COOPER & SCULLY 2006 EMPLOYMENT LAW SEMINAR: STATE LAW TORTS IN THE WORKPLACE

Avoiding Liability for Employment Torts

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I. INTRODUCTION

The work environment is fast becoming a hotbed of litigation between employees and employers wherein employees sue their employers for alleged tortious activities occurring in the workplace.

In April 2006, a plot unfounded in the media weaving a tale of a 53-year-old security company employee who was spanked as part of a camaraderie exercise at work. *Employee Spanking Could Cost $1.2M*, CBS NEWS, April 27, 2006. Janet Orlando quit her job at Alarm One in Fresno and sued the company alleging discrimination, assault, battery, and infliction of emotional distress. *Id.* According to court documents, employees were paddled with rival companies' yard signs in a contest pitting sales teams against each other. *Id.*

Winners of the contest "poked fun" at the losers in what has been described as "a fraternity hazing ritual reminiscent of Animal House," by throwing pies at them, feeding them baby food, making them wear diapers, and swatting their buttocks. *Employee Spanking Could Cost $1.2M*, CBS NEWS, April 27, 2006; Trevor Johnston, *That's Going to Leave a Mark: Jury Awards $1.7 Million in Employee Spanking Case*, WORK CITE, May 4, 2006. The company contended that the spankings were part of a voluntary program used to build camaraderie. *Employee Spanking Could Cost $1.2M*, CBS NEWS, April 27, 2006.

Orlando asked the jury to award her at least $1.2 million for the humiliation she suffered. *Id.* The company stopped the practice in 2004 after another employee complained about being injured. *Id.* The jury awarded Orlando $10,000 economic loss, $40,000 for future medical costs, $450,000 for emotional distress, pain, and suffering, and $1.2 million as punitive damages. Trevor Johnston, *That's Going to Leave a Mark: Jury Awards $1.7 Million in Employee Spanking Case*, WORK CITE, May 4, 2006.

Moreover, this is not a one-time occurrence. In November 2004, two young female employees at a Chattanooga, Tennessee shaved ice company complained the owner spanked them for mistakes. Trevor Johnston, *That's Going to Leave a Mark: Jury Awards $1.7 Million in Employee Spanking Case*, WORK CITE, May 4, 2006. The allegations were the employee was bent over the owner's knee and spanked when forgetting to put a banana in a smoothie. *Id.* As a condition of their employment, the girls were required to sign statements giving the owner permission to spank them. *Id.*

In June 2006, allegations from another teen surfaced wherein she complained her employer Dr. Peter John Fenner spanked her after she made a mistake with some paperwork. Tanya Moore, *Doctor Accused of Spanking Teen*, THE COURIER-MAIL, June 26, 2004.

So aside from abstaining from spanking employees, how can employers avoid liability for torts in the workplace? In an attempt to answer that question, this paper explores several common workplace torts (other than those involving discrimination or violation of state or federal labor law), and issues affecting employer liability and, potentially, insurance coverage for that liability.

II. WHAT IS AN EMPLOYMENT TORT?

First, employers may be asking themselves, what type of conduct constitutes a tort in the workplace. Some commonplace employment torts include assault and battery, false imprisonment, invasion of privacy, defamation, negligence, and intentional infliction of emotional distress.

Assault and battery in the workplace could include some scenarios as rare as (or is it?) the news headlines involving spanking of employees. However, more commonplace occurrences of assault in the workplace transpire between employees.

A claim for false imprisonment frequently arises where an employee is suspected of impropriety. Management may seek out that employee to question him or her about that impropriety –sometimes in a small, enclosed space and under perceived duress, where the employee believes he or she cannot leave.

Employee privacy concerns may be implicated where an employer conducts credit checks, mandates drug testing, reviews confidential medical records, checks up on the employee's off-site activities, and searches employee desks, offices, or lockers.[1]

[1] *See K-Mart Corporation Store No. 7441 v. Trotti*, 677 S.W.2d 632, 638 (Tex.App.–Houston [1st Dist.] 1984, writ ref'd n.r.e.) (where the court found that an employee demonstrated a legitimate expectation to a right of privacy in her locker and her personal effects contained within the locker); *cf. Jennings v. Minco Technology Labs, Inc.*, 765 S.W.2d 497, 500 (Tex.App.–Austin 1989, writ denied) (where Texas courts have decided that drug testing of private sector employees does

Defamation normally arises in the context of an employee either resigning or being terminated from employment where an employer gives a negative reference to prospective employers or discloses the reason the employee was fired.

A claim for negligence can include negligent hiring, supervision, training, or retention. These claims arise in a context where an employee sexually assaults or otherwise assaults another employee or patron.

Last, intentional infliction of emotional distress claims are normally pursued in conjunction with other causes of action, such as wrongful discharge, defamation, or sexual harassment. Employees frequently claim some action by the employer or conduct through its employees or agents has caused mental anguish, lack of sleep, depression, humiliation, or embarrassment.

This paper will concentrate on four of these torts: (1) intentional infliction of emotional distress, (2) defamation, (3) negligent hiring, supervision, training, and retention, and (4) assault.

III. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

A. Elements of a Claim for Intentional Infliction of Emotional Distress

To recover for intentional infliction of emotional distress, a plaintiff must prove that (1) the defendant acted intentionally or recklessly; (2) the conduct was extreme and outrageous; (3) the defendant's actions caused the plaintiff emotional distress; and (4) that the resulting emotional distress was severe. *Hoffmann-La Roche, Inc. v. Zeltwanger*, 144 S.W.3d 438, 445 (Tex. 2004); *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 611 (Tex. 1999).

B. What is Extreme and Outrageous Conduct?

Extreme and outrageous conduct is conduct so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. *Zeltwanger*, 144 S.W.3d at 445 (quoting *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993)). Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. *GTE Southwest, Inc.*, 998 S.W.2d at 612.

1. *Determining what Conduct Is Extreme and Outrageous*

To determine whether certain conduct is extreme and outrageous, the court will consider the context and the relationship of the parties. *GTE Southwest, Inc.*, 998 S.W.2d at 612. A course of conduct should be evaluated as a whole to determine whether it was extreme and outrageous. *Tiller v. McLure*, 121 S.W.3d 709, 715 (Tex. 2003) (per curiam).

A claim for intentional infliction of emotional distress does not lie for ordinary employment disputes. *GTE Southwest, Inc.*, 998 S.W.2d at 612. Thus, to establish a cause of action in the workplace, an employee must prove the existence of some conduct that brings the dispute outside the scope of an ordinary employment dispute and into the realm of extreme and outrageous conduct. *Id.* at 613. Such extreme conduct exists only in the most unusual of circumstances. *Id.* Further, post-termination conduct may constitute intentional infliction if it goes beyond all possible bounds of decency, but again ordinary post-termination disputes are insufficient to support liability. *See Creditwatch, Inc. v. Jackson*, 157 S.W.3d 814, 817 (Tex. 2005). When repeated or ongoing severe harassment is shown, the conduct should be evaluated as a whole in determining whether it is extreme and outrageous. *GTE Southwest, Inc.*, 998 S.W.2d at 616.

It is for the court to determine, in the first instance, whether a defendant's conduct was extreme and

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not amount to a tortious invasion of privacy when there is consent); *Texas Employment Comm'n v. Hughes Drilling Fluids, Inc.*, 746 S.W.2d 796, 801-02 (Tex.App.–Tyler 1988, writ denied) (same); *McLaren v. Microsoft Corp.*, No. 05-97-00824-CV, 1999 WL 339015, *1, *4 (Tex.App.–Dallas 1999, no pet.) (mem. op.) (distinguishing email storage system from employee locker scenario in *Trotti* and finding that employee had no privacy interest in personal email). Accordingly, the question is whether an employee had a reasonable expectation of privacy. *See Trotti*, 677 S.W.2d at 638.

Thus, employers should develop clear employment policies and procedures and evaluate whether those policies further legitimate business needs and objectives. These policies should notify employees that their desks, offices, cubicles and/or lockers are subject to search without notice and that their email, telephone calls, and voice mail are subject to monitoring. The employer might also want to consider signed consent forms or signed acknowledgment of the policies and procedures.

outrageous. *GTE Southwest, Inc.*, 998 S.W.2d at 616. But when reasonable minds may differ, it is for the jury, subject to the court's control, to determine whether, in a particular case, the conduct was sufficiently extreme and outrageous to result in liability. *Id.*

2. *Courts Impose High Burden on Parties to Show Extreme and Outrageous Conduct*

a. Rumors and False Firing of a Sales Supervisor Insufficient to Support Finding of Extreme and Outrageous Conduct

In *Richard Rosen, Inc. v. Mendivil*, former employee Fernando Mendivil sued his employer Richard Rosen and Vice-President Kirk Sales (collectively "defendants") for intentional infliction of emotional distress and defamation based on conduct leading to and after his employment with the company. *Richard Rosen, Inc. v. Mendivil*, __S.W.3d__, No. 08-04-00077-CV, 2005 WL 3118005, *1, *1 (Tex.App.–El Paso 2005, no pet.). The jury found in Mendivil's favor, and the defendants filed a motion for judgment notwithstanding the verdict ("JNOV"). *Id.* The trial court granted the JNOV with respect to punitive damages awarded against Sales and then rendered judgment on the verdict. *Id.* Richard Rosen, Inc. ("appellant") then appealed. *Id.*

