Volume 23

Number 4

2005

QLR

Articles

EMPLOYER LIABILITY FOR EMOTIONAL DISTRESS ARISING FROM INVESTIGATION OF A TITLE VII HARASSMENT COMPLAINT

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I. INTRODUCTION

An employer investigating a sexual harassment claim is faced with substantial obstacles.[1] Not only does the employer face the potential of litigation initiated by the accuser, but often must also defend against litigation arising from the investigation and termination of the accused. Traditional common law actions by the accused against employers, or former employers, include wrongful termination/discharge,[2] defamation,[3] invasion of privacy,[4] and intentional and/or negligent infliction of emotional distress. The focus of this article is limited to claims by the accused employee for intentional and negligent infliction of emotional distress arising from the employer's investigation of the harassment claim.

In general, courts are often reluctant to hold that sexual harassment investigations rise to the level of outrage needed to support emotional distress claims.[5] Nonetheless, some courts will at least *consider* a claim for either intentional or emotional distress within the employment context, as discussed in more detail below.[6] Under Connecticut state

1. *See, e.g.*, Kim S. Ruark, *Damned if You Do, Damned if You Don't? Employers' Challenges in Conducting Sexual Harassment Investigations*, 17 GA. ST. U. L. REV. 575 (2000); David F. McCann, *Supervisory Sexual Harassment and Employer Liability: The Third Circuit Sheds Light on Vicarious Liability and Affirmative Defenses*, 45 VILL. L. REV. 767 (2000); Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look at* Merritor Savings Bank, FSB v. Vinson, 44 VAND. L. REV. 1229 (1991).

2. *See, e.g.*, Petermann v. Int'l Bhd. of Teamsters, 344 P.2d 25 (Cal. Ct. App. 1959 (upholding claim of wrongful discharge for plaintiff's refusal to commit unlawful acts); Nees v. Hocks, 536 P.2d 512 (Or. 1975) (upholding claim of wrongful discharge when plaintiff missed work to serve on jury duty).

3. Elbeshbeshy v. Franklin Institute, 618 F. Supp. 170 (E.D. Penn. 1985) (defamation case).

4. K-Mart Corp. Store No. 7441 v. Trotti, 677 S.W.2d 632 (Tex. Ct. App. 1984) (privacy action).

5. *See* Twine v. Dickson, No. 3:97-CV-2268-G, 1999 U.S. Dist. LEXIS 216 (N.D. Tex. Jan. 5, 1999).

6. *See, e.g.*, Shaffer v. National Can Corp., 565 F. Supp. 909 (E.D. Pa. 1983) (recognizing intentional infliction of emotional distress within the employment context);

law, liability for negligent infliction of emotional distress is limited to conduct arising during the termination process.[7] In *Malik v. Carrier Corp.*,[8] a federal court of appeals case decided in Connecticut, the Second Circuit held that employers cannot, as a matter of law, be held liable for *negligent* infliction of emotional distress arising from the investigation of a sexual harassment claim.[9] The decision, as discussed below, was largely based on the duties imposed on employers by federal law to investigate claims of sexual harassment.[10] Although the Second Circuit clearly prohibits claims based in *negligence*, this same rationale should not apply to *intentional* conduct of the employer in investigating a claim. A policy prohibiting all emotional distress claims would give employers unfettered rights in investigating harassment claims, even beyond the point necessary to elicit the information required for a thorough investigation.

This Article proposes that while accused employees may not have a claim for negligent infliction of emotional distress arising from the investigation of the harassment claim, intentional and egregious conduct of the employer that exceeds the scope of a necessary and thorough investigation as mandated by federal law may be grounds for a claim of intentional infliction of emotional distress. Part II of this article provides a background on Title VII of the Civil Rights Act of 1964, particularly with respect to the elements and defenses associated with sexual harassment caused by the creation of a hostile work environment. Part II also includes a brief summary of the elements of intentional and negligent infliction of emotional distress, including case examples of each. Part III is divided into two parts. The first part of this Part discusses the Second Circuit case barring claims for negligent infliction of emotional distress arising from the investigation of a harassment claim as a matter of law, and briefly discusses a case denying relief for a claim of discrimination and harassment based on the same rationale. The other part of Part III examines two cases in which courts have *at least considered* a claim for intentional infliction of emotional distress arising from the investigation of a sexual harassment claim. Part IV

Grossman v. Computer Curriculum Corp., 131 F. Supp. 2d 299 (D. Conn. 2000) (recognizing negligent infliction of emotional distress within employment context).

7. Edwards v. Community Enterprises, 251 F. Supp. 2d 1089, 1105 (D. Conn. 2003).

8. 202 F.3d 97 (2d Cir. 2000).

9. *Id.* at 108.

10. *Id.* at 106.

synthesizes these cases and provides a proposed standard for courts to adopt. Finally, Part V concludes the article.

