How to Use Torts Tactically in Employment Litigation

Ty Hyderally, Esq.
Hyderally & Associates, P.C.
33 Plymouth Street, Suite 202
Montclair, NJ 07042
tyh@employmentlit.com
www.employmentlit.com
O- (973) 509-8500
F (973) 509-8501

New Jersey Law Center
Employment Law Roundtable
December 14, 2017

Introduction

Employees who do not present facts sufficient to support statutory discrimination claims may find relief in tort. Prior to the passage of the Civil Rights Act of 1991, supplemental employment torts in complaints for statutory discrimination was often an effective strategy to support a jury demand and to add compensatory and/or punitive damages. This thus expanded the potential award beyond equitable relief. Today, supplemental tort claims may provide the possibility of compensatory and/or punitive damage awards in excess of the statutory caps established by Congress. Employment torts may be used to increase the economic viability of what would otherwise be a wrongful discharge claim for contract damages only. In situations where the statutory limitations period for filing a timely charge of discrimination has passed, employment torts may provide alternative claims. Torts with a typical discrimination case also provides a legitimate basis for focusing attention on the employer's malevolent conduct. In addition, torts can be a means of establishing individual liability, and including torts may also by-pass an exclusionary insurance clause. The following employment Torts illustrate several ways that employees may assert claims against their employers.

Intentional Infliction of Emotional Distress

This is one of most common torts claims brought by plaintiffs against employers. Emotional distress is either negligently or intentionally inflicted. The difference is based on the state of mind of the company or person responsible for performing the harmful act. Generally, the basic elements of emotional distress that a plaintiff must show are: (1) extreme and outrageous conduct; (2) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and injury; and (4) severe emotional distress. The Restatement (Second) of Torts § 46 defines emotional distress as, "one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." In most jurisdictions, the complained of conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as intolerable in a civilized community.

An employer can be held legally responsible for an employee's actions when the conduct that caused the emotional distress is within the scope of the employee's job, or the employer consented to the conduct. In workplace claims, intentional infliction of emotional distress is most often alleged in complaint of sexual harassment. Emotional distress is a very fact intensive claim that it is difficult to prove. Generally, if damages are received the are monetary and often depend on the jury if your claim goes to trial.

Defamation

Defamation occurs when an employer harms an employee by intentionally making a false statement about the employee. Defamation is the unprivileged publication of false information which injures a person's reputation. Defamation generally requires a false communication by a

third person. The term encompasses both slander (verbal statements) and libel (written or printed statements). Many states analyze slander and libel separately, recognizing libel as the more serious wrong. State rules differ on what an employee must prove to win a defamation case. In order to create a cause of action for defamation under the Restatement (Second) of Torts §558 a plaintiff must show:

> (1)a false and defamatory statement concerning another, (2) an unprivileged publication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (per se) or the existence of special harm caused by the publication (per quod). *Id.*

Under § 559 of the Restatement, "a communication is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Restatement (Second) of Torts § 559.

In the employment context, defamation usually involves employer statements to third parties, usually other employers, concerning why an employee was terminated or otherwise disciplined. If the employee's manager provides a false reference that hurts the employee's chances of getting a job, or damages the employee's reputation, the employee can sue for defamation. However, there are statements about an employee that an employer can make. For example, a statement concerning an employee is conditionally privileged if the statement is communicated among persons with a mutual interest in the statement's subject matter. If an employer proves that a defamatory statement is subject to qualified privilege, then the employee must prove that the statement was made with actual malice.

Intentional Interference with Contract

Tortious interference with a contract is a business tort that allows parties to hold a third person liable. According to the Restatement (Second) of Torts §766, "one who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract." To establish a cause of action plaintiff must show: (1) an existing valid contractual relationship, (2) knowledge of the relationship on the part of the interfering party, (3) intentional interference with performance of the contract, (3) causation and (4) damages.

Interference with employment contracts generally arises in three different employment contexts: where a former employer provides an unfavorable post-employment job reference that results in the rejection of the employee for the new job; where an employer seeks to enforce a non-compete agreement; and where a supervisor or manager allegedly interferes with an employee's job performance or causes the employee to be terminated.

The principal defense to an intentional interference claim is legal justification – whether the employer or agent acted with a proper motive to advance a legitimate interest. Restatement (Second) of Torts § 767 (1977). Truth is also a defense to an intentional interference claim, and employers may generally provide truthful post-employment references without incurring liability for intentional interference. Restatement (Second) of Torts § 772 (1977).

Invasion of Privacy

In the modern work environment, what constitutes invasion of privacy has shifted due to the often-integral roles that e-mail and the internet play in conducting business. However, there remain several boundaries that afford employees protections from unauthorized invasions of privacy in the work place. Restatement (Second) of Torts § 652 (1977) states that "one who invades the privacy of another is subject to liability for the resulting harm to the interests of the other." As such, employers who invade the privacy of employees without authorization may be held liable for such violations.