Appellant operated retail stores in Texas and New Mexico, and Mendivil started work as a supervisor for the New Mexico stores in November 1992 reporting to Sales. *Id.* By 1994, Mendivil was supervising six stores, and in March 1995, the company issued a memo formally announcing Mendivil as the immediate supervisor of its New Mexico operations praising his hard work and track record. *Id.* As part of his position, Mendivil traveled between stores, transported special orders, and moved products to balance out inventory. *Id.* He attended weekly management meetings in El Paso. *Id.* Six months after starting with the company, the company purchased a van for his use and reimbursed gas and maintenance. *Id.*

After March 1995, Mendivil started having communication problems with Sales and Mr. Richard Rosen ("Rosen") due to a disagreement about sales strategy. *Id.* at *2. In April, they had a disagreement about cutting back mailing costs, and Rosen changed remodeling done by Mendivil. *Id.* Mendivil decided to resign due to lack of cooperation from Rosen and Sales. *Id.* Mendivil met with Sales on June 10, 1995 and informed him he planned to resign. *Id.* Sales reminded Mendivil that he was the highest paid employee and had a van. *Id.* Mendivil stated that he would continue to work until inventory was done and to settle up on bonuses so that his resignation would be effective August 1. *Id.*

Mendivil and Sales phoned Rosen to inform him about the resignation. *Id.* On June 26, 1995, Sales suggested that Mendivil move up his last day, but Mendivil explained he had already made plans based on the August 1 resignation. *Id.* Sales suggested they discuss the situation with Rosen; however, Rosen had already left for the day. *Id.* On June 28, Mendivil spoke with Rosen about his conversation with Sales. *Id.* at *3. Rosen tried to talk Mendivil out of leaving and stated he could fix the problem. *Id.* Two days later, Mendivil wrote a letter to Rosen detailing his reasons for resignation, his discussed departure date, and requested a meeting to discuss accounting for his time and severance-related matters. *Id.* at *3-*4.

Around July 1, Mendivil began hearing rumors from other employees that he was fired. *Id.* at *4. Mendivil faxed a letter that day to Rosen and the store managers correcting the rumors. *Id.* However, no one from the company contacted him about the letter. *Id.* Before the July 4 weekend, Mendivil received a message from the Santa Fe store manager that he was wanted in El Paso on Monday. *Id.* On his way, he stopped in at the Alamogordo store to pick up some inventory. *Id.* The store manager asked him what he was doing there since he had been fired. *Id.* Mendivil continued on his way to El Paso. *Id.* Upon his arrival, Sales told him it was best for the company for Mendivil to leave immediately and demanded the keys to the van. *Id.* This conversation took place on the sales floor in front of other people. *Id.* Mendivil had no way to get back to Santa Fe and pleaded with Sales to allow him an hour to make travel arrangements. *Id.* at *4-*5. Mendivil's mother followed him back downtown to take the van back. *Id.* at *5. Mendivil asked Sales to sign a receipt that the van was in good order, but Sales refused and threatened to call the police. *Id.* Mendivil felt humiliated by Sales's threats. *Id.* Mendivil's mother was embarrassed, upset, and started crying. *Id.* After another employee stated that the van appeared to be in good order, Mendivil handed over the keys. *Id.* He returned home with his mother and felt traumatized and thought it was outrageous to have to go through such an experience. *Id.* His mother stated that Mendivil was very distraught and pale after the incident. *Id.*

The false statements that Mendivil had been fired continued after July 5 with store managers still discussing the "firing" six to eight weeks later. *Id.* Mendivil was still hearing the rumor six to eight months later as he applied for other positions. *Id.* In seeking employment, Mendivil contacted the sales representative at Western Warehouse to set up a meeting. *Id.* However, the representative did not want to set up a meeting after hearing that Mendivil had been fired. *Id.* Mendivil received similar responses from other sales representatives in New Mexico. *Id.* Mendivil could not find employment in Santa Fe because it was a small community and everyone thought he had been fired. *Id.* at *6. He finally started his own business in El Paso in February 1996. *Id.* Mendivil failed in his attempts to collect his vacation pay and bonus. *Id.*

When he left the company, Mendivil described himself as devastated, embarrassed, humiliated, depressed, and unhappy. *Id.* at *7. He was dazed and could not think clearly. *Id.* He also suffered due to the company's false statements about him being fired. *Id.* He did not believe he could approach potential employers due to the rumor he was fired. *Id.* He was also nervous because he had an obligation to pay his son's education costs. *Id.* In the six months that followed, Mendivil could not sleep, his girlfriend left him, and his relationship with his son was strained due to his inability to pay for his son's education. *Id.* He sought psychological counseling in 1998 from Dr. Gary Feldman. *Id.* Feldman provided that Mendivil suffered from moderate clinical depression, including physical symptoms such as high blood pressure and cholesterol levels and that Mendivil's termination and falling out with the company caused his depression. *Id.*

On appeal, appellant complained there was no evidence of extreme and outrageous conduct. *Id.* at *9. Mendivil relied on the following conduct to show that appellant engaged in a course of conduct that was extreme and outrageous: (1) around July 1, he heard rumors he had been fired from other employees, some which were told by Rosen; (2) on July 5, Rosen told the Alamogordo store manager that he had been fired; (3) he was asked to attend a meeting in El Paso without being told its purpose; (4) the company did not warn him they intended to take away the van even though they knew it was his only source of transportation; (5) when demanding the van, Sales spoke loudly in public and threatened to call the police; (6) Sales refused to sign a receipt for the van instead yelling at him in front of passerby, threatening to call the police, and making his mother cry; (7) following July 5, he continued to hear rumors that he had been fired from prospective employers; (8) as late as February 1996, Rosen reported the firing to a store manager; (9) Sales refused a promised recommendation; (10) the company refused to pay him for vacation time and his earned bonus; (11) when he tried to collect his money, he was accused of extortion and blackmail and threatened with criminal charges. *Id.* at *10.

In reviewing the legal sufficiency of the evidence, the court of appeals concluded that the appellant's conduct did not rise to the level of extreme and outrageous conduct sufficient to meet the exacting requirements of an intentional infliction of emotional distress claim. *Id.* (*citing Creditwatch, Inc.*, 157 S.W.3d at 816). Recognizing that rude behavior does not equate to outrageousness and that behavior is not outrageous simply because it is tortious, the court stated that while representatives treated Mendivil rudely, insensitively, verbally threatened him and defamed his reputation, their conduct did not raise to the level of outrageousness necessary to establish the tort. *Id.*

b. Denial of Phone Access to Sick Child Insufficient to Take It Out of Realm of Ordinary Employment Disputes

Former employee Juanita Fletcher sued her employer the City of Houston and her supervisor Susan McMillian (collectively "defendants") asserting an age discrimination claim against the city and a claim for intentional infliction of emotional distress against McMillian. *City of Houston v. Fletcher*, 166 S.W.3d 479, 483 (Tex.App.–Eastland 2005, review denied). The jury found in favor of Fletcher, and defendants appealed. *Id.* On appeal, Fletcher relied on the following evidence to support her claim that McMillian's conduct was extreme and outrageous: (1) McMillian engaged in daily, humiliating verbal confrontations, insults, and name-calling against her such as calling stupid, senile, and incompetent; (2) McMillian often screamed at her in front of other employees; (3) McMillian, while knowing that her daughter was very ill at home, did not allow her to receive phone calls but transferred her calls to another employee; (4) McMillian demoted her; (5) McMillian took away her job duties and made her perform menial tasks; (6) McMillian permitted younger employees to give her orders, (7) McMillian permitted younger, less-qualified employees to perform her job duties; (8) McMillian imposed overly burdensome reporting requirements on her; (9) McMillian refused to allow her to attend key meetings or conduct field research

necessary to do her job; (10) McMillian did not allow her to receive essential email communications; and (11) McMillian prohibited her, but not others, from communicating with persons in other departments. *Id.* at 492.

However, the court found that the evidence was insufficient to support a finding that McMillian engaged in extreme and outrageous conduct. *Id.* The court concluded Fletcher did not prove the existence of some conduct that brings the dispute outside the scope of an ordinary employment dispute and into the realm of extreme and outrageous conduct. *Id.* at 492-93 (citing *GTE Southwest, Inc.*, 998 S.W.2d at 613). The court recognized that Fletcher argued that the denial of telephone access to her ill child took the case out of the realm of an ordinary employment dispute; however, the court provided that her line was transferred to another employee and that the employee could give her messages. *Id.* at 493. The court determined that the phone call transferring did not constitute extreme and outrageous conduct nor did McMillian's name-calling. *Id.*

C. Intentional Infliction of Emotional Distress As a Gap-Filler Tort

The Texas Supreme Court held in *Standard Fruit and Vegetable Co. v. Johnson*, 985 S.W.2d 62, 68 (Tex. 1998) that intentional infliction of emotional distress was a gap-filler tort judicially created for the limited purpose of allowing recovery 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. The Court provided that the tort's clear purpose was to supplement existing forms of recovery by providing a cause of action for egregious conduct that might otherwise go unremedied. *Id.* The Court also cautioned that the tort of intentional infliction of emotional distress was a gap-filler tort that should not be extended to circumvent the limitations placed on the recovery of mental anguish damages under more established tort doctrines. *Id.*

The Court recently reiterated that the tort should not be extended to thwart legislative limitations on statutory claims for mental anguish and punitive damages. *Zeltwanger*, 144 S.W.3d at 447. The tort has no application when the actor intends to invade some other legally protected interest even if emotional distress results. *Id.* Accordingly, where the gravamen of a plaintiff's complaint is really another tort, then intentional infliction of emotional distress should not be available. *Id.*