II. BACKGROUND

A. Sexual Harassment in the Workplace

1. Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[11] Underlying this language is Title VII's "broad rule of workplace equality."[12] To establish sexual harassment, the plaintiff must present evidence that the workplace is infused with "discriminatory intimidation, ridicule, and insult" that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[13]

An aggrieved employee must prove four elements in order to prevail on a Title VII hostile work environment claim: (1) that she was harassed because of sex, (2) that the harassment was unwelcome, (3) that the harassment was sufficiently pervasive or severe to create an abusive working environment, and (4) that some basis exists for imputing liability to the employer.[14] In determining whether the conduct is sufficiently pervasive or severe, all the surrounding circumstances must be considered, including the following: the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and

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11. 42 U.S.C. § 2000e-2(a)(1) (1994); *see also* Harris v. Forklift Systems, Inc., 510 U.S. 17, 21-23 (1993) (holding that conduct need not seriously affect an employee's psychological well-being or lead the employee to suffer injury in order to be actionable under Title VII as an abusive work environment, and that such abusive work environment should be examined by looking at all the circumstances both objectively as well as subjectively from the employee's perception).

12. *Harris*, 510 U.S. at 22.

13. *Id.* at 21 (quoting Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65-67 (1986)).

14. *See, e.g.*, *Harris*, 510 U.S. 17; *see also* Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

whether it unreasonably interferes with an employee's work performance.[15]

2. *Duty of Employer to Investigate Sexual Harassment Claims*

Vicarious liability may be imposed on an employer for creating an "actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee."[16] In *Faragher v. City of Boca Raton*,[17] the United States Supreme Court set forth two alternatives for vicarious liability of employers for misuse of supervisory authority regarding the creation of an actionable hostile environment.[18] The first is to require proof of some "affirmative invocation of that authority by the harassing supervisor".[19] The other is to recognize an affirmative defense to liability if the employer "exercised reasonable care to avoid harassment and to eliminate it when it might occur, and [if] the complaining employee had failed to act with like reasonable care to take advantage of the employer's safeguards and otherwise to prevent harm . . ."[20]

The Court noted that while Title VII seeks to make persons whole for harm resulting from unlawful employment discrimination, avoiding harm, rather than providing redress, is the primary objective.[21] Furthermore, regulations adopted by the Equal Employment Opportunity Commission ("EEOC") are in accord with the Title VII policy of encouraging employers to take steps to prevent sexual

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15. *Harris*, 510 U.S. at 23.

16. *Faragher*, 524 U.S. at 807.

17. *Id.*

18. The Court wrote:

> In sum, there are good reasons for vicarious liability for misuse of supervisory authority. That rationale must, however, satisfy one more condition. We are not entitled to recognize this theory under Title VII unless we can square it with *Meritor's* holding that an employer is not "automatically" liable for harassment by a supervisor who creates the requisite degree of discrimination, and there is obviously some tension between that holding and the position that a supervisor's misconduct aided by supervisory authority subjects the employer to liability vicariously; if the "aid" may be the unspoken suggestion of retaliation by misuse of supervisory authority, the risk of automatic liability is high.

Id. at 804.

19. *Id.* at 804.

20. *Faragher*, 524 U.S. at 805. The court further noted that proof that an employer had an anti-harassment policy with a complaint procedure was not necessary in every instance as a matter of law. *Id.* at 807.

21. *Id* at 805-06 (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)).

harassment. Policy statements issued by the EEOC advise employers to implement complaint procedures designed to encourage victims of harassment to report harassing behavior without requiring a victim to complain to the offending supervisor first.[22] In support of its holding the Court wrote, "It would therefore implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative *obligation* to prevent violations and give credit here to employers who make reasonable efforts to discharge their *duty*."[23]

B. Common Law Emotional Distress Remedies

By its very nature, a sexual harassment investigation inevitably involves emotional and confrontational circumstances. In some cases, the investigation results in a lawsuit by the accused employee against the employer for either intentional or negligent infliction of emotional distress. This section will introduce both claims, including the necessary elements as well as case examples.

1. Intentional Infliction of Emotional Distress

A claim for intentional infliction of emotional distress generally requires a showing of four elements: (1) intentional or reckless conduct, (2) extreme and outrageous conduct, (3) a causal connection between the wrongful conduct and the emotional distress, and (4) severe emotional distress.[24] While proving intent, causation, and severe emotional distress are typically straightforward, the element of "extreme and outrageous" conduct poses considerable difficulty for the courts.[25] Liability has been imposed only when the conduct is "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

22. *Faragher*, 524 U.S. at 806 (citing 29 C.F.R. § 1604.11(f)(1997) and EEOC POLICY GUIDANCE ON SEXUAL HARASSMENT, 8 FEP Manual 405:6699 (Mar. 19, 1990)).

