim"); Newsom v. Thalimer Bros., Inc., 901 S.W.2d 365, 368 (Ct. of App. Tenn. 1995) ("the employer's threats to peacefully invoke processes of law unaccompanied by force or any form of restraint could not constitute false imprisonment").

Illustration 3 is based on Faulkenberry v. Spring Mills, Inc., 271 S.C. 377, 247 S.E.2d 445 (S.C. 1978). The court noted that a merchant's common law right to delay those that it has reasonable cause to believe to be shoplifters had been codified in South Carolina. Id. at 379-380. Other states also have codified the merchant's right to detain suspected shoplifters. See, e.g., Silvera v. Home Depot U.S.A., Inc. 189 F.Supp.2d 304 310 (applying Maryland law); Hampton v. Dillard Dept. Stores, 985 F.Supp. 1055, 1119 (D. Kan. 1997) (applying Kansas law).

The court in *Campbell v. Safeway, Inc.*, supra, noted that Oregon has codified the merchant's privilege to detain suspected shoplifters for a reasonable time in a reasonable manner, but stressed this privilege does not justify bullying tactics and threats. 332 F. Supp.2d at 1376. The court in Fermino v. Fedco, Inc., 7 Cal.4th 701, 872 P.2d 559, 30 Cal. Rptr.2d 18 (1994), recognized that the California legislature had codified the merchant's privilege to detain a suspected thief for a reasonable time, but stressed it does not justify detaining an employee "for the purpose of securing a confession to the theft of money at a prior time." Id. at 716. (quoting Moffat v. Buffams' Inc., 21 Cal.App.2d 371, 375 (1937)). See also, e.g., De Angelis v. Jamesway Dept. Store, 205 N.J. Super. 519, 524-527, 501 A.2d 561, 564-67 (1985) (recognizing New Jersey merchant's privilege under New Jersey common and statutory law, but finding law inapplicable "to custodial interrogation of an employee accused of theft of money"); Parrott v. Bank of America Nat'l Trust & Savings Assn., 97 Cal.App.2d 14, 23, 217 P.2d 89, 95 (Dist. Ct. of App. 1950) ("where a person has reasonable grounds to believe that another is taking his property *as distinguished from those cases where the offense has been completed*, he is justified in detaining the suspect for a reasonable length of time for the purpose of investigation in a reasonable manner, but the plaintiff "was detained for the purpose of securing a confession to the theft of money at a prior time.").

In most jurisdictions an action for false imprisonment is not barred by the exclusive remedy provisions of a workers' compensation law. See, e.g., Skelton v. W.T. Grant Co., 331 F.2d 593 (5th Cir.

1964) (Tuttle, J.) (applying Georgia law); Fermino v. Fedco, supra, at 721-722 (false imprisonment not "normal part of the employment relationship"); Morris v. United Parcel Service, 134 A.D.2d 840, 841-42, 521 N.Y.S.2d 591, 592 (1987) ("Intentional torts do not come within the exclusive remedy provision of Workers' Compensation Law").

Comment d. Section 13 of the Restatement Second of Torts states: "An actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) a harmful contact with the person of the other directly or indirectly results." Section 21 of the Restatement Second of Torts states: "(1) An actor is subject to liability to another for assault if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) the other is thereby put in such imminent apprehension."

Comment *d* to § 13 of the Restatement Second of Torts states that "the plainitff's consent to the contact with his person will prevent the liability. …Therefore the absence of consent is a matter essential to the cause of action, and it is uniformly held that it must be proved by the plaintiff as a necessary part of his case." Comment *e* to § 21 of the Restatement Second of Torts states that "acts which would ordinarily subject the actor to liability do not do so under particular circumstances and when done for particular purposes, either because the other consented to the invasion which results from the actor's conduct or because such acts are permitted by law irrespective of the other's consent. . . . The consent which is here important is consent to be put in apprehension."

Section 1 of the Restatement Third of Torts states: "A person acts with the intent to produce a consequence if: (a) the person acts with the purpose of producing that consequence; or (b) the person acts knowing that the consequence is substantially certain to result." A workers' compensation law, however, is more likely to exclude liability if the harmful contact or imminent apprehension was not the purpose of the tortious act. See below.

Employees have brought assault and battery actions against their employers for the use of excessive force: (1) when being escorted off the employer's premises at the time of a termination, see, e.g., Kennedy v. Parrino, 555 So. 2d 990, 992 (La. Ct. App. 1989) (employer allegedly pushed employee to ground from behind after ordering him to leave premises); Leahy v. Federal Express Corp., 609 F.Supp. 668, 672 (E.D. N.Y. 1985) (pulling back jacket to reveal a firearm and pushing back employee in response to attempt to exit); (2) for sexual aggression, see, e.g., Johnson v. AT&T Technologies, Inc., 713 F.Supp. 885, 889 (M.D. N.C. 1989) (contact "beyond the bounds usually tolerated by a decent society"); (Davis v. Utah Power & Light Co., 53 FEP Cas. 1039 (D. Utah 1988) (intentional touching of employee's "body in an offensive manner without her consent"); and (3) for intentionally being subjected to dangerous working conditions, see, e.g., Swope v. Columbian Chemicals Co., 281 F.3d 185, 196 (5th Cir. 2002) (defendant's exposure of plaintiff "to excessive levels of ozone that [defendant] knew to a substantial certainty would be harmful" could constitute battery under Louisiana law).

The exclusivity provisions of workers' compensation laws generally preclude employees bringing actions against their employers for assaults and batteries committed by co-employees. If those assaults and batteries are within the scope of employment, recovery for the physical harms they cause generally would be remedied, as any other work-related accidents, only under the workers' compensation system. Many jurisdictions, however, do not preclude damage actions for intentional batteries or assaults committed by employers, by their alter egos, or by authorized managerial agents. A minority of these jurisdictions allow such actions when intent is based on knowledge that conduct is substantially certain to cause serious injury or death. See, e.g., Bakerman v. The Bombay Co., Inc., 961 So.2d 259, 262 (Fla. 1007); Laidlow v. Hariton Machinery Co., 170 N.J. 602, 620, 790 A.2d 884, 896 (2002); Woodson v. Rowland, 329 N.C. 330, 345, 407 S.E.2d 222, 231 (1991); Jones v. VIP Dev. Co., 15 Ohio St.3d 90, 472 N.E.2d 1046 (1984). For a comprehensive treatment, see Larson's Workers' Compensation, §§ 103.01 and 103.04.

Some of the jurisdictions that allow recovery outside workers' compensation to employees injured in industrial accidents caused by intentional acts of their employers' authorized agents recognize a generic intentional tort not tied expressly to the traditional assault and battery torts. See, e.g., Laidlow, supra; Hannah v. Dayton Power & Light Co., 82 Ohio St.3d 482, 484, 696 N.E.2d 1044, 1046 (1998). In *Hannah* the Ohio Supreme Court articulated a three-part test: "(1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (2) knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and (3) that the

employer, under such circumstances, and with such knowledge, did act to require the employee to perform the dangerous task." Id. at 484.

Employees injured in industrial accidents caused by intentional acts of their employers' managerial agents in some cases also may be able to claim employer liability for fraudulent concealment or intentional misrepresentation. See, e.g., Blankenship v. Bridgestone Americas Holding, Inc. 467 F. Supp.2d 886, 893 (C.D. Ill. 2006) (employees alleged their employer's managers falsely reassured them it was safe to continue to use rubber solvent the managers knew was poisonous).

Illustration 4 is based on Bennight v. Western Auto Supply Co., 670 S.W.2d 373 (Ct. of App. Tex. 1984). The court stated that "intent" to cause particular consequences is not limited to those consequences which the actor "desires," but includes those which he knows are certain, or substantially certain, to result from his act." Id. at 377. The court found the evidence supported a finding that the defendant committed an assault on the plaintiff by intentionally placing her in apprehension of being attacked and bitten. "[T]he manager's intention to place [the plaintiff] in such apprehension extends by operation of law to the specific additional injury which she did receive and for which she sought recovery, whether or not the manager in fact intended that additional and subsequent harm." Id. 378.

See also Field v. Philadelphia Electric Co., 388 Pa. Super. 400, 565 A.2d 1170 (1989). In *Field* managers of a nuclear power plant injected dangerously radioactive gas into a tunnel into which an independent contractor had been ordered to resolve a standing water problem. The court stated that it was sufficient for the plaintiff to allege that the plant's managers "did intend for him to come into contact with the radiation;" the plaintiff did not have to allege that the managers intended to harm him. Id. at 417. The court also relied on Restatement Second of Torts § 18, Comment *c*, which states that an intent to contact someone with an offensive foreign substance constitutes contact for purposes of battery. Id.

Contrast Fricke v. Owens-Corning Fiberglas Corp., 571 So.2d 130 (1990). In *Fricke* an employee of a chemical processing company suffered brain damage after voluntarily descending into a tank filled with toxic fumes to rescue an unconscious fellow employee. The *Fricke* court agreed that a defendant does not have to intend "to inflict actual damage or that his intention be malicious. It is sufficient if the actor intends to inflict either a harmful or offensive contact without the other's consent." Id. at 132. The *Fricke* court stressed, however, that no one knew that the plaintiff's entry into the tank would subject him to contact with toxic fumes. Id.

Comment e. Section 46 of the Restatement Third of Torts states: "An actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional harm to another is subject to liability for that emotional harm and, if the emotional harm causes bodily harm, also for the bodily harm." This section closely reflects a similar § 46 in the Restatement Second of Torts, which is expressly followed in most jurisdictions. See Reporters Notes to § 46 Restatement Third of Torts. There does not seem to be any recent decision holding that the intentional infliction of emotional harm may not be actionable in any case. No jurisdiction holds that it is not applicable or that its elements are not the same in the employment context. For general treatment of the intentional infliction of emotional harm tort in the employment context, see, e.g., Martha Chamallas, Discrimination and Outrage: The Migration from Civil Rights to Tort Law, 48 Wm. & Mary Law Rev. 2115 (2007); Frank J. Cavico, The Tort of Intentional Infliction of Emotional Distress in Private Employment, 21 Hofstra Lab. & Emp. L. J. 109 (2003); Dennis P. Duffy, Intentional Infliction of emotional Distress and Employment At Will: the Case Against "Tortification" of Labor and Employment Law, 74 B.U. L. Rev. 387 (1994).