1. *Employee Cannot Combine Claims for Sexual Harassment and Intentional Infliction of Emotional Distress to Gain Damages in Excess of Legislative Limits*

In *Hoffman-La Roche Inc. v. Zeltwanger*, former employee Joan Zeltwanger sued her employer Hoffman-La Roche ("Hoffman") for sexual harassment, retaliation, and intentional infliction of emotional distress and her supervisor Jim Webber for intentional infliction of emotional distress. 144 S.W.3d at 441-42. Zeltwanger prevailed on all her claims except for retaliation. *Id.* at 442. The court of appeals affirmed the awarded damages, and Hoffman appealed only the intentional infliction of emotional distress claim to the Texas Supreme Court. *Id.*

Zeltwanger began working as a sales representative for Hoffman in November 1990 out of her home. *Id.* Until 1992, she worked under sales manager Betty Turicchi. *Id.* However, when Turicchi became a supervisor in another region, Webber became her supervisor. *Id.* Webber began telling dirty jokes in front of her the last half of 1992 and engaged in other objectionable conduct. *Id.* Zeltwanger discussed Webber's conduct with Turicchi, who gave her pointers and told her to document everything. *Id.* However, Turicchi warned her that making a sexual harassment claim would jeopardize Zeltwanger's chances of advancement. *Id.* at 443. Zeltwanger eventually contacted human resources, and on August 19, 1994, she faxed a handwritten statement of her complaints against Webber. *Id.* On August 24, Webber conducted a regularly-scheduled performance review of Zeltwanger, which was also attended by Turicchi. *Id.* at 444. Webber criticized her job performance and her sales skills. *Id.* Shortly following the review, Hoffman concluded its investigation of Zeltwanger's complaints and fired Webber. *Id.* At the end of 1994, Zeltwanger received notice that she was being fired. *Id.* The jury awarded Zeltwanger approximately $8.5 million for mental anguish and punitive damages under her sexual harassment claim and about $9 million for her mental anguish and punitive damages under her intentional infliction of emotional distress claim. *Id.* at 446. Due to the duplication, the trial court allowed Zeltwanger to take her mental anguish and punitive damages under her IIED claim and collect only her front and back pay under her statutory claim. *Id.* Her statutory recovery for the damages would have been capped at $300,000. *Id.*

In the Supreme Court, Hoffman complained that Zeltwanger improperly used her IIED claim to circumvent the legal limitations on the amount of mental anguish and punitive damages recoverable in a sexual harassment action. *Id.* The Court agreed concluding that an IIED claim should not be extended to thwart legislative limitations on statutory claims for mental anguish and punitive damages. *Id.* at 447. The Court recognized that by combining her sexual harassment claim with her IIED claim, Zeltwanger had circumvented, by more than thirty-fold, the legislative determination of the maximum amount that a defendant should pay for this type of conduct. *Id.*

Subsequently, the courts of appeals have consistently concluded that plaintiffs cannot seek damages for intentional infliction of emotional distress in conjunction with damages for some other legally protected right. For example, the Fourteenth District Court of Appeals in Houston determined that a plaintiff cannot pursue a claim for intentional infliction of emotional distress based solely on her defamation claim. *Oliphint v. Richards*, 167 S.W.3d 513, 517 (Tex.App.–Houston [14th Dist.] 2005, review denied). The court provided that because Oliphint did not even attempt to base his claim for intentional infliction of emotional distress on facts independent of his defamation claim, a claim for IIED was not available. *Id.* (citing *Zeltwanger*, 144 S.W.3d at 447 ("Where the gravamen of a plaintiff's complaint is really another tort, intentional infliction of emotional distress should not be available.")).

D. Interplay of the Worker's Compensation Act and Claims for Intentional Torts

1. *Employee Who Seeks Worker's Compensation Benefits May Also Recover for an Intentional Tort Committed by Co-Employee*

If an employee is injured during the course of his employment, the Worker's Compensation Act provides his sole remedy, and he generally may not sue his employer for common law liability for negligence of even gross negligence. *Walls Reg'l Hosp. v. Bomar*, 9 S.W.3d 805, 806-07 (Tex. 1999); *Rodriguez v. Naylor Indus., Inc.*, 763 S.W.2d 411, 412 (Tex. 1989). However, an employer may be liable for intentional torts committed by one employee against another, but "intent" is narrowly defined as a desire to cause harmful consequence or a belief that such harm is substantially certain to result. *Rodriguez*, 763 S.W.2d at 412. The employer must also generally be shown to have some involvement in the injury. *Reed Tool Co. v. Copelin*, 689 S.W.2d 404, 406 (Tex. 1985). However, an intentional failure to provide a safe workplace does not amount to intentional injury unless the employer believes that its conduct is substantially certain to cause the harm. *Rodriguez*, 763 S.W.2d at 412. An allegation of willful negligence or willful gross negligence does not allege an intentional injury. *Castleberry v. Goolsby Bldg. Corp.*, 617 S.W.2d 665, 666 (Tex. 1981).

If an employee opts to receive worker's compensation benefits for an injury sustained in the scope of his employment, the employee may be considered to have made an election of remedies and thus be barred from seeking damages for an intentional tort from his employer. *Medina v. Herrera*, 927 S.W.2d 597, 600-02 (Tex. 1996). The Act does not, however, shield a third party, such as another employee or supervisor, from common law liability for an intentional tort. *Id.* at 602. Thus, if an intentional tort is employment-related, the employee's acceptance of worker's compensation benefits will not shield the third party from liability. *Id.* If the tort is not work-related, the injuries are not covered by the Act and the compensation remedy and the intentional tort remedy would be mutually exclusive. *Id.*

2. *Employee Not Barred from Seeking Damages for Intentional Infliction of Emotional Distress due to Conduct of Co-Employee*

In *Boullt v. Smith*, pro se appellant Boullt was injured during the course of his employment by Johnson Equipment Company. *Boullt v. Smith*, No. 03-02-00303-CV, 2004 WL 2357881, *1, *1 (Tex.App.–Austin 2004, no pet.) (mem. op.). Boullt sued the company, his supervisor Joe Smith, and the San Antonio representative Jack Doe (collectively "appellees") complaining about working conditions and medical care provided, alleging violations of his constitutional rights, and seeking damages for pain, suffering, and intentional infliction of emotional distress. *Id.* Appellees moved for partial summary judgment asserting that appellant's cause of action fell within the jurisdiction of the Worker's Compensation Commission and that appellant failed to exhaust his administrative remedies. *Id.* Boullt alleged that due to unsafe working conditions he was injured during the course of his employment and that appellees failed to provide him prompt and adequate medical care. *Id.* at *3. Appellees countered that appellant's acceptance of worker's compensation benefits barred his common law claims for

negligence or intentional torts. *Id.*

Boullt was employed by Johnson Equipment out of San Antonio in 1999. *Id.* at *1. Boullt and Smith were assigned to a project at Dell Computer in Austin where he had to pass through security checkpoints on the job site. *Id.* Boullt was wanted by police for parole violations and feared his status would be discovered if security information was reviewed. *Id.* He explained the problem to Smith, who told him to keep quiet about the warrant. *Id.* In August 1999, Smith stripped some electrical wires and inserted them into an extension cord in an attempt to raise a piece of equipment. *Id.* As Boullt reached under the equipment, the wires shifted and the equipment slammed down on his hand electrocuting him and amputating the ends of his fingers. *Id.* His fingers were reattached at the emergency room. *Id.* Boullt alleged that Smith deliberately failed to report the accident because he did not want Dell to know. *Id.* The day after the accident, Boullt spoke to Doe who stated that Johnson Equipment did not want to file a worker's compensation claim because it would tarnish the company's workplace safety record. *Id.* Because Doe refused to file a claim, Boullt was unable to attend an appointment to have the stitches examined and wound cleaned because he had no money. *Id.* When Boullt threatened to call the president of Dell, Doe filed a claim so that Boullt was able to obtain medical treatment. *Id.* Boullt alleged that after the claim was filed, Doe began taking steps to have Boullt's parole revoked and to have Boullt's compensation reduced. *Id.* In December 1999, Boullt arrived at the commission's offices for a benefits review and was arrested for parole violations. *Id.*

The trial court granted appellees' motion for partial summary judgment and dismissed Boullt's remaining claims for want of prosecution. *Id.* at *1. On appeal, the court found that Boullt's initial injury was clearly work-related and that any further injury or exacerbation of that injury caused by delay in receiving worker's compensation benefits as a result of Doe's reluctance to file a claim was also work-related. *Id.* at *4. Thus, the court agreed that Boullt's acceptance of worker's compensation benefits barred him from seeking common law damages from Johnson Equipment for negligence or intentional torts. *Id.* Further, the court determined that the "exclusive remedy" rule extended the employer's immunity from liability for negligence or gross negligence to co-employees. *Id.* Thus, the trial court did not err in granting summary judgment as to Johnson Equipment, Smith, and Doe as to Boullt's claims for negligence and gross negligence. *Id.* However, the court found it was error to grant summary judgment on Boullt's claims of intentional tort against Doe and Smith because the intentional tort was work-related and committed by a co-employee. *Id.* at *5.