23. *Id.* at 806 (emphasis added).

24. RESTATEMENT (SECOND) OF TORTS §46 (1965). *See, e.g.*, Harris v. Jones, 380 A.2d 611, 616-617 (Md. 1977) (holding that, without proof that preexisting nervous condition was aggravated or without showing of intensity and duration of emotional distress suffered, the humiliation suffered by plaintiff as a result of his coworker's alleged actions in repeatedly ridiculing plaintiff because of his stuttering was not, as matter of law, so intense as to constitute "severe" emotional distress required to recover for tort of intentional infliction of emotion distress).

25. *Harris*, 380 A.2d at 614.

civilized community."[26] On the other hand, mere insults, threats, annoyances, petty oppressions or other trivialities are insufficient to support a claim for intentional infliction of emotional distress.[27]

For example, in *Tidelands Automobile Club v. Walters*,[28] a Texas appeals court found conduct to be extreme and outrageous where an automobile club wrongfully denied a life insurance claim after altering an autopsy report falsely to reflect that plaintiff's wife, who never consumed alcohol during their 46-year marriage, was drunk when she died in a one-car accident.[29] In *Cummings v. Pinder*, the Supreme Court of Delaware deemed an attorney's conduct extreme and outrageous when he failed to fully advise a client on her rights, unilaterally increased the amount of his contingent fee, and arranged for a stop payment order on an insurance company check endorsed to the client.[30] Within the employment context, the plaintiff in *Shaffer v. National Can Corp.*[31] was the subject of sexual harassment over the course of almost four years.[32] Her supervisor repeatedly, and on one occasion publicly, invited her to accompany him socially.[33] When the plaintiff refused to accept his invitations, the supervisor made threats concerning the plaintiff's employment status and retaliated against the plaintiff by making her job difficult to perform.[34] The district court found that these allegations were sufficient to state a cause of action for intentional infliction of emotional distress.[35]

On the other hand, courts have not found conduct to be extreme and outrageous in the following scenarios: where a wife had an abortion against the wishes of her husband;[36] when a patient was given an HIV-positive roommate without disclosure;[37] or when an employer, in a severe and curt manner, questioned an employee about possible theft.[38] However, results are inconsistent due to the fact-sensitive nature of the

26. *Id.* (quoting comt. d to Restatement §46).
27. *Id.*
28. 699 S.W. 3d 939 (Tex. App. 1985).
29. *Id.*
30. 574 A.2d 843 (Del. 1990).
31. 565 F.Supp. 909 (E.D. Pa. 1983).
32. *Id.* at 910.
33. *Id.*
34. *Id.*
35. *Shaffer*, 565 F.Supp. at 915.
36. Przybyla v. Pryzbyla, 275 N.W.2d 112 (Wis. 1978).
37. Bain v. Wells, 936 S.W.2d 618 (Tenn. 1997).
38. Randall's Food Mkts, Inc. v. Johnson, 891 S.W.2d 640 (Tex. 1995).

inquiry, and what may be considered extreme and outrageous in one jurisdiction, might fail to be so in another.[39]

2. Negligent Infliction of Emotional Distress

Negligent infliction of emotional distress as an independent tort claim is a relatively new and unsettled area of law.[40] Within the employment context, courts are particularly reluctant to allow a claim for negligent infliction of emotional distress.[41] In those states where the claim is recognized, requirements for recovery vary significantly between, and even within, jurisdictions.

For example, in North Carolina, the plaintiff must show that (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff to suffer severe emotional distress, and (3) the conduct did in fact cause the plaintiff to suffer severe emotional distress.[42] The North Carolina Supreme Court held that a defendant police officer was not liable for negligent infliction of emotional distress when, based on probable cause and the fact that plaintiff had engaged in the police chase, the officer arrested plaintiff at his place of business, allowed him to collect his belongings, and handcuffed him outside the building.[43]

Similarly, under Connecticut law, the plaintiff must establish that the defendant "knew or should have known that its conduct involved an unreasonable risk of causing emotional distress, and that the distress, if

39. *See* Wilson v. Bellamy, 414 S.E.2d 347, 359 (N.C. Ct. App. 1992) (holding that a sexual battery, standing alone, does not constitute the required extreme and outrageous conduct when two fraternity members kissed and fondled a young woman who was heavily intoxicated or unconscious while others watched).

40. JOHNSON, VINCENT R. & ALAN GUNN, STUDIES IN AMERICAN TORT LAW, 549 (2d ed. 1999).

41. *See, e.g.*, Tischmann v. ITT/Sheraton Corp., 882 F. Supp. 1358, 1368 (S.D.N.Y. 1995) (holding that the plaintiff's claim of negligent infliction of emotional distress within the employment context was not actionable under New York law, as such claim would circumvent the state's at will employment rule); Antalis v. Ohio Dep't of Commerce, 589 N.E.2d 429, 431 (Ohio Ct. App. 1990) (holding that where an employee developed severe, debilitating depression as a result of her supervisor's "significant criticism" of her job performance in front of other employees, the trial court correctly denied plaintiff's claim for negligent infliction of emotional distress, on the grounds that state law did not recognize such a cause of action arising from an employment situation).