Courts consistently have held that an employer's mere exercise of authority over its employees is not subject to intentional infliction claims simply because the exercise causes emotional harm. See, e.g., Abeles v. Mellon Bank Corp., 747 N.Y.S.2d 372, 373 (N.Y. App. Div. 2002) (employee-at-will cannot assert intentional infliction claim because of her discharge); Randall's Food Markets, Inc., 891 S.W.2d 640, 644 (Tex. 1995) ("severe and curt" questioning of store manager about possible theft not actionable); Mayon v. Southern Pac. Transp. Co., 805 F.2d 1250, 1253 n.3 (5th Cir. 1986) ("Mere wrongful discharge will not support an award for emotional distress."); Krochalis v. Insurance Co. of N.A., 629 F. Supp. 1360, 1373 (E.D. Pa. 1985) (applying Pennsylvania law; employment termination even when accompanied by defamatory innuendo cannot be basis of intentional infliction claim) ; Buscemi v. McDonnell Douglas Corp., 736 F.2d 1348, 1352 (9th Cir. 1984) (same); Rawson v. Sears, Roebuck & Co., 530 F. Supp. 776, 780-81 (D. Colo. 1982) (firing of long-term employee did not comprise intentional infliction of emotional distress).

These cases apply the general principle that employers, like other actors, do not engage in extreme and outrageous behavior when they do no more than insist on their legal rights. See also, e.g., Childers v.

Chesapeake and Potomac Telephone Co., 881 F.2d 1259, 1266 (4th Cir. 1989) (employer could contest workers' compensation claim even knowing emotional distress would result); Restatement Second of Torts, § 46, Comment *g* (A defendant "is never liable, for example, 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.").

Furthermore, even insensitivity, excessively harsh criticism, and unfair treatment of employees are not necessarily extreme and outrageous. See, e.g., Carnemolla v. Walsh, 815 A.2d 1251, 1260-61 (Conn. App. Ct. 2003) (forcing an employee to resign for misrepresenting hours as part of a scheme urged by firm's accountant); Higgins v. Metro-North R.R. Co., 318 F.3d 422, 428 (2d Cir. 2003) (applying New York law) (four incidents of yelling); Zephir v. Inemer, 757 N.Y.S.2d 851, 852 (N.Y. App. Div. 2003) (frequent unnecessary interruptions, "falsely maligning" work performance, and inappropriate comments about clothing not sufficient); Tex. Farm Bureau Mut. Ins. Cos. v. Sears, 84 S.W.3d 604, 612 (Tex. 2002) (branding an employee as a suspect in an illegal kickback scheme without direct evidence not sufficient); Pytlik v. Professional Resources Ltd., 887 F.2d 1371, 1378-1379 (10th Cir. 1989) (allegations of illegal retaliatory discharge while in hospital not sufficient); Economo v. Borg-Warner Corp., 829 F.2d 311, 317 (2d Cir. 1987) (denial of medical insurance claim not extremely outrageous).

In other cases, courts have found an employer's harsh treatment of employees not to satisfy the standards of the intentional infliction tort because the plaintiffs failed to demonstrate that they suffered emotional distress that was sufficiently severe to be actionable. See, e.g., Leavitt v. Wal-Mart Stores, Inc., 238 F. Supp. 2d 313, 317 (D. Me. 2003) (failure to accommodate disability caused only "distress" that did "not rise beyond the usual emotional traumas of daily life in a modern society."); Williams v. Tennessee National Corp., 97 S.W.3d 798, 805 (Tex. App. 2003) (plaintiff was able to "bounce back" in good mental health from being questioned, terminated, and escorted from building in front of other employees). See also Moniodis v. Cook, 64 Md. App. 1, 15, 494 A.2d 212, 219 ((1985) (finding evidence of severe emotional distress sufficient for only one of four plaintiffs, as other three were able to "carry on" without significant disruption of the "daily routine" of their lives).

Courts, however, do not insulate extreme and outrageous methods of discipline, supervision and termination from intentional infliction claims. For instance, in GTE Southwest, Inc. v. Bruce, 998 S.W.2d 605, 614 (Tex. 1999), the court held a jury could find extreme and outrageous a supervisor's repeated face-to-face yelling, swearing, and threatening "lung[ing]" at employees, often over trivial matters. The court stressed the "totality of the conduct," "the cumulative quality and quantity of the harassment." Id. at 615. In Dean v. Ford Motor Credit Co., 885 F.2d 300, 307 (5th Cir. 1989), the court held a jury could find extreme and outrageous a supervisor's placement of checks in an employee's purse to make it appear she was a thief. The court stated: "The fact that the defendant did not accuse the plaintiff of theft is irrelevant. Merely causing the innocent plaintiff to be subject to such an accusation of crime and putting her in fear that it might come passes the bounds of conduct that will be tolerated by a civilized society." Id. In Archer v. Farmer Bros. Co., 70 P.3d 495, 500 (Colo. App. 2002), the court held a jury could find extreme and outrageous the defendant's "barging" into its employee's mother-in-law's home to fire the long-tenured employee without notice while he lay in bed partially dressed recovering from a recent heart attack of which the defendant was aware. In Bodewig v. K-Mart, Inc., 54 Ore. App. 480, 486-487,635 P.2d 657, 661 (1981), the court held that a jury could find a K-Mart manager "exceeded the bounds of social toleration" "in reckless disregard of … predictable effects" by putting a cashier, who he had already deemed innocent, "through the degrading and humiliating experience of submitting to a strip search in order to satisfy [a] customer . . . creating a commotion" about missing money. For other examples of decisions holding that juries could find particular conduct to comprise the intentional infliction of emotional harm, see, e.g., Rigsby v. Fallsway Equipment Co., 779 N.E.2d 1056, 1065-1066 (Ohio Ct. App. 2002); Robel v. Roundup Corp., 59 P.3d 611, 614 (Wash. 2002); Graham v. Commonwealth Edison co., 742 N.E.2d 858, 868 (Ill. App. Ct. 2000); LaBrier v. Anheuser Ford, Inc., 612 S.W.2d 790 (Mo. Ct. App. 1981), Agis v. Howard Johnson Co., 371 Mass. 140, 355 N.E.2d 315 (Mass. 1976).

Some courts consider the authority of supervisors over employees to be a factor in judging whether conduct is extreme and outrageous. See, e.g., McClease v. R.R. Donnelley & Sons Co., 226 F.Supp. 2d 695, 698, 703 (E.D. Pa. 2002) (racist comments made by managers); Graham v. Commonwealth Edison Co., 742 N.E. 858, 866-68 (Ill. App. Ct. 2000) ("the more power and control that a defendant has over a plaintiff, the more likely defendant's conduct should be deemed to be outrageous"); GTE Southwest, Inc. v. Bruce, 998 S.W.2d 605, 615 (Tex. 1999) ("liability may arise when one in a position of authority engages in repeated or ongoing harassment of an employee"); Swenson v. Northern Crop Ins., Inc., 498

N.W.2d 174, 185 (N.D. 1993) (employer-employee relationship is important factor); Harris v. Jones, 380 A.2d 611, 615-616 (Md. 1977) (position of employer justifies more careful scrutiny by courts); Contreras v. Crown-Zellerbach Corp., 656 P.2d 1173, 1176 (Wash. 1977) ("When one in a position of authority, actual or apparent, over another has allegedly made racial slurs and jokes and comments, this abusive conduct gives added impetus to the claim of outrageous behavior."); cf. Kentucky Fried Chicken Nat. Management Co. v. Weathersby, 326 Md. 663, 678, 607 A.2d 8, 15 (Ky. 1996) (employment relationship is factor to be considered, but "conduct must still reach same degree of outrageousness" to prove tort). See also Restatement Second of Torts § 46 comment e (Outrageous conduct "may arise from an abuse by the actor of a position, or relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests.").

Some courts also have stated that an employer's knowledge of particular conditions of employees is relevant to whether the employer's conduct was outrageous and intended to cause severe emotional harm. In Alcorn v. Anbro Engineering, 468 P.2d 216 (Cal. 1970), for instance, the court stressed the supervisor's humiliating and racially insulting language and his awareness of the employee's "particular susceptibility" to emotional distress. Id. at 218-219. See also, e.g., Kroger Co. v. Willgruber, 920 S.W.2d 61, 66 (Ky 1996) ("despite its knowledge" that plaintiff was "mighty sick" mentally, defendant sent plaintiff to new state, knowing that no job would be there for him); Elson v. Consolidated Edison Co. of New York, Inc., 226 A.D.2d 288, 289, 641 N.Y.S.2d 294, 294 (1st Dept. 1996) (plaintiff with underlying psychological condition "known to defendant" was interrogated for eight hours, shown a gun, and was not permitted to call lawyer); Robbins v. Galbraith, 9 I.E. Cas. (BNA) 1776 (E.D. Pa. 1994) (employer's manner of discharge and eviction of farm manager found to be outrageous because of employer's knowledge that manager had twin daughters with cystic fibrosis); Peterson v. Sioux Valley Hosp. Ass'n, 486 N.W.2d 516, 519 (S.D. 1992) (knowing of plaintiff's fear of group confrontation, employer required plaintiff to explain her work-related and medical problems to ten co-workers prior to discharge); Priest v. Rotary, 634 F. Supp. 571, 583 (N.D. Cal. 1986) ("outrageous character of defendant Rotary's conduct arose from his knowledge that plaintiff Priest was peculiarly susceptible to emotional distress by reason of her abdominal condition and by reason of her economic condition"); Brown v. Ellis, 40 Conn. 944, 946 (Super. Ct. 1984) (employer knew of plaintiff's fear of heights when deliberately assigning him to taking photographs at great heights). See also Restatement Second of Torts, § 46, Comment *f* (outrageous behavior "may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress").

Illustration 7 is based roughly on Wilson v. Monarch Paper Co., 939 F.2d 1138, 1145 (5th Cir. 1991). For a contrasting case similar to Illustration 8, where the employer directly discharged, rather than subjected to humiliation, an employee with over 30 years of experience, see Pottenger v. Potlatch Corp., 329 F.3d 740 (9th Cir. 2003).

In Pottenger, the court held that there was not adequate evidence to support a claim of age discrimination. Numerous other decisions, however, have held that illegal discriminatory employment decisions do not necessarily meet the strict standards of the intentional infliction of emotional harm tort. See, e.g., Jackson v. Blue Dolphin Communications of N.C., 226 F. Supp. 2d 785, 795 (W.D.N.C. 2002) (even though the employer's actions may have violated federal or state law, they do constitute "extreme and outrageous conduct" under North Carolina law); Briggs v. Aldi, Inc., 218 F.Supp. 2d 1260, 1263 (D. Kan. 2002) (termination of employee, while treating others differently because of race); Walker v. City of Elba, Ala., 874 F. Supp. 361, 365 (M.D. Ala 1994) (allegations that defendant paid blacks less and terminated plaintiff because of race do not state claim for intentional infliction). All discriminatory employment actionsare not substantially certain to cause severe emotional harm.