E. Conclusion

In conclusion, recent court decisions show that employees carry a heavy burden to establish claims for intentional infliction of emotional distress. Courts rarely find that conduct brings the dispute out of an ordinary employment dispute. Further, plaintiffs have been precluded from seeking damages for emotional distress in an effort to bypass statutory damage caps and in addition to another tort that forms the sole basis for their emotional distress recovery.

IV. DEFAMATION

A. Elements of a Claim for Defamation

In order to prevail on a claim for defamation, the plaintiff must prove that (1) the defendant published a statement of facts; (2) the statement referred to the plaintiff; (3) the statement was defamatory, and (4) the defendant acted with negligence regarding the truth of the published statements. *WFAA-TV v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998). Slander is a defamatory statement that is orally communicated or published to a third person without legal excuse. *Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995). A libel is a defamation expressed in written or other graphic form that tends to injure a living person's reputation and expose that person to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation. TEX. CIV. PRAC. & REM. CODE § 73.001 (Vernon 2005).

A plaintiff is referred to in a defamatory statement if he is named in the statement or if those who know the plaintiff would understand that the statement was referring to the plaintiff. Newspapers, Inc. v. Matthews, 339 S.W.2d 890, 893 (Tex. 1960). In determining whether a statement is defamatory, the court will construe the statements as a whole, in light of surrounding circumstances and based upon how a person of ordinary intelligence would perceive the entire statement. *Carr v. Brasher*, 776 S.W.2d 567, 570 (Tex. 1989). A statement is defamatory if the words tend to injure a person's reputation, exposing the person to public hatred, contempt, ridicule, or financial injury. TEX. CIV. PRAC. & REM. CODE ANN. § 73.001 (Vernon 2005); *Austin v. Inet Technologies, Inc.*, 118 S.W.3d 491, 496 (Tex.App.–Dallas 2003, no pet.). However, a plaintiff

may not recover on a defamation claim based on a publication to which he consented or which he authorized, procured, or invited. *Lyle v. Waddle*, 188 S.W.2d 770, 772 (Tex. 1945).

Whether a statement is reasonably capable of defamatory meaning is a question of law to be determined by the court. *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 114 (Tex. 2000). Because the issue of defamatory meaning is a question of law, a jury should be permitted to determine a statement's meaning and the statement's effect on the ordinary person only when the court determines the language to be "ambiguous or of doubtful import." *Einhorn v. LaChance*, 823 S.W.2d 405, 411 (Tex.App.–Houston [1st Dist.] 1992, writ dism'd w.o.j.).

1. *Statements that Did not Sufficiently Identify the Employee or the Reasons He Was Fired Not Defamatory*

In *Henriquez v. Cemex Management, Inc.*, 177 S.W.3d 241, 245 (Tex. App.–Houston [1st Dist.] 2005, review denied), former employee Oswaldo Henriquez sued Cemex for wrongful breach of his employment contract, defamation, and business disparagement. In 2001, Henriquez entered into a contract with Cemex to serve as its procurement director. *Id.* His employment was to begin on September 1, 2001 for a minimum of three years. Id. After accepting employment, Henriquez and his family moved from Venezuela. *Id.* On December 2, 2002, Vice-President of Human Resources Andy Miller terminated Henriquez's employment. *Id.* Henriquez testified that he was fired because Cemex representatives believed he had stolen money by taking money under the table from two vendors. *Id.* In his lawsuit, Henriquez asserted that Cemex through its authorized officers, agents, and employees disseminated and wrongfully published certain incorrect facts about him to Roland Sped and its owner Alfredo Tauszky and IFS and its owner Ramon Montesano. *Id.* at 247. Henriquez also alleged that Cemex made defamatory statements about him in Houston and abroad accusing him of unlawful acts including receipt of unmerited and unapproved commissions in excess of one million dollars. *Id.*

Henriquez specifically identified seven instances of defamation: (1) during a September 2002 meeting between Tauszky and Francisco Perez, Jaime Elizondo, and Eduardo Horowitz from Cemex Venezuela and Alfonso Caballero from Cemex Mexico, the Cemex representatives told Tauszky that Henriquez had taken money from Cemex and that they believed Henriquez had used his influence in helping Tauszky obtain business for Roland Sped; (2) during another September 2002 meeting between Francisco Perez of Cemex Venezuela and Ramon Montesano of IFS, Montesano was told that Cemex had "found quite a few irregular things and that they needed him to cooperate" and that someone at Cemex was being investigated in regard to the relationship between Cemex and IFS and Roland Sped; (3) in a meeting called by Perez of Cemex Venezuela, Perez told Cemex Venezuela employees that Henriquez had been fired because he had irregular business with suppliers and vendors; (4) a meeting between former Cemex employees P.R. Talluri and Maria Christina Gonzalez during which Talluri told Gonzalez that he had heard the Henriquez had been fired because he took money from vendors; (5) a conversation between Cezar Cruz and Tony Espinosa, both from Cemex, in which Cruz told Espinosa that Henriquez was going to be fired; (6) a statement made by Espinosa to Cemex employees Alex Calbrella and Marco Jerez that they should not talk to Henriquez because he was going to be fired; and (7) a statement by Francisco Salinas of Cemex to Ricardo Lobo of Cemex that "bad things" were being said about Henriquez. *Id.*

Cemex filed a summary judgment motion seeking dismissal of Henriquez's claims and asserting that Henriquez's defamation claim was precluded because the alleged defamatory statements were either not capable of a defamatory meaning or were subject to the qualified privilege of an employer to investigate employee wrongdoing. *Id.* at 245-46.

On appeal, the court found that the statement made to Ramon Montesano that "someone" at Cemex was being investigated with regard to their relationships with IFS and Roland Sped did not sufficiently identify Henriquez to be capable of defamatory meaning. *Id.* at 252. Further, Francisco Salinas's alleged statement that "bad things" were being said about Henriquez and Cruz's alleged statement to Espinosa and Espinosa's subsequent statements to Calbrella and Jerez that Henriquez was going to be fired were not sufficiently specific to be defamatory. *Id.* Because these statements did not contain specific reasons as to why Henriquez was being fired, they cannot be considered defamatory as a matter of law. *Id.*

2. *Employee Invited Defamation by Hiring Investigator to Check References*

In *Oliphant v. Richards*, former employee Barry

Oliphant sued his employer Jacobs Engineering and one of his supervisors Scott Richards. *Oliphant v. Richards*, 167 S.W.3d 513, 513 (Tex.App.–Houston [14th Dist.] 2005, review denied). Oliphint began working for a subsidiary of Jacobs Engineering in 1984 eventually working directly for Jacobs until his employment ended in 1991. *Id.* Richards was one of his supervisors from 1989 until 1991. *Id.* The day before his employment ended, Oliphint had a heated conversation with another supervisor Jimmy Lee. *Id.* Lee had asked Oliphint to perform an inspection earlier than scheduled, and Oliphint refused and hung up on Lee. *Id.* The next day, Richards called Oliphint into his office and told him his employment was being terminated. *Id.* At that time, Oliphint told his side of the story and informed Richards that he wanted to quit because he could not work with Lee anymore. *Id.* Oliphint claims that Richards agreed to document the separation as a resignation. *Id.* Richards denied this, and documented that Oliphint was terminated for performance and other problems related to alcohol. *Id.*

A few months later when Oliphint was interviewing for another job, he was asked about his separation from Jacobs, to which he responded he had resigned. *Id.* Oliphint testified that the interviewer shook his head in disgust and called him a liar. *Id.* When pressed for details, the interviewer told Oliphint that was not what Jacobs told him. *Id.* Oliphint eventually obtained another job, and held various jobs during the 1990s, but claims that he was turned down from a second job based on a suspected negative reference from Richards. *Id.* Oliphant began looking for a job in 2000 and was not satisfied with the results of his search. *Id.* So, in March 2002, he hired a private investigator to check his references. *Id.* The investigator first called the human resources department at Jacobs, and they would only verify dates of employment and positions held. *Id.* The investigator then called Richards directly, who told her Oliphint had been terminated for substance abuse problems. *Id.*

Oliphint denied having substance abuse problems, and based on Richards's statement to the investigator, sued Richards and Jacobs (collectively "appellees") for defamation, intentional infliction of emotional distress, and negligence. *Id.* Appellees filed a motion for summary judgment, which the trial court granted. *Id.* Oliphint appealed. *Id.*

On appeal, appellees argued that Oliphint's defamation claim was barred because he consented to or invited publication of the statement by hiring a private investigator to solicit a statement from Richards. *Id.* However, Oliphint contended that hiring an investigator did not amount to consent or invitation to defamation and relied on *Frank B. Hall & Co. v. Buck*, 678 S.W.2d 312, 617 (Tex.App.–Houston [14th Dist.] 1984, writ ref'd n.r.e.) and *Free v. American Home Assurance Co.*, 902 S.W.2d 51 (Tex.App.–Houston [1st Dist.] 1995, no writ). *Id.*

In *Buck*, the former employee was abruptly fired and unable to find another job, so he hired an investigator to determine the real reason he was fired. *Buck*, 678 S.W.2d at 617. The former employer made defamatory statements about him to the investigator. Id. On appeal, the court rejected the argument that the employee invited the defamation because there was nothing in the record to indicate that Buck knew his employer would defame him when the investigator made an inquiry. *Id.* In *Free*, the court again rejected the employer's argument that the former employee consented to the defamatory statements made to a headhunter because the employer could not establish as a matter of law that the plaintiff had reason to believe the employer would defame him when he requested his references be checked. *Free*, 902 S.W.2d at 53-55.

