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Alex B. Long

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Alex B. Long, *University of Tennessee College of Law*

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Alex B. Long[*]

INTRODUCTION

Despite decades of study and effort, workplace discrimination and harassment remain intractable problems. There is no shortage of suggestions in academic literature as to how to reform the law in order to combat workplace discrimination and harassment.[1] As one author has noted, the #MeToo movement prompted "a flurry of proposed and enacted legislative reform" designed to address sexual harassment.[2] While the Black Lives Matter movement was originally focused on criminal justice reform, the movement has also triggered increased attention to inequality and harassment in the workplace.[3]

Despite the attention devoted to these problems, however, there remains a sense that discrimination law, as currently constituted, has come up short in the fight against workplace discrimination and harassment.[4] For example, Supreme Court decisions in the late 1990s encouraged employers to develop policies and training designed to educate employees concerning workplace discrimination and harassment as a means of avoiding punitive damage awards and shielding employers altogether from vicarious liability for supervisor harassment.[5] The thought was that such training would

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[*] Williford Gragg Distinguished Professor, University of Tennessee College of Law. Thanks to Nicole Buonocore Porter for comments on an earlier draft. Thanks also to Morgan Webber, Michael Trotter, and Will Hitchcock for their research assistance.

[1] *See, e.g.*, Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Scholars*, 71 STAN. L. REV. ONLINE 17, 18 (2018) (offering proposals for reform).

[2] *See* Julie Goldscheid, *Sexual Assault by Federal Actors, #MeToo, and Civil Rights*, 94 WASH. L. REV. 1639, 1679 (2019).

[3] *See* Molly Gibbons, Comment, *License to Offend: How the NLRA Shields Perpetrators of Discrimination in the Workplace*, 95 WASH. L. REV. 1493, 1526–27 (2020) (noting that the movement "has prompted a discussion regarding the ways in which racism arises in other areas of life, such as the workplace").

[4] *See* Goldscheid, *supra* note 2, at 1679 (stating that the fact that "sexual harassment on the job persists over thirty years since the [first major judicial decision on the subject], confirms that law, or at least the legal frameworks embodied in current anti-discrimination laws, have had limited results").

[5] *See* Susan Bisom-Rapp, *Sex Harassment Training Must Change: The Case for Legal Incentives for Transformative Education and Prevention*, 71 STAN. L. REV. ONLINE 62, 66–67 (2018) (discussing cases).

reduce instances of workplace harassment.[6] But the stories from the #MeToo movement and the continued prevalence of race-based and other forms of harassment have tended to call into question the effectiveness of anti-harassment training as currently implemented.[7]

Given the dominant role that Title VII and other anti-discrimination statutes play in this regard, most of the suggestions regarding how to make the law more effective in combatting discrimination and harassment involve statutory reform.[8] But it is worth noting that tort law has also long played a role in the law governing the workplace as it relates to discrimination and harassment. Whether it involves the Supreme Court's repeated decisions to import tort law principles into Title VII jurisprudence or plaintiffs' decisions to include tort claims supplementing or replacing traditional statutory discrimination claims, tort law plays a role in addressing employment discrimination.[9]

Perhaps the most common tort claim that employees assert in instances of alleged workplace discrimination or harassment is the tort of intentional infliction of emotional distress (IIED). When subjected to racial or sexual harassment or the creation of a hostile work environment, employees sometimes allege that the conduct amounts to IIED.[10] Unfortunately for employees, it is notoriously difficult for employees to prevail on IIED claims against their employers. Liability under the tort is limited to begin with, even outside of the employment context.[11] Not only must a plaintiff establish that a defendant intentionally or recklessly caused severe emotional distress, the plaintiff must establish that the defendant's conduct was "extreme and outrageous" or "beyond all bounds of decency."[12] This is a difficult standard to satisfy in general, but when the defendant is an

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[6] *See id.*

[7] *See id.* at 68 (stating that anti-harassment training, "at least as generally practiced, does not prevent harassment").

[8] *See* Goldscheid, *supra* note 2, at 1681–87 (listing proposed legislative reforms).

[9] *See* Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV 2115, 2132–34 (2007) (discussing IIED cases in which courts have been willing to permit recovery for workplace harassment); Sandra F. Sperino, *Discrimination Law: The New Franken-Tort*, 65 DEPAUL L. REV. 721 (2016) (discussing the courts' importation of common-law tort principles into Title VII jurisprudence).

[10] *See, e.g.*, Coates v. Wal-Mart Stores, Inc., 976 P.2d 999 (N.M. 1999).

[11] *See* Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1, 18 (1988) (noting the difficulties employees face); Frank J. Cavico, *The Tort of Intentional Infliction of Emotional Distress in the Private Employment Sector*, 21 HOFSTRA LAB. & EMP. L.J. 109, 122 (2003) (summarizing cases illustrating difficulties employees face in establishing extreme and outrageous conduct).

[12] RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (AM. LAW INST. 1965).

employer, the difficulty level for a plaintiff increases dramatically. Citing the need to preserve managerial discretion, courts espouse the need to adopt an "especially strict approach" in IIED cases in the workplace.[13]

As a result of this strict approach, employees are frequently unable to establish that employer misconduct satisfies this high threshold. There are numerous examples of employees bringing IIED claims against employers who have engaged in some fairly horrific forms of conduct, only to be told by courts that the conduct is not egregious enough to be actionable.[14] This strict approach also applies to instances of unlawful employment discrimination and harassment. In short, the general rule among courts is that conduct that amounts to unlawful discrimination under Title VII or some other anti-discrimination statute does not ordinarily rise to the level of extreme and outrageous conduct for purposes of an IIED claim.[15]

At the same time, a few courts—almost undetected in the literature on the subject—have recognized that one form of employer conduct may merit special treatment when assessing an IIED claim against an employer. According to these courts, the fact that an employer has engaged in retaliatory conduct may be "a critical and prominent" factor in assessing an employer's behavior.[16] And where an employer engages in discriminatory conduct and then retaliates against an employee who opposes such conduct, these courts have also been more willing to find that the employee may have engaged in the type of extreme and outrageous conduct necessary to support an IIED claim.[17]

This Article champions the approaches these courts have taken and uses them as a jumping off point for a broader discussion of the evils of employment retaliation and how more robust policing of employment retaliation may more effectively deter discrimination in the workplace. One

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[13] Burkhart v. Am. Railcar Indust., Inc., 603 F.3d 472, 478 (8th Cir. 2010); *infra* notes 88–98 and accompanying text.

[14] *See* McClease v. R.R. Donnelley & Sons Co., 226 F. Supp. 2d 695, 698 (E.D. Pa. 2002) (concluding that employer who made a racially discriminatory statement to employee and who fired employee after employee refused to sign a false affidavit did not engage in extreme and outrageous conduct); Hooten v. Pa. College of Optometry, 601 F. Supp. 1151, 1155 (E.D. Pa. 1984) (concluding that harassing plaintiff at work about her status as a wife and mother in front of other co-worker and purposely overloading plaintiff's work schedule was not extreme and outrageous); Shewmaker v. Minchew, 504 F. Supp. 156, 163 (D.D.C. 1980) (concluding that harassment, exclusion of the plaintiff from business meetings, and circulation of rumors concerning plaintiff was not actionable); Jackson v. Creditwatch, Inc., 84 S.W.3d 397, 406–07 (Tex. App. 2002) (holding that president of company who, *inter alia* exposed his genitals to plaintiff and publicly embarrassed plaintiff did not engage in extreme and outrageous conduct).

[15] *See infra* notes 126–131 and accompanying text.

[16] *See infra* notes 213–226 and accompanying text.

[17] *See infra* notes 213–237 and accompanying text.

frequent theme in the literature on employment retaliation is that more robust statutory protection from employment retaliation is necessary in the fight against employment discrimination so that employees are not deterred from speaking out against discrimination for fear of retaliation.[18] This Article suggests that, given the gaps in existing statutory law, the IIED tort may also supplement statutory law in this fight. But, drawing social science research into the subject of retaliation, this Article also focuses on what one court has referred to as the "greater detrimental impact upon the victim" that retaliation has on employees.[19] Based on the special harms that retaliation inflicts on victims, this Article argues that courts should recognize retaliatory conduct as an especially weighty factor in deciding whether conduct is extreme and outrageous for purposes of IIED claims, particularly where it is coupled with discriminatory conduct.

Part I of this Article begins with a discussion of the "extreme and outrageous" conduct requirement of the IIED tort, including a discussion of some of the markers or indicators of such conduct. Part II focuses on IIED claims in the workplace and the strict approach that courts have taken regarding such claims, even when the employer conduct in question involves unlawful discrimination. It also focuses on the decisions of those courts that view retaliation as a prominent factor in assessing whether an employer's conduct is extreme and outrageous. Part III examines the ways in which IIED claims might serve to fill the gaps in existing statutory discrimination law in the case of employer retaliation stemming from an employee's opposition to discrimination or harassment. Finally, Part IV examines the social science literature on employer retaliation in order to better explain the harmful effects on employees. Specifically, it argues that because employment retaliation is so emotionally damaging and because retaliation is so likely to deter employees from complaining about potentially unlawful employee conduct like discrimination, courts should recognize retaliation as a prominent factor in assessing whether an employer's conduct rises to the level of extreme and outrageous conduct and should ordinarily classify retaliation in response to resistance to discrimination as creating at least a jury issue on the issue of whether the conduct was extreme and outrageous.

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[18] *See, e.g.*, Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 38 (2005) (noting that retaliation against employees tends to make other similarly-situated employees less inclined to speak about discrimination); Nicole Buonocore Porter, *Ending Harassment by Starting with Retaliation*, 71 STAN. L. REV. ONLINE 49, 51 (2018) (attributing the underreporting of workplace discrimination to the fear of retaliation).

[19] *See infra* notes 213–226 and accompanying text.

I. EXTREME AND OUTRAGEOUS CONDUCT IN THE IIED TORT

A. The Tort of Intentional Infliction of Emotional Distress

The tort of "outrage" or IIED is a dignitary tort, designed to compensate those who, in the words of Kenneth Abraham and G. Edward White, have been treated "in a way that does not respect that person's intrinsic worth."[20] Tort law was historically reluctant to permit recovery in the absence of physical injury.[21] Concerns over permitting recovery in such instances included the difficulty in establishing causation and the possibility of fakery.[22] The original version of the *Restatement of Torts* did not recognize the tort of intentional infliction of emotional distress and it was not until a later supplement in 1948 that the tort first appeared.[23] But the authors—relying in part on the scholarship of William Prosser[24] and Calvert Magruder[25]—went to considerable lengths to limit the potential reach of the new tort.

First, liability only attaches where the defendant acts recklessly or with the intent to cause severe emotional distress.[26] Distress is "severe" where a reasonable person cannot be expected to endure it.[27] In addition to limiting recovery to situations in which a plaintiff suffered "severe emotional distress," the authors also imposed a high hurdle for plaintiffs to clear in establishing the wrongfulness of a defendant's conduct. A defendant's conduct must be "extreme and outrageous," that is "beyond all possible bounds of decency [so as] to be regarded as atrocious, and utterly intolerable in a civilized community."[28] This rather amorphous definition aside, the concept of extreme and outrageous conduct is more frequently

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[20] Kenneth S. Abraham & G. Edward White, *The Puzzle of the Dignitary Torts*, 104 CORNELL L. REV. 317, 320, 335 (2019).

[21] *See* Russell Fraker, *Reforming Outrage: A Critical Analysis of the Problematic Tort IIED*, 61 VAND. L. REV. 983, 987 (2008) (discussing the history of tort law pertaining to emotional distress).

[22] *See* Martha Chamallas, *The Architecture of Bias: Deep Structures in Torts Law*, 146 U. PA. L. REV. 463, 494 (1998) ("There were fears that plaintiffs could easily fake injuries and that it would be impossible to trace the invisible causal chain from the accident to the plaintiff's injury.").

[23] *See* Fraker, *supra* note 21, at 988.

[24] *See* William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939).

[25] *See* Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936).

[26] RESTATEMENT (SECOND) OF TORTS § 46(1) (AM. LAW INST. 1965).

[27] *Id.* cmt. j.

[28] *Id.* cmt. d.

described by courts in terms of what such conduct is not.[29] Famously, extreme and outrageous conduct does not include "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities."[30]

IIED claims may be limited in other ways. For example, IIED claims are frequently asserted alongside other claims. But a few courts view IIED as a gap-filler tort that applies "in those rare instances in which a defendant intentionally inflicts severe emotional distress in a manner so unusual that the victim has no other recognized theory of redress."[31] Under this approach, a plaintiff may not recover on an IIED claim where the plaintiff could recover under a more traditional tort theory, such as battery or assault.[32] This same idea has also been applied in the case of recovery for sexual harassment under both a statutory cause of action and IIED.[33] Thus, for example, the Texas Supreme Court has held that a plaintiff may not avoid the statutory cap on damages recoverable in a statutory sexual harassment action by also tacking on an IIED claim based on the same conduct.[34]

B. Markers of Extreme and Outrageous Conduct

Courts routinely emphasize that the "extreme and outrageous conduct" requirement imposes a demanding standing.[35] But the lack of a clear standard defining the concept of extreme and outrageous conduct is one of the defining traits of the IIED tort. As explained by one author, "the threshold of liability under IIED is nothing other than the degrees of opprobrium and hyperbole that the defendant's behavior inspires in the eyes

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[29] *See* Wilson v. Monarch Paper Co., 939 F.2d 1138, 1142 (5th Cir. 1991) (stating the concept escapes precise definition); Fraker, *supra* note 21, at 994 (stating that "[t]he *Restatement* commentary effectively concedes the impossibility of precise definition").

[30] RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (AM. LAW INST. 1965).

[31] Standard Fruit and Vegetable Co. v. Johnson, 985 S.W.2d 62, 68 (Tex. 1998); *see also* Banks v. Fritsch, 39 S.W.3d 474, 481 (Ky. Ct. App. 2001) ("[T]he tort of outrage is intended as a 'gap-filler,' providing redress for extreme emotional distress where traditional common law actions do not.").

[32] *See Banks*, 39 S.W.3d at 481 ("Where an actor's conduct amounts to the commission of one of the traditional torts such as assault, battery, or negligence for which recovery for emotional distress is allowed, and the conduct was not intended only to cause extreme emotional distress in the victim, the tort of outrage will not lie.").

[33] *See* Hoffmann-La Roche Inc. v. Zeltwanger, 144 S.W.3d 438, 447 (Tex. 2004).

[34] *Id.*

[35] *See, e.g.*, Chang Hyun Moon v. Kang Jun Liu, 44 N.E.3d 1134, 1143 (Ill. Ct. App. 2015) (stating that the element "sets a high bar for the type of conduct that will create liability"); Atkinson v. Farley, 431 N.W.2d 95, 97 (Mich. Ct. App. 1988) (referring to threshold for such conduct as "formidable").

of the court."[36] As Judge Judith Kaye once observed, "The tort is as limitless as the human capacity for cruelty."[37]

This definitional difficulty raises at least two concerns for courts. One is the concern previously identified: the tort "may overlap with other areas of law, with potential liability for conduct that is otherwise lawful."[38] Relatedly, the lack of clear standards sometimes leads to unpredictable outcomes.[39] For example, a court may rely heavily on the fact that the defendant is merely exercising a legal right, hence the conduct is not extreme and outrageous.[40] Where, however, the defendant's conduct goes beyond what is necessary to exercise that right, the conduct may be actionable.[41]

While there is no clear definition of the concept of extreme and outrageous conduct, the *Restatement (Third) of Torts* at least lists several potential indicators of such conduct. These include "the relationship of the parties, whether the actor abused a position of authority over the other person, whether the other person was especially vulnerable and the actor knew of the vulnerability, the motivation of the actor, and whether the conduct was repeated or prolonged."[42]

1. The Relationship of the Parties

According to at least one court, the most important factor in the determination of whether conduct was extreme and outrageous is whether a special relationship existed.[43] Where such a relationship exists, a defendant may have "a greater obligation to refrain from subjecting the victim to abuse" and other forms of wrongful conduct than a stranger would.[44] Thus, the existence of a special relationship generally makes it easier for the

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[36] Fraker, *supra* note 21, at 994.

[37] Howell v. N.Y. Post Co., 612 N.E.2d 699, 702 (N.Y. 1993).

[38] *Id.*

[39] *See* Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 63 (1982) (referring to the results of IIED cases as being unpredictable); Alex B. Long, *Lawyers Intentionally Inflicting Emotional Distress*, 42 SETON HALL L. REV. 55, 55–56 (2012) (stating that the lack of clear standards concerning this element leads to unpredictable results).