Where employers are responsible for extreme and outrageous harassment of employees, an intent to cause severe emotional harm may be easier to demonstrate. Illustration 9, for instance, is based on Pollard v. E.I. DuPont de Nemours, Inc., 412 F.3d 657, 664-65 (6th Cir. 2005) (applying Tennessee law). The court found corporate liability for the intentional infliction of emotional distress based "not on vicarious liability" for the co-workers' harassment, much of which may not have been within the scope of employment, but rather based on the "failure to act in the face of outrageous conduct." Id. at 665. This supervisory failure presumably was itself deemed extreme and outrageous by the court. For a similar case basing corporate liability on supervisors' watching and laughing at outrageous lewd and vulgar sexist comments directed at emotionally harmed female employees, see Coates v. Wal-Mart Stores, Inc., 976 P.2d 999, 1009 (N.M. 1999) (supervisors "intentionally allowed the harassment to continue with "utter indifference to the consequences"). For other decisions holding that a jury could find conduct comprising

harassment to constitute an intentional infliction of emotional harm, see, e.g., Burns v. Mayer, 175 F.Supp.2d 1259, 1267 (Nev. 2001) (applying Nevada law); Cox v. Indian Head Indus., Inc., 1223 F.Supp. 2d 892, 896 (W.D. N.C. 2000); Patterson v. Augat Wiring Systems, Inc., 944 F.Supp. 1509, 1526 (N.D. Ala. 1996); Appel v. Reser's Fine Foods, Inc., 939 F. Supp. 789, 791 (D.Or. 1996); Priest v. Rotary, 634 F. Supp. 571, 574 (N.D. Cal. 1986).

Some courts, however, have found sexual harassment serious enough to be actionable under anti-discrimination law not to be sufficiently extreme and outrageous to satisfy the strict standards of the intentional infliction of emotional harm tort. See, e.g., Miner v. Mid-Am Door Co., 68 P.3d 212, 223 (Okla. Civ. App. 2002) (defendant could be liable for discriminatory harassment, but conduct was not "extreme and outrageous"); Hoy v. Angleone, 554 Pa. 134, 152, 720 A.2d 745, 754 (1998) ("sexual harassment alone does not arise to the level of outrageousness necessary to make out a cause of action for the intentional infliction of emotional distress"); Pucci v. USAIR, 940 F.Supp. 305, 309 (M.D. Fla. 1996) (dismissing plaintiff's claim based on finding that sexual harassment was not outrageous).

The standard for actionable harassment under Title VII of the 1964 Civil Rights Act, "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment", see Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986), differs somewhat from the standards for the intentional infliction tort. The Title VII standard does not require actionable harassment to be extreme and outrageous, and the Supreme Court has confirmed it does not require actionable conduct "to be psychologically injurious," so long "as the environment would reasonably be perceived, and is perceived, as hostile or abusive." Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). Since anti-discrimination law condemns only discriminatory harassment, however, extreme and outrageous conduct that meets the standards for the intentional infliction of emotional distress tort may not be actionable under anti-discrimination law. See, e.g. Sisco v. Fabrication Technologies, Inc., 350 F.Supp. 2d 932, 940-943 (D. Wyo. 2004) ("bestial" conduct was extreme and outrageous, but not sex discrimination).

Whether a workers' compensation law precludes an employee's cause of action against an employer for the intentional infliction of emotional distress generally depends on whether the employee can recover for the harm caused by the conduct under the workers' compensation law. If the harm is substantially a compensable physical injury or a kind of mental injury that is compensable under the particular act, the independent tort action generally will be barred. See, e.g., Iacampo v. Hasbro, Inc., 929 F.Supp. 562, 583 (D.R.I. 1996) (applying Rhode Island law) (workers' compensation act provides exclusive remedy for emotional distress claim); Konstantopoulos v. Westvaco Corp., 690 A.2d 936, 938-939 (Del. 1996) (workers' compensation law provides exclusive recovery for mental harm from harassment); Green v. Wyman-Gordon Co., 442 Mass. 551, 558, 664 N.E.2d 808, 813 (1996) (workers' compensation law provides exclusive remedy "for emotional distress intentionally inflicted by one employee on another"); Slaymaker v. Archer-Daniels-Midland Co., 540 N.W.2d 459, 462 (Iowa App. 1995) ("mental anguish" resulting from possible physical injury from exposure to asbestos only compensable under workers' compensation act)).

However, if the harm is an emotional or mental injury that is not compensable under the particular act, a tort cause of action generally will be available. See, e.g., Sisco v. Fabrication Technologies, Inc., 350 F.Supp. 2d 932, 942-943 (D. Wyo. 2004) (Wyoming workers' compensation law provides exclusive remedy only for a mental injury caused by a compensable physical injury); Kerans v. Power Paint Co., 61 Ohio St. 3d 486, 489, 575 N.E.2d 428, 431 (1991) (workers' compensation law does not provide remedy for "psychological disturbances arising solely from emotional distress"). The workers' compensation laws of many jurisdictions also have been interpreted specifically not to preclude common law actions for harassment. See, e.g., Burns v. Mayer, 175 F.Supp.2d 1259, 1267 (Nev. 2001) (Nevada workers' compensation law only precludes actions for accidental injuries, and harassment is not accidental); Byrd v. Richardson-Greenshields Securities, 552 So.2d 1099, 1104 (Fla. 1989) (because of strong public policy, workers' compensation exclusivity does not bar common law claims arising from sexual harassment); Ford v. Revlon, 153 Ariz. 38, 44, 734 P.2d 580, 586 (1987) (sexual harassment not accidental injury compensable under act).

In most states actions for the intentional infliction of emotional distress are not precluded by anti-discrimination law. See, e.g, Burns v. Mayer, 175 F.Supp.2d 1259, 1267 (Nev. 2001) (applying Nevada law); Cronin v. Sheldon, 195 Ariz. 531, 541, 991 P.2d 231, 241 (1999) (state anti-discrimination law does not preclude discriminatorily discharged employees' collateral common law actions, such as intentional infliction tort); Rojo v. Kliger, 52 Cal.3d 65, 73, 801 P.2d 373, 377, 276 Cal. Rptr. 130, 134 (Cal. 1990) (state anti-discrimination law does not supplant common law causes of action which do not require

exhaustion of administrative remedies); Helmick v. Cincinnati Word Processing, Inc., 45 Ohio St. 3rd 131, 134, 543 N.E.2d 1212, 1216 (1989) (common law remedies for sexual harassment not abolished by state anti-discrimination law); Retherford v. AT & T Communications of Mountain States, Inc., 844 P.2d 949, 966-67 (Utah 1992) (intentional infliction claim not preempted by state anti-discrimination law because discrimination is not an indispensable element of the claim).

A few courts, however, have held that alleged employer conduct that is remedial through anti-discrimination law cannot also be the basis for a common law claim. See, e.g., Quantock v. Shared Mktg. Servs., Inc., 312 F.3d 899, 905 (7th Cir. 2002) (applying Illinois law) (precluding any claim based on "factual allegations identical to those set forth in … Title VII claim"); Martinez v. Cole Sewell Corp., 233 F.Supp. 2d 1097, 1139-40 (N.D. Iowa 2002) (applying Iowa law) (state tort claim preempted by state anti-discrimination statute because employee relied "on precisely the same allegations" as in her statutory claim); Arthur v. Pierre Ltd., 323 Mont. 453, 459, 100 P.3d 987, 992 (2004) (Montana anti-discrimination statute provides exclusive remedy for claims arising from allegations of discrimination). See also Hoffman-La Roche Inc. v. Zeltwanger, 144 S.W.3D 438, 447 (Tex. 2004) (not allowing plaintiff to bring intentional infliction claim for discriminatory harassment after statute of limitations for statutory discrimination claim had run).

Federal law governing labor management relations in some cases may preempt actions claiming the intentional infliction of emotional harm. Because § 301 of the Labor Management Relations Act directs federal law to determine the meaning of collective bargaining agreements, the Court has held that this provision preempts common law tort actions that are dependent upon the meaning of a collective agreement. See Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985). For cases finding § 301 preemption of intentional infliction claims, see, e.g., Humble v. Boeing Co., 305 F.3d 1004, 1014 (9th Cir. 2002) (preemption because collective agreement would determine whether job assignment and failure to accommodate upon return from medical leave was outrageous); Newberry v. Pacific Racing Ass'n, 854 F.2d 1142, 1149-1150 (9th Cir. 1988) (emotional distress claim arising out of discharge and investigation leading up to it); cf. Howell v. Lab One, Inc., 243 F. Supp. 2d 987, 990-91 (D. Neb. 2003) (applying same principles for unionized employees under the Railway Labor Act whose claim of intentional infliction depended upon interpretation of drug testing clauses in collective agreement). In many cases, however, claims of intentional infliction by employees covered by a collective agreement are not dependent upon the agreement and thus are not preempted. See, e.g., Galvez v. Kuhn, 933 F.2d 773, 779-780 (9th Cir. 1991) (foreman's harassment could not be justified by collective agreement and thus emotional distress claim not dependent on agreement); Keehr v. Consolidated Freightways of Delaware, Inc., 825 F.2d 133, 137 (7th Cir. 1987) (claim against supervisor's abusive language not dependent upon meaning of collective agreement, even though a grievance could have been filed against supervisor). See also Retherford, supra, at 971-72 (distinguishing between preempted claims against the exercise of supervisory authority, which do require interpretation of collective agreement, and non-preempted claims against personal conduct not involving supervisory authority).

Generally, the National Labor Relations Act (NLRA) preempts state regulation of conduct that is also regulated or arguably regulated by the NLRA. See generally San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236 (1959). If the conduct inflicting emotional harm on an employee is arguably prohibited by the NLRA, a common law action against that conduct may be preempted. However, in Farmer v. United Brotherhood of Carpenters & Joiners of America, Local 25, 40 U.S. 290 (1977), the court held that an intentional infliction of emotional distress action was not preempted because "the potential for interference" with the federal labor relations scheme "is insufficient to counterbalance the legitimate and substantial interest of the State in protecting its citizens" from outrageous behavior, so long as union-based discrimination did not form the basis of the tort claim. Id. at xxx.