Employees may bring four types of intrusion claims, which include: (a) unreasonable intrusion upon the seclusion of another; (b) appropriation of the other's name or likeness; (c) unreasonable publicity given to the other's private life; and (d) publicity that unreasonably places the other in a false light before the public. In order to succeed in an Invasion of Privacy claim, an employee's best argument would be that they reasonably and legitimately expected, given the circumstances, that the employer would refrain from searching or invading their privacy. This reasonable expectation will be partly circumstantial, and based on the employer's policies and past practices.

One example of an employer's liability for an invasion of privacy is through the unreasonable intrusion theory, which occurs when an employer or a fellow employee intentionally intrudes, physically or otherwise, upon the private matters of a victim-employee, and the intrusion is highly offensive to a reasonable person. Employers who ratify, but do not participate in such conduct, may also be held liable for such unreasonable intrusions. *See, e.g., Busby v. Truswal System Corp.*, 551 So. 2d 322 (Ala. 1989). Other examples of an invasion of privacy include an employer or fellow employee's sexual harassment, public disclosure of

private facts, unreasonable searches, or drug tests and surveillance administered in an invasive manner.

In contrast, employees should keep in mind that their employers may have the right to monitor their email and internet usage. If an employer has a written policy in place that notifies employees that their emails may be monitored, it is likely that such employers have the right to monitor, review, and read all employee emails. This may be particularly true where employees are using a workplace computer and/or a business email account. Likewise, employers ordinarily have the right to ensure that their employees are using the Internet for the specified work purposes.

Assault and Battery

Assault and battery in the work place are most commonly brought as a result of varying degrees of sexual harassment committed by fellow employees or employers. According to the Restatement (Second) of Torts § 18 (1965), an alleged tortfeasor—in this case, an employer or fellow employee - is subject to liability for battery if: (a) he or she 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.

In addition, Restatement (Second) of Torts § 33 (1965) states that assault occurs where an employer or fellow employee: (a) 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. Employers can also be made accountable,

under Title VII of the Civil rights Act of 1964, for battery because of physical harassment inflicted on account of sex, age, race, disability, color, or national origin.

Examples of assault and battery include sexual assault where unwanted contact occurred, workplace investigations, polygraph and drug testing, and exposure to toxic substances in the workplace. To prove liability, the employer or fellow employee need not to possess the present ability to inflict injury. Rather, liability may be established as long as the plaintiff had reasonable apprehension of injury. Restatement (Second) of Torts § 33 (1965).

Under *respondeat superior*, employers may be held liable for the assault and/or battery of their employees when they committed the tort, as long as their employees were acting within the scope of their employment. Employers may also be held liable if they ratify such conduct. *Stevenson v. Precision Std., Inc.*, 762 So. 2d (Ala. 1999); *BE & K Construction Co.*, 604 So. 2d 398 (Ala. 1992)

In preparing to litigate a tort claim, employees should keep in mind the defenses that employers may have, and be prepared to rebut them. These include consent by the employee, privilege of the employer to inflict the otherwise impermissible tort, and self-defense or defense of others.

Negligent hiring, training and retention

Employers are responsible for supervising their employees, and may be held directly liable for negligence as a result of tortious conduct that their employees commit. To establish an employer's liability for negligent supervision, training or retention, a plaintiff must demonstrate that the employer (1) knew or should have known that one its employees was behaving in a dangerous or otherwise incompetent manner, and (2) that the employer nevertheless retained or

failed to adequately train or supervise the employee. *Daisley v. Riggs Bank. N.A.*, 2005 U.S. Dist. LEXIS 10232 (D.C. May 31, 2005).

For example, employers who fail to adequately run background checks on potential employees may be liable for negligence, as the employer should have done their due diligence in ensuring that their employees would not pose a threat in the work place. Another common example occurs when an employee commits sexual harassment, for second time offenders; Since the employer reasonably knew or should have known that the conduct may occur, they may be held negligent. See, e.g., B.C.B. Co., Inc. v. Troutman, 409 S.E.2d 218, 220 (Ga. App. 1991). Moreover, where an employer fails to train or improperly trains or educates employees, and an employee thereafter to injures someone as a result, the employer may be independently liable for the actions of their employee.

Conclusion

The aforementioned tort theories provide a number of practical ways in which employees can prove the additional liability of their employers in discrimination claims. Employees who do not present facts sufficient to support statutory discrimination claims may find relief in tort, and such relief may very well be in excess of what employees would have received otherwise. Taken together, when used tactically, there are a number of ways in which torts can bolster employment discrimination claims, and provide for the broadest form of relief.