[40] *See* RESTATEMENT (THIRD) OF TORTS § 46 cmt. e (AM. LAW INST. 2012).

[41] *See id.*

[42] *Id.* cmt. d.

[43] House v. Hicks, 179 P.3d 730, 737 (Or. Ct. App. 2008).

[44] Williams v. Tri-County Metro. Transp. Dist., 958 P.2d 202, 204 (Or. Ct. App. 1998); *see also* Garretson v. City of Madison Heights, 407 F.3d 789, 799 (6th Cir. 2005) (stating that "a special relationship between the parties may lower the level of conduct needed to be actionable").

plaintiff to satisfy the "extreme and outrageous conduct" requirement.[45] Special relationships can include the employer/employee relationship, the landlord/tenant relationship, the physician/patient relationship, the debtor/creditor relationship, and the church/congregation member relationship.[46]

2. Abuse of a Position of Authority

The fact that the defendant was in a position of authority or in a relation with the plaintiff that gives the defendant actual or apparent authority over the plaintiff or the power to affect the plaintiff's interests is another factor cutting in favor of a finding of extreme and outrageous conduct.[47] Examples include police officers, school authorities, and landlords.[48] The fact that a defendant occupies a position of power over the plaintiff enhances the ability of the defendant to inflict emotional distress.[49] As explained by one court, "[t]he anxiety and loss of control felt by one who cannot protect his vital interests" may be an aggravating factor in the consideration of whether conduct is extreme and outrageous.[50] Indeed, Prosser and Keeton note that the leverage that one in a position of authority enjoys over another may be "something very like extortion."[51] Thus, a police officer's racial slurs uttered during the course of an interrogation may be actionable where such slurs would not be actionable if coming from a private citizen or even a public official not having the power to affect the plaintiff's interests.[52]

3. Vulnerability of the Plaintiff

The fact that the defendant is aware that the plaintiff is particularly susceptible to emotional distress due to some peculiarity may also makes it more likely that the defendant's conduct will be deemed as extreme and

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[45] *See* RESTATEMENT (SECOND) OF TORTS § 46 cmt. d. (AM. LAW INST. 1965) ("It is only where there is a special relation between the parties . . . that there may be recovery for insults not amounting to extreme outrage.").

[46] *See Hicks*, 179 P.3d at 737.

[47] *See* RESTATEMENT (SECOND) OF TORTS § 46 cmt. e (AM. LAW INST. 1964); *see also* Bryant v. Better Bus. Bureau of Greater Md., Inc., 923 F. Supp. 720, 747 (D. Md. 1996).

[48] *See id.*

[49] *See* Ky. Fried Chicken Nat'l Mgmt. Co. v. Weathersby, 607 A.2d 8, 15 (Md. 1992) (stating that an individual's position of power "may enhance his or her ability to do harm").

[50] *See* Price v. State Farm Mut. Auto. Ins. Co., 878 F. Supp. 1567, 1572 (S.D. Ga. 1995).

[51] PROSSER & KEETON, ET AL., THE LAW OF TORTS 61 (5th ed. 1984).

[52] *See Ky. Fried Chicken Nat'l Mgmt. Co.*, 607 A.2d at 15 (stating that an individual's position of power "may enhance his or her ability to do harm").

outrageous.[53] The "peculiarity" may be physical, emotional, or even financial.[54] Where a defendant acts recklessly or with the intent to inflict emotional distress and is already on notice that the victim is susceptible to emotional distress, the conduct may cross the line into extreme and outrageous behavior where it otherwise might not.[55] In the words of one court, such conduct may become "heartless, flagrant, and outrageous."[56]

4. Motivation of the Defendant

The defendant's motivation is perhaps the least theorized of the factors listed in the *Restatement*.[57] The decisional law suggests that the actor's motive is a factor to consider and that some type of wrongful motivation may compound the wrongfulness of the defendant's conduct, thus making it extreme and outrageous.[58] The fact that a defendant was motivated by

[53] *See* RESTATEMENT (SECOND) OF TORTS § 46 cmt. f (AM. LAW INST. 1964).

[54] *See* Eckenrode v. Life of Am. Ins. Co., 470 F.2d 1, 5 (7th Cir. 1972) (involving denial of payment of life insurance benefits and high pressure tactics in an attempt to force a settlement); Langer v. George Washington University, 498 F. Supp. 2d 196, 200 (D.D.C. 2007) (involving plaintiff who was known by defendant to be in a "fragile mental state" and physically susceptible to emotional distress); Holmes v. Oxford Chemicals, Inc., 510 F. Supp. 915, 919 (M.D. Ala. 1981) (involving defendant who slashed plaintiff's disability income in the hope that such drastic action might force plaintiff to seek Social Security benefits).

[55] *Cf.* Langer v. George Washington Univ., 498 F. Supp. 2d 196, 200 (D.D.C. 2007) (noting that while employer-employee conflicts generally do not rise to the level of outrageous conduct, plaintiff stated a claim where employer was aware of employee's vulnerability to harassment and continued to harass employee).

[56] *Langer*, 498 F. Supp. 2d at 200.

[57] The defendant's motivation was not listed in the RESTATEMENT (SECOND) OF TORTS as being a relevant consideration in the determination of extreme and outrageous conduct. While the concept is listed in a comment within § 46 of the RESTATEMENT (THIRD) OF TORTS, RESTATEMENT (THIRD) OF TORTS § 46 cmt. d (AM. LAW INST. 2012), none of the comments or illustrations included speak in any depth on the concept.

[58] *See* Dale v. City of Chi. Heights, 672 F. Supp. 330, 333 (N.D. Ill. 1987) (stating that defendant's discriminatory animus compounded the wrongfulness of defendant's conduct and that plaintiff had alleged extreme and outrageous conduct); Schmitz v. Smentowski, 785 P.2d 726, 735 (N.M. 1990) (listing the defendant's motive as a factor to consider); Taylor v. State, 617 So.2d 1198, 1204 (La. Ct. App. 1993) (relying on the fact that defendant acted with an ulterior motive in concluding that conduct could be extreme and outrageous); Gital Dodelson, *Outrage: Withholding a Get as Intentional Infliction of Emotional Distress*, 15 RUTGERS RACE & L. REV. 240, 257 (2014) ("When a man chooses to ruin his wife's present and future life out of hatred and spite, the tort of intentional infliction of emotional distress can be used to provide a remedy for the tremendous anguish that he causes."). Various authors have suggested that racially-motivated speech or conduct can be actionable under an IIED theory in some cases. *See* Hafsa S. Mansoor, *Modern Racism, but Old-Fashioned IIED: How Incongruous Injury Standards Deny "Thick Skin" Plaintiffs Redress for Racism and Ethnoviolence*, 50 SETON HALL L. REV.

racial animus, malice, or some other improper motive would logically seem to contribute to the outrageousness of the defendant's conduct.[59]

At the same time, the *Restatement* notes the fact that a defendant's conduct "has been characterized by malice, or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort" does not necessarily make the conduct extreme and outrageous.[60] Courts frequently observe that a wrongful motivation alone does not render conduct extreme and outrageous and that, ultimately, the focus must be on the nature of the defendant's conduct itself.[61] And in order for the defendant's wrongful motive to tip the balance, the underlying conduct must itself be fairly egregious.[62] Thus, in a New Mexico case, the fact that the defendant was "motivated in significant part by a malicious intent to injure" the plaintiff when he initiated sexual relationships with the plaintiff's ex-wife, then-current wife, and former fiancée was insufficient to render this conduct extreme and outrageous.[63]

One recurring scenario involves a defendant who is motivated by a desire to humiliate another.[64] The fact that the defendant publicly humiliated the plaintiff makes it more likely that the conduct will be

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881, 887 (2020) (citing author).

[59] *Cf.* RESTATEMENT (SECOND) OF TORTS § 767 cmt. d (AM. LAW INST. 1979) (explaining that the defendant's motive is a relevant consideration in determining whether a defendant's interference with another's contractual relation is improper and stating that "[a] motive to injure another or to vent one's ill will on him serves no socially useful purpose").

[60] RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (AM. LAW INST. 1964).

[61] *See* Perez-Dickson v. City of Bridgeport, 43 A.3d 69, 101 (Conn. 2012) ("[W]rongful motivation by itself does not meet the standard for intentional infliction of severe emotional distress; rather, it is the act itself which must be outrageous.") (quotations omitted); Cohen v. Meyers, 167 A.3d 1157, 1182 (Conn. Ct. App. 2012) ("The court properly focused on the conduct on which Meyers' claim was based, rather than by the generalized characterizations of this conduct, regardless of the motivation behind that conduct."); Padwa v. Hadley, 981 P.2d 1234, 1242 (N.M. Ct. App. 1999) (stating that the fact that defendant may have motivated by malicious intent to injure was insufficient to render conduct extreme and outrageous); *see also* RESTATEMENT (SECOND) OF TORTS § 767 cmt. d (AM. LAW INST. 1965) (stating that the fact that a defendant's conduct was aggravated by malice that might be sufficient for an award of punitive damages under another tort theory has not been enough to rise to the level of extreme and outrageous conduct).

[62] *Cf.* Kelso v. Watson, 562 N.E.2d 975, 977 (Ill. Ct. App. 1990) ("Cremation of a corpse against the wishes of the next-of-kin, if done maliciously, out of ill will or spite, likewise could be conduct sufficiently outrageous to support that element of the tort.").

[63] *Padwa*, 981 P.2d at 1242.

[64] *See* Agarwal v. Johnson, 603 P.2d 58, 67 (Cal. 1979) (involving supervisor who used racial epithets in an attempt to humiliate plaintiff); Beavers v. Johnson Controls World Servs., Inc., 901 P.2d 761, 763 (N.M. Ct. App. 1995) (concluding jury could properly find supervisor's conduct to be extreme and outrageous where supervisor subjected plaintiff to unjustified public harassment, ridicule, and humiliation).

deemed extreme and outrageous.[65] Prior to the recognition of the IIED tort, there were numerous decisions allowing for recovery stemming from the embarrassment and humiliation of guests, customers, and passengers by the owners of places of public accommodations who removed them from their facilities in a public manner.[66] These decisions helped pave the way for recognition of the IIED tort,[67] and humiliation continues to play a role in IIED cases today.[68]

Several of the illustrations of extreme and outrageous conduct listed in the *Restatement* involve conduct designed solely to humiliate another or humiliation in pursuit of some other goal.[69] The *Restatement* provides the example of a spouse seeking a divorce "who announces intimate facts in the newspaper as part of the process of obtaining a divorce."[70] Other examples from judicial decisions include a supervisor who allegedly mocked an employee's dwarfism for the purpose of humiliating the employee[71] and police officers who made racially derogatory comments about a suspect in front of the suspect's neighbors and then publicly celebrated his arrest.[72]

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[65] *See* Steiner v. Showboat Operating Co., 25 F.3d 1459, 1466 (9th. Cir. 1994) ("[W]here there is public humiliation it is much more likely that the [IIED] action will lie."); Bujnicki v. American Paving and Excavating, Inc., No. 99-CV-646S, 2002 WL 34691183, *8 (W.D.N.Y Jan. 20, 2002) (recognizing that "some combination of public humiliation" and other factors may satisfy the extreme and outrageous standard); *see also* Atakpa v. Perimeter OB-GYN Assocs., P.C., 912 F. Supp. 1566, 1577 (N.D. Ga. 1994) (stating that defendant's conduct did not rise to the level of extreme and outrageous because even if defendant's conduct was discriminatory, there was no evidence that it was done out of any desire to humiliate the plaintiff); *Beavers*, 901 P.2d at 763 (involving supervisor who allegedly humiliated and demeaned plaintiff in front of other workers).

[66] *See* Elizabeth Sepper, *A Missing Piece of the Puzzle of the Dignitary Torts*, 104 CORNELL L. REV. ONLINE 70, 73 (2019) (discussing cases); *see also* Chi., St. L. P.R. Co. v. Holdridge, 20 N.E. 837, 839 (Ind. 1889) (stating, in context of case involving passenger expelled from train, that "the fact that the wrong is done under circumstances of peculiar indignity and degradation is to be considered as an element of compensation"); Chi. & N.W. Ry. Co. v. Chisholm, 79 Ill. 584, 589 (Ill. 1875) (involving passenger who was expelled from a train in front of a large group of people and who, therefore, may have "endured feelings of shame and humiliation").

[67] *See* Magruder, *supra* note 25, at 1051–53 (discussing cases); Seppter, *supra* note 66, at 73.

[68] *See* Fletcher v. Starbucks Corp., No. 3:14-CV-01898 (JCH), 2015 WL 4250698, at *4 (D. Conn. July. 13, 2015) (denying defendant's motion to dismiss where plaintiff was allegedly denied access to restroom due to his race and this fact was made known to others in the store).

[69] RESTATEMENT (THIRD) OF TORTS § 46 cmt. b ill. 3 (AM. LAW INST. 2012); *id.* cmt. e; *id.* cmt. j ill. 10.

[70] RESTATEMENT (THIRD) OF TORTS § 46 cmt. c (AM. LAW INST. 2012).

[71] *See* Pennell v. Vacation Reservation Ctr., LLC, 783 F. Supp. 2d 819, 823 (E.D. Va. 2011).

[72] *See* Hernandez v. County of Marin, No. 11-cv-03085-JST, 2013 WL 4525640, at *9

5. Repeated or Prolonged Conduct

Conduct that is repeated or occurs over a prolonged period of time may also nudge that conduct into the realm of extreme and outrageous conduct.[73] Where individual instances of wrongful conduct amount to a pattern, the conduct may rise to the level of extreme and outrageous where the individual instances, standing alone, would not.[74] One fact that may make the defendant's conduct particularly offensive in such cases is the fact that the victim is not able to avoid the conduct.[75] Another is the fact that the defendant may be in a position to adversely impact the plaintiff.[76] A clear example is debt collection cases in which a debtor is subjected to hounding by a creditor.[77]

6. The Nature of the Conduct

A final consideration is the nature of the conduct itself. The *Restatement* makes clear that mere insults, annoyances, and the like do not rise to the level of extreme and outrageous conduct, at least if none of the other indicators of such conduct are present.[78] Similarly, the fact that the defendant's conduct merely amounts to the exercise of the defendant's legal rights is unlikely to result in a finding of extreme and outrageous conduct.[79] But the fact that the conduct goes beyond what is necessary to carry out this exercise of a legal right may support a finding of extreme and outrageous

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(N.D. Cal. Aug. 19, 2013).

[73] *See* Howard v. Town of Jonesville, 935 F. Supp. 855, 861–62 (W.D. La. 1996) (stating that a pattern of deliberate, repeated harassment in the workplace may constitute intentional infliction of emotional distress); Boyle v. Wenk, 392 N.E.2d 1053, 1056 (Mass. 1979) ("Repeated harassment . . . may compound the outrageousness of incidents which, taken individually, might not be sufficiently extreme to warrant liability"); Padwa v. Hadley, 981 P.2d 1234, 1242 (N.M. Ct. App. 1999) ("We recognize that nonprivileged conduct that is 'already at the edge of outrageous' may become actionable by virtue of its repetition."); RESTATEMENT (THIRD) OF TORTS § 46 cmt. d (AM. LAW INST. 2012).

[74] *See* Bishop v. Okidata, Inc., 864 F. Supp. 416, 428 (D.N.J. 1994) (denying motion to dismiss where defendant's alleged conduct amounted to a continuing pattern of harassment).

[75] *See* DAN B. DOBBS ET AL., THE LAW OF TORTS § 386 (2d ed. 2011).

[76] *See* Margita v. Diamond Mortg. Corp., 406 N.W.2d 268, 272 (Mich. Ct. App. 1987) (noting the fact that mortgage company had "a great deal of power to affect plaintiffs' credit rating and future borrowing ability").

[77] *See* Champlin v. Wash. Trust Co., 478 A.2d 985 (R.I. 1984) (discussing this situation).

[78] *See supra* note 30 and accompanying text.

[79] *See* RESTATEMENT (THIRD) OF TORTS § 46 cmt. e (AM. LAW INST. 2012).

conduct, at least where some other aggravating factor is present.[80] Thus, the heartless landlord who evicts an ill or destitute tenant has not engaged in extreme and outrageous conduct merely by evicting the tenant.[81] But if the same landlord makes unnecessary threats of violence or needlessly humiliates the tenant, the conduct might be actionable.