The broad preemption provision of the federal Employee Retirement Income Security Act of 1974 (ERISA) precludes any intentional infliction of emotional harm action that relates to a benefit plan regulated by ERISA. See 29 U.S.C. § 1144(A) (ERISA "shall supersede any and all State laws insofar as they may no or hereafter relate to any [ERISA-regulated] employee benefit plan"). See, e.g., Marshall v. Ormet Corp., 228 F.Supp.2d 811, 815-16 (S.D. Ohio 2002) (preempting intentional infliction claim involving the failure to pay disability retirement benefits).

Chapter 7

Employee Privacy and Autonomy

Introductory Note: This Chapter concerns the protections afforded through the common law to employee privacy and autonomy interests that supplement constitutional, statutory and regulatory protections accorded those interests. The division of this chapter into Topic 1 (privacy) and Topic 2 (autonomy) reflects the traditional division described in Whalen v. Roe, 429 U.S. 589, 598-600 (1977): "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." The interest in privacy refers to what has been called the "right to be left alone," the right to keep certain areas and activities free from intrusion by others. The interest in personal autonomy covers activities that may not be private but are considered so much a part of the individual's personality that they deserve a level of protection against outside interference.

The focus in this Chapter is on employer liability rather than the liability of employees to one another. In most jurisdictions a violation of privacy protections constitutes a tort eliciting appropriate tort remedies. In other jurisdictions, the courts use the rubric of the "public policy" cause of action, a violation of which also typically results in tort remedies; this cause of action, referred to as the tort of "wrongful discipline in violation of public policy," is the subject of Chapter 4 of this Restatement. In a few jurisdictions, the courts may limit the aggrieved employee to contract remedies. Aspects of employee privacy are also the subject of federal and state constitutional provisions and of federal and state statutes that cover particular areas of protection. In the union-represented sector, moreover, collective bargaining agreements may provide protection to certain privacy interests. This Chapter covers only the common law of workplace privacy and autonomy and does not address federal or state constitutional or statutory law or collective bargaining agreements, except to the extent that legal developments in those areas may inform and help shape the common law. Where a subject is not covered in this Chapter, the reader should consult other provisions of this Restatement and the Restatement Second of Torts.

TOPIC 2: PROTECTION OF EMPLOYEE PERSONAL AUTONOMY

§ 7.08. Employee Personal Autonomy Interests

Employees have a right of personal autonomy while in the employment relationship. Protected employee autonomy interests include the interests in:

(a) engaging in conduct or activities entirely outside of the workplace that do not interfere with the employee's responsibilities as an employee; and

(b) adhering to or expressing moral, ethical, or other personal beliefs or belonging to associations so long as such adherence, expression, or association does not interfere with the employee's responsibilities as an employee.

Comment:

a. Scope. Sections 7.08 and 7.09 address the common-law protections against unreasonable employer intrusion on the employee's right of personal autonomy while in the employment relationship. Section 7.08 describes the nature of the employee's autonomy interests, and section 7.09 states the elements of an actionable employer intrusion upon those interests. The employee's right of personal autonomy, construed in a manner consistent with the nature of the employment relationship, concerns the employee's personal conduct, activities, and beliefs that occur outside of the workplace, or, in the case of adhering to or expressing beliefs or belonging to associations, otherwise do not interfere with the employee's responsibilities as an employee. Employees necessarily cede a great deal of their overall autonomy during their working time because they relinquish control over their work time and entrepreneurial discretion to the employer (§ 1.01). But that cession is limited to the scope of employment.

b. Emerging legal protection. In some cases, employers have made express contractual promises to employees that aspects of their private lives will not be made the subject of employer requirements. Such promises may be enforceable agreements, promises, or statements under the principles stated in Chapter 2 of this Restatement. Along another spectrum, employer interference with employee autonomy interests that violate established public policy may give rise to tort claims under Chapter 5. In addition, the employee's right to hold certain religious beliefs and engage in religious practices is recognized by constitutional and statutory provisions applicable to government and private employees. And, perhaps most directly on point, state "legitimate activities" laws in a number of jurisdictions establish public policy in favor of

shielding off-duty lawful activities and beliefs from employer interference. Section 7.08 draws on these legislative and judicial protections for such activities and beliefs.

c. Conduct outside of the workplace. Although statutes may provide more specific protections, the employee autonomy interest recognized in Subsection (a) concerns conduct and activities that take place outside of the workplace. If the employee is on the employer's premises or engaged in his job duties, even if they are performed off-site, his conduct is not within the scope of protection of this Subsection.

Illustrations:

1. E drives his car to work and parks in the employer's parking lot. He has a rifle in his car locked securely away in the trunk, as he plans to visit a gun range after work. Even though E has no plans to use the gun at the workplace and does not open the trunk while in the parking lot, having a gun in his car at the employer's parking lot is conduct occurring at the workplace and hence outside the scope of this Section.

2. Employer X fired E after he complained about a variety of workplace practices that, in E's good-faith view, raised safety concerns. E's verbal complaint conduct may be protected under particular occupational safety laws or under the public policy tort recognized in Chapter 5 but does not implicate an autonomy interest protected under this Section.

Similarly, although dating between coworkers may take place largely or exclusively after working hours and outside the employer's premises, dating or romantic relationships between coworkers is not conduct occurring entirely outside the workplace.

Illustration:

3. E has a romantic relationship with F, a fellow employee at X's food production plant. The relationship between E and F has caused dissension among other employees at work, particularly when E tries to join the same shift as F. X's refusal to grant E's request to join F's shift and E's subsequent resignation do not implicate E's protected autonomy interests under this Section because relationships with coworkers do not take place entirely outside of the workplace.

d. Adhering to or expressing personal beliefs or belonging to associations. Employees' protected autonomy interests in expression and associations retain protection during working time and on the employer's premises; they are not to subject to the same extra-workplace limitation as employees' protected autonomy interests in engaging in conduct. However, such expression or associations that interfere with the employee's responsibilities as employee are not entitled to protection under Subsection (b).

REPORTERS' NOTES

Comment a. Scope. [RN to come]

Comment b. Emerging legal protection. [RN to come]

Discussion of contract protections:

In Rulon-Miller v. International Business Machines Corp., 208 Cal.Rptr. 524 (1st Dist. 1984), *overruled on other grounds*, Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988) (disallowing tort actions for breach of good faith and fair dealing), the employer's chairman had distributed a policy to all company managers stating that: "We have concern with an employee's off-the-job behavior only when it reduces his ability to perform regular job assignments, interferes with the job performance of other employees, or if his outside behavior affects the reputation of the company in a major way. When on-the-job performance is acceptable, I can think of few situations in which outside activities could result in disciplinary action or dismissal." *Id.* at 530. The court held that "this company policy insures to the employee both the right of privacy and the right to hold a job even though 'off-the-job behavior' might not be approved of by the employee's manager." *Id*.

Discussion of whistleblower and retaliation protections

Discussion of state "lawful activities" protections

Comment c. Conduct outside of the workplace. Illustration 1 is based on Hansen v. American Online, Inc., 96 P.3d 950 (Utah 2004). In *Hansen*, the plaintiffs had taken their guns out of their car trunks while on the parking lot simply to transfer them to another car. Security cameras recorded the transfer. Although keeping a gun in a locked trunk on the employer's premises is not considered outside the workplace, an employee might still have privacy protections if the gun is kept in the trunk and only found after an improperly intrusive search. Illustration 2 is based on Bushko v. Miller Brewing Co., 134 Wis.2d 136, 396 N.W.2d 167 (Wis. 1986). In that case, the court found that the plaintiff's allegations of safety hazards failed to rise to the level of a public policy tort. The plaintiff also argued that the public policy tort should include the right to free speech. The Court stated:

> "The court of appeals held that 'freedom of speech' is a public policy that may support a wrongful discharge action. . . . Although we recognize a wrongful discharge claim when an employer's actions violate a clearly mandated public policy, the public policy exception may not be used to extend constitutional free speech protection to private employment. . . . If we did not hold to the narrow public policy wrongful discharge claim . . . the next complaint would be based on the employer's failure to exercise due process in the discharge or failure to grant equal rights to the employee in the discharge. That Pandora's box would have no limit to claims not susceptible to a motion for summary judgment and would eliminate any distinction between private and governmental employment.

Bushko, 134 Wis. at 145-46.

Almost all courts have held that romantic relationships between coworkers – particularly those between supervisors and subordinates – are matters of workplace concern and do not constitute private behavior. *See, e.g.*, Barbee v. Household Automotive Finance Corp., 113 Cal.App.4th 525, 6 Cal.Rptr.3d 406 (2003) (recognizing employer interests in avoiding conflicts of interest between work-related and family-related obligations, reducing favoritism or even the appearance of favoritism, and preventing sexual harassment); Crosier v. United Parcel

Service, Inc., 150 Cal.App.3d 1132, 198 Cal.Rptr. 361 (1983) (disapproved of on other grounds by Foley v. Interactive Data Corp., 47 Cal. 3d 654, 765 P.2d 373 (1988)) (finding that the employer was "legitimately concerned with appearances of favoritism, possible claims of sexual harassment and employee dissension created by romantic relationships between management and nonmanagement employees"); Rogers v. International Business Machines, 500 F. Supp. 867 (W.D. Pa. 1980) (finding that employee's termination because of a relationship with a subordinate was based on employer's "legitimate interest in preserving harmony among its employees and in preserving its normal operational procedures from disruption") (applying Pa. law); Patton v. J.C. Penney Co., 301 Or. 117, 719 P.2d 854 (1986), abrogated on other grounds by McGanty v. Staudenraus, 321 Or. 532, 901 P.2d 841 (1995) (finding no tortious conduct for termination based on relationship with coworker); Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 335 N.W.2d 834 (1983) (same); Ward v. Frito-Lay, Inc., 95 Wis.2d 372, 290 N.W.2d 536 (Ct.App.1980) (same); Patton v. J.C. Penney, 719 P.2d 854 (Oregon 1986) (same). However, at least one court has held open the possibility in dicta that an employer's actions concerning a consensual relationship between employees could be tortious. Mercer v. City of Cedar Rapids, 104 F. Supp. 2d 1130, 1180 (N.D. Iowa 2000) (stating that "intrusion upon the privacy of an employee's off-duty, consensual relationship with another coworker might be highly offensive in private sector employment") (applying Iowa law).