However, the court distinguished the situation as it applied to Oliphint because according to Oliphint's own testimony he knew within months of leaving Jacobs that appellees were contradicting his account of his separation leading a prospective employer to call him a liar. *Oliphant*, 167 S.W.3d at 513. Though he might not have known the exact statement, Oliphint clearly had reason to expect a defamatory statement. *Id.* Thus, the court concluded that by hiring an investigator, Oliphint invited the defamation. *Id.*

B. Who Can Be Held Responsible for Defamation in an Employment Context?

A corporation may be held liable for defamation by its agent if such defamation is referable to the duty owing by the agent to the corporation and was made in the discharge of that duty. *Texam Oil Corp. v. Poynor*, 436 S.W.2d 129, 130 (Tex. 1968); *Wal-Mart Stores, Inc. v. Lane*, 31 S.W.3d 282, 288 (Tex.App.–Corpus Christi 2000, pet. denied). A corporation may also be held liable for tortious acts of a vice-principal of the corporation. *Lane*, 31 S.W.3d at 288. A vice-principal is a corporate officer, a person with authority to employ, direct, and discharge servants of the master, or a person with whom the master has confided the management of the whole or part of a department of division of the business. *Id.*

C. Defenses to Defamation

1. *Defense of Qualified Privilege*

Legal excuse for defamation includes the defense for qualified privilege. *Hansen v. Our Redeemer Lutheran Church*, 938 S.W.2d 85, 92 (Tex.App.–Dallas 1996, writ denied). A qualified privilege attaches to bona fide communications, on a subject in which the speaker has an interest or duty to another person having a corresponding interest or duty. *Id.* This privilege is termed conditional or qualified because a person availing himself of it must use it in a lawful manner and for a lawful purpose. *Id.* Similarly, a conditional or qualified privilege attaches to employer communications made in the course of an investigation following a report of employee wrongdoing. *Randall's Food Markets*, 891 S.W.2d at 646. The privilege remains intact as long as communications pass only to persons having an interest or duty in the matter to which the communications relate. *Id.* Communications passing beyond those with an interest or duty in the subject matter are not privileged. *Id.* However, communications between company principals and employees, including communication concerning the termination of an employee, have been held to be protected by this privilege. *Id.*

2. *Question of Privilege is a Question of Law*

When the facts are undisputed and the language used in the publication is not ambiguous, the question of privilege is ordinarily a question of law. *TRT Dev. Co.-KC v. Meyers*, 15 S.W.3d 281, 286 (Tex.App.–Corpus Christi 2000, no pet.). A court determines, as a matter of law, whether a privilege exists. *Calhoun v. Chase Manhattan Bank (U.S.A.) N.A.*, 911 S.W.2d 403, 408 (Tex.App.–Houston [1st Dist.] 1995, no writ).

3. *Actual Malice Defeats the Privilege*

Proof that a statement was motivated by actual malice existing at the time of publication defeats the privilege. *Randall's Food Markets*, 891 S.W.2d at 646. A statement is made with actual malice when it is made with knowledge of its falsity or with reckless disregard as to its truth. *Id.* Reckless disregard is a high degree of awareness that the statement is probably false. *Carr*, 776 S.W.2d at 571. In a summary judgment context, if a defendant accused of defamation offers evidence that is "clear, positive and direct," even if such evidence is from an interested witness, establishing the lack of actual malice, the plaintiff must offer controverting proof to establish a fact issue as to malice. *Casso v. Brand*, 776 S.W.2d 551, 558 (Tex. 1989).

a. Statements Made to Those with an Interest in Obtaining Information, and Not Made with Actual Malice

In *Henriquez*, after finding that some of the alleged defamatory statements were not defamatory as a matter of law, the court examined whether the remainder of the statements were subject to the defense of qualified privilege. *Henriquez*, 177 S.W.3d at 252. The court found that the statements made to Tauszky and Montesano during the September 2002 meetings with Perez from Cemex were made in the course and scope of Cemex's investigation into the allegations that Henriquez, Roland Sped, and IFS were engaging in wrongful conduct. *Id.* at 253. These parties were part of the group being investigated so that they had an interest in the subject matter of the communication and a qualified privilege attached to the statements. *Id.* (citing *Randall's Food Markets, Inc.*, 891 S.W.2d at 646.).

Perez's statements to other Cemex Venezuela employees about Henriquez's termination were also protected by the privilege. *Id.* (citing *Randall's Food Markets*, 891 S.W.2d at 646 (providing that communications between company principals and employees, including information regarding the termination of an employee, have been held to be protected by the privilege)). The court determined that the summary judgment evidence showed that those who might have been informed of the reasoning behind Henriquez's termination had an interest or duty in the subject matter. *Id.* Last, the statement made by Talluri to Gonzalez cannot give rise to a claim against Cemex as neither was an employee of Cemex at the time the statements were made. *Id.*

However, the court recognized that the privilege would not apply if the statements were made with actual malice. *Id.* at 254. The evidence showed that Perez, who became regional procurement director for Cemex Venezuela in August 2001, assumed most of the responsibilities previously held by Henriquez and noticed charges being submitted by Roland Sped and IFS that were higher than he thought they should be. *Id.* Around the same time, he was notified by Cemex employee Heiddy Corredor about inappropriate business dealings between Cemex Venezuela, Roland Sped, and IFS. *Id.* Thus, Perez believed it was necessary to investigate the

relationship between Henriquez and IFS and Roland Sped. *Id.* As part of the investigation, Perez met with Roland Sped and IFS and believed that further investigation was needed, so he hired KPMG to conduct a full audit of the transactions. *Id.* Based on the investigation and the audit, Henriquez's employment was terminated because he believed that Henriquez had been involved in a scheme to overcharge Cemex. *Id.*

Henriquez cited two of his own affidavits to establish actual malice; however, the court determined that the affidavits did nothing to address actual malice as they did not counter Cemex's evidence that Perez conducted an investigation based on his own personal review of the documentation and based on allegations by another employee. *Id.* The affidavits did not address whether Cemex had a basis to conduct the investigation or whether anyone made defamatory statements with malice. *Id.* In fact, the court concluded that Cemex's summary judgment evidence established that Perez believed the statements made were factually correct and that he did not act with reckless disregard as to their truth or falsity in publishing the statements. *Id.*

b. No Privilege if Statement Made to Employee Without Interest or Duty with Regard to Information

In *Richard Rosen, Inc. v. Mendivil*, __S.W.3d__, No. 08-04-00077-CV, 2005 WL 3118005, *1, *1 (Tex.App.–El Paso 2005, no pet.), former employee Fernando Mendivil sued his employer Richard Rosen, Inc. ("appellant") and its Vice-President Kirk Sales for intentional infliction of emotional distress and defamation based on their conduct leading to and after the end of his employment with the company. On appeal, appellant argued that Mendivil could not establish that it defamed him because there was no evidence that Mr. Richard Rosen communicated the false statement that Mendivil had been fired to anyone outside the company or that the false statement was not received by a corporate employee in the course and scope of their duties for the company. *Id.* at *11. Essentially, appellant complained that it established the qualified privilege defense. *Id.* at *12. Appellant conceded that Mr. Richard Rosen ("Rosen") was an agent of the corporation and that Rosen's statements to store managers Garcia and Hinijosa that Mendivil had been fired were false. *Id.* However, appellant nevertheless argued that the statements were not made to anyone outside the company but only employees who were required to receive the false communication in the course and scope of their duties for the company. *Id.* Appellant provided that Garcia and Hinijosa worked closely with Mendivil and were in the circle of company employees required to receive the communication. *Id.*

Mendivil provided that by July 1 he began to hear rumors that he had been fired from several store employees who received the news from Rosen himself. *Id.* Garcia testified that Rosen called him on July 5 and told him Mendivil had been fired. *Id.* The court stated that even if Rosen made the communication out of a duty to report the a co-worker who held a corresponding interest in the information in the course and scope of his position, there was evidence that the false statement was made several months after Mendivil's employment ended. *Id.* Further, Mendivil was no longer Hinijosa's immediate supervisor so there was no business reason for Rosen to communicate the false statement to Hinijosa. *Id.* Thus, the court concluded that because Rosen communicated the defamatory statement to a company employee who did not have an interest or duty with regard to the information, then appellant could not conclusively establish a qualified privilege defense as a matter of law. *Id.*

D. Conclusion

To avoid liability for defamation, employers should first counsel their supervisory employees against making untruthful or derogatory comments about lower level employees or employees over whom the supervisor has management responsibility. Second, the employer should implement a policy whereby when an employee is terminated or resigns, that the reasons for that termination or resignation should only be disclosed to employees who absolutely need to know those reasons in the course and scope of their duties for the employer.

V. NEGLIGENT HIRING, SUPERVISION, TRAINING, AND RETENTION

A. Elements of Claim for Negligently Hiring, Supervising, Training, or Retaining an Employee

The elements of negligently hiring, supervising, training, or retaining an employee are as follows: (1) the employer owed the plaintiff a legal duty to hire, supervise, train, or retain competent employees; (2) the employer breached that duty; (3) the breach proximately caused the plaintiff's injury. *Rosell v. Cent. W. Motor Stages, Inc.*, 89 S.W.3d 643, 655 (Tex.App.–Dallas 2002, pet. denied); *Labella v. Charlie Thomas, Inc.*, 942 S.W.2d 127, 137 (Tex.App.–Amarillo 1997, writ denied).