Conduct is more likely to be deemed extreme and outrageous where it is wrongful by reference to some objective indicia. The fact that there is some other external decision that conduct is wrongful helps lead to the conclusion that such conduct is, by its nature, more wrongful than the insults, annoyances, and the like that are not actionable. So, for example, acts of violence or threats of violence are one form of conduct that may render otherwise proper conduct extreme and outrageous.[82] Extortionate conduct may also be actionable.[83] Courts also sometimes point to the fact that a defendant's conduct violates a statute, offends the public policy underlying a statute, or violates a profession's ethical standards as a factor contributing to a finding of extreme and outrageous conduct.[84]

II. WORKPLACE IIED CASES

The clearest general theme to emerge from a review of IIED cases in the workplace is that liability for IIED is more limited for conduct occurring in the workplace than it is in other settings. One does not have to look deep into the caselaw in the area to find the idea that courts have adopted "an *especially strict* approach to outrage claims arising from employment relationships"[85] and that courts "have been particularly hesitant in finding intentional infliction of emotional distress claims actionable within an employment claim."[86] This idea appears repeatedly in workplace IIED

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[80] *See id.* cmt. e.

[81] *See id.* 46 cmt. g, ill. 14.

[82] *See* Dobbs, *supra* note 75, at § 386; *see also* Metro. Atlanta Rapid Transit Auth. v. Mosley, 634 S.E.2d 466, 470 (Ga. 2006) (concluding alleged conduct was not extreme and outrageous because it was of short duration and was not physically threatening); Haverbush v. Powelson, 551 N.W.2d 206, 234–35 (Mich. Ct. App. 1996) (referencing defendant's threats of violence among other acts in affirming verdict for plaintiff).

[83] *See* Lashley v. Bowman, 561 So.2d 406, 410 (Fla. Dist. Ct. App. 1996) ("When the conduct smacks of extortion, this tort is likely to be present.").

[84] *See* Howard University v. Best, 484 A.2d 958, 986 (D.C. 1984) ("Actions which violate public policy may constitute outrageous conduct sufficient to state a cause of action for infliction of emotional distress."); Long, *supra* note 39, at 64–69 (discussing cases).

[85] Burkhart v. Am. Railcar Indust., Inc., 603 F.3d 472, 478 (8th Cir. 2010) (emphasis added).

[86] Jackson v. Blue Dolphin Commc'ns of N.C., L.L.C., 226 F. Supp. 2d 785, 794 (W.D.N.C. 2002).

decisions, most often in cases in which the plaintiff loses on the issue of whether the employer's conduct was extreme and outrageous.[87] As discussed, this is even true in the case of various forms of discriminatory conduct. But as discussed below, a few courts view retaliatory conduct stemming from opposition to discriminatory or harassing conduct as meriting special consideration.

A. The "Especially Strict Approach" to Workplace IIED Claims

The caselaw involving IIED in the workplace makes plain that liability for IIED is even more limited in the workplace than in other settings.[88] There are obviously limits to this idea, such as where a supervisor's behavior involves threats of physical violence or similar conduct.[89] But in general, "only the most unusual" of supervisory actions are subject to

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[87] *See* Kirwin v. N.Y. State Office of Mental Health, 665 F. Supp. 1034, 1040 (E.D.N.Y. 1987) ("Plaintiff's allegations therefore fall far short of the strict standard required to state a claim for intentional infliction of emotional distress."); Cavico, *supra* note 11, at 122 ("There are many cases that clearly illustrate the difficulty of demonstrating extreme and outrageous conduct in an employment setting."); Marina Sorkina Amendola, *Intentional Infliction of Emotional Distress: A Workplace Perspective*, 43 VT. L. REV. 93, 94 (2018) (noting the strict requirements and the fact that few plaintiffs succeed).

[88] *See* Richards v. U.S. Steel, 869 F.3d 557, 567 (7th Cir. 2017) ("Liability for emotional distress, as a common-law tort, is even more constrained in the employment context."); Cavico, *supra* note 11, at 180 (stating that a "synthesis of current case law" reveals that "courts will scrutinize very carefully, strictly, and at times severely, the instances of factual misconduct alleged to have given rise to the independent tort of outrage, especially in an at will employment situation"). Prior to the 1980s, there were relatively few claims of intentional infliction of emotional distress set in the non-union workplace. With the tort still in its relative infancy, decisions were somewhat mixed in terms of what sort of employer conduct could qualify as extreme and outrageous. Some early workplace IIED claims were premised on the argument that the act of firing the employees in question was, by itself, extreme and outrageous. Results in these cases were mixed. *See, e.g.*, Counce v. M. B. M. Co., 597 S.W.2d 92, 93 (Ark. Ct. App. 1979) (denying employer's motion for summary judgment); DeMarco v. Publix Super Markets, Inc., 360 So. 2d 134, 136 (Fla. Ct. App. 1978) (holding that the act of firing is not, by itself, extreme and outrageous conduct). As the traditional at-will employment rule went under attack in the 1980s, courts saw an increase in the number of statutory discrimination, contract, and tort claims against employers. *See* Arthur S. Leonard, *A New Common Law of Employment Termination*, 66 N.C. L. REV. 631, 636–67 (1988) (discussing "judicial cracks in the at will citadel" that took place during the 1980s); 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, 389–90 (1994) (discussing the increased use of contract and tort theories during that time).

[89] *See* GTE Southwest, Inc. v. Bruce, 998 S.W.2d 605, 613 (Tex. 1999) (involving supervisor who, in addition to subjecting employees to verbal abuse, physically threatened employees).

challenge in the form of an IIED claim.[90] As an obvious example, it is well-established that the mere act of discharging an at-will employee does not amount to extreme and outrageous conduct.[91]

The presence of one or more of the indicators of extreme and outrageous conduct that might lead to a jury question outside of the workplace setting often do not have the same effect when the conduct occurs in the workplace. For example, the *Restatement (Second) of Torts* explains that a police officer who extorts money through threats of arrest may have engaged in extreme and outrageous behavior through the abuse of the officer's position of authority.[92] But there are also decisions that conclude that when a supervisor—who similarly occupies a position of authority over an employee—conditions future employment on an employee's submission to the supervisor's demands for sex, he has not, as a matter of law, engaged in extreme and outrageous conduct.[93] Employers who subject employees to excessive scorn or ridicule,[94] make false accusations against employees,[95] or impose grossly burdensome demands or working conditions on employees[96] are expressly or impliedly conditioning future employment on their employees' submission to these practices. In other contexts, these

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[90] *See GTE Southwest, Inc.*, 998 S.W.2d at 613 ("Such extreme conduct exists in only the most unusual of circumstances.").

[91] *See* Grandchamp v. United Air Lines, Inc., 854 F.2d 381, 384–85 (10th Cir. 1988) (stating "discharge from employment, without more, is not outrageous conduct"). In contrast, the manner in which an employer fires an employee might be extreme and outrageous, particularly where the employer abuses the employer's authority. *See* Crump v. P & C Food Mkts., Inc., 576 A.2d 441, 449 (Vt. 1990) ("[I]f the manner of termination evinces circumstances of oppressive conduct and abuse of a position of authority vis-a-vis plaintiff, it may provide grounds for the tort action.").

[92] RESTATEMENT (SECOND) OF TORTS § 46 cmt. e (AM. LAW INST. 1964).

[93] *See* McIsaac v. WZEW–FM Corp., 495 So. 2d 649, 651 (Ala. 1986) (finding as a matter of law that the act of firing an employee because the employee rejected supervisor's advances is not extreme and outrageous conduct); *see also* Brewer v. Petroleum Suppliers, Inc., 946 F. Supp. 926, 934, 936 (N.D. Ala. 1996) (stating that sexual "demands which, if refused, carry a consequence of economic loss or loss of status at employment" are not sufficient to establish extreme and outrageous conduct).

[94] *Cf.* Moye v. Gary, 595 F. Supp. 738, 741–42 (S.D.N.Y. 1984) (concluding that subjecting employee to homophobic insults was not extreme and outrageous).

[95] *Cf.* Hamilton v. School District of Columbia, 852 F. Supp. 2d 139, 153 (D.D.C. 2012); Vierria v. California Highway Patrol, 644 F. Supp. 2d 1219, 1247 (E.D. Cal. 2009).

[96] *See* King v. Wiseway Super Ctr., Inc., 954 F. Supp. 1289, 1295 (N.D. Ind. 1995) (holding that acts of "scheduling [plaintiff] improperly, not allowing her to perform her job duties, not treating her as a manager, not giving her the information she needed, never communicating with her, never training her, forcing her to work without breaks, and making derogatory comments to others" did not rise to the level of extreme and outrageous conduct"); Stewart v. Parish of Jefferson, 668 So. 2d 1292 (La. Ct. App. 1996) (affirming dismissal of IIED claim where supervisor, *inter alia*, increased the employee's workload and pressured employee to accept a demotion).

sorts of actions by one in a position of authority might be actionable under an IIED theory.[97] In the workplace context, they generally are not.[98]

Similarly, the fact that an employer's adverse employment actions are motivated by a desire to make work so unpleasant that an employee quits is also unlikely to amount to extreme and outrageous conduct.[99] In *Wilson v. Monarch Paper Co.*,[100] the Fifth Circuit Court of Appeals explained

> [T]hat it is not unusual for an employer, instead of directly discharging an employee, to create unpleasant and onerous work conditions designed to force an employee to quit, *i.e.*, "constructively" to discharge the employee. In short, although this sort of conduct often rises to the level of illegality, except in the most unusual cases it is not the sort of conduct, as deplorable as it may sometimes be, that constitutes "extreme and outrageous" conduct.[101]

The Fifth Circuit later expanded upon this language from *Wilson* and explained that "an employer may call upon an employee to do more work than other employees, use special reviews on a particular employee and not on others to downgrade his performance, and institute long-range company plans to move younger persons into sales and management positions without engaging in extreme and outrageous conduct."[102]

Summing up the status of the law as it existed in the late 1980s, Professor Regina Austin observed, "[o]nly the extraordinary, the excessive, and the nearly bizarre in the way of supervisory intimidation and humiliation warrant judicial relief through the tort of intentional infliction of emotional distress. All other forms of supervisory conduct that cause workers to experience emotional harm are more or less 'trivial' in the terminology of the *Restatement of Torts*."[103] This observation remains essentially accurate more than three decades later.

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[97] *See* Carter v. District of Columbia, 795 F.2d 116, 139 (D.C. Cir. 1986) (affirming jury verdict in IIED case involving police officers who "deliberately uttered false reports of criminal activity").

[98] *See supra* notes 93–96 and accompanying text.

[99] *See* Ford v. Gen. Motors Corp., 305 F.3d 545, 555 (6th Cir. 2002) (stating that constructive discharge does not amount to extreme and outrageous conduct); Dollard v. Bd. of Educ., 777 A.2d 714, 716–17 (Conn. 2001) (dismissing employee's IIED claim based on employer alleged "concerted plan and effort to force the plaintiff to resign from her position or to become so distraught that they would have a colorable basis for terminating her employment").

[100] 939 F.2d 1138 (5th Cir. 1991).

[101] *Id.* at 1143.

[102] Deus v. Allstate Ins. Co., 15 F.3d 506, 515 (5th Cir. 1994).

[103] Austin, *supra* note 11, at 18.

B. Justifications for the "Especially Strict Approach" to Workplace IIED Claims

Courts are not always explicit as to why the concept of extreme and outrageous conduct—which the *Restatement* already warns should be narrowly cabined[104]—should be construed especially narrowly in the workplace context.[105] To the extent courts explain why a stricter approach is justified, they typically do so on the grounds of preserving the employment-at-will rule and the employer discretion that goes along with it.[106] Courts have noted that "every employer must on occasion review, criticize, demote, transfer, and discipline employees,"[107] and unless liability is limited to only "truly egregious" employer conduct, nearly every employee would have a cause of action."[108] Thus, the narrow approach preserves the at-will rule not only by prohibiting claims based on firings but also claims based on day-to-day managerial decisions.[109] This narrow approach obviously helps to shield employers from liability for their own actions and those of their supervisors.[110]

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[104] *See supra* notes 28–30 and accompanying text.

[105] Chamallas, *supra* note 126, at 2132 (stating that courts "rarely explain" why they are "particularly hesitant" to recognize workplace IIED claims "and cite to non-employment precedents as well as general principles of law to justify their decisions").

[106] *See* Lapidus v. N.Y.C. Chapter of the N.Y. State Ass'n for Retarded Children, Inc., 504 N.Y.S.2d 629, 634 (N.Y. Sup. Ct. 1986) (explaining that plaintiff who was allegedly fired in a humiliating manner should not be allowed to "subvert the traditional at-will contract rule by casting his cause of action in terms of a tort of intentional infliction of emotional distress"). *See generally* Stein v. Davidson Hotel Co., 945 S.W.2d 714, 717 (Tenn. 1997) (explaining that "[t]he employment-at-will doctrine recognizes that employers need freedom to make their own business judgments without interference from the courts"); William R. Corbett, *The Need for a Revitalized Common Law of the Workplace*, 69 BROOK. L. REV. 91, 152–53 (2003) (noting the "the wide berth given to management prerogative under employment at will").

[107] Wilson v. Monarch Paper Co., 939 F.2d 1138, 1143 (5th Cir. 1991).

[108] Richards v. U.S. Steel, 869 F.3d 557, 567 (7th Cir. 2017).

[109] There are obviously exceptions in which a supervisor engages in truly horrifying behavior. In *Naeem v. McKesson Drug Co*., 444 F.3d 593, 606 (7th Cir. 2006), the supervisor's actions included "forcing Ms. Naeem to climb up an unstable metal stairway to hook up computer equipment during her pregnancy; sabotaging Ms. Naeem's computer to deny her access and alter her files; publicly criticizing Ms. Naeem's work during meetings with other supervisors; moving her office and her transportation files, causing her to be unable to locate necessary paperwork; and increasing the amount of work due under the PIPs, knowing that Ms. Naeem would not be able to meet the deadlines." The Seventh Circuit Court of Appeals concluded that the jury's finding that such conduct was extreme and outrageous was justified. *Id.*

[110] At least one court has cited similar ideas concerning individual supervisor or co-worker liability:

The other justification sometimes offered for establishing such a strict standard of extreme and outrageous conduct in workplace IIED cases is simply that the workplace, by its nature, is stressful, so a high bar needs to be set in order to prevent an overflow of claims of emotional distress. Workplace stress may result from interaction with co-workers in the form of "workplace gossip, rivalry, personality conflicts and the like,"[111] all of which could potentially lead to litigation if adequate limits are not placed on the tort. More importantly, employers must make a host of decisions, and employees must accept the reality that they will be

> [S]ubject to routine employment-related conduct, including performance evaluations, both formal and informal; decisions related to such evaluations, such as those involving transfer, demotion, promotion and compensation; similar decisions based on the employer's business needs and desires, independent of the employee's performance; and disciplinary or investigatory action arising from actual or alleged employee misconduct.[112]

Another common idea in workplace IIED decisions, originally derived from the *Restatement* but applied with special force in the workplace setting, is that mere insults do not rise to the level of extreme and outrageous conduct.[113] As observed by one federal court, "[e]ven repeated incidents of foul language and name-calling in the workplace have been insufficient to state a claim for intentional infliction of emotional distress."[114] The Court of Appeals for the Fifth Circuit explained that it has recognized "that the rough-and-tumble of daily business life 'contemplate[s] a degree of teasing and taunting that in other circumstances might be considered cruel and outrageous.'"[115]

It is noteworthy that where an employer's conduct is unrelated to

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> [E]mployees who fear lawsuits by fellow employees may be less competitive with each other, may promote the interest of their employer less vigorously, may refrain from reporting the improper or even illegal conduct of fellow employees, may be less frank in performance evaluations, and may make employment decisions such as demotions, promotions and transfers on the basis of fear of suit rather than business needs and desires. All this conduct would contribute to a less vigorous and less productive workplace.

Perodeau v. Hartford, 792 A.2d 752, 758 (Conn. 2002).

[111] *Id.* at 769.

[112] *Id.* at 768–69.

[113] *See supra* note 30 and accompanying text.

[114] Gibbs v. Voith Indus. Servs., Inc., 60 F. Supp.3d 780, 802 (E.D. Mich. 2014).