As a corollary, off-duty contact between coworkers also falls outside the protections for autonomy. See, e.g., Manning v. Department of Employment Sec., 850 N.E.2d 244, 18 A.L.R.6th 839 (Ill. App. Ct. 1st Dist. 2006) (employee's conduct in leaving a vulgar message on a coworker's personal voice mail after work was misconduct harmful to the employer).

Comment d. Adhering to or expressing personal beliefs or belonging to associations. [RN to come]

§ 7.09. Liability for Intrusions on Employee Autonomy

An employer is subject to liability for intruding upon an employee's protected personal autonomy interest if:

(a) the employer discharges or takes other material adverse employment action against the employee based on the employee's exercise of a protected personal autonomy interest under § 7.08; and

(b) the employer does not have a good-faith basis for believing that the employee's exercise of that autonomy interest interferes with the employer's legitimate business interests.

Comment:

a. Adverse employment action. Employers are subject to liability for any adverse employment actions they take against an employee in violation of this Section. Although termination represents the most severe such action, any action that negatively affects the employee's terms and conditions of employment potentially injures that employee. As set forth in Chapter 5, the disciplinary decision is actionable when it negatively affects an employee sufficiently to dissuade a reasonable worker from engaging in the protected activity (in this case, exercising his or her protected autonomy interests).

Illustration:

1. M, a manager at X, learns that E is a member of a religion which M finds offensive. X reassigns E from her position as forklift operator to a less-skilled laborer position. Her pay remains the same, as do her benefits. However, the changes in her job duties are sufficiently important that they could well dissuade E from exercising her protected autonomy interests constitute a material adverse employment action.

b. Good faith. The employer is subject to liability under this Section for violating an employee's protected autonomy interests if it does so without good-faith justification. The implied duty of good faith and fair dealing, contained in every employment agreement and implicit in every employment relationship, recognizes "a duty of cooperation such that he or she will not hinder the other's ability to accomplish that party's performance under the agreement or deprive that party of the benefit of the contract." (§ 2.06, Comment *a.*) If the employer

disciplines an employee because of conduct, behavior, or beliefs that it lacks even a good-faith belief as to its impact on the workplace or legitimate business interests, such discipline undermines, without countervailing justification, the employee's right of personal autonomy. Recognizing the limits of existing decisional law, the good-faith requirement limits liability to employers who act against an employee for exercising protected personal autonomy interests that the employer knows or lacks any good-faith basis to believe otherwise, that such exercise does not interfere in any way with the employee's responsibilities as an employee.

Illustrations:

2. M, a supervisor for employer X, engaged in a pattern of harassment of E. M also told E he would fire her if she ever got married. When M learned of E's plan to marry, he fired her. If M was acting within the scope of his authority for X, X would be liable for E's termination.

3. E worked as a manager at a retail store. Outside of working hours, E also operated a mail-distribution business which sold white supremacist and Nazi music and paraphernalia. An article in a local paper discussed E's mail-distribution business, which it described as "racist." After learning of E's business through the article, X terminated E's employment. X's determination that the negative publicity surrounding E's mail-distribution business harmed its legitimate business interests was made in good faith.

c. Legitimate business interests. Courts have generally accorded employers substantial discretion to determine whether an employee's off-premises activity interferes with workplace responsibilities or the company's reputation. For example, because employees in a managerial position often act as a representative of the employer, their off-hours behavior can affect the reputation of the employer; this can provide a legitimate basis for employer's taking cognizance of such behavior in making employment decisions. The employer who acts in good faith as to its belief that an employee's exercise of protected autonomy interests interferes with the legitimate business interests of the company is not subject to liability under this Section.

Illustration:

4. E attends the meeting of a citizens' advisory group working to develop proposals to regulate the use of nearby public lands. X, E's employer and a private lumber company, submits a proposal that would allow further development rights for the lumber industry on public lands. Identifying himself as X's employee, E speaks up at the meeting against X's plan. Believing in good faith that E's speech undermined X's legitimate business interests, X terminates E's employment. E's expression of views is not protected under this Section.

REPORTERS' NOTES

Comment a. Adverse employment action. Like § 4.01(b), this provision protects not only against discharge but also against all other discipline that could be considered material. Illustration 1 is taken in part from Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53 (2006). *Burlington* concerned the antiretaliation provisions in Title VII. The court held that an action taken by the employer could be considered materially adverse if such action "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 68. Here, the standard can be adapted to cover those disciplinary actions that could well dissuade a reasonable worker from engaging in the protected autonomy interests. As the court noted, "normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence." *Id.*

Comment b. Good faith. Illustration 2 is based on Cunningham v. Dabbs, 703 So.2d 979 (Ala.Civ.App. 1997). In *Cunningham*, a supervisor subjected the plaintiff-employee to frequent episodes of sexual harassment. When the supervisor learned that plaintiff was getting married, he fired her. The court rejected her wrongful discharge claim, but it denied summary judgment as to her intrusion upon seclusion and outrage claims. It essentially treated the wrongful discharge claim as an outrage claim by basing the outrage claim on her discharge. *Cunningham*, 703 So.2d at 983 ("[In support of the outrage claim,] Cunningham alleges a pattern of harassment and a termination of employment in violation of her fundamental right to marry."). Under this Chapter, the plaintiff would have an action under § 7.09 for her discharge based on her marriage.

Illustration 3 is based on Wiegand v. Motiva Enterprises, LLC, 295 F. Supp. 2d. 465 (D.N.J. 2003). However, the employee in that case was a clerk at a retail establishment. See also Graebel v. American Dynatec Corp., 230 Wis. 2d 748, 604 N.W.2d 35 (Table) (Ct. App. 1999) (employee fired because of letter to local newspaper using racially inflammatory expressions).

Off-duty expressions of racial, sexual, age-oriented, or religious bigotry may also impact the employer by providing support for another employee's discrimination claim. See Cooley v. Carmike Cinemas, Inc., 25 F.3d 1325 (6th Cir. 1994) (finding no error in allowing off-duty verbal statements critical of the elderly into evidence for age discrimination case).

Comment c. Legitimate business interests. Illustration 4 is based on Edmondson v. Shearer Lumber Products, 73 P.2d 733 (Idaho 2003). *Edmondson* is similar to, but reaches a contrary result from, Novosel v. Nationwide Insurance Co., 721 F.2d 894 (3d Cir. 1983) (applying Pa. law). Because *Novosel* focused its public policy analysis on the protection of employees' freedom of expression, it is perhaps the highest-profile case to provide protection for worker autonomy. It held that the employee stated a claim for termination based on the tort of wrongful discharge in violation of public policy. Illustration 7 reaches a contrary result because the decision in *Novosel* is not compatible with common-law protections for worker autonomy. The employer in *Novosel* was clearly asking the employee to participate in a work-related lobbying effort that would directly benefit the employer's business interests. As such, it falls under the rubric of political action that an employer may demand of its employees during the course of the employee's job performance. Under the logic of *Novosel*, "[a]n explicit contractual provision authorizing an employer to dismiss a lobbyist for failure to undertake lobbying might be unenforceable or subject to a balancing test." *Novosel*, 721 F.2d at 903 (statement of Becker, J., dissenting from the denial of the

petition for rehearing). Worker autonomy interests focus on those aspects of employee autonomy that are clearly separate from the workplace.

Moreover, *Novosel*'s use of the balancing test from public-employee speech cases, such as Connick v. Myers, 461 U.S. 138 (1983) and Pickering v. Board of Education, 391 U.S. 563 (1968), was problematic in its direct incorporation of federal constitutional law into state common law. Most courts have rejected a direct application of public-sector speech protections to the private sector. See, e.g., Dixon v. Coburg Dairy, Inc., 330 F.3d 250, 262 (4th Cir. 2003) (applying S.C. law) (declining to reach "the absurd result of making every private workplace a constitutionally protected forum for political discourse"), reversed on other grounds, 369 F.3d 811 (4th Cir. 2004) (en banc); Grinzi v. San Diego Hospice Corp., 14 Cal. Rptr. 3d 893, 900 (Cal. App. 4th 2004) ("We do not find [*Novosel*] persuasive and also decline to adopt it."); Edmondson v. Shearer Lumber Products, 75 P.3d 733, 738-739 (Idaho 2003) (*Novosel* policy not "endorsed by any other court"); Shovelin v. Central New Mexico Elec. Co-op., Inc., 850 P.2d 996, 1010 (N.M. 1993) ("We did not, however, adopt the approach taken by the Third Circuit in *Novosel* and are not inclined to adopt that approach now."); Tiernan v. Charleston Area Medical Center, Inc., 506 S.E.2d 578, 588-591 (W.Va. 1998) (rejecting the *Novosel* approach in a lengthy discussion); Barr v. Kelso-Burnett Co., 478 N.E.2d 1354, 1356 (Ill. 1985) (constitutional guarantee of free speech provided by Illinois and U.S. Constitutions does not provide protection or redress against private individuals or corporations which seek to abridge free expression of others); Graebel v. American Dynatec Corp., 604 N.W.2d 35 (Table), 1999 WL 693460 (Wis. App. 1999) ("Although we recognize a wrongful discharge claim when an employer's actions violate a clearly mandated public policy, the public policy exception may not be used to extend constitutional free speech protection to private employment." (quoting Bushko v. Miller Brewing Co., 396 N.W.2d 167, 172 (Wis. 1986))).

However, it is important to recognize that none of these cases, in terms of their holdings, reject the more limited approach taken in this Section. The cases all involved either workplace conduct or conduct that had a significant impact on the employer's business or reputation. See *Dixon*, 330 F.3d at 254-55 (no public policy protection for Confederate flag on tool box that would be visible to coworkers); *Grinzi*, 14 Cal. Rptr. 3d at 896 (no protection for employee's membership in Women's Garden Circle, an investment group the employer believed to be an illegal pyramid scheme); *Edmondson*, 75 P.3d at 736 (no protection for employee's involvement in local government task force that concerned issues vital to the employer's interest, particularly when employee opposed employer's interests); *Shovelin*, 850 P.2d at 1010 (no protection for employee serving as local mayor; employer warned employee prior to election that mayoral duties would interfere with employee's ability to perform the job); *Tiernan*, 506 S.E.2d at 588-591 (no protection for employee's letter, published by newspaper, that was critical of and sarcastic towards the employer); *Barr*, 478 N.E.2d at 1355 (plaintiffs had, prior to said discharge by the defendants without threats or intimidation and peaceably, informed fellow employees of layoff procedures being utilized); *Graebel*, 604 N.W.2d 35, 1999 WL 693460 at *1 (employee fired because of letter to local newspaper using racially inflammatory expressions).