42. Best v. Duke University, 448 S.E.2d 506, 511 (N.C. 1994) (quoting Johnson v. Ruark Obstetrics, 395 S.E.2d 85, 97 (N.C. 1990)).

43. *Id.*

it were caused, might result in illness or bodily injury."[44] Connecticut limits liability for negligent infliction of emotional distress within the employment context to conduct arising in the termination process.[45] For example, in considering a negligent infliction of emotional distress claim, the Connecticut Supreme Court held that "the mere act of firing an employee, even if wrongfully motivated, does not transgress the bounds of socially tolerable behavior . . . and therefore is not enough, by itself, to sustain a claim for negligent termination of employment."[46] In *Grossman v. Computer Curriculum Corp.*,[47] on the other hand, the requirement that the employer's conduct involve the termination process was satisfied when the plaintiff alleged that his employer's false accusations about his job performance, bad-mouthing of him to customers, and other efforts designed to bring about his termination, resulted in resignation that was constructive termination.[48] Consequently, the employee's claim for negligent infliction of emotional distress survived summary judgment.[49]

III. AUTHORITY

As discussed in Part II, there is substantial variation among the courts over the conduct necessary to support a claim of intentional or negligent emotional distress. There is a similar tension among the courts over how to handle claims of intentional or negligent emotional distress arising out of sexual harassment investigations. Some courts, reasoning that employers should not be subject to liability for conduct arising in a federally-mandated harassment investigation, have dismissed such claims as a matter of law. Other courts, however, have recognized that these claims may be viable under some circumstances.

A. No Liability for Emotional Distress Arising from Investigation

The two cases which follow illustrate instances where liability for conduct by the employer arising during the harassment investigation is barred as a matter of law. The first involves negligent infliction of

44. Edwards v. Community Enterprises, 251 F. Supp. 2d 1089, 1105 (D. Conn. 2003) (quoting Buckman v. People Express, Inc., 205 Conn. 166, 530 A.2d 596 (1987)).
45. *Id.*
46. *Id.*
47. 131 F. Supp. 2d 299 (D. Conn. 2000).
48. *Id.* at 309.
49. *Id.*

emotional distress. The second case involves a claim of a discriminatory investigation.

1. No Liability for Negligent Infliction of Emotional Distress

In *Malik v. Carrier Corp.*,[50] a federal court of appeals case decided in Connecticut, the Second Circuit held that employers cannot, as a matter of law, be held liable for *negligent* infliction of emotional distress arising from the investigation of a sexual harassment claim.[51] As discussed in Part II.B.2, Connecticut law limits liability for negligent infliction of emotional distress within the employment context to conduct arising in the termination process.[52]

In August 1992, the plaintiff, Rajiv Malik, joined Carrier Corporation's Leadership Associate Program, which offered executive training to recent business school graduates.[53] Each associate was expected to secure an offer from a division within Carrier in which he or she previously worked.[54] During the course of Malik's employment, Regina Kramer, Carrier's Manager of Professional Recruitment, received complaints on three separate occasions regarding inappropriate remarks made by Malik to female co-workers.[55] After Kramer received the second complaint, she decided to investigate. When discussing the situation with Robert Rasp, Malik's supervisor, Rasp initially declined to provide any information regarding the second complaint because he believed he had already resolved the issue.[56] In an effort to overcome Rasp's reluctance, Kramer told him about the earlier complaint, stating that she needed to know if the two events were similar.[57] Soon after this discussion, word got out about Malik's past conduct and rumors circulated in the office.[58]

Upon learning of the second incident, Phyllis Snyder, Carrier's Human Resource Manager, interviewed Alice Fabian, the co-worker making the second complaint.[59] Fabian told Snyder of several sexually-oriented remarks directed towards her by Malik, including inquiries

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50. 202 F.3d 97 (2d Cir. 2000).
51. *Id.* at 108.
52. *See supra* notes 44-49 and accompanying text.
53. *Malik*, 202 F.3d at 100.
54. *Id.* at 100.
55. *Id.* at 101.
56. *Id.* at 100
57. *Malik*, 202 F.3d at 100-01.
58. *Id.* at 101.
59. *Id.*

about her virginity, about going out with him if he was terminally ill, and about her husband "sharing" her with Malik.[60] Snyder then learned of another complaint by a female employee that Malik had made inappropriate sexually-oriented remarks.[61] This complaint was reported to the female employee's supervisor, who in turn reported it to Rasp, Malik's supervisor. Snyder sent Kramer a memorandum setting out the facts of each complaint.[62]