[115] Wilson v. Monarch Paper Co., 939 F.2d 1138, 1143 (5th Cir.1991) (quoting W. PAGE KEEETON ET AL., PROSSER & KEEETON ON TORTS (5th ed. 1984 Supp. 1988)).

traditional forms of employer decision making, there is more likely to be a triable issue on the question of whether the conduct was extreme and outrageous. For example, courts have found attempts by employers to frame employees for theft[116] or to make false accusations of theft while threatening criminal prosecution to the rise to the level of extreme and outrageous conduct.[117] Likewise, extreme forms of abuse or bullying on the part of a manger having no relation to the workplace have sometimes qualified.[118] But assuming the wrongful conduct relates to more traditional forms of managerial actions, a workplace IIED claim is unlikely to succeed.[119]

C. The Failure of IIED Claims Based on Harassment and Retaliation as an Example of *the "Especially Strict Approach"*

Employees sometimes bring IIED claims in lieu of or in addition to traditional Title VII discrimination or harassment claims. At first glance, it seems like these might be viable claims. Many of the markers of extreme and outrageous conduct identified previously are present in these situations, particularly in the case of sexual or race-based harassment.[120] For example, the harassment occurs within the context of the employer/employee relationship, a relationship the law often treats as being special.[121] There is typically an abuse of authority when a supervisor harasses a subordinate.[122] The harassment is also frequently repeated or prolonged and is of a humiliating or degrading character.[123] Harassment also does not involve an exercise of employer discretion, so the arguments against allowing IIED claims because they limit employer decision-making carry little weight. Moreover, as this section discusses, the humiliation that a harassment victim often experiences is a strong predictor of severe emotional distress.[124] Employees also sometimes bring IIED claims based on

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[116] *Cf.* Dean v. Ford Motor Credit Co., 885 F.2d 300, 308 (5th Cir.1989).

[117] *Cf.* Beavers v. Johnson, 145 S.E.2d 776 (Ga. Ct. App. 1965).

[118] *See* Livingston v. Marion Bank and Trust Co., 30 F. Supp. 3d 1285, 1324 (N.D. Ala. 2014) (concluding triable issue existed where high-ranking employee used his position to coerce employee into answering intimate questions concerning employee's rape).

[119] There are, of course, limitations on this principle as well. *See* Smithson v. Nordstrom, Inc., 664 P.2d 1119, 1120–21 (Or. Ct. Ap. 1983) (concluding jury issue existed where employer did not reasonably believe there was sufficient evidence to charge employee with theft but nevertheless interrogated her for three hours and threatened her with criminal prosecution if she did not sign a confession).

[120] *See supra* notes 35–84 and accompanying text.

[121] *See supra* note 46 and accompanying text.

[122] *See supra* notes 47–52 and accompanying text.

[123] *See supra* notes 64–77 and accompanying text.

[124] *See infra* notes 144–162 and accompanying text.

workplace retaliation. Once again, many of the same markers of extreme and outrageous conduct would seem to be present in employment retaliation situations. But as the following section discusses, employees have generally had only limited success with IIED claims based on workplace harassment and retaliation.

1. IIED Claims Involving Employment Discrimination and Harassment

IIED claims involving employment discrimination illustrate the especially strict approach to workplace IIED claims. Outside of the workplace setting, the fact that objectionable conduct is motivated by racial animus, malice, or some other improper motive may be enough to create a jury question on the issue of whether the objectionable conduct was extreme and outrageous.[125] In the employment setting, however, it is almost black-letter law that a discriminatory discharge, demotion, or other adverse action does not rise to the level of extreme and outrageous conduct.[126] As one federal court has explained, "[g]enerally, ordinary workplace disputes,

[125] *See supra* notes 59–58 and accompanying text.

[126] *See* Godfredson v. Hess, 173 F.3d 365, 373 (6th Cir.1999) (applying Ohio law) ("[A]n employee's termination, even if based upon discrimination, does not rise to the level of 'extreme and outrageous conduct' without proof of something more."); Armijo v. Yakima HMA, LLC, 868 F. Supp. 2d 1129, 1136 (E.D. Wash. 2012) (stating that termination with a discriminatory motive cannot be enough to sustain an IIED claim); Jackson v. Blue Dolphin Commc'ns of N.C., L.L.C., 226 F. Supp. 2d 785, 794 (W.D.N.C. 2002) ("A termination, allegedly in violation of federal law alone, does not constitute extreme and outrageous conduct . . . . Further, under North Carolina law, acts of discrimination are not necessarily 'extreme and outrageous.'"); Anzures v. La Canasta Mexican Food Products Inc., No. 1 CA-CV 14-0250, 2015 WL 4504156, at *5 (Ariz. Ct. App. July 23, 2015) ("La Canasta's termination of Anzures's employment does not 'go beyond all possible bounds of decency,' even if it was motivated by retaliation."); Cavico, *supra* note 11, at 153 ("[M]ost courts appear very reluctant to automatically extend the tort cause of action to a discrimination case."); Chamallas, *supra* note 9, at 2127 ("For the most part, courts do not equate discrimination with outrageous conduct."). For specific examples of this principle, see Hamilton v. School District of Columbia, 852 F. Supp. 2d 139, 153 (D.D.C. 2012) (concluding that allegation of racially-motivated transfer and false allegations did not rise to the level of extreme and outrageous conduct); E.E.O.C. v. MTS Corp., 937 F. Supp. 1503, 1514 (D.N.M. 1996) (granting summary judgment to employer where employee's firing was allegedly disability-based); Dandridge v. Chromcraft Corp., 914 F. Supp. 1396 (N.D. Miss. 1996) (applying Mississippi law) (holding that a racially-motivated demotion was not sufficiently extreme and outrageous); King v. Wiseway Super Ctr., Inc., 954 F. Supp. 1289, 1295 (N.D. Ind. 1995) (holding alleged gender-based demotion and acts making it impossible for employee to do job were not extreme and outrageous). In contrast, if an employer fires an employee and makes racist statements while firing the employee, the manner of the firing—as opposed to the simple act of firing—might be extreme and outrageous. *Cf.* Alcorn v. Anbro Engineering, Inc., 468 P.2d 216, 217–19 (Cal. 1970).

including . . . discrimination, harassment, and hostile work environment claims . . . do not rise to the level of extreme and outrageous conduct necessary to support a claim of IIED."[127] In developing this approach, some courts have expressed a general concern over permitting employees to recharacterize discriminatory discharge claims as IIED claims.[128] Indeed, some courts have invoked the rule that where a plaintiff can seek a remedy under another theory, an IIED claim is simply not available.[129]

The reluctance to recognize IIED claims in the workplace also extends to claims beyond traditional discriminatory discharge. Harassment on the basis of race, sex, or other characteristics likewise does not typically rise to the level of extreme and outrageous conduct.[130] As a result, IIED claims based on employment discrimination typically fail even where, in the words of one court, "a defendant or its employees engaged in highly reprehensible conduct or otherwise intended to cause the plaintiff to suffer emotional distress."[131]

For example, in one case, a supervisor referred to an African-American employee as a monkey, sent a KKK-themed text with a depiction of a noose to another employee, and used racial slurs (including the N-word) on an almost daily basis.[132] According to an Illinois federal court, this conduct was not extreme and outrageous for purposes of an IIED claim.[133] In another decision from the same court, the court held as a matter of law that the actions of a supervisor and co-workers, which included hanging a pickaninny doll in the plaintiff's office, subjecting the plaintiff to racial slurs, and wrongfully placing the plaintiff on probation, was deplorable but was not extreme and outrageous for purposes of an IIED claim.[134] In a case

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[127] Ibraheem v. Wackenhut Servs., Inc., 29 F. Supp. 3d 196, 216 (E.D.N.Y. 2014).

[128] *See, e.g.*, Stevens v. New York, 691 F. Supp. 2d 392, 399 (S.D.N.Y. 2009) ("The courts are wary of allowing plaintiffs to recharacterize claims for wrongful or abusive discharge . . . as claims for intentional infliction of emotional distress.").

[129] *See* Louis v. Mobil Chemical Co., 254 S.W.3d 602, 609 (Tex. Ct. App. 2008) (holding that because plaintiff's claims were covered by other statutory remedies, plaintiff could not sue for IIED).

[130] *See supra* note 127 and accompanying text.

[131] DeSoto v. Bd. of Parks & Recreation, 64 F. Supp. 3d 1070, 1096 (M.D. Tenn. 2014). There are, of course, exceptions. For example, a supervisor's racist taunts and insults may sometimes (but not always) amount to extreme and outrageous conduct. *See* Shamim v. Siemens Indus., Inc., 854 F. Supp. 2d 496 (N.D. Ill. 2012) (dismissing employee's IIED claim based on supervisor's offensive racial, religious, and ethnic slurs directed at employee); Gomez v. Hug, 645 P.2d 916, 922 (Kan. 1982) (reversing summary judgment in favor of employer where employee was subjected to a string of vulgar and racist slurs).

[132] Golden v. World Sec. Agency, Inc., 884 F. Supp. 2d 675, 683–84 (N.D. Ill. 2012).

[133] *Id.* at 697.

[134] Briggs v. North Shore Sanitary Dist., 914 F. Supp. 245, 252 (N.D. Ill. 1996). In contrast, the supervisor's alleged act of turning off the exhaust fan in the plaintiff's lab so

from Georgia, two co-workers allegedly referred to the plaintiff as a "f----t" and a "sand n-----" on an everyday basis for almost a year, yet the appellate court held as a matter of law that such conduct was not extreme and outrageous.[135]

In some instances, the alleged conduct in question amounts to discrimination in violation of Title VII but does amount to extreme and outrageous conduct.[136] For example, there are numerous cases in which courts have found alleged hostile work environment sexual harassment to be actionable under Title VII but not sufficiently egregious to amount to extreme and outrageous conduct.[137] Indeed, at least one court has held that "as a general rule, sexual harassment alone does not rise to the level of outrageousness necessary to make out a cause of action for the intentional infliction of emotional distress."[138] Instead, "Sexual harassment will only support an outrageous conduct claim when the harassment alleged is especially heinous compared to other sexual harassment claims."[139]

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that the plaintiff was exposed to toxic mercury fumes for eight hours could qualify as extreme and outrageous. *Id.*

[135] Ghodrati v. Stearnes, 723 S.E.2d 721 (Ga. Ct. App. 2012); Reply Brief of Appellant, Ghodatri v. Stearnes, 2011 WL 11538014, at *9–10. There are, of course, situations in which courts have been willing to hold that discriminatory conduct may rise to the level of extreme and outrageous conduct. *See* Turley v. ISG Lackawanna, Inc., 774 F.3d 140, 161–62 (2d Cir. 2014) (affirming jury verdict in favor of employee where supervisor failed to address repeated forms of race-based harassment over the course of three years and blocked others' efforts to investigate harassment).

[136] *See* Walker v. Thompson, 214 F.3d 615, 628 (5th Cir. 2000) (concluding triable issue of fact existed concerning employee's claim of racial harassment in violation of Title VII but that conduct did not amount to extreme and outrageous conduct).

[137] *See, e.g.*, Cossairt v. Jarrett Builders, Inc., 292 F. Supp. 3d 779, 786, 791 (M.D. Tenn. 2018) (concluding that supervisor's crude comments could form the basis for a hostile work environment claim but did not rise to the level of extreme and outrageous conduct); Piech v. Arthur Andersen & Co., 841 F. Supp. 825, 832 (N.D. Ill. 1994) ("If true, Piech states a claim for sexual harassment but not intentional infliction of emotional distress."); Hoy v. Angelone, 720 A.2d 745, 755 (Pa. 1998) (finding hostile work environment did not rise to the level of extreme and outrageous conduct); Chamallas, *supra* note 126, at 2127 ("[C]ourts have refused to classify discrimination as *per se* outrageous and have even hesitated to declare the "severe" or "pervasive" harassment required to prove a Title VII claim of hostile environment sufficient to satisfy the threshold tort requirement of 'extreme and outrageous' conduct.").

[138] *Hoy*, 720 A.2d at 754. Title VII preempts federal employee IIED claims based upon discrimination. *See* Brown v. Gen. Servs. Admin., 425 U.S. 820, 835 (1976) (holding that Title VII provides the exclusive judicial remedy for claims of discrimination in public employment).

[139] Cossairt v. Jarrett Builders, Inc., 292 F. Supp. 3d 779, 790 (M.D. Tenn. 2018); *see also* Cavico, *supra* note 11, at 156 ("Similar to the racial discrimination and harassment cases, the courts typically hold that sexual harassment, even though violating Title VII, does not necessarily equate to a finding of intentional infliction of emotional distress."). Some victims of severe and pervasive harassment have been able to raise a triable issue on

The fact that harassing conduct may be actionable under Title VII but not amount to extreme and outrageous conduct is noteworthy given the demanding standard that Title VII caselaw imposes. To amount to illegal harassment resulting in a hostile work environment under Title VII, the conduct must, by definition, be severe or pervasive.[140] This inquiry focuses on, among other things, whether the conduct occurred repeatedly or over a prolonged period of time.[141] The fact that the nature of the conduct was severe or occurred repeatedly or over a prolonged period would both be factors tending to at least raise a jury question on the issue of whether the conduct was extreme and outrageous. Indeed, the Supreme Court has specifically stated that to be actionable under Title VII, the conduct in question must be "extreme."[142] Despite this, several courts have stated that the fact that harassment was severe or pervasive under Title VII is insufficient to raise a jury question as to the extreme and outrageous nature of such conduct for purposes of an IIED claim.[143] Of course, if discriminatory or harassing conduct is not actionable under Title VII, the conduct, almost by definition, is not extreme and outrageous for purposes of an IIED claim.

The fact that discriminatory or harassing behavior typically does not rise to the level of extreme and outrageous conduct is perhaps particularly surprising in light of its potential to cause severe emotional distress. As others have noted, employment discrimination—and harassment in particular—is especially likely to result in emotional distress.[144] One

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the issue of the outrageousness of the defendant's conduct. *See, e.g.*, Ibraheem v. Wackenhut Servs., Inc., 29 F. Supp. 3d 196, 215 (E.D.N.Y. 2014) (recognizing potential viability of such a claim where harassment involves battery); Greenhorn v. Marriott International, Inc., 258 F. Supp. 2d 1249, 1262 (D. Kan. 2003) (stating supervisor's exposure of himself and other conduct could amount to extreme and outrageous conduct).

[140] *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

[141] *See* Walker v. Ford Motor Co., 684 F.2d 1355, 1359 (11th Cir. 1982) (concluding sufficient evidence existed to support finding of severe or pervasive harassment where conduct was repeated and prolonged).

[142] Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998).

[143] *See* Piech v. Arthur Andersen & Co., 841 F. Supp. 825, 831 (N.D. Ill. 1994).

[144] *See* H.R. Rep. No. 102-40, pt. 2, at 718 (noting that sexual or religious discrimination often produces emotional distress); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 137 (1982) (discussing the psychological harms of racial stigmatization); Brianne J. Gorod, *Rejecting "Reasonableness": A New Look at Title VII's Anti-Retaliation Provision*, 56 AM. U. L. REV. 1469, 1513 (2007) (noting the psychological harms suffered by victims of sexual harassment); Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 518 (2006) ("[I]t is well-established that race- or sex-based decisionmaking can cause stigmatic or dignitary harm to the employee who was the subject of that decision."); Frank S. Ravitch, *Complicity and Discrimination*, 69 SYRACUSE L. REV. 491, 525 n. 237 (2019) ("Numerous studies

common consequence of workplace discrimination and harassment is the accompanying sense of humiliation that victims experience.[145] The essence of humiliation is the feeling that one has been unjustly degraded or lowered by one with greater power.[146] It is this feeling of having been wronged by one in a position of power that drives many of the negative consequences associated with humiliation.[147] Humiliation involves not only a sense of unfairness, but a feeling of powerlessness.[148] These feelings of disrespect and unfairness may impact an individual's sense of esteem and claims of status.[149] As researchers have noted, each of us makes claims of status: "I am a good parent;" "I am a good employee;" "I am a good student;" "I am a valued member of this community."[150] An act of humiliation degrades these sorts of status claims.[151] And where the degradation is public, the effect is to deny the victim the voice to make status claims within the relevant community and to deprive the victim of the "very ability to behave as members of their communities" due to this degraded status.[152] In this way, humiliation amounts to an attack on the dignity of another; to

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have shown the psychological harm that discrimination can cause for gays and lesbians."); Devon Sherrell, Comment, "*A Fresh Look": Title VII's New Promise for LGBT Protection Post-Hively*, 68 EMORY L.J. 1101, 1104 (2019) (noting higher rates of depression among LGBT victims of employment discrimination).