CHAPTER 9

REMEDIES

Introductory Note: This Chapter treats the remedies available in actions seeking redress for violations of the rules stated elsewhere in this Restatement. It builds on and incorporates the treatment of remedial questions in the Restatement Second of Contracts, the Restatement Second of Torts, the Restatement Third of Agency, and the Restatement Third of Unfair Competition. Where an aspect of remedies is not covered in this Chapter, the provisions of the other Restatements should be consulted. This Restatement covers only the nonstatutory law of the employment relationship (see Chapter 1).

This Chapter is divided into two parts. Part 1 considers claims against employers. Part 2 considers claims against employees. Each part is, in turn, divided between claims for damages and claims for injunctive relief.

A note on terminology: The word "claims" is used rather than "actions" because often these claims can be asserted as a defense, by counterclaim, or by impleader (third-party complaint) by the defendant in litigation initiated by the employer or the employee as the case may be. The term "employee" includes, unless otherwise indicated, current or former employees. Whenever the term "compensation" is used, it includes employee pension and insurance benefits as well as salary or wage (see Chapter 3). The term "breach" refers to a material breach of an agreement or other undertaking.

PART 1. CLAIMS AGAINST EMPLOYERS

A. CONTRACT

§ 9.01. Damages – Employer Breach of an Agreement for a Definite or Indefinite Term or of an Employer Promise

(a) An employer who lacks cause for termination of an unexpired agreement for a definite term of employment (§§ 2.03-2.04) is subject to liability to the discharged employee for all compensation that the employee would have received under the remaining term of the agreement, less the compensation from alternative employment during that period of time the employee could obtain by reasonable efforts.

(b) An employer who lacks cause for termination of an agreement for an indefinite term of employment requiring cause for termination (§§ 2.03-2.04) is subject to liability to the discharged employee for all compensation that the employee would have been reasonably certain to receive under that agreement, less the compensation from alternative employment during that period of time the employee could obtain by reasonable efforts. .

(c) The parties may provide for a reasonable liquidated damages provision in lieu of the measure of damages stated in (a) and (b).

(d) An employer who breaches a promise to limit termination of employment that reasonably induces detrimental reliance by the employee (§ 2.02, Comment *c*) is subject to liability to the discharged employee for damages reasonably incurred in reliance on that promise that could not have been reasonably avoided by the employee.

Comment:

a. Termination of employment. For purposes of this Chapter, the phrase "termination of employment" includes not only express terminations effected by the employer but also "constructive terminations" effected by an employee whose terms and conditions have been so adversely altered as to be tantamount to a termination of employment. Similarly, "discharged employee" includes an employee who terminates employment on account of a constructive discharge. (See § 2.01, Comment *e* and Illustration 4.)

b. Agreement for a definite or indefinite term. The terminology here tracks that used in Chapter 2. An agreement between an employer and an employee is binding on both parties unless mutually rescinded or modified. It requires consideration or bargained-for exchange under the usual rules of contract formation stated in Chapters 3-4 of the Restatement Second of

Contracts. (See § 2.03, Comment *d*.) Such an agreement can provide for a definite term of employment whereby earlier termination of the agreement absent cause (§ 2.03(a)). Such an agreement can also provide for an indefinite term yet require cause for termination (§ 2.03(b)).

c. Compensation. The term compensation includes all remuneration and employee benefits treated in Chapter 3. The value of some employee benefits may not be readily calculable or comparable to benefits obtained in alternative employment. The question of ERISA preemption of state regulation of employee welfare benefit plans is discussed in § 3.03, Comment *a*.

d. Would have received under the remaining term of the definite-term agreement. If the employer lacks cause to terminate a definite-term agreement, it may be fairly assumed that the employment would have continued for at least the stated term of the agreement. Absent explicit language in the agreement, cause in a definite-term agreement does not include changes in the economic condition of the employer (§ 2.04(a)). If the term of employment exceeds one year, the agreement is likely to require a writing under the applicable Statute of Frauds, and hence the parties are likely to be able to draft for possible contingencies.

e. Would have been reasonably certain to receive under the indefinite-term agreement. "Cause" in an indefinite-term agreement has a broader scope than in a definite-term agreement and includes significant changes in the economic condition of the employer (§ 2.04(b)). But where the employer's termination of the agreement is without cause, the determination of the compensation the employee would have been reasonably certain to receive under the agreement but for the employer's breach is necessarily a difficult, predictive endeavor. Both in cases governed by statutory law and by nonstatutory law, the courts increasingly have allowed the issue of lost future income to go to the trier of fact under guidelines that place borders on the inquiry. See § 9.05, Comment *e*.

f. Mitigation: reasonable efforts to obtain alternative employment. Recovery for breach of any contractual obligation is limited to damages that could not have been "avoided without undue risk, burden or humiliation." Restatement Second of Contracts § 350(1). Reasonable mitigation is not a "duty" in the sense that the promisee is subject to liability for failure to mitigate; it is, rather, a discount factor that decreases the amount of damages awarded. The injured party is, however, "not precluded from recovery . . . to the extent that he has made reasonable but unsuccessful efforts to avoid loss." Id. § 350(2). The burden of proof on failure to mitigate is usually placed on the employer.

g. Reasonable liquidated damages clause. The parties are generally free to provide that obligations owed under the agreement are not subject to mitigation or to specify what the damages should be in the event of a breach. The parties can specify a reasonable figure that captures the likely losses to the injured party, whether from an ex ante or ex post perspective. A reasonable liquidated damages clause takes the place of the damages inquiry in subsection (a) or

(b). If, however, the liquidated damages provision does not reasonably reflect likely losses, it will be treated as an unenforceable penalty, and the inquiry in subsection (a) or (b) will apply.

h. Promissory estoppel. Subsection (d) deals with employer promises to limit termination of employment that reasonably induce detrimental reliance by the promisee-employee. Such promises are enforceable under the Restatement Second of Contracts § 90(1). "The remedy granted for breach" of such promises, however, "may be limited as justice requires". Id. The fundamental question is what the employer promised the employee or prospective employee. If the employer promised employment that could not be terminated except for cause, and the employee reasonably relies to the employee's detriment on such a promise, the affected employee has a reliance-based claim for damages against the employer that is similar to the claim under subsection (b). If, however, the employer promised the employee or prospective employee employment that, however attractive the compensation and other terms, would be terminable without cause, and the employee reasonably relies to his detriment on such promise, the affected employee has a claim only for limited reliance damages, such as relocation costs, because no particular period of employment with the employer was promised.

§ 9.02. Damages – Employer Breach of Binding Policy Statement

An employer who breaches a binding policy statement made by the employer that limits termination of employment (§ 2.05) is subject to liability to the discharged employee for all compensation the employee would have been reasonably certain to receive under the policy statement, less the compensation the employee could obtain by reasonable efforts in alternative employment during that period of time.

Comment:

a. Binding employer policy statements. The terminology here tracks § 2.05 which provides that unilateral policy statements can be binding on employers while they remain in effect.

b. Would have been reasonably certain to receive under the policy statement. In general, the employer's obligation under a binding policy statement is limited to the period the policy remains in effect. If, however, the policy statement creates a nonmodifiable term limiting termination of employment to cause, the measure of damages would be the same as under § 9.01(b).

§ 9.03. Damages – Employer Breach Other than Termination of Employment

An employer who breaches the terms of an agreement (§ 2.03), employer promise (§ 2.02, Comment *c*), or binding policy statement (§ 2.05) providing for compensation or benefits is subject to liability for damages for lost compensation or benefits caused by such breach that could not have been reasonably avoided by the employee.

Comment:

a. Employer breach other than termination. This Section applies only where the employer has not terminated the employment of the affected employee. Where the employer has terminated that employment, §§ 9.01-9.02 apply. This Section also does not apply where the employer has adversely changed the employee's working conditions but the altered conditions do not amount to a constructive discharge under § 2.01, Comment *e* and Illustration 4. The parties are free, however, to provide in their agreement for a specification of job duties and other working conditions as well as a remedy for altered duties or other working conditions that would give rise to a constructive discharge (sometimes called a termination by the employee for cause).

For tort remedies for employer violations of public policy short of discharge under Chapter 5, see § 9.05.

b. Agreement for compensation or benefits. This Section states the measure of damages for employer breach of obligations to pay compensation and benefits under Chapter 3. Employees may also obtain to obtain further remedies through applicable state wage-payment laws.

c. Relevance of term of employment. The employee's entitlement to earned compensation or benefit is the same whether the employment relationship is terminable at will or terminable only for cause (§ 3.01(a)). The extent of damages may differ, however, where the item of compensation or benefits in question is keyed to length of service.

d. Could not have been reasonably avoided by the employee. Any damages recoverable by the injured employee are discounted by the compensation and benefits in alternative employment the employee received or could have received through reasonable efforts.

§ 9.04. Injunctive Relief

(a) Except as otherwise provided by law, specific performance of an agreement, promise, or statement providing for the employment of the prospective employee or continuation of the employment of the employee is disfavored.

(b) Any injunctive relief to enforce an employment agreement (§ 2.03), employer promise (§ 2.02, Comment *c*), or binding employer policy statement (§ 2.04) must satisfy the traditional requirements of irreparable injury, inadequate remedy at law, and a balance of the equities clearly favoring the party seeking such relief.

Comment:

a. Injunctive relief. The reference here is to court-ordered injunctive relief for violations of nonstatutory employment law. In some employment statutes, the term "equitable relief" is used to describe a broader range of remedies, such as reinstatement with backpay, that while they may require the exercise of discretion by the court, are not necessarily subject to the traditional requirements for injunctive relief (as stated in subsection (b)).

b. Specific performance. It is a longstanding rule of the equity courts that specific performance of personal services agreements will not be granted. The rule seeks both to protect employees from performing compelled services but also to avoid the supervisory burdens of having to monitor court decrees requiring the ongoing performance of affirmative duties. The first purpose explains why employers cannot obtain such decrees; the second purpose explains why neither party can. What equity will do, provided the traditional requirements stated in subsection (b) are met, is enforce positive decrees that do not require ongoing judicial supervision (e.g., "pay the compensation owed") or negative decrees (e.g., "do not enforce the no-compete covenant") that require a party to refrain from taking an action.

c. Except as otherwise provided by law. Employment statutes routinely require reinstatement of employees to the positions they held before their employment was unlawfully terminated or instatement to positions that were unlawfully denied to them. Reinstatement with backpay is the presumptive remedy under these laws. Sometimes reinstatement is not desired by the affected employee or is impractical; in such cases, courts under various statutes have interpreted their authority to award equitable relief to include a "front pay" remedy in lieu of reinstatement. In cases governed by common law, the courts have not awarded reinstatement as a remedy, without express statutory authorization.

