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HOW TO USE TORTS TACTICALLY IN EMPLOYMENT LITIGATION

FROM THE PLAINTIFF'S PERSPECTIVE



EMPLOYMENT TORTS COVERED:

- Intentional Infliction of Emotional Distress
- Defamation
- Intentional Interference with the Employment Contract
- Invasion of Privacy
- Assault and Battery
- Negligent Hiring, Training and Retention

WHY INCLUDE EMPLOYMENT TORTS IN YOUR CLAIMS ANALYSIS

- Employees who do not present facts sufficient to support statutory discrimination claims may find relief in tort
- 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
- Employment torts may provide alternative claims when the statutory limitations period for filing a timely charge of discrimination has passed
- Torts can be a means of establishing individual liability
- Including torts may by-pass an exclusionary insurance clause

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

- One of the most common torts claims brought by plaintiffs against employers
- In employment context this is most often alleged in a complaint of sexual harassment.
- **Restatement (Second) of Torts § 46**
 - 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
- **Elements of the Claim:**
 1. Extreme and outrageous conduct
 2. Intent to cause, or disregard of substantial probability of causing, severe emotional distress
 3. A causal connection between the conduct and injury
 4. Severe emotional distress

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

- **Extreme and outrageous conduct**

- 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

- **Severe emotional distress**

- Distress inflicted must be so severe that no reasonable man could be expected to endure it

DEFAMATION

- Defamation → unprivileged publication of false information which injures a person's reputation
- Defamation encompasses both slander (verbal statement) and libel (written statement)
- **Restatement (Second) of Torts § 558**
 - To create liability for defamation 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)

DEFAMATION

- Statements are defamatory if they impute to defamed individual:
 - A criminal offense
 - Loathsome disease
 - Matter incompatible with your business, trade, profession, or office
 - Serious sexual misconduct
- If the statement falls into the above categories, a plaintiff does not have to prove the statement injured his reputation

INTENTIONAL INTERFERENCE WITH CONTRACT

- **Restatement (Second) of Torts § 766:**

- On 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

- **Elements:**

- 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
 4. Causation
 5. Damages

INTENTIONAL INTERFERENCE WITH CONTRACTS

- Generally arise 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
 - Where a supervisor or manager allegedly interferes with an employee's job performance or causes the employee to be terminated
- Defenses
 - Legal justification – whether the employer or agent acted with a proper motive to advance a legitimate interest
 - Truth – employers may generally provide truthful post-employment references without incurring liability for intentional interference

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.
- Restatement (Second) of Torts § 652 (1977)
 - “one who invades the privacy of another is subject to liability for the resulting harm to the interests of the other.”
- Employers who invade into private affairs of employees without authorization may be held liable for such intrusions.
- Four types of invasion claims:
 - (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;
 - (d) publicity that unreasonably places the other in a false light before the public.

INVASION OF PRIVACY

- Examples of invasion of privacy:
 - unreasonable intrusion theory: 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. Other examples:
 - sexual harassment
 - public disclosure of private facts
 - unreasonable searches
 - drug tests and surveillance administered in an invasive manner
- Can an employer check email and internet usage?
 - Generally, an employer's written policy notifying you that your emails will be read allows them to do so. Employers may also ensure that their employees are using the internet for work-related purposes, and may thus review internet usage.
- Employee's best argument: legitimate and reasonable expectation of privacy, given the circumstances.

ASSAULT AND BATTERY

- Battery occurs if an alleged tortfeasor:
 - (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) a harmful contact with the person of the other directly or indirectly results.
 - Restatement (Second) of Torts § 18 (1965).
- Assault occurs where an alleged tortfeasor:
 - (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.
 - Restatement (Second) of Torts § 33 (1965).
- 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.

ASSAULT AND BATTERY

- Examples of assault and battery:
 - Sexual assault where there has been unwanted contact,
 - Workplace investigations,
 - Polygraph and drug testing
 - Exposure to toxic substances in the workplace
- Burden of proof: the tortfeasor is not required to have the present ability to inflict injury, so long as the plaintiff had reasonable apprehension of injury. Restatement (Second) of Torts § 33 (1965)
- *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.
- Defenses to keep in mind and rebut: Consent (employee agreed to the possibility of being hurt), privilege to engage in the conduct, self-defense or defense of others.

NEGLIGENT HIRING, TRAINING, & 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 prove 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); *Mardis v. Robbins Tire & Rubber Co.*, 669 So. 2d 885, 889 (Ala. 1995).

NEGLIGENT HIRING, TRAINING, & RETENTION

- **Examples:**

- Employers who fail to adequately run background checks on potential employees
 - The employer should have done their due diligence in ensuring that their employees would not pose a threat in the work place.
- Sexual harassment, especially for second time offenders
 - Since the employer reasonably knew or should have known that the conduct may occur, they may be held negligent.
- Moreover, where an employer fails to train or improperly trains or educates employees, and an employee thereafter 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.