[145] *See* H.R. Rep. No. 102-40, pt. 2, at 718 ("Victims of intentional sexual or religious discrimination in employment terms and conditions often endure terrible humiliation, pain and suffering."); Neil Altman, *Humiliation, Retaliation, and Violence*, 19 TIKKUN 16, 16 (2004) (noting that humiliation is closely linked with retaliation in the psychological literature); Delgado, *supra* note 144, at 137 (noting that the psychological responses to racial stigmatization include humiliation); Gorod, *supra* note 144, at 1513 (noting the humiliation that may accompany sexual harassment); Sam Stonefield, *Non-Determinative Discrimination, Mixed Motives, and the Inner Boundary of Discrimination Law*, 35 BUFF. L. REV. 85, 124 n. 143 (1986) ("The humiliation, embarrassment and psychological harm that can be caused by discrimination is particularly severe and well-established.").

[146] *See* Trumbull, *infra* note **Error! Bookmark not defined.**, at 643; *see also* Phil Leask, *Losing Trust in the World: Humiliation and its Consequences*, 19 PSYCHODYN PRACT. 129, 131 (2013) (stating power is central to humiliation), https://www.tandfonline.com/doi/pdf/10.1080/14753634.2013.778485?needAccess=true.

[147] *See generally* Leask, *infra* note **Error! Bookmark not defined.**, at 131 (stating "humiliation is a demonstrative exercise of power").

[148] *See* McCauley, *infra* note **Error! Bookmark not defined.**, at 257 (stating that humiliation "involves being placed in a lowly, debased, and powerless position by someone who has, at that moment, greater power than oneself").

[149] *See* Burton, *infra* note **Error! Bookmark not defined.** ("In short, humiliation is the public failure of one's status claims."); Trumbull, *infra* note **Error! Bookmark not defined.**, at 647 (stating that "disrespect endangers esteem and status").

[150] *See* Burton *supra* note **Error! Bookmark not defined.**; Torres & Bergner, *supra* note **Error! Bookmark not defined.**, at 197.

[151] *See* Torres & Bergner, *supra* note **Error! Bookmark not defined.**, at 197.

[152] Torres & Bergner, *supra* note **Error! Bookmark not defined.**, at 199.

humiliate an individual is to rob that individual of his or her dignity.[153]

The research in the field suggests that humiliation may lead to any number of long-lasting negative consequences, some of them quite substantial.[154] Victims of humiliation are likely to experience anger and a desire for revenge and to punish the perpetrator for the injustice.[155] The victim who does not retaliate may perceive this failure as a shortcoming, which can lead to feelings of shame.[156] Numerous studies show that beyond these sorts of readily predictable consequences, humiliation "may be a substantial contribution in the genesis of depression [and] character pathology."[157] According to one review, "[s]uffering severe humiliation has been shown empirically to plunge individuals into major depressions, suicidal states, and severe anxiety states, including ones characteristic of posttraumatic stress disorder."[158] Factors that may contribute to the severity of the humiliation include how public the humiliation was, how core to the individual's way of life the community in which the humiliation occurred was, to what degree the individual was effectively silenced or marginalized, and whether the humiliation was carried out with malicious intent.[159]

The fact that humiliation occurs in the workplace may be a particularly important factor in the severity of emotional harm an individual suffers. The workplace is where many individuals derive a strong sense of identity and status.[160] For many people, the workplace provides a particularly

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[153] *See* Doron Shultziner & Itai Rabinovici, *Human Dignity, Self-Worth and Humiliation: A Comparative Legal-Psychological Approach*, 18 PSYCHOL., PUB. POL'Y, AND L. 105, 111 2012 ("Violations of dignity in terms of the thin meaning are usually acts that humiliate."), https://www.researchgate.net/publication/228322601_Human_Dignity_Self-Worth_and_Humiliation_A_Comparative_Legal-Psychological_Approach; Daniel Statman, *Humiliation, Dignity and Self-Respect*, 13 PHIL. PSYCHOL. 523, 523 (2000) ("[I]n humiliation, one is 'stripped of one's dignity,' one is 'robbed of" dignity, or simply 'loses' it.") (citations omitted), https://www.researchgate.net/publication/247516323_Humiliation_dignity_and_self-respect.

[154] *See* Donald C. Klein, *The Humiliation Dynamic: An Overview*, 12 J. PRIMARY PREVENTION 93, 105 (1991) ("Humiliation has been "implicated—directly or indirectly—in many, if not most, clinically[-]recognized emotional and social disorders."); Leask, *infra* note **Error! Bookmark not defined.**, at 129.

[155] *See* Leask, *infra* note **Error! Bookmark not defined.**, at 136; McCauley, *infra* note **Error! Bookmark not defined.**, at 259.

[156] *See* McCauley, *infra* note **Error! Bookmark not defined.**, at 263.

[157] Trumbull, *infra* note **Error! Bookmark not defined.**, at 655.

[158] Torres & Bergner, *supra* note **Error! Bookmark not defined.**, at 199.

[159] Torres & Bergner, *supra* note **Error! Bookmark not defined.**, at 200.

[160] *See* Fisk, *infra* note **Error! Bookmark not defined.**, at 80–81 (noting that work is where many find a sense of significance and identity).

strong sense of community.[161] Therefore, in the words of one author, "[h]umiliation at work can be an especially toxic phenomenon."[162]

2. IIED Cases Involving Retaliation

Courts generally take a similar approach to IIED claims based on employment retaliation. Workplace retaliation may take a variety of forms. The most obvious forms are "ultimate employment actions," such as discharge, demotion, denial of promotion, or pay decrease.[163] But there are other forms of retaliation, such as undesirable transfers, changes in job duties, written reprimands and warnings,[164] schedule changes,[165] physically isolating an employee from co-workers,[166] excessive criticism or public ridicule,[167] and ostracizing or instructing subordinates to ostracize the employee who engages in protected activity.[168]

Title VII and other anti-discrimination statutes prohibit employers from retaliating against employees who oppose unlawful discrimination or participate in a proceeding involving such discrimination.[169] The retaliation need not result in discharge in order to be actionable. Instead, where an employee engages in this sort of protected conduct, employer retaliation is actionable where it is "materially adverse," that is where it might well dissuade a reasonable employee from engaging in protected conduct.[170] Federal courts differ dramatically in terms of their application of this standard, with some courts adopting a strict approach as to what sorts of action might deter an individual from engaging in protected activity and others adopting a more context-specific approach.[171]

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[161] *See* Naomi Schoenbaum, *Towards a Law of Coworkers*, 68 ALA. L. REV. 605, 608 (2017) (noting the critical role that coworkers play in our lives).

[162] Fisk *infra* note **Error! Bookmark not defined.**, at 80.

[163] *See* Dollis v. Rubin, 77 F.3d 777, 781–82 (5th Cir. 1995) (per curiam). At least one court has suggested that placing an employee on leave is an ultimate employment action. Thompson v. City of Waco, 764 F.3d 500, 503 (5th Cir. 2014).

[164] *See* Bhatti v. Trs. of Bos. Univ., 659 F.3d 64, 72 (1st Cir. 2011).

[165] *See* Nicole Buonocore Porter, *Disabling ADA Retaliation Claims*, 19 NEV. L.J. 823, 832 (2019) (listing cases); Sandra F. Sperino, *Retaliation and the Reasonable Person*, 67 FLA. L. REV. 2031, 2036 (2015) (same).

[166] *See* Olonovich v. FMR-LLC Fidelity Invs., CIV No. 15-599 SCY/WPL, 2016 WL 9777193, at *7 (D.N.M. June 21, 2016).

[167] *See* Alvarado v. Fed. Express Corp., 384 F. App'x 585, 589 (9th Cir. 2010).

[168] *See* Olonovich, 2016 WL 9777193, at *2.

[169] *See id.* at *2; Clay v. Lafarge N. Am., 985 F. Supp. 2d 1009, 1030 (S.D. Iowa 2013).

[170] Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 57 (2006).

[171] *See* Sperino, *supra* note 165, at 2035 (noting the strict approach taken by some courts).

Plaintiffs sometimes bring IIED claims in addition to or in place of a statutory retaliation claim. One of the earliest workplace IIED cases involving alleged employer retaliation was *Harrison v. Loyal Protective Life Ins. Co.*,[172] a 1979 case from Massachusetts. In *Harrison*, an employer was aware that an employee had terminal cancer and was unable to continue working. Despite this, the employee's supervisor threatened the employee, saying that if he filed for physical disability benefits, he would not be able to return to his job when he regained his health.[173] Thus, the supervisor threatened to retaliate against the employee if the employee exercised his right to claim disability benefits. The complaint alleged that the employer allowed and was aware of the supervisor's threat.[174] With little discussion, the Massachusetts Supreme Judicial Council held that the employee had stated a cause of action for IIED against the employer.[175]

But the *Harrison* decision is an outlier today. Instead, as is the case with IIED claims based on discriminatory or harassing conduct, it is the unusual case in which retaliation creates a jury question on the issue of extreme and outrageous conduct, even where the retaliation is unlawful by statute.[176] For example, in one case, an employee was allegedly called a "bitch" and reassigned to an isolated work location with no windows or fans and that contained bats, rats, raccoons, and other animals (that she had to clean up after) for asserting her rights under the Family and Medical Leave Act (FMLA).[177] Being reassigned to this location was viewed by employees as a punishment.[178] Despite this, the court held as a matter of law that the employer's conduct was not extreme and outrageous.[179]

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[172] 396 N.E.2d 987 (Mass. 1979).

[173] *Id.* at 988.

[174] *Id.* at 992.

[175] *Id.* at 992.

[176] *See, e.g.*, Brewerton v. Dalrymple, 997 S.W.2d 212, 216 (Tex. 1999) ("Even if an employer has a 'retaliatory motive' in terminating an employee, this conduct is not extreme and outrageous as a matter of law."); McCoy v. Pacific Maritime Assn., 216 Cal.App.4th 283, 295 (Cal. Ct. App. 2013) (concluding fact that defendant's conduct may have amounted to unlawful retaliation did not mean that the conduct rose to the "extreme and outrageous" standard); Texas Farm Bureau Ins. Companies v. Sears, 54 S.W.3d 361, 374 (Tex. Ct. App. 2001) ("An employee's firing, even if wrongful, *e.g.*, in retaliation, alone does not constitute legally sufficient evidence of extreme and outrageous conduct."); Janken v. GM Hughes Elec., 53 Cal.Rptr.2d 741, 756 (Cal. Ct. App. 1996) ("A simple pleading of personnel management activity is insufficient to support a claim of intentional infliction of emotional distress, even if improper motivation is alleged.").

[177] Gibbs v. Voith Indus. Servs., Inc., 60 F. Supp. 3d 780, 802 (E.D. Mich. 2014).

[178] *Id.* at 788.

[179] *Id.* at 802. Courts are sometimes willing to recognize a tort claim based on employment retaliation, although the tort in question is not IIED. The tort of retaliatory discharge in violation of public policy also limits the ability of an employer to retaliate against an employee who engages in some form of protected activity that public policy

Courts typically take a similar approach when the retaliation is triggered by an employee's opposition to harassment. Rather than treating the underlying harassment and eventual retaliation together as part of a pattern of wrongful conduct when considering the "extreme and outrageous conduct" element, courts frequently consider the wrongful acts in isolation.[180] The result is often that neither the harassment nor the ensuing retaliation rises to the level of extreme and outrageous conduct.[181]

III. THE POTENTIAL ROLE OF IIED CLAIMS IN ADDRESSING WORKPLACE DISCRIMINATION AND HARASSMENT

Workplace IIED claims are not the only situation in which courts take a restrictive approach to employee claims. Restrictive decisions under Title VII limit the reach of the statute and its effectiveness in addressing discrimination—most notably, harassment—and retaliation. As a result, there are various gaps in Title VII's coverage when it comes to harassment and retaliation. As discussed in this Part, there are some states that recognize that retaliation in response to opposition to discrimination or harassment may rise to the level of extreme and outrageous conduct. In such situations, it is possible that IIED claims might help fill some of the gaps that currently exist in employment discrimination law.

1. Gaps in Title VII Harassment Law that Limit Remedies Afforded to Plaintiffs

As interpreted by courts, Title VII's anti-discrimination provision contains various gaps. One obvious example is the fact that Title VII does

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encourages. *See* RESTATEMENT OF EMPLOYMENT LAW § 5.01 (AM. LAW INST. 2015). Thus, the employee who refuses to commit an unlawful act, fulfills an important public obligation (*e.g.*, jury duty), exercises a statutory right to benefits, refuses to waive a non-waivable right, engages in whistleblowing activities, or otherwise engages in other activity directly furthering a well-established public policy and is discharged because of such action may have a tort claim against an employer. *Id.* § 5.02. A few jurisdictions also recognize the tort of retaliatory *discipline* in violation of public policy, which prohibits an employer from engaging in other forms of retaliation short of discharge because an employee has engaged in protected activity. *Id.* § 5.01 cmt. a. But these types of employer acts, which lie at the core of the employment-at-will rule, generally do not rise to the level of extreme and outrageous conduct according to courts.

[180] *Cf.* Thomas v. Habitat Co., 213 F. Supp. 2d 887, 899 (N.D. Ill. 2002) (stating that if a jury believed that employer's conduct was in retaliation for complaints of sexual harassment, "the entire course of conduct" could be considered extreme and outrageous).

[181] *See* Daniels v. C.L. Frates & Co., 641 F. Supp. 2d 1214, 1218 (W.D. Okla. 2009) (dismissing IIED claim based on creation of hostile work environment and retaliation).

not cover workplaces with fewer than 15 employees.[182] Another example is the fact that there is no individual liability under Title VII for discriminatory or retaliatory conduct.[183] And as the law has developed, employer liability for the harassment committed by employees is limited. If the harassing employee is merely a co-worker, the employer is only liable where the employer "knew or should have known about the harassment and failed to take effective action to stop it."[184] Under the Supreme Court's decisions in *Faragher v. City of Boca Raton*[185] and *Burlington Industries, Inc. v. Ellerth*,[186] employers are only vicariously liable under Title VII for the harassing conduct of an employee when the employee has the authority to take tangible employment actions against the employee, such as hiring or firing.[187] Moreover, employers are afforded an affirmative defense in the case of harassment by a supervisor that frequently enables them to avoid liability except where the harassment results in a tangible employment.[188]

Under this defense, an employer can avoid liability if the employer exercised reasonable care to prevent, and correct promptly, any harassing behavior and the plaintiff-employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.[189] The most obvious way in which an employer can satisfy its burden under this defense is by developing a policy that allows for the internal reporting and investigation of allegations of harassment. But the *Farragher*/*Ellerth* affirmative defense also led to an increased focus on the use of employer-sponsored anti-harassment training for employees.[190] Indeed, the Supreme Court was explicit in its belief that the creation of a reporting procedure might encourage employees to complain before the harassing conduct became severe or pervasive and, therefore, became actionable under Title VII.[191]

The reality has proven somewhat disappointing. While anti-harassment training is common, there are questions concerning how effective such training is.[192] And the Court's affirmative defense has created its own odd

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[182] 42 U.S.C. § 2000e(b) (2012) (defining "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees").

[183] *See, e.g.*, Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 588 (9th Cir. 1993).

[184] Pryor v. United Air Lines, Inc., 791 F.3d 488, 498 (4th Cir. 2015).

[185] 524 U. S. 775 (1998).

[186] 524 U. S. 742 (1998).

[187] Vance v. Ball State Univ., 570 U.S. 421, 424 (2013).

[188] Burlington Industries, Inc. v. Ellerth, 524 U. S. 742 (1998); Faragher v. Boca Raton, 524 U.S. 775 (1998).

[189] *Ellerth*, 524 U.S. at 765.

[190] *See* Bisom-Rapp, *supra* note 5, at 67 (noting EEOC guidance following *Ellerth* that employers develop anti-harassment training).

[191] *See Ellerth*, 524 U.S. at 764.