B. TORT

§ 9.05. Damages – Employer Breach of Tort-Based Duty

(a) An employer who breaches a tort-based duty to an employee (Chapters 4-7) is subject to liability in damages to the affected employee for all harms caused by the breach, less damages that could have been reasonably avoided by the employee.

(b) To the extent provided by law, available items of damages that may be sought under (a) include economic loss, reasonably certain future economic loss, noneconomic loss, punitive damages, and nominal damages.

(c) Unless otherwise provided by law, an employer who breaches a tort-based duty (Chapters 4-7) is not subject to liability for the attorney's fees incurred by the employee in maintaining the employee's claim.

Comment:

a. Tort-based duty. The reference here is to nonwaivable, nondelegable duties the breach of which gives rise to a tort claim, as opposed to obligations that are assumed by contract (assumpsit). Employer torts are treated in Chapters 4-7.

b. All harms caused by the breach. The general rule of tort law is that "[o]ne injured by the tort of another is entitled to recover damages from the other for all harm, past, present, and prospective, legally caused by the tort." Restatement Second of Torts § 910. This formulation may be useful as a general matter, but there areas of law that impose restrictions on available damages, such as the availability of damages for economic losses arising from negligent breach of contract, see Restatement Third of Torts: Liability for Economic Harm § 3 (Tentative Draft No. 1, 2012); the availability of damages for harm to earning capacity without proof of pecuniary loss, see Restatement Second of Torts § 906(b); or the availability of damages for emotional harm unaccompanied by physical injury or some special relationship, see Restatement Third of Torts: Liability for Physical and Emotional Harm §§ 45-48 (forthcoming, 2012). In addition, damages are recoverable only for harm caused by the employer's tortious conduct. See Restatement Second of Torts §§ 430-454, 917; 1 Restatement Third of Torts: Liability for Physical and Emotional Harm, Chapters 5 and 6.

c. Mitigation of damages. Tort law recognizes avoidable consequences as a factor in the diminution of damages. One generally cannot "recover damages for any harm that could have been avoided by the use of reasonable effort or expenditure after commission of the tort." Restatement Second of Torts § 918(1). This rule does not apply to harms intentionally or recklessly caused, "unless the injured person with knowledge of the danger of the harm intentionally or heedlessly failed to protect his own interests." Id. § 918(2).

d. Economic loss. In the context of "invasions of interests of personality," such assault, battery, false imprisonment, "insulting conduct amounting to a tort, and all other acts constituting a tort because intended or likely to cause bodily harm or emotional distress," the Restatement Second of Torts § 924(b) recognized "loss or impairment of earning capacity" as a compensable element of harm to the person. Comment *c* states a measure of damages for such loss or impairment to the time of trial: "A person physically harmed by the tort of another is entitled to receive as damages the amount of earnings he has been prevented from acquiring up to the time of the trial. This amount is the difference between what he probably could have earned but for the harm and any lesser sum that he actually earned in any employment or, if he failed to avail himself of the opportunities, the amount he probably could have earned in work for which he was fitted, up to the time of the trial." See also discussion of proof of "[h]arm to earning capacity" in Restatement Second of Torts § 906(b), Comment *c*.

Following the lead of the Torts Restatement, the courts have regularly allowed recovery of proven lost earnings caused by the employer's tortious conduct up to the trial. Other economic losses include reasonable relocation, medical, and other expenses caused by such conduct.

e. Reasonably certain future economic loss. The determination of future lost earnings entails a much more difficult inquiry than the determination of lost earnings up to the point of trial. Although some courts continue to be skeptical of claims of future economic harm, courts in a roughly equal number of jurisdictions, perhaps influenced by the availability of "front pay" in lieu of reinstatement for statutory employment law violations (see § 9.04, Comment *c*), show increasing receptivity to allowing well-documented claims of reasonably certain future economic loss to be submitted to the trier of fact. This Section adopts the view of the latter jurisdictions, but urges courts to proceed with care. Through insisting on competent vocational expert testimony, especially with respect to the availability of alternative employment, identifying the

appropriate factors to be considered by the jury, and reviewing any resulting award for grounding in the evidence, courts can take steps to minimize the speculative nature of the inquiry, while honoring the principle of recovery for proven harm.

f. Noneconomic loss. Damages for emotional harm are generally available for intentional torts like assault, battery, false imprisonment, intentional infliction of emotional distress, invasion of privacy and defamation. The law of the jurisdiction governing the particular tort, however, may restrict the availability of such damages by requiring proof of physical injury or pecuniary loss.

g. Punitive damages. Punitive damages are assessed avowedly to deter future wrongdoing rather than to compensate the particular plaintiff. As a general matter, they "may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." Restatement Second of Torts § 908(2). The law of the jurisdiction governing the particular tort may limit the size or availability of punitive damages awards. Constitutional principles, under the federal due process clauses, require that the size of a punitive damages award is reasonably related to the size of the compensatory damages award in a given case, and that appellate courts in the jurisdiction review awards for comparability across cases.

h. Nominal damages. "Nominal damages are a trivial sum of money awarded to a litigant who has established a cause of action but has not established that he is entitled to compensatory damages." Restatement Second of Torts § 907.

i. Attorney's fees. The "American Rule" provides that each party bears its own attorney's fees irrespective of the outcome of the litigation. By contrast, European countries tend to follow a "loser pays" rule. In the U.S., in cases involving statutory employment claims, the law often authorizes the shifting of attorney's fees to the non-prevailing defendants, usually losing employers. Traditional equitable exceptions to the American Rule allow fee-shifting against litigants who have brought an action or asserted a claim in bad faith or where litigants have created a "common fund" out of which attorney's fees can be paid.

§ 9.06. Injunctive Relief – Employer Breach of Tort Duty

Any injunctive relief to enforce an employer's tort-based duty toward its employee (Chapters 4-7) must satisfy the traditional requirements of irreparable injury, inadequate remedy at law, and a balance of the equities clearly favoring the party seeking such relief.

Comment:

See § 9.04.

PART 2.

CLAIMS AGAINST EMPLOYEES

§ 9.07. Damages – Employee Breach of Agreement

Unless the employment agreement provides otherwise, an employee who breaches an actionable obligation, including any actionable common-law obligation, imposed by the employment agreement is subject to liability in damages for economic loss to the employer caused by such breach, less damages that could have been reasonably avoided by the employer.

Comment:

a. An actionable obligation. In all employment relationships, the basic exchange is compensation and benefits to be paid the employee in exchange for the employee's competent, satisfactory performance of the requirements of the position. If the employee performs poorly in his or her position, the employer's usual recourse is to terminate the employment relationship or discipline the employee in some other manner. Even where the employment relationship can be terminated only for cause, demonstrated poor performance constitutes cause for termination (see § 2.04). As a general matter, employers do not have a cause of action for damages against an employee who breaches his or her employment-agreement obligations. A cause of action for damages is, however, available where the employee breaches an "actionable obligation," including any actionable common-law obligation, stated in the agreement. An actionable obligation is either an expressly stated in the agreement as subjecting the employee to liability in damages for breach or a fiduciary obligation under the law of agency.

b. Imposed by the employment agreement. A premise of this Section is that employee obligations that can result in damages for breach are contained in an agreement rather than in an employer promise or unilateral policy statement.

c. Economic loss. Recovery for breach of contract under this Section is limited to cases of economic loss to the employer caused by the employee's breach, such as economic loss caused by managerial employee's services for a competitor while still an employee of the employer. (See § 8.02.) Economic loss also may be present where the employer is sued by a third party for damages caused by the employee's negligence towards the third party. Under this Section, the

agreement would have to provide for an indemnification obligation by the employee in such circumstances.

§ 9.08. Injunctive Relief – Employee Breach of Agreement

To the extent provided by law, any injunctive relief to enforce an actionable obligation of the employee contained in the employment agreement that is otherwise enforceable under Chapter 8 must satisfy the traditional requirements of irreparable injury, inadequate remedy at law, and a balance of the equities clearly favoring the party seeking such relief.

Comment:

See § 9.10, Comment.

§ 9.09. Damages – Employee Breach of Tort-Based Duty

(a) An employee who breaches a tort-based duty, including any fiduciary duty, the employee owes the employer (Chapter 8) is subject to liability for all harm caused by the breach, less damages that could have been reasonably avoided by the employer.

(b) To the extent provided by law, available items of damages that may be sought under (a) include past economic loss, reasonably certain future economic loss, noneconomic loss, and punitive damages.

(c) As an alternative to the measure of damages under (b), an employer may deny any compensation owed, and obtain the return of any compensation paid, to an employee who breaches the employee's duty of loyalty owed the employer (§ 8.01), where (1) the consequences of the employee's disloyalty cannot be apportioned to a specific subset of the services for the employer provided by the employee, and (2) the nature of the disloyalty renders practicably infeasible reasonable calculation of the harm caused the employer.

(d) Unless otherwise provided by law, an employee who breaches a tort-based duty, including a fiduciary duty, owed to the employer (Chapter 8) is not subject to liability for the attorney's fees incurred by the employer in maintaining the employer's claim.

a. Tort-based duty. The reference here is to nonwaivable, nondelegable duties the breach of which gives rise to a tort claim, as opposed to obligations that are assumed by contract (assumpsit). The employee's duty of loyalty (§ 8.01), including the duty not to disclose or use confidential employer information for the employee's personal benefit or the benefit of third parties (§ 8.03), is a prime example of an employee's tort-based duty.

b. Allowable items of damages. See § 9.05, Comments *b-i*.

c. Alternative of denial of compensation to disloyal employee. Under this subsection, an employer injured by an employee's breach of the employee's duty of loyalty (see § 8.01), in lieu of seeking damages under subsection (b), may withhold all compensation owed and obtain the return of all compensation paid to a disloyal employee, but only where (1) the employee's disloyalty pervades the entire employment relationship and cannot be apportioned to a specific subset of the services for the employer provided by the employee, and (2) the nature of the employee's breach renders practicably infeasible reasonable calculation of the harm caused the employer. Recovery under this subsection is in the alternative because it is potentially available only when the harm caused by the employee's breach cannot be reasonably demonstrated.

The jurisdictions are evenly split between an approach that disallows all compensation to a disloyal employee where apportionment is not feasible ("forfeiture for disloyalty" approach), and jurisdictions that require that the employer show that the harm caused by the employee's breach clearly outweighed the value generated by the employee's services, take a narrow view regarding when apportionment is infeasible, or reject any withholding of compensation for services rendered ("forfeiture only where no benefit" approach).

