INTRODUCTION

Within the last two decades, the parameters of employment law have considerably expanded. At one time plaintiff-employees were confined to “traditional actions… involving claims under the National Labor Relations Act, Fair Labor Standards Act, Title IV of the Civil Rights Act of 1964, [and] the Age Discrimination in Employment Act.” Frank B. Harty, Employment Torts: Emerging Areas of Employer Liability, 39 Drake L. Rev. 3, 5 (1989-90). The narrowness of these constraints, along with the further restrictions specifically applicable to each of the Acts under which plaintiffs were allowed to plead for relief, gave defendant-employers a considerable advantage. See Id. at 4-5.

Creative approaches to trial advocacy utilized by plaintiffs’ lawyers, combined with the courts’ decision to expand the scope of permissible employment actions, enlarged the arena of employment law. See Lindbergh Porter, Jr., Employment Torts: High Risk Components of Wrongful Discharge Lawsuits, 548 PLI/Lit 65, 69 (1996). An influx of general tort-based claims were added to the traditional employment actions available to plaintiffs. See Harty, supra, at 5.
These “employment torts” provide plaintiffs with a number of benefits that traditional employment actions lack, including alternative theories of relief, the option of bringing suit against multiple parties under joint or several liability, and a convenient vehicle for circumventing the numerous disadvantages that plague federal, and in some cases state, employment laws. See Id. at 4-6. Thus, actions based on intentional infliction of emotional distress; invasion of privacy; defamation; intentional interference with contractual relations; false imprisonment; negligent hiring, retention, training, and supervision; and assault and battery, have become common claims against employers. Id. See also Porter, supra.

The respective elements required in order to establish each tort shall be set forth below, and those elements that present plaintiffs with the most difficulty shall be explained individually. Furthermore, each tort shall be discussed in the context of its current role in contemporary employment litigation, as well as its prospective place in emerging court views, to the extent that such detail is applicable to the given cause of action.

I. INTENTIONAL INFILCTION OF EMOTIONAL DISTRESS

Intentional infliction of emotional distress (also referred to as IIED) is perhaps the most commonly asserted tort claim among individuals initiating legal action in the area of employment law. Though IIED may stand as a valid cause of action on its own, plaintiffs often attach this “catch-all tort” to additional claims, because it “encompasses conduct which falls both within and beyond the ambit of… other torts.” Harty, supra, at 41.

According to the Restatement (Second) of Torts § 46 (1965), “one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm results” therefrom, he shall be liable for that as well. A plaintiff who wishes to establish this cause of action must show: (a) that the defendant subjected him to extreme and outrageous conduct; (b) intending to cause, or
disregarding a substantial probability that he would cause the plaintiff severe emotional distress; (c) that the plaintiff in fact experienced such distress; and (d) said emotional distress was causally connected to the extreme and outrageous conduct manifested by the defendant. *Id.*

The essence of IIED lies in extreme and outrageous conduct. *Harty,* *supra,* at 41. Plaintiffs tend to run into the most trouble with this first element, as liability will be imposed “only where the conduct has been so outrageous in character, and so extreme in degree, as to… [contravene] all possible bounds of decency, and… be regarded as atrocious, and utterly intolerable” in a civilized society. *Restatement,* *supra,* cmt. d. The majority and minority standards both rely on this language, though each interprets it differently. *See* *Harty,* *supra.*

A few jurisdictions have held that “a plaintiff’s status as an employee should entitle him to a greater degree of protection from insult[ing] and outrage[ous]” treatment by a supervisor – or any other individual similarly possessing formal authority over him – than that which would be granted to him against the same treatment by a stranger. *GTE Southwest, Inc. v. Bruce,* 998 S.W.2d 605, 612 (Tex. 1999). *See, e.g., Travis v. Alcon Labs., Inc.,* 202 W.Va. 369, 504 S.E.2d 419 (1998); *Bridges v. Winn Dixie Atlanta, Inc.,* 176 Ga.App. 227, 335 S.E.2d 445 (1985); *Alcorn v. Anbro Eng’g, Inc.,* 2 Cal.3d 493, 468 P.2d 216 (1970). However, these decisions go against the weight of authority and form the minority view on this particular point.

majority standard, “[s]uch extreme [and outrageous] conduct exists only in the most unusual of circumstances.” *GTE Southwest, Inc.*, 998 S.W.2d at 613. See also *Robel v. Roundup Corp.*, 148 Wash.2d 35, 59 P.3d 611 (2002) (where former coworkers tormented and verbally attacked disabled employee in the workplace on a regular basis, using various racial slurs and vulgar names in the presence of customers while performing their jobs, their conduct was found to be sufficiently extreme and outrageous to constitute a cause of action for IIED).