[192] *See* Bisom-Rapp, *supra* note 5, at 68 (questioning the effectiveness of such

gap in coverage. The defense effectively requires employees to come forward promptly with complaints of harassment; the Court itself has suggested that employees may end up raising concerns before the harassment becomes severe or pervasive. But as the caselaw has developed, an employer is only prohibited from retaliating against an employee who complains about possible harassment if the employee has a reasonable belief that the harassment is unlawful. [193] Title VII's "severe or pervasive" standard for what qualifies as actionable harassment is notoriously difficult to satisfy.[194] And many federal courts have adopted an exceptionally strict view of what qualifies as a "reasonable" belief.[195] The determination as to what qualifies as a reasonable belief as to the illegal nature of employer conduct is largely determined by reference to Title VII caselaw on the subject of discrimination.[196] Aside from being complex, Title VII jurisprudence establishes a high bar for plaintiffs attempting to establish intentional discrimination.[197] As a result, employees who may have been retaliated against for raising concerns about possible discrimination may be denied a remedy because they fail to understand the complexities of federal discrimination law, such as the rule that a supervisor's use or toleration of "stray" racial slurs in the workplace does not violate Title VII.[198]

This potentially places an employee in a Catch-22: if the employee reports before the conduct approaches the demanding "severe or pervasive" level, the employee may lack a reasonable belief that the conduct was actually unlawful. If the employee waits until ongoing harassment reaches this level, the employee may be deemed to have unreasonably failed to take advantage of the employer's policy and be unable to proceed on a harassment claim.

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training).

[193] *See* Clark Cty. Sch. Dist. v. Breeden, 532 U.S. 268, 271 (2001).

[194] *See, e.g.*, Rester v. Stephens Media, LLC, 739 F.3d 1127, 1131 (8th Cir. 2014) (referring to the standard as a demanding one).

[195] *See* Matthew W. Green, Jr., *What's So Reasonable About Reasonableness? Rejecting a Case-Law Centered Approach to Title VII's Reasonable Belief Doctrine*, 62 U. KAN L. REV. 759, 794 (2014).

[196] *See* Furcron v. Mail Ctrs. Plus, LLC, 843 F.3d 1295, 1311 (11th Cir. 2016).

[197] *See* Charlotte S. Alexander et al., *Post-Racial Hydraulics: The Hidden Dangers of the Universal Turn*, 91 N.Y.U. L. REV. 1, 14–16 (2016) (noting the difficulties in proof Title VII plaintiffs face in light of court decisions); Green, *supra* note **Error! Bookmark not defined.**, at 771–72 (noting the complexity of the law in the area).

[198] This is the so-called "stray remarks doctrine." *See* Shager v. Upjohn, 913 F.2d 398, 402 (7th Cir. 1990) ("[A] slur is not in and of itself proof of actionable discrimination."); Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505, 540 (2018) ("The basic idea behind this doctrine is that alleged discriminatory remarks that happen in a casual setting outside discussions regarding the dismissal decision do not support an inference of discrimination.").

The gap created by the odd interaction of the strict "severe or pervasive" standard, the strict interpretation of Title VII's anti-retaliation provision, and *Ellerth*/*Farragher*'s affirmative defense illustrates how essential it is for the anti-discrimination goal of Title VII that employees have adequate protection from retaliation. One of the more distressing aspects of the retaliation decisions is the fact that the limited protection afforded to victims of retaliation increases the likelihood that discrimination and harassment within the workplace will continue to thrive. As the Supreme Court has recognized, retaliation or the threat of retaliation may have a strong deterrent effect on those who would raise concerns about the organization's actions and treatment of others.[199] The evidence suggests that those who have less status in the workplace are more likely to be deterred from raising concerns about that structure or its abuses.[200] This tendency for the threat of retaliation to deter the most vulnerable of employees from opposing workplace discrimination necessarily impacts the ability of Title VII and other anti-discrimination statutes to effectively address workplace discrimination. As the Supreme Court has noted, anti-discrimination statutes depend in no small measure on the willingness of co-workers to come forward with concerns over discrimination and harassment and to participate in proceedings designed to remedy such conduct.[201] In order to encourage employees to engage in such protected activities, anti-discrimination statutes contain anti-retaliation provisions designed to provide protection for those employees who do so. Weak legal protection from retaliation makes it more likely that workplace discrimination and harassment will go unaddressed.

Building upon this idea, Professor Nicole Buonocore Porter has argued that in order to address workplace harassment, one must first address workplace retaliation.[202] Porter points to studies revealing that victims of sexual harassment, for example, frequently fail to report harassment for fear of retaliation, including ostracism by co-workers.[203] Therefore, Porter argues, "[i]f we hope to increase the reporting rates of victims of harassment, we must at a minimum protect those employees who experience retaliation after reporting harassment."[204]

Yet, the retaliation law that has developed under Title VII has its own

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[199] *See* Burlington N. and Santa Fe Ry. Co. v. White, 548 U.S. 53, 64 (2006).

[200] *See* Brake, *supra* note **Error! Bookmark not defined.** at 39–40 (noting that "the fear of retaliation is especially chilling and all the more effective in silencing" the opposition of those with less power in the workplace).

[201] *See White*, 548 U.S. at 67 ("Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses.").

[202] *See* Porter, *supra* note 18, at 50.

[203] *See* Porter, *supra* note 18, at 51.

[204] Porter, *supra* note 18, at 56.

set of gaps. As mentioned, to be protected from retaliation, an employee must have suffered a "materially adverse" action in response to protected activity.[205] Some courts have adopted a strict view of what qualifies as a materially adverse act of retaliation for purposes of a Title VII claim.[206] For example, some courts have adopted the position that a written reprimand or warning without any tangible consequences—even when the reprimand is undeserved—is not retaliation that might dissuade a reasonable employee from making or supporting a charge of discrimination.[207] Some courts have similarly adopted the bright-line rule that unfulfilled threats of termination do not meet the material adversity standard, nor does placing an employee on disciplinary or administrative leave.[208] Others improperly import the rule developed in discrimination cases that a transfer that does not involve a demotion in form or substance cannot rise to the level of a materially adverse action.[209] Even when not adopting these sorts of bright-line rules,

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[205] *See supra* note 170 and accompanying text.

[206] *See supra* note 171 and accompanying text.

[207] *See* Bhatti v. Trs. of Bos. Univ., 659 F.3d 64, 72 (1st Cir. 2011) (affirming summary judgment for employer); Emami v. Bolden, 241 F. Supp. 3d 673, 685 (E.D. Va. 2017) (stating that a negative performance review, standing alone, does not constitute a materially adverse action); Porter, *supra* note 165, at 831 (citing cases in which "discipline, reprimands, and negative evaluations [are not considered] 'materially adverse'"). *But see* Hallmon v. Advance Auto Parts, Inc., 921 F. Supp. 2d 1110, 1118 (D. Colo. 2013) (stating that repeated threats to issue a written warning, even if not acted upon, may qualify as materially adverse).

[208] *See* Porter, *supra* note 165, at 832 (same); Sperino, *supra* note 165, at 2036 (listing cases); *see also* Hellman v. Weisberg, 360 F. App'x 776, 779 (9th Cir. 2009) ("[T]he mere threat of termination does not constitute an adverse employment action."); Brown v. SDH Educ. E. LLC, No. 312-cv-2961-TLW, 2014 WL 468974, at *7 (D.S.C. Feb. 4, 2014) ("An Unrealized Threat of Termination Is Not an Adverse Action"); McKneely v. Zachary Police Dep't, No. 12-354-SDD-RLB, 2013 WL 4585160, at *10–11 (M.D. La. Aug. 28, 2013) (holding in favor of employer where employee was on disciplinary leave for thirty days pending an investigation and stating that investigations do not amount to adverse actions).

[209] *See* Lawtone-Bowles v. City of New York, 17cv8024, 2019 WL 652593, at *4 (S.D.N.Y. Feb. 15, 2019); Hair v. Fayette Cty. of Pa., 265 F. Supp. 3d 544, 568 (W.D. Pa. 2017). Courts have adopted similarly strict bright-line rules in other situations. *See* Gomez-Perez v. Potter, 452 Fed. Appx. 3, 8 (1st Cir. 2011); *see also* Butler v. Exxon Mobil Corp., 838 F. Supp. 2d 473, 496 (M.D. La. 2012) (stating that supervisor chastisement does not rise to the level of material adversity). And many courts have articulated a similar rule that "ostracism by co-workers do[es] not rise to the level of material adversity but instead fall[s] into the category of 'petty slights, minor annoyances, and simple lack of good manners.'" *Butler*, 838 F. Supp. 2d at 496 (quoting Stewart v. Miss. Transp. Comm'n, 586 F.3d 321, 332 (5th Cir. 2009)); *see also* Porter, *supra* note 165, at 832 (stating "courts almost uniformly hold that 'shunning,' 'ostracizing,' and being harassed does not rise to the level of an adverse employment action"). There are, of course, courts that take a more context-specific approach in these situations. For example, the Seventh Circuit Court of Appeals has held that retaliatory ostracism by co-workers may rise to the level of a

some court adopt a narrow view of what might be likely to deter a reasonable employee from engaging in protected activity, such as the decisions in which supervisors have physically isolated the offending employee from co-workers and instructed co-workers not to speak to the employee[210] or in which supervisors have allegedly berated employees on a daily basis or in front of co-workers in retaliation for engaging in protected activity.[211]

2. *IIED Claims as a Means of Addressing Discrimination and Harassment*

One way to encourage the reporting of harassment would be to amend Title VII and other statutes to provide greater protection from retaliation.[212] Indeed, comprehensive reform of employment discrimination laws at the state and federal level might go a long way in the fight against employment discrimination and harassment. Still, a less ambitious, but nonetheless helpful, approach might be to let IIED claims lend a hand.

Even under the most conservative conceptions of the proper role of IIED claims, these are situations in which IIED claims might potentially fill a gap in existing law and provide a remedy. If courts were willing to

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materially adverse action if it is sufficiently severe, and the employer ordered it or knew about it and failed to properly respond. Baker v. Henderson, No. 99-2660, 2000 WL 767846, at *7 (7th Cir. June 12, 2000).

[210] *See* Martinez v. City of Birmingham, Case No. 2:18-cv-0465-JEO, 2018 WL 5013861, at *5 (N.D. Ala. Oct. 16, 2018) (dismissing retaliation claim where employee was isolated from other employees); Olonovich v. FMR-LLC Fidelity Investments, CIV No. 15-599 SCY/WPL, 2016 WL 9777193, at *7 (D.N.M. June 21, 2016) (holding that supervisor's act of directing co-workers to not speak to plaintiff and isolating plaintiff by moving her desk was insufficient to establish actionable retaliation); Cruz v. New York State Dept. of Corrections and Community Supervision, No. 13 Civ. 1335(AJN), 2014 WL 2547541, at *6 (S.D.N.Y. June 4, 2014) (dismissing retaliation claim on the grounds that supervisor's act of isolating plaintiff from coworkers was not "more disruptive than a mere inconvenience"); Slaughter v. College of the Mainland, Civil Action No. G-12-018, 2016 WL 4771030, at *5 (S.D. Tex. Sep. 12, 2012) (holding that supervisor's acts of isolating plaintiff from meetings, information, and other personnel and instructing co-workers did not rise to the level of material adversity). *But see* Moore v. KUKA Welding Sys. & Robot Corp., 171 F.3d 1073, 1080 (6th Cir.1999) (holding instructing "the other employees not to talk to [plaintiff], go into his area or otherwise interact with him" constituted actionable retaliation).

[211] *See* Ghiles v. City of Chi. Heights, No. 12 CV 7634, 2018 WL 1377909, at *4–5 (N.D. Ill. Mar. 19, 2018); Booth v. Cty. Exec., 186 F. Supp. 3d 479, 488 (D. Md. 2016) (stating that supervisor's act of verbally embarrassing plaintiff in front of coworkers did not rise to the level of material adversity). *But see* Mazur v. Sw. Veterans Ctr., CV17-826, 2018 WL 3957410, at *12 (W.D. Pa. Aug. 17, 2018) (denying defendant's motion to dismiss where supervisor, *inter alia*, regularly berated plaintiff in front of other employees).

[212] *See* Porter, *supra* note 18, at 56.

recognize IIED claims premised on retaliation for having opposed unlawful discrimination or harassment, the tort might potentially serve as an additional tool in the fight against discrimination and harassment.

While courts generally do not view employment retaliation as extreme and outrageous conduct, a few courts view retaliation that occurs as part of course of conduct involving discriminatory or harassing behavior as conduct of a special character. In Pennsylvania, where the general rule is that hostile work environment sexual harassment, standing alone, does not amount to extreme and outrageous conduct, harassment *combined* with retaliatory employer behavior may qualify.[213] Thus, the employee who is a victim of both harassment and retaliation may state a claim. In *Hoy v. Angelone*, a 1998 Pennsylvania decision, the Pennsylvania Supreme Court explained that "[r]etaliatory conduct is typically indicative of discrimination of a more severe nature and usually has a greater detrimental impact upon the victim."[214] Thus, "retaliation is a critical and prominent factor in assessing the outrageousness of an employer's conduct."[215]

Under this approach, it is the rare case in which workplace harassment, standing alone, can amount to the extreme and outrageous conduct necessary to support an IIED claim.[216] But when harassment is accompanied by retaliation, courts applying Pennsylvania law have sometimes been willing to classify conduct as extreme and outrageous.[217]

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[213] Hoy v. Angelone, 720 A.2d 745, 754 (Pa. 1998).

[214] *Id.*

[215] *Id.*

[216] *Id.*

[217] *See* Hare v. H&R Indus., Inc., 67 Fed. App'x. 114, 121, 2003 WL 21197050, at *5 (3d Cir. May 22, 2003) (affirming IIED verdict in favor of plaintiff where supervisors acquiesced in and were responsible for harassment and ultimately terminated employee's employment in retaliation for her complaints); Cox v. Keystone Carbon Co., 861 F.2d 390, 395–96 (3d Cir. 1988) ("[T]he only instances in which courts applying Pennsylvania law have found conduct outrageous in the employment context is where an employer engaged in both sexual harassment and other retaliatory behavior against an employee."); Frankhouser v. Clearfield Cty. Career and Tech. Ctr., Case No. 3:18-cv-180, 2019 WL 1259570, at *17 (W.D. Pa. March 19, 2019) ("[F]or allegations of sexual harassment to rise to the level of extreme and outrageous conduct, courts have often required both sexual harassment and retaliation against the harassed employee."); Bowersox v. P.H. Glatfelter Co., 677 F. Supp. 307, 310–11 (M.D. Pa. 1988) (holding that employer retaliation stemming from employee's rejection of sexual advances may qualify as extreme and outrageous conduct). In one odd case, a federal court held that an employee who had been the victim of sexual harassment could not state an IIED claim when she reported the harassment to management and was retaliated against in the form of increased harassment. *See* Mandel v. M & Q Packaging Corp., No. 3:09-CV-0042, 2009 WL 2579308, at *7 (M.D. Pa. Aug. 18, 2019). According to the court, this type of retaliation was not extensive enough to qualify as extreme and outrageous, even when considered in conjunction with the other harassment the plaintiff endured. *See id.* In another decision that is difficult to

For example, in *Bowersox v. P.H. Glatfelter*, an employee turned down the alleged repeated sexual advances of a supervisor.[218] In response, the supervisor assigned the employee "burdensome tasks, withheld information from her which was necessary in her job, created an oppressive work environment, and followed her throughout defendant's plant."[219] In addition, he allegedly threatened the employee with suspension if she complained about his harassment and gave her a less-than-satisfactory performance evaluation.[220] The alleged retaliatory harassment was severe enough that the employee eventually resigned.[221] Under the standard approach in workplace IIED cases, neither the harassment nor the retaliation, standing alone, would have been sufficient to sustain a finding of extreme and outrageous conduct.[222] But when considered together, the conduct, as alleged, was sufficiently outrageous to survive the defendants' motion to dismiss.[223] Thus, in the words of the Pennsylvania Supreme Court, retaliation is a "weighty factor" among "a number of factors used in assessing" an IIED claim.[224]

It is noteworthy that courts applying Pennsylvania law have not required that either the harassment or the retaliation meet the statutory definitions of actionable conduct under Title VII. Instead, what appears to be more relevant is the fact that the conduct is serious and of a harassing and retaliatory nature.[225] In a few instances, courts in other jurisdictions have

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comprehend, a federal court ruled that an employee who was retaliated against for filing a charge of sexual harassment could not state an IIED claim because she was retaliated against for filing the charge, not for rejecting the supervisor's sexual advances. *See* Van Horn v. Elbeco Incorporates, No. CIV.A. 94-2720, 1996 WL 385630, at *16 (E.D. Pa. July 10, 1996).

[218] *Bowersox*, 677 F. Supp. at 308.