However, the employer cannot be held liable if the employee does not commit an actionable tort recognized under common law. *Gonzales v. Willis*, 995 S.W.2d 729, 739-40 (Tex.App.–San Antonio 1999, no pet.). As such, negligent hiring is a dependent tort. *Id.*

B. Tort is Based on Employer's Own Negligence

A claim of negligent hiring and supervision is based on an employer's direct negligence instead of the employer's vicarious liability for the torts of its employees. *See Doe v. Boys Club of Greater Dallas, Inc.*, 868 S.W.2d 942, 950 (Tex.App.–Amarillo 1994), *aff'd by*, 907 S.W.2d 472 (Tex. 1995). Under the tort of negligent hiring and supervision, an employer who negligently hires an incompetent or unfit individual may be directly liable to a third party whose injury was proximately caused by the employee's negligent or intentional act. *Verinakis v. Med. Profiles, Inc.*, 987 S.W.2d 90, 97-98 (Tex.App.–Houston [14th Dist.] 1998, pet. denied). The basis of responsibility is the employer's own negligence in hiring an incompetent employee whom the employer knows, or by the exercise of reasonable care should have known, to be incompetent or unfit, thereby creating an unreasonable risk of harm to others. *Estate of Arrington v. Fields*, 578 S.W.2d 173, 178 (Tex.Civ.App.–Tyler 1979, writ ref'd n.r.e.). One who retains the services of another has a duty to investigate the background for the fitness for the position and to remain knowledgeable of that fitness. *Robertson v. Church of God Int'l*, 978 S.W.2d 120, 125 (Tex.App.–Tyler 1997, pet. denied). The employer is liable if another person is injured in some manner related to his employment because of lack of fitness. *Id.*

The duty of the employer or contractee extends only to prevent the employee or independent contractor from causing physical harm to a third party. *See Sibley v. Kaiser Found. Health Plan of Tex.*, 998 S.W.2d 399, 403-04 (Tex.App.–Texarkana 1999, no pet.); *Hendrix v. Bexar County Hosp. Dist.*, 31 S.W.3d 661, 662 (Tex.App.–San Antonio 2000, pet. denied) (involving sexual assault of patient by hospital employee); *Duran v. Furr's Supermarkets, Inc.*, 921 S.W.2d 778, 789-90 (Tex.App.–El Paso 1996, writ denied) (involving assault and battery of a customer).

C. Application of the Worker's Compensation Act

Generally where employees sustain certain injuries while working, the employee's exclusive remedy is the Worker's Compensation Act. *Walls Reg'l Hosp. v. Bomar*, 9 S.W.3d 805, 806 (Tex. 1999). The Worker's Compensation Act provides the exclusive remedy for employee injury sustained in the course of their employment. *Id.* However, some injuries are not compensable under the Act, including those that arise out of an act of a third person intended to injure the employee because of a personal reason and not directed at the employee as an employee or because of the employment. *Id.* This exception is labeled the "personal animosity" exception. *Id.*

The purpose of the personal animosity exception is to exclude from coverage those injuries resulting from a dispute which has been transported into the place of employment from the injured employee's private or domestic life, at least where the animosity is not exacerbated by the employment. *Id.* at 806-07. However, whenever conditions attached to the place of employment or otherwise incident to the employment are factors in a catastrophic combination, the consequent injury arises out of the employment. *Id.*

The Texas Supreme Court found the exception did not apply where a restaurant manager was stabbed by a customer's jealous boyfriend because his job duties included interaction with customers. *See Nasser v. Sec. Ins. Co.*, 724 S.W.2d 17, 19 (Tex. 1987). The exception also did not apply where two nurses alleged they were harassed at work by one of the doctors because all the incidents occurred while plaintiffs were doing their jobs and the doctor was doing his. *See Bomar*, 9 S.W.3d at 807.

D. Torts Against Employees

An employer owes a duty to its employees to appropriately hire and supervise other employees.

1. *Personal Animosity Exception Did Not Apply Where Assault Occurred due to Work Dispute and Not Relationship or Animosity Outside of Employment*

In *Urdiales v. Concord Technologies Delaware, Inc.*, 120 S.W.3d 400, 402 (Tex.App.–Houston [14th Dist.] 2003, review denied), Richard Urdiales sued his former employee Concord Technologies ("Concord") after being assaulted by his supervisor Alfredo Cantu. On March 28, 2000, Cantu struck Urdiales in the chest with a steel pipe during an argument after Urdiales was late returning from lunch. *Id.* Cantu received a written warning from Concord. *Id.* Unhappy with Concord's

response, Urdiales sued Concord and Cantu for negligent hiring, retention, supervision, and training, among other causes of action. *Id.* at 403. Concord moved for summary judgment, which the trial court granted, and this appeal ensued. *Id.*

Concord's summary judgment motion argued that Urdiales's claims were barred by the Worker's Compensation Act. *Id.* at 404. On appeal, Urdiales did not dispute that he was covered by worker's compensation or that he was acting in the course and scope of his employment. *Id.* However, he argued that his injuries arose out of an act of a third person intended to injure him due to a personal reason and not directed at the employee of because of employment. *Id.*

However, the court determined that Urdiales identified no personal dispute or animosity that motivated Cantu to assault him. *Id.* at 405. In fact, the assault occurred after Cantu confronted him about being late for work. *Id.* Therefore, nothing showed that Cantu attacked him because of an event or a relationship outside of work. *Id.* Because Concord demonstrated as a matter of law that Cantu's dispute with Urdiales was directed at Urdiales as an employee and arose from his employment, the personal animosity exception under the Act did not apply and Urdiales's claim was barred by the Act. *Id.* Accordingly, the trial court properly granted summary judgment on the negligence claim against Concord. *Id.*

2. *Company's Stated Policy against Sexual Harassment Coupled with its Written Policies, Training, and Supervision Sufficient to Overcome Claim of Negligence*

In *Mackey v. U.P. Enterprises, Inc.*, 935 S.W.2d 446, 449, 451 (Tex. App.–Tyler 1996, no writ), employee Glenda Mackey sued her employer UPE, two managers, and the Taco Bell Corporation for eight separate causes of action based on sexual harassment, one including negligent supervision, training, and evaluation of her managers Ron Smith and Greg Johnson. Mackey was employed as an hourly wage employee in one of UPE's restaurant's under Smith's supervision. *Id.* at 449. She was later transferred to another restaurant where she was supervised by Johnson. *Id.* She was terminated in August 1991 for several reprimands for failure to report to work as scheduled and rudeness to customers. *Id.* The trial court granted summary judgment against Mackey on all eight causes of action. *Id.* at 451.

Under her negligence claim, Mackey alleged that UPE failed to adequately monitor Smith and Johnson's supervisory practices in their positions as store managers, failed to detect and take action to deter the alleged sexual harassment by Smith and Johnson, and failed to implement and monitor procedures for the handling of employee grievances. *Id.* at 459. UPE argued that the negligence claim was barred by the exclusive remedy for work-related injuries. *Id.* However, Mackey argued that the injuries she sustained from Smith's and Johnson's conduct were not work-related but were personal toward her. *Id.*

The court stated that UPE's summary judgment evidence showed that it had a written policy against sexual harassment posted in all its stores. *Id.* at 459-60. Further, new employees were required to read the policy and sign a statement acknowledging they had done so. *Id.* UPE stressed to all employees that sexual harassment was against company policy and conducted training sessions with its managers and employees at least twice per month. *Id.* Managers were also instructed regarding what conduct constituted sexual harassment and that they were responsible for controlling prohibited conduct. *Id.* UPE established and implemented a grievance procedure. *Id.* Officers and supervisors from the home office visited each restaurant daily to monitor activities. *Id.* Thus, UPE argued that it acted as a reasonable, prudent employer and was not negligent in supervising, training, and evaluating Smith and Johnson. *Id.*

The court determined that it was necessary for Mackey to submit summary judgment evidence to controvert these facts or specify other acts or omissions by UPE showing its failure to monitor, detect, or implement, and that she failed to do so. *Id.* Thus, the court found there was no genuine issue of material fact regarding UPE's alleged negligent supervision, training, and evaluation. *Id.*

3. *Employee Raised Issue of Fact Regarding Whether Sexual Assault Occurred in Scope of Her Employment*

In *Villanueva v. AstroWorld, Inc.*, 866 S.W.2d 690, 692 (Tex.App.–Houston [1st Dist.] 1993, writ denied), former employee Rosann Villanueva sued AstroWorld, S.F. Holdings, and Six Flags Corporation (collectively "defendants") alleging it was negligent and grossly negligent in the hiring, training, supervision, and control of its employees. During the summer of 1990, Villanueva worked as a ticket taker with fellow employee Joe Guerra. *Id.* Villanueva, who was sixteen at the time,

alleged that late one night in July or August that Guerra raped her in her ticket booth shortly after she closed her booth. *Id.* Guerra contended that Villanueva consented to sexual intercourse. *Id.* Before his employment, Guerra had been convicted of the third degree felony offense of unauthorized use of a motor vehicle. *Id.* AstroWorld sought summary judgment alleging that Villanueva's sole remedy was worker's compensation and that S.F. Holdings and Six Flags Corporation had no responsibility for hiring, training, supervision and control of AstroWorld employees. *Id.* Summary judgment was granted in favor of defendants, and Villanueva appealed. *Id.*