Rasp informed Malik that Kramer was investigating the Fabian complaint and that Kramer had made reference to a second incident.[63] On April 25, 1994, Kramer, along with Regina Hitchery, Carrier's Vice President of Human Resources and Kramer's boss, met with Malik to inform him that although they would not discipline him, they would place a Letter of Record in his file.[64] The letter was not shown to anyone except Malik.[65] At this point of the investigation, Malik claimed he was having difficulty sleeping, was taking various medications, and was unable to perform his job well.[66]

In August 1994, nearly four months after the April 25 interview with Malik, Hitchery met with Malik to remind him of his responsibility to secure a position.[67] She advised Malik to put the sexual harassment incident behind him and to focus on securing a final placement.[68] Malik, however, did little to secure final placement, and was subsequently fired.[69]

Malik sued Carrier in the United States District Court for the District of Connecticut for, among other things, negligent infliction of emotional distress. His emotional distress claim was based on emotional harm caused by Kramer's pressing of the investigation as

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60. *Id.*
61. *Malik*, 202 F.3d at 101.
62. *Id.*
63. *Id.*
64. *Id.* The Letter of Record stated in relevant part:

> After thorough investigation it is my conclusion that while it is clear that discussions of a sexually [sic] nature occurred between the two of you the content and intent of the discussion is disputed. As a result the issue will be closed for lack of substantiation. While there is nothing to substantiate the claim of sexual harassment your behavior was unacceptable.

Malik, 202 F.3d at 101-02.
65. *Id.* at 102.
66. *Id.*
67. *Id.*
68. *Malik*, 202 F.3d at 102.
69. *Id.*

well as the Letter of Record placed in his personnel file.[70] At the trial level, a jury returned a verdict for Malik on the negligent emotional distress claim, awarding him $400,000 in damages.[71] Carrier appealed the trial court's denial of its motion for a judgment as a matter of law as to the emotional distress claim.[72]

The Second Circuit appeals court began by noting that it was unclear whether Connecticut law recognizes negligent infliction of emotional distress within the employment context.[73] The court then proceeded to interpret the state law regarding negligent infliction of emotional distress consistent with the federal law requiring employers to promptly and thoroughly investigate complaints of sexual harassment. Specifically, "an employer's investigation of a sexual harassment complaint is not a gratuitous or optional undertaking; under federal law, an employer's failure to investigate may allow a jury to impose liability."[74] The court, by interpreting Connecticut law consistently with the court's interpretation of federal law, avoided the issue of whether the federal law would preempt the state law.[75] Acknowledging the inherently sensitive nature of a sexual harassment complaint, the court wrote:

> [V]irtually any employer investigation into allegations of sexual harassment [could] expose the employer to liability. Such investigations foreseeably produce emotional distress . . . guilty or innocent. As with any investigation into potentially embarrassing personal interactions, confidentiality is difficult

70. *Id.* at 105.
71. *Id.* at 103.
72. *Malik*, 202 F.3d at 103.
73. *Id.* Carrier argued that under Connecticut law, negligent infliction of emotional distress in the employment context is limited to actions taken in the course of an employee's termination. *See* Parsons v. United Techs. Corp., 243 Conn. 66, 700 A.2d 655 (1997) (holding that negligent infliction of emotional distress in the employment context arises only where it based upon unreasonable conduct of the defendant in the termination process (quoting Morris v. Hartford Courant Co., 200 Conn. 676, 513 A.2d 66 (1986)). Although Connecticut's Worker Compensation Act initially covered both physical and emotional injuries that occurred in the workplace, it was amended after *Morris* to exclude coverage for mental and emotional impairment, hence, no longer precluding emotional distress claims. *See* CONN. GEN. STAT. § 31-275(16) (1993); *See also* Karanda v. Pratt & Whitney Aircraft, No. CV-98-5820255, 1999 WL 329703 at *5 (Conn. Super. Ct. May 10, 1999).
74. *Malik*, 202 F.3d at 105 (citing *Faragher*, 524 U.S. 775).
75. *Id.* at 106 n.2.

> or impossible to maintain if all pertinent information is to be acquired from all possible sources.[76]

According to the court, at issue was ensuring that "federal policies are not undermined by imposing on employers legal duties enforceable by damages that reduce their incentives to take reasonable corrective action as required by federal law."[77] Taking into account both the inherently sensitive nature of harassment claims and the firmly grounded federal policies and requirements imposed on employers in carrying out such investigations, the court concluded that Malik's emotional distress claim failed as a matter of law.[78]