[219] *Id.*

[220] *Id.*

[221] *Id.*

[222] *See* Armijo v. Yakima HMA, LLC, 868 F. Supp. 2d 1129, 1136 (E.D. Wash. 2012) ("[T]ermination with a discriminatory or retaliatory motive cannot be enough to support this tort."); Daniels v. C.L. Frates and Co., 641 F. Supp. 2d 1214, 1218 (W.D. Okla. 2009) ("Oklahoma courts . . . have routinely held that workplace harassment claims do not rise to the level of outrageous conduct necessary to support a claim of intentional infliction of emotional distress."); *Bowersox*, 677 F. Supp. at 311 (stating if the only allegations involved sexual harassment, the employee's claim would have failed).

[223] *Bowersox*, 677 F. Supp. at 312. Employees in other jurisdictions have raised similar arguments. In *Satterfield v. Karnes*, 736 F. Supp. 2d 1138, 1171 (E.D. Ohio 2010), the employee alleged sexual harassment and also alleged that the employer's retaliation for complaining about the harassment was "especially outrageous." The claim failed, however, in part because there was insufficient proof of retaliation to begin with. *See id.* at 1170, 1171.

[224] Hoy v. Angelone, 720 A.2d 745, 754 (Pa. 1998).

[225] For example, in *E.E.O.C. v. Federal Express Corp.*, 537 F. Supp. 2d 700 (M.D. Pa.

likewise been receptive to the idea that employer retaliation stemming from a complaint of sexual harassment may rise to the level of extreme and outrageous conduct.[226]

Illinois courts have adopted a similar approach, although one not as confined to instances of harassment. In *Johnson v. Federal Reserve Bank of Chicago*,[227] an employee disclosed illegal banking practices to auditors. His supervisors then allegedly engaged in a pattern of ongoing retaliatory conduct, of which the employer was aware, that continued even after the employee notified supervisors that his physical and mental health were suffering as a result of their actions.[228] The Illinois Court of Appeals held that the employer's conduct, "though not extreme and outrageous *per se*, became so by its retaliatory and punitive nature."[229] Numerous subsequent Illinois and federal decisions applying Illinois law have cited *Johnson* for the proposition that the fact that an employer engaged in retaliatory acts in

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2005), an employee "was regularly subjected to rude and offensive language and displays of physical vulgarity motivated by sex." *Id.* at 713–14. After the employee complained to management, "co-workers refused to load her truck, refused to speak with her, assaulted her with heavy freight, and sabotaged her truck." *Id.* at 714. There was also evidence that the employer failed to adequately respond to this co-worker retaliation. *Id.* According to the court, there was sufficient evidence of extreme and outrageous conduct to survive a summary judgment motion. *Id.* It is not clear, however, that the harassment the employee endured was severe or pervasive enough to qualify as actionable sex discrimination, whether the co-worker harassment was severe enough to qualify as actionable retaliation under Title VII, or whether the employer could he held liable for its failure to put a stop to co-worker retaliation. *See* Burlington N. and Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006) (citing source observing that courts have held that "'snubbing' by supervisors and co-workers" is not actionable); Hawkins v. Anheuser-Busch Inc., 517 F.3d 321, 347 (6th Cir. 2008) (holding employer may only be liable for co-worker retaliation where supervisors or members of management have actual or constructive knowledge of the co-worker's retaliatory behavior and responded to the plaintiff's complaints so inadequately that the response manifests indifference or unreasonableness under the circumstances).

[226] *See* Lucas v. Brown & Root, Inc., 736 F.2d 1202, 1205 (8th Cir. 1984) (applying Arkansas law and concluding employee stated a claim where she refused supervisor's sexual advances and then employer made false representations while contesting employee's unemployment benefit claims); Schwartz v. Bay Industries, Inc., 274 F. Supp. 2d 1041 (E.D. Wis. 2003) (applying Wisconsin law and holding that plaintiff stated a claim where supervisor allegedly retaliated against employee after she refused supervisor's sexual advances); Kanzler v. Renner, 937 P.2d 1337, 1343 (Wyo. 1997) (identifying retaliation for refusing or reporting sexual harassment as a factor that may aid in the determination); Retherford v. AT & T Comm'ns of Mountain States, 844 P.2d 949, 978 (Utah 1992) (concluding plaintiff had stated a claim where defendants "shadowed her movements, intimidated her with threatening looks and remarks, and manipulated circumstances at her work in ways that made her job markedly more stressful, all in retaliation for her good-faith complaint of sexual harassment").

[227] 557 N.E.2d 328 (Ill. Ct. App. 1990).

[228] *Id.* at 330–31.

[229] *Id.* at 331.

response to an employee's protected activities is a factor to consider in deciding whether conduct is extreme and outrageous.[230] In addition to situations like *Johnson* where an employee "blows the whistle" on unlawful conduct, some courts applying Illinois law have classified employer retaliation as extreme and outrageous where employees have refused to engage in unlawful conduct or have engaged in activity protected by Title VII.[231] Other courts have sometimes been willing to recognize IIED claims in similar situations involving retaliation resulting from opposition to discrimination or other forms of protected activity.[232]

Importantly, these decisions treat retaliation and the underlying harassment or other wrongful conduct as part of a pattern of connected wrongful conduct.[233] Rather than treating the harassment and ensuing retaliation as discrete acts, neither of which, standing alone, might rise to the level of extreme and outrageous conduct, this approach views the defendant's behavior as inextricably linked. The effect of treating retaliation—in the words of the Pennsylvania Supreme Court—as a "weighty" factor in workplace IIED cases[234] may be to transform employer acts that might otherwise be classified as trivial into extreme and outrageous conduct. For example, the whistleblowing employee in *Johnson* was subjected to threats of termination, given an excessive work load, denied

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[230] *See* Shamin v. Siemens, 854 F. Supp. 2d 496, 512 (N.D. Ill. 2012) ("As a rule, courts have found an employer's actions "extreme and outrageous" when an employee experiences retaliation from her employer soon after refusing (or resisting) the employer's instructions to violate a law."); Graham v. Commonwealth Edison Co., 742 N.E.2d 858, 867–68 (Ill. Ct. App. 2000) ("When an employer's conduct is both coercive and retaliatory, courts have generally found the conduct to be extreme and outrageous, constituting a claim for intentional infliction of emotional distress.).

[231] *See* Pommier v. James L. Edelstein Enters., 816 F. Supp. 476 (N.D. Ill.1993) (holding employee stated IIED claim based on retaliation for filing an internal complaint of sexual harassment); Swider v. Yeutter, 762 F. Supp. 225, 227 (N.D. Ill. 1991) (concluding employee stated IIED cause of action where she alleged retaliation for having filed a sex discrimination claim); Milton v. Ill. Bell Tel. Co., 427 N.E.2d 829, 831 (Ill. Ct. App. 1981) (finding extreme and outrageous conduct where employee refused to falsify work reports in violation of law and was retaliated against by, *inter alia*, giving employee less desirable work assignments).

[232] *See* Hurst v. St. George Cmty. Consol. Sch. Dist., No. 08-CV-2182, 2009 WL 1363408, at *4 (C.D. Ill. May 13, 2009) (concluding plaintiff stated an IIED claim where employer allegedly threatened to terminate and did ultimately terminate employee who refused to support employer's untrue statements); Walters v. Rubicon, Inc., 706 So.2d 503, 507–08 (La. Ct. App. 1997) (holding plaintiff stated IIED claim where employer allegedly retaliated against employee who reported violations of law to employer).

[233] *See* Class v. N.J. Life Ins. Co., 746 F. Supp. 776, 778. (N.D. Ill. 1990) (concluding that acts of sexual harassment were not extreme and outrageous but ensuing retaliation was part of a pattern of wrongful conduct and was actionable).

[234] Hoy v. Angelone, 720 A.2d 745, 755 (Pa. 1998).

opportunities for advancement, had the quality of his work undervalued, was given poor performance reviews, and had his instructions to his direct subordinates undercut.[235] Absent the employer's retaliatory motive, this conduct would have been unlikely to qualify as extreme and outrageous based on the general approach to workplace IIED claims.[236] But according to the *Johnson* court, the defendant's conduct, "though not extreme and outrageous *per se*, became so by its retaliatory and punitive nature.[237]

IV. RECOGNIZING THE DETRIMENTAL IMPACT THAT RETALIATION AND HARASSMENT HAVE ON VICTIMS AND THE SEVERE NATURE OF SUCH CONDUCT

Revenge, at first though sweet,
Bitter ere long back on itself recoils.
- John Milton[238]

If courts are to adopt the approach to IIED claims involving retaliation for having opposed discrimination or harassment described in this Article, plaintiffs will need to offer a sufficient justification to overcome the longstanding tendency of courts to apply the "especially strict approach" to workplace IIED claims. The justification for treating retaliation stemming from opposition to workplace discrimination or harassment as a special kind of wrong that may support an IIED claim is that such conduct is more severe or egregious in nature than other forms of workplace misconduct and is likely to have a greater detrimental impact upon victims.[239] The following Part anticipates the challenge to this assertion. Does retaliation—at least when combined with discrimination or harassment—really have a greater impact on victims than other forms of conduct? And is such conduct truly more severe in nature than other forms of employer conduct that is not actionable? Delving into the psychological research into the nature of retaliation and the special harms that retaliation has upon the law's ability to combat workplace discrimination, this Part concludes that the assertions are, in fact, justified.

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[235] Johnson v. Fed. Reserve Bank of Chi., 557 N.E.2d 328, 330 (Ill. Ct. App. 1990). Another example is *Frankhouser v. Clearfield County Career and Technology Center*, Case No. 3:18-cv-180, 2019 WL 1259570 (W.D. Pa. Mar. 19, 2019), in which an employer allegedly retaliated against an employee who reported sexual harassment through "enhanced job scrutiny and generally negative and unfavorable behavior." *Id.* at *17.

[236] *See supra* note 222 and accompanying text.

[237] *Johnson*, 557 N.E.2d at 331.

[238] JOHN MILTON, PARADISE LOST, Book IX, Line 171 (1667).

[239] *See* Hoy, 720 A.2d at 754; *supra* note 214 and accompanying text.

A. The Nature of Retaliation

1. The Nature of Retaliation in General

As one author who has studied retaliation at length puts it, "there's no better way to ensure that someone is going to harm you than to harm him or her first."[240] The desire to retaliate against those who have committed some perceived wrong or injustice against us is deeply ingrained.[241] As an example, one study into the physiology of retaliation measured the brain activities of participants in a game in which one of the participants had double crossed the other participants.[242] Researchers found that the thought of punishing the wrongdoer for this transgression triggered the reward center of the brain that is closely associated with pleasure.[243]

One reason why the desire to retaliate is so deeply ingrained is perhaps because of the important function retaliation served in early human evolution. Retaliation is largely defined in terms of revenge and punishment.[244] One who retaliates against another for the other's supposed wrongful conduct may be motivated by a desire to make oneself feel better by making the perceived wrongdoer suffer or to deter similar wrongful conduct moving forward.[245] Evolutionary psychologists posit that revenge or retaliation may have served adaptive functions related to deterrence.[246] Our early ancestors could not afford to be seen as being an easy target to be

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[240] MICHAEL MCCULLOUGH, BEYOND REVENGE 28 (2008).

[241] *See generally id.* at 10 (stating "the desire for revenge is a universal trait of human nature, crafted by natural selection, that exists today because it was adaptive in the ancestral environment in which the human species evolved").

[242] DJ de Quervain et al., *The Neural Basis of Altruistic Punishment*, 305 SCI. 1254, 1255 (2004).

[243] *Id.*

[244] *See Retaliate*, MERRIAM-WEBSTER DICTIONARY (defining the term in terms of "to return like for like; especially: to get revenge), https://www.merriam-webster.com/dictionary/retaliate; *Retaliation*, NOLO'S PLAIN-ENGLISH LAW DICTIONARY (defining the term in terms of punishment), https://www.law.cornell.edu/wex/retaliation; Frank D. LoMonte & Clay Calver, *The Open Mic, Unplugged: Challenges to Viewpoint-Based Constraints on Public-Comment Periods*, 69 CASE W. RES. L. REV. 19, 61 (2018) (discussing retaliation in terms of punishment); Karina Schumann and Michael Ross, *The Benefits, Costs, and Paradox of Revenge*, 4 SOC. AND PERSONALITY PSYCHOL. COMPASS 1193, 1194 (2010) (listing deterrence as one of the functions of retaliation), https://web.stanford.edu/~omidf/KarinaSchumann/KarinaSchumann_Home/Publications_files/Schumann.SPPC.2010.pdf.

[245] Schumann and Ross, *supra* note 244, at 1194; *see also* Dale T. Miller, *Disrespect and the Experience of Injustice*, 52 ANN. REV. OF PSYCHOL. 527, 541 (2001) (explaining that retaliation may serve to convey to others the idea that one "does not tolerate unjust treatment by others").

[246] *See* MCCULLOUGH, *supra* note 240, at 49–56.

taken advantage of in terms of food, shelter, or other necessities. In order to prevent outsiders or those within a group from engaging in aggression at our expense, it was necessary to let others know that there would be transaction costs associated with doing so.[247] Therefore, retaliating against one who we perceived as having wronged us served as a means of deterring the perceived wrongdoer from trying the same thing in the future.[248] Similarly, retaliation against a perceived wrongdoer also served as a threat to future would-be transgressors that there would be consequences for wrongdoing.[249] The failure to retaliate in the face of aggression potentially made survival more difficult.

Modern studies illustrate the important role that retaliation and the threat of retaliation play in deterring future unwanted behavior. In one study, undergraduate students wrote an essay, which was graded harshly by a reviewer acting in concert with the researchers.[250] Later, the same students were presented with the ability to administer (what they believed were) electric shocks of increasing intensity to their reviewer. Half of the participants were told that the roles would later be reversed and that the reviewer would be able to administer electric shocks to the students. The other half were not told that the roles would later be reversed. The participants who believed they could shock with impunity generally gave stronger shocks to their reviewers than those who believed the reviewers would later have the ability to retaliate.[251] Thus, the threat of retaliation on the part of the reviewers had a deterrent effect on the severity of the retaliation the participants were willing to inflict.[252]

In addition to illustrating the deterrent effect that the threat of retaliation may have, this study also perhaps illustrates the strong drive humans have to retaliate. Several studies suggest that retaliators are often motivated by a desire to exact revenge and to "balance the moral ledger."[253] Interestingly,

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[247] *See id.* at 50.

[248] *See id.*

[249] *See id.* at 51.

[250] *See id.* at 50–51 (citing S.R. Diamond, *The Effect of Fear on the Aggressive Responses of Anger Aroused and Revenge Motivated Subjects*, 95 J. PSYCHOL. 185 (1977)).

[251] *See id.* at 51 (citing S.R. Diamond, *The Effect of Fear on the Aggressive Responses of Anger Aroused and Revenge Motivated Subjects*, 95 J. PSYCHOL. 185 (1977)).

[252] *See id.*

[253] *See* Kevin M. Carlsmith, *The Paradoxical Consequences of Revenge*, 95 INTERPERSONAL REL. AND GROUP PROCESSES 1316, 1323 (2008) ("Our findings support a functional account of punishment—people use punishment to strategically repair their negative mood.") [hereinafter Carlsmith, *Paradoxical Consequences*]; Kevin M. Carlsmith et al., *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 J. PERSONALITY AND SOC. PSYCHOL. 284, 295 (2002) (summarizing results of study finding that "just deserts" perspective motivated individuals more than deterrence justification when assigning punishment) [hereinafter Carlsmith et al., *Why do We Punish?*]. *See*

the research indicates that acting on this desire actually has the potential to cause physical as well as mental harm for the retaliator.[254]

2. The Nature of Retaliation in the Workplace

Workplace retaliation is closely associated with abuse of power. The perceived need to seek retribution for a perceived wrong is positively correlated with the values of power and authority.[255] In other words, power asymmetry influences the likelihood of workplace retaliation; workers who enjoy higher status than their transgressors are more likely to act on the urge to take revenge than their counterparts.[256] One logical explanation for this phenomenon is that those who enjoy higher status also enjoy the connections and resources that make it less likely that they will suffer adverse consequences for their retaliatory conduct.[257] In contrast, those who enjoy less status may be less inclined to take revenge out of necessity. Thus, those with power in the workplace are able to flaunt it by retaliating against those who challenge that power.[258]

Status also matters in terms of who is most likely to be on the receiving end of retaliatory conduct and how likely it is that the conduct will deter future unwanted conduct. Not surprisingly, those with lower status in the

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generally MCCULLOUGH, *supra* note 240, at 48 (explaining that some social scientists attribute the desire to seek revenge to an attempt to "balance a moral ledger that has become lopsided"). A 2008 study found that participants who had the ability to retaliate against a perceived wrongdoer and who acted upon that ability felt worse than those who lacked the ability to punish the transgressor. *See* Carlsmith, *Paradoxical Consequences*, *supra* note 253, at 1323.