Villanueva first asserted that the trial court erred in granting summary judgment where material questions of fact were raised regarding whether her injuries were sustained in the course of employment. *Id.* at 693. In response to defendants' argument that her injury was covered by worker's compensation, Villanueva claimed her injuries fell under the personal animosity exception to the Worker's Compensation Act and were not the type of injury originating in the employer's work to be compensable under the Act. *Id.* The court provided that Villanueva's personal affidavit stated that on a prior occasion Guerra had asked her out on a date and that she refused. *Id.* at 694. Further, at the time of assault, Villanueva and Guerra were not having any disagreements concerning work, and the attack appeared to be motivated by Guerra's attraction to Villanueva. *Id.* Thus, the court found that Villanueva's affidavit raised a material fact issue as to the motivation of the attack on her that invoked the personal animosity exception of the Act. *Id.* Then, the burden shifted to defendants to prove as a matter of law that the assault did not arise from personal circumstances but from employment circumstances. *Id.*

Second, Villanueva argued that the trial court erred because S.F. Holdings and Six Flags Corporation failed to show that they were not her employer and that their subsidiary AstroWorld was adequately capitalized. *Id.* at 695. S.F. Holdings and Six Flags Corporation asserted that AstroWorld had exclusive control over the hiring of its employees and the security of its premises. *Id.* Villanueva argued that she raised fact questions as to who employed her. *Id.* The court recognized that Villanueva's W-2 form included both AstroWorld and Six Flags Corporation as her employers. *Id.* Thus, the court determined that Villanueva created a fact issue as to Six Flags Corporation but not as to S.F. Holdings. *Id.* at 695-96.

E. Torts Against Third Parties

An employer also owes a duty to third parties, who are not employees, to appropriately hire and supervise its employees.

1. *No Breach of Duty in Supervision of Youth Pastor*

In *Lynch v. Pruitt Baptist Church*, Dwayne and Karen Lynch, as next friend of their son Justin, sued the church for negligence alleging it had failed to supervise its youth pastor, Kevin Flowers; they also sued Flowers for negligence alleging he failed to exercise due care. *Lynch v. Pruitt Baptist Church*, No. 12-03-00310-CV, 2005 WL 736998, *1, *1 (Tex.App.–Tyler 2005, no pet.). Flowers organized a back-to-school activity for the church's teenagers, including a game of "capture the flag." *Id.* Fifteen-year-old Justin broke his neck while trying to take the flag from two boys, ages sixteen and thirteen, who were holding onto the flag and carrying it toward their team's base. *Id.* The trial court awarded a directed verdict in favor of the church finding that Flowers was not negligent. *Id.* On appeal, the court focused on the claim that the church negligently supervised Flowers thereby breaching its duty to Justin and reviewed the record to determine whether there was any probative evidence that the church breached its duty in supervising Flowers. *Id.* at *2.

During trial, the church's pastor testified that Flowers was hired as the youth minister in September 1997 and that he had carefully checked Flowers's references and training. *Id.* Flowers had received training at East Texas Baptist University in Marshall where had instructed on providing recreational activities for teenagers. *Id.* During the three years Flowers served as youth minister, he continued his training to improve his performance. *Id.*

The pastor stated that Flowers had performed his job well and regularly supervised games and other recreational activities for the church's teenagers. *Id.* Justin's parents also conceded that Flowers had been a good youth minister as did other witnesses. *Id.* at *3. In fact, there was no negative testimony in the record regarding Flowers's performing his job or the church's supervision of him in his responsibilities. *Id.* Thus, the court concluded there was no evidence to support the allegation that the church had negligently supervised Flowers. *Id.*

2. *Failure to Follow Regulatory Guidelines*

Did Not Establish Proximate Cause for Injuries and Death

In *Donaldson v. J.D. Transportation*, Jack and Shirley Donaldson sued J.D. Transportation Company and Jaime Dominguez under the wrongful death and survival statutes as a result of their death of their daughter Nerissa Villarreal. *Donaldson v. J.D. Transportation Co.*, No. 04-04-00607-CV, 2005 WL 1458230, *1, *1 (Tex.App.–San Antonio 2005, no pet.). On June 2, 2002, Ruben Villarreal, a truck driver employed by J.D. Transportation, was driving a commercial truck with his wife Nerissa as a passenger and had an accident. *Id.* Both Ruben and Nerissa were killed in the accident. *Id.* The Donaldsons' suit alleged that the injuries and death of Nerissa were proximately caused by the negligence of Ruben and his supervisor Jaime in hiring, supervision, and retention of Ruben. *Id.* They alleged that the company was vicariously liable for the negligence of both Ruben and Jaime. *Id.* The trial court entered judgment awarding the Donaldsons damages from J.D. Transportation under a theory of vicarious liability due to the acts of both Ruben and Jaime but not against Jaime individually. *Id.* In its findings and conclusions, the trial court provided that Jaime, acting in the course and scope of his employment, had been solely responsible for the hiring, supervision, and retention of employees, including Ruben and was the proximate cause of Nerissa's injuries and death. *Id.*

The company and Jaime appealed complaining there was no evidence or insufficient evidence to support the trial court's finding that the negligence of Jaime was a proximate cause of the injuries and death of Nerissa. *Id.* The parties agreed that Jaime owed a duty to Nerissa and that he violated that duty by failing to strictly comply with the federal regulations for hiring commercial truck drivers. *Id.* at *3. The Donaldsons argued that had Jaime complied with the guidelines, he would have learned that Ruben (1) was an insulin-dependent diabetic, and (2) had a criminal conviction and revocation of probation for a drug-related offense in 1996. *Id.*

While an established medical history or diagnosis of diabetes requiring insulin is a disqualifying characteristic, the only evidence of the condition came from Nerissa's family. *Id.* Jaime was not required to interview and seek out information from an applicant's family. *Id.* Further, there was no evidence that had Jaime complied with other hiring requirements that he would have learned about the diabetes. *Id.* While the Donaldsons alleged Ruben had terminated from his previous position due to diabetes, there was no record evidence to support the contention. *Id.* In fact, the court found valid evidence that Ruben had presented Jaime with a medical release card prior to his employment. *Id.*

The court also found that while there was some evidence of Ruben's prior conviction that there was no evidence that had Jaime learned about the conviction that Ruben would have been precluded from employment. *Id.* at *4. The regulations only required that an applicant's driving record be reviewed for motor vehicle law violations within the past three years, but did not require a criminal background check. *Id.* So, the court concluded that had Jaime complied with the regulations, he would not have discovered the conviction unrelated to his driving record and that the conviction would not have necessarily precluded Ruben's employment. *Id.* Therefore, the court decided that there was no evidence to support the finding that any negligent act or omission by Jaime was a proximate cause of the injuries and death of Nerissa. *Id.*

3. *Summary Judgment Granted in Error Where Fact Issues Existed as to Whether Hospital Owed Duty to Patient and Whether that Duty was Breached*

In *Doege v. Sid Peterson Memorial Hosp.*, No. 04-04-00570-CV, 2005 WL 1521193, *1, *1 (Tex.App.–San Antonio 2005, review denied), Margaret Doege sought emergency care at the hospital for back pain. During an ultrasound, Doege was allegedly sexually assaulted by radiology technician Rudy Montez. *Id.* Montez was an employee of Millenium Staffing, who provided hospital staff. *Id.* Doege sued Montez and Millenium alleging medical negligence, assault, offensive physical contact, and IIED. *Id.* Doege later added the hospital for medical negligence, negligent hiring, supervision, training, and retention of Montez, and was vicariously liable for his acts, failure to provide proper medical care, and for maintaining a dangerous condition on the premises. *Id.*

The hospital filed a motion to dismiss and motion for summary judgment. *Id.* After settling with Montez and Millenium, Doege amended her petition taking out her allegations against the hospital for medical care. *Id.* Following a hearing, the trial court signed an order that Doege agreed to withdraw all medical negligence claims and rendered summary judgment in favor of the hospital on all remaining claims. *Id.* at *2.

On appeal, the hospital argued that it did not owe a duty to Doege to hire, supervise, or retain competent

employees or did not breach that duty because the hospital performed such duty. *Id.* at *7. The hospital attached copies of documents received by Montez including the employee orientation, training, and policy statements including sexual harassment, patient bill of rights, customer service agreement, and code of ethics. *Id.* The hospital also included an affidavit from Director of Radiology Robin Anstad. *Id.* The affidavit provided that Montez was required to provide an employment history and references to show proof of licensure to perform the duties for which he was hired. *Id.* at *8. Montez was given orientation and training consistent with the hospital's policies and procedures. *Id.* Montez was also reviewed annually for competency in performing his duties. *Id.*

The court determined that the evidence alone submitted by the hospital did not establish that it owed no duty to Doege or did not breach that duty. *Id.* Further, the court provided that the following evidence submitted by Doege raised issues of fact: (1) deposition testimony from Nurse Juanita Flores stating that Montez made unwanted sexual advances towards her before the assault; (2) Flores notified her supervisor and the assistant director; (3) the employee handbook provided that harassment would not be permitted and should be reported immediately to the administrator of head of human resources; (4) the human resources general policy on harassment provided the hospital would investigate reports of sexual harassment; (5) Flores stated that the incident was not reported by her supervisor, and Montez was never disciplined or counseled; (6) Montez's deposition testimony that even though he signed the documents, he had never seen implementation of hospital policies on patient rights or sexual harassment. *Id.*

Accordingly, the court concluded that the trial court erred in rendering summary judgment in favor of the hospital on Doege's negligent hiring, supervision, training, and retention claims. *Id.*

F. Conclusion

To avoid liability for either employee or third party claims for negligent hiring, supervision, training, and retention, an employer should conduct background checks on its applicants, especially to avoid hiring those applicants with a background of criminal offenses that could endanger others. Thus, employers should implement a policy and procedure whereby each applicant's background is thoroughly researched. Employers should also implement written policies addressing conduct in the workplace, especially prohibited conduct such as sexual assault or harassment. Employers should also have new employees acknowledge they have read the policies, conduct frequent training sessions on the policies, and create a grievance system to handle any complaints.