2. *Investigation of Harassment Claim Not Harassment Itself*

Flanagan v. Ashcroft[79] is a case factually similar to *Malik*, except based on discrimination instead of negligent infliction of emotional distress. The Seventh Circuit in *Flanagan* held that the employer's investigation of the conduct of federal law enforcement officers who had been accused of using offensive language while conducting a job-related seminar did not itself constitute sexual harassment.[80] The investigation began when the employer, the Drug Enforcement Agency, received complaints that an instructor at its Chicago-based Basics Narcotics Training School used offensive language while conducting a seminar.[81] The investigation eventually expanded to five DEA agents, resulting in the resignation of one officer and the subsequent transfer to different cities of the remaining officers.[82]

Thereafter, the five officers, all white males, initiated an action under Title VII charging that the DEA had mishandled the case, and that the transfers, proposed dismissal, and other decisions regarding their employment had been in retaliation for their opposition to unlawful employment discrimination. The crux of the discrimination claim was that the DEA had egregiously and unprofessionally conducted the investigation, treated the witnesses with hostility and in an accusatory manner, and caused negative and untrue rumors to be circulated about

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76. *Id.* at 106.
77. *Id.*
78. *Malik*, 202 F.3d at 108.
79. 316 F.3d 728 (7th Cir. 2003).
80. *Id.* at 730.
81. *Id.* at 729.
82. *Id.* at 729.

the officers.[83] As a result, the federal officers claimed that the DEA had created a "sexually charged, racially charged, hostile and offensive working environment."[84]

The United States District Court for the Northern District of Illinois dismissed the discrimination count for failure to state a claim upon which relief could be granted. The district court granted the employer's motion for summary judgment on the retaliation count because the evidence showed that all employment actions taken against the agents were based on the ensuing investigation which revealed that the officers had, in fact, engaged in misconduct, and on the harassment suit filed by female seminar attendees against the officers and the resulting negative publicity.[85]

On appeal the Seventh Circuit relied on the same rationale as *Malik,* stating that "an investigation of sexual harassment that exceeds the proper limits is not itself a form of actionable sexual harassment"[86] and concluded that permitting such a claim would "place employers on a razor's edge."[87] Essentially, the employer would be left with one of two undesirable choices: ignore complaints of sexual harassment and face Title VII liability if the complaints are meritorious, or investigate them thoroughly and face discrimination claims from the targeted employees.[88] Based on this, the court affirmed the district court's dismissal of the discrimination count for failure to state a claim upon which relief can be granted and affirmed the summary judgment in favor of the DEA as a matter of federal law.[89]

B. Liability for Intentional Infliction of Emotional Distress Arising from Investigation?

The following cases provide examples of instances where courts at least considered a claim for intentional infliction of emotional distress arising from the harassment investigation. In the first case, a claim for intentional infliction of emotional distress from the investigation and termination of a sexual harassment complaint was considered, but denied because the plaintiff failed to offer sufficient evidence of

83. *Flanagan*, 316 F.3d at 729.
84. *Id.* at 730.
85. *Id.*
86. *Id.* (quoting McDonnell v. Cisneros, 84 F.3d 256, 260-61 (7th Cir. 1996)).
87. *Flanagan*, 316 F.3d at 730.
88. *Id.*
89. *Id.*

outrageous conduct. The court in the second case considered both negligent and intentional infliction of emotional distress, but denied relief because of lack of sufficient evidence and because of the employer's need to properly manage and discipline employees.

1. Intentional Infliction of Emotional Distress Claim Considered but Denied

In *Twine v. Dickson*,[90] the Federal District Court for the Northern District of Texas considered, but subsequently denied, an employee's claim for intentional infliction of emotional distress arising from the investigation and termination of a sexual harassment complaint filed against him by a co-worker.[91] The complainant alleged that the employee, Elisha Twine, had asked a co-worker for a kiss, touched her buttocks, and asked for a "quickie."[92] The City of Dallas Equipment, Communications, and Information Services Division (ECI) fired Twine based on those allegations as well as the results of a previous investigation into an earlier harassment complaint.[93]

Twine sued ECI for, among other things, intentional infliction of emotional distress.[94] Twine alleged that ECI knew the charges of harassment were untrue, but proceeded with the action to cause him to suffer. Twine further alleged that ECI had "exceeded the bounds of common decency" by failing to reinvestigate the facts of the earlier investigation.[95]

To prevail on an intentional infliction of emotional distress claim under Texas law, the plaintiff must prove the following elements: (1) intentional or reckless conduct by the defendants, (2) extreme and outrageous conduct, (3) emotional distress caused by such conduct, and (4) severe resulting emotional distress.[96] The district court held that, in the employment context, a claim for intentional infliction of emotional distress will not lie for "mere employment disputes," noting that the emotional distress suffered must be "so severe that no reasonable person could be expected to endure it."[97]

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90. No. 3:97-CV-2268-G, 1999 U.S. Dist. LEXIS 216 (N.D. Tex. Jan. 5, 1999).
91. *Id.* at *21.
92. *Id.* at * 2.
93. *Id.* at *3.
94. *Twine*, 1999 U.S. Dist. LEXIS at *1.
95. *Id.* at *21.
96. *Id.*
97. *Id.*