[254] As a physiological matter, thoughts of vengeance lead to increases in blood pressure and heart rate, which suggests that people who hold grudges for years may experience long-term health consequences. *See* MCCULLOUGH, *supra* note 240, at 7 (reporting results of studies). Research also suggests that prolonged thoughts of retaliation are associated with a host of psychological disorders, such as negative affect and depression, post-traumatic stress disorder symptoms, psychiatric morbidity, and reduced life satisfaction. *See* Schumann and Ross, *supra* note 244, at 1196.

[255] *See* Ian R. McKee & N.T. Feather, *Revenge, Retribution, and Values: Social Attitudes and Punitive Sentencing*, 21 SOC. JUST. 138, 149–50 (2008).

[256] *See* Karl Aquino, *How Employees Respond to Personal Offense: The Effects of Blame Attribution, Victim Status, and Offender Status on Revenge and Reconciliation in the Workplace*, 86 J. APPLIED PSYCHOL. 52, 53 (2001) (discussing studies addressing the effects of the urge for revenge in the workplace).

[257] *See* Schumann and Ross, *supra* note 244, at 1199.

[258] *See generally* Ann C. Wendt and William M. Slonaker, *Sexual Harassment and Retaliation: A Double-Edged Sword*, 67 SAM ADVANCED MGMT. J. 49 (2002) ("If harassment displays power over another, then retaliation flaunts power."), https://go.gale.com/ps/i.do?v=2.1&it=r&sw=w&id=GALE%7CA94465279&prodId=AONE&sid=googleScholarFullText&userGroupName=tel_main&isGeoAuthType=true.

workplace are particularly likely to be the targets of retaliation.[259] Higher-ranking employees who complain of wrongdoing are less likely to face organizational retaliation.[260]

B. The Detrimental Impact of Retaliation and Discrimination

Taking revenge on a perceived wrongdoer may produce a host of negative psychological outcomes for victims, particularly when the retaliation is coupled with discriminatory conduct. Employees who suppress anger in the face of perceived mistreatment by one in a position of power are more likely to experience negative psychological and physiological effects, such as feelings of humiliation and resentment, the inability to remove the negative incident from their mind, and raised blood pressure and heart disease.[261] Numerous authors have noted the sense of humiliation that often accompanies workplace discrimination and harassment.[262] The research suggests that such feelings are also likely to accompany retaliation.

In contrast, those who are able to express concerns they may have about the workplace to their superiors without experiencing retribution are more likely to have positive feeling about their workplaces. For example, a study of over 1,000 employees found that employees who were able to give voice to their concerns about having been mistreated and avoid retaliation for having done so were more positive about their jobs than those who had remained silent about mistreatment.[263] Employees with a significant history

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[259] *See* Brake, *supra* note 18, at 39 (noting that "low-power persons are particularly susceptible to retaliation"); J.P. Near et al., *Explaining the Whistle-Blowing Process: Suggestions from Power Theory and Justice Theory*, 4 ORGS. SCI., 393, 403 (1993) (concluding that whistle blowers who have less power in the workplace may be more likely to experience retaliation).

[260] *See* Mindy E. Bergman et al., *The (Un)reasonableness of Reporting: Antecedents and Consequences of Reporting Sexual Harassment*, 87 J. APPLIED PSYCHOL. 230, 236 (2002). The relationship between the parties and the severity of the perceived injustice also influence the severity of the retaliation. For example, a 2019 study found that when one co-worker wrongs another, the wronged co-worker is likely to retaliate in a proportional, eye-for-an-eye manner rather than escalating the conflict through more severe forms of retaliation. *See* Lindsey Greco et al., *An Eye for an Eye? A Meta-Analysis of Negative Reciprocity in Organizations*, 104 J. APPLIED PSYCHOL. 14 (2019). Thus, low-intensity co-worker misconduct (such as incivility) is likely to be met with a proportionally mild response that is similar in kind to the original wrongdoing. *See id.* at 2. More severe wrongdoing (such as aggression or physical violence) is likely to be met with similarly severe retaliation. *See id.*

[261] *See* Leora Eisenstadt & Deanna Geddes, *Suppressed Anger, Retaliation Doctrine, and Workplace Culture*, 20 U. PA. J. BUS. L. 147, 182 (2017).

[262] *See supra* note **Error! Bookmark not defined.** and accompanying text.

[263] *See* Cortina and Magley, *supra* note 280, at 258.

of prior mistreatment and who faced retaliation after voicing opposition to the mistreatment reported higher levels of psychological and physical problems than those who had experienced retaliation after less intense mistreatment.[264] But the group reporting the highest level of psychological and physical problems were those with a significant history of prior mistreatment and who remained silent about the mistreatment rather than complaining.[265] Given the distress that often accompanies being the victim of discrimination, being the victim of retaliation after having opposed such misconduct is only likely to increase the psychological harm one experiences.

Employees who complain about discrimination or other forms of workplace misconduct may experience other forms of distress aside from humiliation. For example, it is well-established that one of the main reasons why employees do not complain about unlawful discrimination and other forms of employer misconduct is the fear of creating disharmony in the workplace and facing retaliation from co-workers.[266] When reporting wrongdoing occurring within an organization, an employee may feel a sense of disloyalty, as if coming forward with such information is a betrayal of the organization. This is also obviously how the employee's action is sometimes perceived. So, it is perhaps not surprising that those who report or oppose unlawful conduct are particularly susceptible to emotional distress stemming from retaliation, including depression and related conditions.[267] For example, one study of corporate whistleblowers found that most experienced retaliation and 10% stated they attempted suicide.[268]

In short, there is ample support for the Pennsylvania Supreme Court's observation that retaliatory conduct is likely to have a greater detrimental impact upon a victim than other forms of employer misconduct, at least where the retaliation is in response to opposition to discrimination or harassment.

C. The Severity of Retaliatory and Discriminatory Conduct

As the Pennsylvania Supreme Court has also observed, retaliatory conduct is typically indicative of discrimination of a more severe nature

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[264] *Id.* at 262.

[265] *Id.*

[266] *See* Nicole Buonocore Porter, *Relationships and Retaliation in the #MeToo Era*, 72 FLA. L. REV. 797, 816–19 (2020) (summarizing scholarship in the field).

[267] *See* Miriam Cherry, *Whistling in the Dark?*, 79 WASH. L. REV. 1029, 1053 (2004) ("Due to the extreme stress, many whistleblowers develop serious mental illness, such as depression, which can lead to other problems, such as alcohol or drug abuse.").

[268] David Culp, *Whistleblowers: Corporate Anarchists or Heroes? Towards a Judicial Perspective*, 13 HOFSTRA LAB. & EMP. L.J. 109, 113 (1995).

than "mere" discrimination or harassment. Workplace retaliation in response to opposition to discrimination or harassment certainly has a detrimental impact on victims. But it also has a potential detrimental impact on workplace culture and helps perpetuate discrimination in the workplace. These features increase the overall severity of such conduct.

1. The Impact of Retaliation Upon Workplace Culture

The effect that retaliation may have upon the culture of a workplace is a factor that increases the severity of the conduct. The fear of retaliation and resulting silence may have negative consequences for the workplace as a whole. In every organization, there is a "psychological contract" that contains the unwritten expectations of the relationship, most notably the employer-employee relationship.[269] The idea of unwritten interpersonal codes of conduct may extend to co-workers within an organization.[270] A perceived breach committed by a member of one's own group is different than a perceived offense committed by one from outside the group. In the former instance, the perceived offense is more likely to produce a sense of betrayal and disrespect.[271] And in the specific case of a perceived offense by a person of higher-status within the same group—such as a supervisor—the perceived offense is more likely to be perceived as an abuse of power.[272] These are situations in which the perceived victim may feel that retribution is called for in order to rectify the breach of the psychological contract and even the moral ledger.

Employees with lower status who feel they have been mistreated by those who outrank them may displace retaliation onto others within the

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[269] *See* Miller, *supra* note 245, at 532 ("A psychological contract is an implicit understanding of what is and is not acceptable in a relationship."); Denise M. Rousseau, *Psychological and Implied Contracts in Organisations*, 2 EMP. RESPS. AND RTS. J. 121, 123 (1989) (defining the concept in terms of "an individual's beliefs regarding the terms and conditions of a reciprocal exchange agreement between that focal person and another party").

[270] *See* Miller, *supra* note 245, at 530 (discussing feelings of betrayal stemming from violations of interpersonal codes of conduct by co-workers).

[271] *See* Miller, *supra* note 172, at 539 (noting the different responses to offenses committed by in-group members versus out-group members); Janice Anna Knights & Barbara Jean Kennedy, *Psychological Contract Violation: Impacts on Job Satisfaction and Organizational Commitment Among Australian Senior Public Servants*, 10 APPLIED H.R.M. RES. 57, 58 (2005) (noting that breach of a psychological contract produces "feelings of betrayal, distress, anger, resentment, a sense of injustice and wrongful harm").

[272] *See* Miller, *supra* note 245, at 539 (stating that "in the case of a higher-status person the source of the indignation will generally be the belief that the offender has abused his or her position").

organization or the organization as a whole in passive ways that are more difficult to detect, such as putting less effort into work or being absent from work more often.[273] Employees who feel they are not free to express their unhappiness with mistreatment to management may instead seek out sympathetic co-workers with whom they can express their unhappiness.[274] This may in turn to lead to so-called "negative emotional contagion," a phenomenon in which the negative attitudes and emotions of one person spread within an organization.[275] Employees who feel silenced may engage in their own forms of retaliatory conduct against employers when confronted with what they perceive to be injustices.[276] In some cases, the retaliation is minor in nature, such as physical withdrawal in the workplace or workplace absences.[277] In others, the retaliation may be more substantial, such as vandalism, theft from the employer, and resisting organizational authority—and in some cases extreme—as in the case of workplace violence.[278] Indeed, studies have found that incidences of workplace violence are higher in workplaces where employees feel they are treated with disrespect.[279]

2. Retaliatory Conduct as a Means of Perpetuating Discrimination and Harassment

Finally, the fact that retaliation tends to deter others from coming

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[273] *See* Greco et al., *supra* note **Error! Bookmark not defined.**, at 4–5, 16.

[274] Eisenstadt & Geddes, *supra* note 274, at 183.

[275] *Id.*; *see also* Tony Schwartz, *Emotional Contagion Can Take Down Your Whole Team*, HARV. BUS. REV. (July 11, 2012), https://hbr.org/2012/07/emotional-contagion-can-ta.html (discussing emotional contagion in the workplace).

[276] *See* Robert Folger and Daniel P. Skarlicki, *A Popcorn Metaphor for Employee Aggression*, *in* 23 MONOGRAPHS IN ORGANIZATIONAL BEHAVIOR AND INDUSTRIAL RELATIONS 47 (1998) (noting that if managerial decision making and actions are perceived as unfair, employees may feel resentment and a desire to seek retribution); Greco et al., *supra* note **Error! Bookmark not defined.**, at 2 (noting various forms of retaliatory negative work behavior directed toward the organization); Daniel P. Skarlicki & Robert Folger, *Retaliation in the Workplace: The Roles of Distributive, Procedural, and Interactional Justice*, 82 J. APPLIED PSYCHOL. 434, 434 (1997) (reporting results of study finding that "when employees felt exploited by the company, they were more likely to engage in acts against the organization, such as theft, as a mechanism to correct perceptions of injustice").

[277] *See* Folger and Skarlicki, *supra* note 276, at 48; Greco at al., *supra* note **Error! Bookmark not defined.**, at 3.

[278] *See* Aquino, *supra* note **Error! Bookmark not defined.**, at 52 (discussing studies addressing the effects of the urge for revenge in the workplace); Greco at al., *supra* note **Error! Bookmark not defined.**, at 2 (listing resistance of authority as an example of retaliatory negative workplace behavior).

[279] *See* Folger and Skarlicki, *supra* note 276, at 72.

forward with concerns over discrimination and harassment, thereby impeding efforts to eliminate workplace discrimination, is a factor that increases the severity of the conduct. Retaliation or the threat of retaliation may have a strong deterrent effect on those who would raise concerns about the organization's actions and treatment of others. Complaints by a lower-ranking employee about misbehavior on the part of a higher-ranking individual may be seen by the organization as a challenge to authority.[280] Retaliation on the part of the organization or the higher-ranking individual in such a case may serve to maintain the hierarchical structure of the workplace.[281]

Weak legal protection from retaliation makes it more likely that workplace discrimination and harassment will go unaddressed. Therefore, retaliation has a detrimental impact not only upon its victims and co-workers but upon the structures in place designed to prevent discrimination. Ultimately, these external harms increase the overall severity and add to the overall outrageousness of retaliatory conduct involving complaints of discrimination.

CONCLUSION

As currently applied by most courts, the IIED tort has a limited role to play in the fight against discrimination. In light of the more severe nature of workplace discrimination and harassment involving retaliatory conduct and the greater detrimental impact that such conduct is likely to have, courts should follow the approach of those courts that treat retaliatory conduct as a critical and prominent factor in assessing the extreme and outrageous nature of the conduct. By doing so, courts can take the IIED tort off of the bench and put it into the game of combatting workplace discrimination.

To be clear, not every case involving discrimination and retaliation will necessarily amount to extreme and outrageous conduct or perhaps even raise a jury question.[282] Even where courts give special weight to the fact of

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[280] *See* Lily M. Cortina & Vicki J. Magley, *Raising Voice, Risking Retaliation: Events Following Interpersonal Mistreatment in the Workplace*, 8 J. OCCUPATIONAL HEALTH PSYCHOL. 247, 249 (2003) ("[E]xposing the misbehavior of a highly placed member of the organizational hierarchy—thus characterizing that person as unlawful, unethical, or inappropriate—questions that hierarchy.").

[281] *See id.* (stating the organization's dominant culture "may therefore retaliate against the victim to correct this challenge to authority"); Near et al., *supra* note **Error! Bookmark not defined.**, at 404 (explaining that whistleblowers question "the basic authority structure of the organization by calling its managers incompetent or unethical—a situation most likely to result in retaliation because the authority structure of the organization has been challenged").

[282] *See* Lada v. Del. Cty. Cmty. Coll., Civil Action No. 08-cv-4754, 2009 WL

retaliation, there will be many instances in which the conduct in question is not sufficiently egregious to overcome the traditional reluctance of courts to recognize workplace IIED claims. This is most likely to be the case where an employer engages in traditional forms of discrimination, such as a failure to promote, where the employer's actions lie at the core of the employment at-will rule and courts have been especially unlikely to permit recovery.[283]

But harassment presents a different situation, one in which the conduct in question has little to do with employer prerogative. Considering the acts of harassment and retaliation as part of a continuing pattern of action and treating the fact of retaliation as a particularly weighty factor may lead to more positive outcomes for some plaintiffs whose success is not likely under Title VII. Some courts have expressed a greater inclination to permit IIED claims against individual supervisors or co-workers than against a plaintiff's ultimate employer.[284] Therefore, the approach described in this Article is most likely to have its greatest impact in the case of individual supervisor liability where a clear gap in statutory law currently exists. A jury question as to the extreme and outrageous nature of conduct might also exist in some cases where an employer encourages or tolerates co-worker retaliation against an employee who has complained of unlawful harassment.

In keeping with the approach described by the Pennsylvania and Illinois courts, retaliatory conduct should be a weighty factor in the determination of whether conduct is extreme and outrageous. And where the plaintiff is a victim of both harassment and retaliation in response to complaints of such harassment, a jury question should ordinarily exist with respect to an IIED claim.

3217183, at *12 (E.D. Pa. Sep. 30, 2009) (dismissing claim under Pennsylvania's approach).

[283] *See* William R. Corbett, *"You're Fired!": The Common Law Should Respond with the Refashioned Tort of Abusive Discharge*, 41 BERKELEY J. EMP. & LAB. L. 63, 112 (2020) (stating that the "large body of case law finding that discharges are not outrageous because employers are exercising their lawful right is too powerful to overcome").

[284] *See* Snyder v. Med. Serv. Corp., 35 P.3d 1158, 1163 (Wash. 2001) (stating that plaintiff may have had a claim against supervisor but instead brought claim against employer).