VI. ASSAULT

A. Elements of a Claim for Assault

The elements of assault are the same in both the criminal and civil context. *Forbes v. Lanzl*, 9 S.W.3d 895, 900 (Tex.App.–Austin 2000, pet. denied). A person commits assault if that person: (1) intentionally, knowingly, or recklessly causes bodily injury to another; (2) intentionally or knowingly threatens another with imminent bodily injury; or (3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative. TEX. PEN. CODE ANN. § 22.01(a) (Vernon Supp. 2004-2005); *Forbes*, 9 S.W.3d at 900.

B. An Employer Can be Held Liable for an Employee's Tortious Acts

To hold an employer liable for the tortious acts of an employee, a plaintiff must show that the employee was acting (1) within the scope of the employee's general authority, (2) in furtherance of the employer's business, and (3) for the accomplishment of an objective for which the employee was hired. *Buck v. Blum*, 130 S.W.3d 285, 288 (Tex.App.–Houston [14th Dist.] 2004, no pet.). If an employer places his employee in a position that involves the use of force, so that the act of using force is in the furtherance of the employer's business, the employer can be found liable for the employee's actions even if the employee uses greater force than is necessary. *Tex. & P. Ry. Co. v. Hagenloh*, 247 S.W.2d 236, 239 (Tex. 1952).

The commission of an intentional tort such as an assault is not generally considered to be within the scope of an employee's authority. *Hagenloh*, 247 S.W.2d at 239. However, intentional torts committed in the accomplishment of a duty entrusted to the employee, rather than because of personal animosity, may render the employer liable. *GTE Southwest*, 998 S.W.2d at 618. However, assault is usually the expression of personal animosity and is not for purposes of carrying out of the employer's business. *Hagenloh*, 247 S.W.2d at 239.

To prove that an assault was committed within the

scope of the employee assailant's authority, a plaintiff must show that the assault was committed to accomplish a duty entrusted to the employee. *Soto v. El Paso Nat. Gas Co.*, 942 S.W.2d 671, 681 (Tex.App.–El Paso 1997, writ denied).

1. *Summary Judgment Granted Because Patron Offered No Evidence to Create a Fact Issue as to Whether Employees Committed Assault in Course and Scope of their Employment*

Also by way of example, in *Knight v. City Streets*, 167 S.W.3d 580, 581 (Tex.App.–Houston [14th Dist.] 2005, no pet.), a nightclub patron sued the nightclub for an alleged assault by three of its employees. After a night out, Knight returned to his car to find it had been burglarized, so he went back to the nightclub to get help from Andrew Sanchez, an off-duty Houston police officer, he had seen working at the club earlier in the evening. *Id.* at 581-82. Knight banged on the door and yelled to get Sanchez's attention. *Id.* at 582. Sanchez and two other employees, Manuel Saenz and Chris Aquino exited the club and assaulted him. *Id.* Sanchez arrested Knight for public intoxication and use of profane language. *Id.*

Knight sued the nightclub alleging it was negligent in its supervision, hiring, and training of its employees and was liable for the assault under a *respondeat superior* theory. *Id.* The club filed a motion for summary judgment asserting there was no evidence on Knight's negligence claim and that it was not liable for assault because there was no evidence Sanchez was a club employee or that any of the three were acting within the course and scope of their employment when Knight was assaulted. *Id.*

Knight offered the following evidence: (1) Houston Police Department offense report from night of assault, (2) excepts from his deposition where he testified what happened, and (3) medical records of the injuries he sustained. *Id.* at 583. The report described Sanchez as an off-duty police officer working a second job at the club. *Id.* His deposition testimony explained that he was assaulted by three men he had seen on previous visits to the club and that the men were wearing black jeans and club t-shirts *Id.* The court stated that while the evidence may create a fact issue as to whether the three men were club employees, it did not create a fact issue as to whether the assault was in the scope of their employment. *Id.*

While Knight characterized the men as "bouncers," he did not provide any evidence to support his belief they held such a position, so Knight failed to produce any evidence that the assault was within the course and scope of the three men's employment with the club. *Id.* at 583-84.

2. *Assault Can be Committed Intentionally, Knowingly, or Recklessly*

In *Hall v. Sonic Drive-in of Angleton, Inc.*, 177 S.W.3d 636, 640 (Tex.App.–Houston [1st Dist.] 2005, review denied), Hall alleged that while working as a shift supervisor at Sonic her hand was injured when she picked up a metal freezer cover lying on the floor in the middle of a walkway. Hall provided that the cover had a razor-sharp edge that sliced her hand below her thumb causing her to lose the use of her right hand. *Id.* When she returned to work on April 24, 2002, Hall alleged that Manager Michael Cantrell grabbed her right wrist and tried to force her to hold a french-fry scooper in her right hand, and told her it did not take a rocket scientist to scoop fries and that she did not have to use her thumb. *Id.* When Hall complained that he was hurting her, he belittled her for not being able to perform her work and said it was pathetic. *Id.* at 640-41.

Sonic and Cantrell moved for summary judgment on Hall's assault claim because Cantrell did not touch Hall with intent to cause her injury but to encourage her to use her thumb as to assist her rehabilitation. *Id.* at 641. The motion also alleged that given the friendly relationship between Hall and Cantrell, that Cantrell had no knowledge or reason to believe that Hall would find his conduct offensive or provocative. *Id.* However, the court found that assault could be committed knowingly or recklessly in addition to intentionally–that Sonic's and Cantrell's assertion that the act was not performed with intent to injure did not conclusively negate Hall's claim as a matter of law. *Id.* at 650 (citing *Price v. Short*, 931 S.W.2d 677, 688 (Tex.App.–Dallas 1996, no writ)).

3. *Employer Not Liable for Intentional Torts Not in the Course and Scope of Employment*

In *Wrenn v. G.A.T.X. Logistics, Inc.*, 73 S.W.3d 489, 492 (Tex.App.–Fort Worth 2002, Rule 53.7(f) motion granted), Edward Wrenn sought personal injury damages against GATZ for an intentional assault by his supervisor. While working as a temporary employee at GATX's distribution center in Arlington, he was assaulted by his supervisor Ken Rushton. *Id.* Wrenn alleged that while

he was sweeping the floor, Rushton became displeased, grabbed him by the throat, raised him from the floor, and banged his head violently into the wall. *Id.* He also alleged that the assault was the result of Rushton's longstanding method of discipline which included threats of violence, violent outbursts, cursing, confrontation, and physical violence. *Id.*

GATX filed a motion for summary judgment asserting that no genuine issue of material fact existed because (1) GATZ was not vicariously responsible for Rushton's intentional assault on Wrenn because Rushton was not authorize to use physical force against other employees and because the assault arose from personal animosity between Wrenn and Rushton; (2) Rushton's assault was not foreseeable so that GATZ did not owe a duty to Wrenn to protect him from the assault; and (3) GATZ was not liable because providing a safe workplace did not encompass protecting against the acts of fellow employees. *Id.*

Wrenn complained that the trial court erred by granting summary judgment in favor of GATX because there were issues of fact regarding GATX's liability under respondeat superior. *Id.* at 493. Wrenn alleged that Rushton was acting within the course and scope of his employment with GATZ when the assault occurred. *Id.*

The court examined GATZ's summary judgment evidence found that the affidavit of Operations Manager Bill Pierson established Rushton's physical assault was neither within his general authority nor in the furtherance of GATZ's business. *Id.* at 494. Rushton was charged with the duty of operating a forklift at the warehouse. *Id.* In this position, Rushton was authorized only to operate that equipment and to direct other employees in fulfilling their employment obligations. *Id.* He was not authorized to use physical force or verbal threats in performing those duties, and such conduct was in fact prohibited. *Id.*

Rushton's deposition showed that he and Wrenn had words, and he didn't like Wrenn's attitude. *Id.* Further, on the morning of the assault, Rushton asked Wrenn to sweep the floor so that a load could be placed there. *Id.* When Wrenn exhibited a smart attitude, Rushton became angry and grabbed Wrenn. *Id.* Thus, the court concluded that the uncontroverted summary judgment evidence showed that Rushton was not authorized to commit assault as part of his duties at GATZ. *Id.* at 495.

C. Conclusion

To avoid liability for assaults in the workplace, employers should clearly define the course and scope of each employee's position. Employers should also have a defined policy and procedure prohibiting workplace assaults and should provide employee training for identifying and dealing with aggression or conflict in the workplace.

VII. CONCLUSION

In conclusion, employers can protect themselves from lawsuits for employment torts by implementing policies and procedure before a situation arises. Employers must prepare initially to avoid liability later. Employers must anticipate problems that may arise in the workplace and address those situations in policies and procedures, through new-hire training sessions, and through continuing education with current employees. Employers should offer training for their supervisory employees, and should also specifically define the course and scope of each employee's position. Finally, employers must know their employees' backgrounds.