The court granted the employer's motion for summary judgment, dismissing Twine's claim for intentional infliction of emotional distress on three grounds. First, Twine alleged that his employer knew the charges of sexual harassment were untrue but proceeded with the action to cause him to suffer.[98] However, he failed to offer evidence that either the accuser or his employer knew the allegations were false, thereby failing to prove extreme and outrageous conduct by the employer.[99] Second, Twine also failed to offer sufficient evidence that his emotional distress, if any, was more than a reasonable person would be expected to endure, thereby failing to prove the severe emotional distress element.[100] Finally, the district court noted that "courts have repeatedly held that in order to properly manage its business, an employer must be able to supervise, review, criticize, demote, transfer, and discipline employees."[101] As a result, the employer was entitled to summary judgment on Twine's claim of intentional infliction of emotional distress.[102]

2. *Intentional & Negligent Infliction of Emotional Distress Survives a Rule 12(b)(6)*

In *Nance v. M.D. Health Plan, Inc.*,[103] claims for intentional and negligent infliction of emotional distress survived a motion to dismiss for failure to state a claim for which relief can be granted.[104] M.D. Health Plan, the defendant employer, fired James Nance as a result of a sexual harassment investigation, which involved allegations of Nance pinching a male's buttocks, singling out that employee for discipline after the employee refused Nance's advances, and showing preferential treatment to those male employees who socialized with him after work.[105] Upon his termination, Nance sued his former employer, M.D. Health Plan, Inc., for among other things, intentional and negligent

98. *Twine*, 1999 U.S. Dist. LEXIS at *21.
99. *Id.*
100. *Id.*
101. *Id.* (quoting MacArthur v. Univ. of Tex. Health Care Ctr. at Tyler, 45 F.3d 890, 898 (5th Cir. 1995)), *see also* Randall's Food Mkts. v. Johnson, 891 S.W.2d 640 (Tex. 1995) (concluding that employees did not engage in extreme and outrageous conduct when they investigated reasonably credible allegations of alleged theft by employees).
102. *Twine*, 1999 LEXIS at * 21.
103. 47 F. Supp. 2d 276 (D. Conn. 1999).
104. *Id.* at 280.
105. *Id.* at 277.

infliction of emotional distress, alleging that the employer's disclosure about the details of the sexual harassment allegation against him to a subordinate, and the employer's questioning the subordinate about Nance's sexual orientation and private social activities, constituted extreme and outrageous conduct.[106]

The court concluded that although Nance had not yet alleged conduct which rose to the level of extreme and outrageous, it could not say that there was no set of facts that, if proved, would entitle him to relief.[107] After discussing the realities of continuing homophobia, discrimination, and violence directed towards homosexuals, the court opined that "an employer's questioning that signals to others its belief that the subject employee is a homosexual in reckless disregard of a foreseeable, unsavory response by those person thus informed, could constitute extreme and outrageous conduct."[108] The court, therefore, denied the employer's motion to dismiss on the intentional infliction of emotional distress claim.[109]

As to the negligent infliction of emotional distress claim, the focus was on the humiliating investigation.[110] Under Connecticut law, negligent infliction of emotional distress in the employment context arises only where "it is based upon unreasonable conduct of the defendant in the termination process."[111] Based on the complaint, the court was unable to determine where the termination process began, and therefore denied the employer's motion to dismiss on the negligence claim.[112]

Since this case was decided in a federal district court in Connecticut, the law as to negligent infliction of emotional distress has been superseded by the later-decided *Malik* decision discussed above in Part III.A.1.[113] As demonstrated in *Nance*, however, a claim for *intentional* infliction of emotional distress may still survive summary judgment.

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106. *Id.* at 278.
107. *Nance*, 47 F.Supp. at 279.
108. *Id.*
109. *Id.* at 279.
110. *Id.* at 280.
111. *Nance*, 47 F.Supp. at 279 (quoting Parsons v. United Techs. Corp., 700 A.2d 655 (1997)).
112. *Id.* at 280.
113. *See supra*, notes 55-77 and accompanying text.

IV. ANALYSIS AND PROPOSAL

The previously cited authority fails to provide a hard and fast answer to the issue of an employer's liability for conduct resulting from the investigation of a sexual harassment complaint. Both the Seventh and Second Circuits have announced adherence to the federal policy encouraging employers to thoroughly investigate sexual harassment complaints. Both acknowledged the obvious problems with imposing liability for conduct arising from a federally mandated investigation. However, *Twine* and *Nance* illustrate that *intentional* infliction of emotional distress arising from investigation of a harassment complaint is still a viable claim for accused employees, at least in Texas and Connecticut.