The forfeiture-for-disloyalty view reflects a general position of the law of agency. Under Restatement Second of Agency § 469, an agent is "entitled to no compensation for conduct which is disobedient or which is a breach of his duty of loyalty"; and where "such conduct constitutes a willful and deliberate breach of his contract of service, he is not entitled to compensation even for properly performed services for which no compensation is apportioned." The Restatement Third of Agency § 8.01, Comment *d(2)*, at 258-259, takes a similar view.

This Restatement follows the forfeiture-only-where-no-benefit approach, which is better suited to the employment relationship, where employees are engaged to perform a range of services not all of which are of a strictly fiduciary character. See Restatement Third of Agency § 8.01, Comment *c*, at 256. Moreover, the "forfeiture-for-disloyalty" approach originated in several jurisdictions in cases involving disloyal brokers who by their disloyalty precluded any market valuation of the property under their stewardship and hence their underlying claim was for compensation for services of no value whatsoever. Where the employer can show that the employee's breach resulted in economic loss exceeding any benefit of the employee's services,

the employer can recover damages under subsection (b). This subsection recognizes that the employer should have an alternative means of recovery by withholding all compensation owed and regaining all compensation paid to the disloyal employee in those circumstances where the employee's conduct precludes any practicable assessment of harm to the employer.

d. Attorney's fees. See § 9.05, Comment *i*.

§ 9.10. Injunctive Relief – Employee Breach of Tort-Based Duty

Any injunctive relief to enforce a tort-based duty, including any fiduciary duty, the employee owes the employer (Chapter 8) must satisfy the traditional requirements of irreparable injury, inadequate remedy at law, and a balance of the equities clearly favoring the party seeking such relief.

Comment:

To obtain injunctive relief under this Section, the employer must show the employee's breach of an obligation is enforceable under Chapter 8 and must satisfy the traditional requirements for such injunctive relief.

APPENDIX

Black Letter of Preliminary Draft No. 9

§ 4.01. Principles of Employer's Liability to Employees Generally

Unless otherwise provided by a workers' compensation law or by other law, an employer is subject to liability to the employer's employee for harm caused by

(a) the employment-related wrongful conduct of the employer;

(b) the employment-related wrongful conduct of the employer's agents, as set forth in § 4.02; or

(c) the employer's failure to perform a tort-based, employment-related duty, including those set forth in §§ 4.03 and 4.04.

§ 4.02. Employer's Liability to Employees for Acts of Agents

Unless otherwise provided by a workers' compensation law or by other law, an employer is subject to liability to the employer's employee for harm caused by

(a) the employment-related wrongful conduct of an agent to whom the employer has delegated general or particular authority to act for the employer and for such conduct ratified by the employer;

(b) the employment-related wrongful conduct of an employee of the employer that was undertaken within the scope of that employee's employment; or

(c) to the extent provided by applicable law, the employment-related wrongful conduct of an employee that is not within the scope of that employee's employment, if that employee has the authority to direct, reward, or discipline the harmed employee, unless the employer can demonstrate that

(1) it took reasonable steps to prevent and promptly remedy any such wrongful conduct, and

(2) the wrongful conduct could have been avoided had the employee not unreasonably failed either

(i) to take advantage of any preventive or corrective opportunities provided by the employer, or

(ii) otherwise to avoid the harm.

§ 4.03. Employer's Duty to Exercise Care in Selecting, Retaining, and Supervising Agents and Employees

Unless otherwise provided by a workers' compensation law or by other law, an employer is subject to liability for harm to an employee caused by breach of the employer's duty to exercise reasonable care in selecting, retaining, or supervising its agents and employees.

§ 4.04. Employer's Duty to Provide Safe Conditions and to Warn of Risk

Unless otherwise provided by a workers' compensation or other law, an employer is subject to liability for harm to an employee caused by breach of its duty

(a) to provide both a reasonably safe workplace and instrumentalities of work, and

(b) to warn of the risk of dangerous working conditions of which the employer but not the harmed employee was or should have been aware.

§ 4.05. Employer's Liability for Intentional Torts Committed Against Employees

Unless otherwise provided by a workers' compensation law or by other law, an employer is subject to liability under the principles set forth in §§ 4.01 and 4.02 for physical and other harm to an employee caused by conduct actionable as an intentional tort, including

(a) false imprisonment;

(b) assault and battery; and

(c) intentional infliction of emotional harm.

§ 7.08. Employee Personal Autonomy Interests

Employees have a right of personal autonomy while in the employment relationship. Protected employee autonomy interests include the interests in:

(a) engaging in conduct or activities entirely outside of the workplace that do not interfere with the employee's responsibilities as an employee; and

(b) adhering to or expressing moral, ethical, or other personal beliefs or belonging to associations so long as such adherence, expression, or association does not interfere with the employee's responsibilities as an employee.

§ 7.09. Liability for Intrusions on Employee Autonomy

An employer is subject to liability for intruding upon an employee's protected personal autonomy interest if:

(a) the employer discharges or takes other material adverse employment action against the employee based on the employee's exercise of a protected personal autonomy interest under § 7.08; and

(b) the employer does not have a good-faith basis for believing that the employee's exercise of that autonomy interest interferes with the employer's legitimate business interests.

§ 9.01. Damages – Employer Breach of an Agreement for a Definite or Indefinite Term or of an Employer Promise

(a) An employer who lacks cause for termination of an unexpired agreement for a definite term of employment (§§ 2.03-2.04) is subject to liability to the discharged employee for all compensation that the employee would have received under the remaining term of the agreement, less the compensation from alternative

employment during that period of time the employee could obtain by reasonable efforts.

(b) An employer who lacks cause for termination of an agreement for an indefinite term of employment requiring cause for termination (§§ 2.03-2.04) is subject to liability to the discharged employee for all compensation that the employee would have been reasonably certain to receive under that agreement, less the compensation from alternative employment during that period of time the employee could obtain by reasonable efforts.

(c) The parties may provide for a reasonable liquidated damages provision in lieu of the measure of damages stated in (a) and (b).

(d) An employer who breaches a promise to limit termination of employment that reasonably induces detrimental reliance by the employee (§ 2.02, Comment *c*) is subject to liability to the discharged employee for damages reasonably incurred in reliance on that promise that could not have been reasonably avoided by the employee.

§ 9.02. Damages – Employer Breach of Binding Policy Statement

An employer who breaches a binding policy statement made by the employer that limits termination of employment (§ 2.05) is subject to liability to the discharged employee for all compensation the employee would have been reasonably certain to receive under the policy statement, less the compensation the employee could obtain by reasonable efforts in alternative employment during that period of time.

§ 9.03. Damages – Employer Breach Other than Termination of Employment

An employer who breaches the terms of an agreement (§ 2.03), employer promise (§ 2.02, Comment *c*), or binding policy statement (§ 2.05) providing for compensation or benefits is subject to liability for damages for lost compensation or

benefits caused by such breach that could not have been reasonably avoided by the employee.

§ 9.04. Injunctive Relief

(a) Except as otherwise provided by law, specific performance of an agreement, promise, or statement providing for the employment of the prospective employee or continuation of the employment of the employee is disfavored.

(b) Any injunctive relief to enforce an employment agreement (§ 2.03), employer promise (§ 2.02, Comment *c*), or binding employer policy statement (§ 2.04) must satisfy the traditional requirements of irreparable injury, inadequate remedy at law, and a balance of the equities clearly favoring the party seeking such relief.

§ 9.05. Damages – Employer Breach of Tort-Based Duty

(a) An employer who breaches a tort-based duty to an employee (Chapters 4-7) is subject to liability in damages to the affected employee for all harms caused by the breach, less damages that could have been reasonably avoided by the employee.

(b) To the extent provided by law, available items of damages that may be sought under (a) include economic loss, reasonably certain future economic loss, noneconomic loss, punitive damages, and nominal damages.

(c) Unless otherwise provided by law, an employer who breaches a tort-based duty (Chapters 4-7) is not subject to liability for the attorney's fees and costs incurred by the employee in maintaining the employee's claim.

§ 9.06. Injunctive Relief – Employer Breach of Tort Duty

Any injunctive relief to enforce an employer's tort-based duty toward its employee (Chapters 4-7) must satisfy the traditional requirements of irreparable

injury, inadequate remedy at law, and a balance of the equities clearly favoring the party seeking such relief.

§ 9.07. Damages – Employee Breach of Agreement

Unless the employment agreement provides otherwise, an employee who breaches an actionable obligation, including any actionable common-law obligation, imposed by the employment agreement is subject to liability in damages for economic loss to the employer caused by such breach, less damages that could have been reasonably avoided by the employer.

§ 9.08. Injunctive Relief – Employee Breach of Agreement

To the extent provided by law, any injunctive relief to enforce an actionable obligation of the employee contained in the employment agreement that is otherwise enforceable under Chapter 8 must satisfy the traditional requirements of irreparable injury, inadequate remedy at law, and a balance of the equities clearly favoring the party seeking such relief.

§ 9.09. Damages – Employee Breach of Tort-Based Duty

(a) An employee who breaches a tort-based duty, including any fiduciary duty, the employee owes the employer (Chapter 8) is subject to liability for all harm caused by the breach, less damages that could have been reasonably avoided by the employer.

(b) To the extent provided by law, available items of damages that may be sought under (a) include past economic loss, reasonably certain future economic loss, noneconomic loss, and punitive damages.

(c) As an alternative to the measure of damages under (b), an employer may deny any compensation owed, and obtain the return of any compensation paid, to an

employee who breaches the employee's duty of loyalty owed the employer (§ 8.01), where (1) the consequences of the employee's disloyalty cannot be apportioned to a specific subset of the services for the employer provided by the employee, and (2) the nature of the disloyalty renders practicably infeasible reasonable calculation of the harm caused the employer.

(d) Unless otherwise provided by law, an employee who breaches a tort-based duty, including a fiduciary duty, owed to the employer (Chapter 8) is not subject to liability for the attorney's fees incurred by the employer in maintaining the employer's claim.

§ 9.10. Injunctive Relief – Employee Breach of Tort-Based Duty

Any injunctive relief to enforce a tort-based duty, including any fiduciary duty, the employee owes the employer (Chapter 8) must satisfy the traditional requirements of irreparable injury, inadequate remedy at law, and a balance of the equities clearly favoring the party seeking such relief.