A. Analysis

At the heart of this issue—whether employers can be held liable for intentional or negligent infliction of emotional distress caused by the investigation of a harassment claim—is the federal policy of giving employers incentives to prevent harassment, thoroughly investigate claims when they do arise, and provide employees with adequate procedures to redress complaints.[114] This policy weighed heavily, if not exclusively, on the outcome in both *Malik*[115] and *Flanagan*.[116] Although *Flanagan* does not address intentional or negligent infliction of emotional distress, the case illustrates the reluctance of courts to impose liability for conduct arising from federally mandated investigations. Based on this firmly-rooted federal policy, the *Malik* court ruled, as a matter of law, that an employee accused of sexual harassment could not bring a claim for *negligent* infliction of emotional distress arising from the investigation of the harassment complaint.[117] The problem is determining whether the holding in *Malik* is limited to negligence, or if the same policy extends to intentional conduct as well.

The *Malik* court does not expressly address the issue; however, based on the weight given to the federal policy underlying its decision, it arguably would have decided an intentional infliction of emotional distress claim the same way. For example, the court noted that an

114. *See* Faragher v. City of Boca Raton, 524 U.S. 775 (1998).
115. 202 F.3d 97 (2000); *supra* notes 55-77 and accompanying text.
116. 316 F.3d 728 (2003); *supra* notes 78-88 and accompanying text.
117. *See supra* Part III.A.1.

employer cannot diligently carry out an investigation if it must worry about the potential of bruising Malik's feelings.[118] Further, as previously noted, employers are not only encouraged to press the investigation, but are also obligated to do so, or face the possibility of civil liability.[119] The Second Circuit's heavy reliance on such language suggests that any conduct by the employer, intentional or negligent, should be considered in light of the federal policy of ensuring thorough investigations of alleged sexual harassment.

There are two possible ways to interpret the holding in *Malik*. The first is a broad interpretation, barring *all* emotional distress claims by employees accused of sexual harassment arising from the investigation of the harassment complaint. The second is a narrow interpretation, limiting the holding in *Malik* strictly to negligence actions.

B. Proposal

This article proposes that courts adopt the narrow interpretation. The Second Circuit, as a matter of law, prohibits a claim for negligent infliction of emotional distress arising from a harassment investigation. However, absent a specific declaration by the courts to the contrary, liability for intentional conduct is still a viable claim for the accused employee. This is an appropriate standard for four main reasons.

First, given the "culpable" nature of intentional conduct and its potential of causing severe and legitimate emotional distress, employers should not be given a "free ticket" to intentionally cause emotional distress in the course of an investigation. If employers are aware that such lawsuits are barred as a matter of law, they would have little incentive to carry out investigations in an acceptable manner. Accused employees would essentially have no recourse against egregious and intentional conduct by an employer causing the employee legitimate emotional distress.

Second, an unfettered right to question an accused employee invites serious misconduct by the employer. This is especially true when the questions are unrelated to the investigation and go beyond the point necessary to elicit the information required for a thorough investigation. This invites employers to knowingly exploit, mistreat, or abuse employees accused of sexual harassment. For example, exposing

118. *Malik*, 202 F.3d at 107.
119. *See* Gallagher v. Delaney, 139 F.3d 338, 348 (2d Cir. 1998).

an accused employee's sexual orientation to fellow co-workers certainly exceeds the bounds of a necessary and thorough investigation.

Third, in cases involving intentional conduct, the federal policy would not be determinative, but instead be a significant factor to weigh against the alleged harm done to an accused employee during the course of an investigation. Rather than a complete bar, this approach would put the decision of whether to allow claims by an accused employee within the sound discretion of the court. As with any intentional infliction of emotional distress claim, only conduct of an extreme and outrageous nature would be punished.

Fourth, and perhaps most importantly, the imposition of liability for intentional conduct will not hinder an employer's ability to thoroughly investigate a sexual harassment claim since an employer will only be liable for that behavior which *exceeds* the bounds of a properly conducted investigation as mandated by law. So long as employers remain within the bounds established by law, investigation practices would not be hindered. Intentional conduct by employers would be judged by the same standards presently in place for intentional infliction of emotional distress.

V. CONCLUSION

Under federal law, employers are obligated to thoroughly investigate Title VII harassment complaints. Courts are now faced with the problem of where to draw the line between conduct necessary to elicit required information and conduct that goes beyond this necessity. With respect to negligent infliction of emotional distress, the Second Circuit has said that liability cannot be imposed as a matter of law. Liability for emotional distress from intentional conduct, on the other hand, has not been clearly prohibited. This article proposes that while accused employees should not have a claim for negligent infliction of emotional distress arising from the investigation of the harassment claim, intentional and egregious conduct by the employer that exceeds the scope of a necessary and thorough investigation as mandated by federal law should be grounds for a claim of intentional infliction of emotional distress.