Liability will not extend to “mere insults, indignities, threats, annoyances… or other trivialities. Restatement, *supra.* See also *Tracy v. New Milford Pub. Schools*, 922 A.2d 280 (Conn.App. 2007) (denial of desired position and initiation of disciplinary actions prior to performance of proper investigation did not qualify as extreme and outrageous conduct); *Bodewig v. K-Mart, Inc.*, 635 P.2d 657 (Or. Ct. App. 1981) (employee accused of stealing money and required to undergo strip search to satisfy customer, despite employer’s relative certainty that she had not in fact stolen it, could not establish extreme and outrageous conduct). Thus, in order to establish a case for IIED “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.” *GTE Southwest, Inc.*, 998 S.W.2d at 613.

In each claim, the allegedly tortuous conduct should be assessed in light of the facts and circumstances surrounding it, as conduct that is merely uncalled for and offensive in one context might be extreme and outrageous in another, because of the context in which it occurred or the existence of some significant detail. There are various situational factors which are capable of bringing otherwise non-actionable conduct up to the level of actionability. Conduct engaged in by a defendant who knew or had reason to know of a condition that made the plaintiff peculiarly susceptible to emotional distress, will be judged more harshly than similar conduct engaged in
without such knowledge. Restatement, supra, cmt. f. Conduct engaged in by an employer or coworker with direct authority over the plaintiff, or real power over his interests, will be judged with regard to the fact that the defendant had an affirmative duty to refrain from behaving abusively towards the plaintiff. *Id.* at cmt. e. See, e.g., *Wenigar v. Johnson*, 712 N.W.2d 190, (Minn.App 2006). Conduct comprised of an ongoing harassment campaign against a plaintiff will be judged – not as a series of individual actions – but as a whole. See, e.g., *Id.*

Yet even with the added benefit of these individualized considerations, very few claimants manage to successfully pass this initial test for intentional infliction of emotional distress claims. However, a plaintiff who manages to meet the standard required in order to establish a sufficient showing of extreme and outrageous conduct will be well on his way to the favorable judgment he seeks.

Tortious intent on the part of the defendant – the second element – and causation between the defendant’s conduct and the plaintiff’s emotional distress – the fourth – are both easier to prove than the first element of the claim.

The standard for the third element – severe emotional distress – is perhaps a bit more difficult to establish, though not nearly as daunting as the first. Severe emotional distress does not include the type of mental suffering to which most people are accustomed and which a well adjusted person is generally able to handle. According to the Supreme Court of Illinois, not “every emotional upset should constitute the basis of an action… [and] a line can be drawn between the slight hurts which are the price of a complex society and the severe mental disturbances inflicted by intentional actions wholly lacking in social utility.” *Knierim v. Izzo*, 22 Ill.2d 73, 85, 174 N.E.2d 157, 164 (1961). Therefore, in order to prevail on an action for IIED, a
plaintiff’s emotional distress must be “so severe that no reasonable man could be expected to endure it.” Restatement, supra, cmt. j.

Legal indications of severe emotional distress include, but are not limited to, “mental suffering... anguish, shock, fright, horror, grief, shame, humiliation... worry, and nausea.” Travis, 202 W.Va. at 430, 504 S.E.2d at 380. Yet, liability will only arise where it can be shown that the above reactions, or other persuasive signs of emotional distress, were experienced to an extreme degree. Intensity and duration are both factors to be considered in determining the severity of a plaintiff’s emotional distress. Restatement, supra. Physical manifestations may serve as supportive proof as well, though their absence will rarely be dispositive of such distress. Vinson, 360 N.W.2d at 118. Additionally, while some direct proof of severe emotional distress is required, “the... extreme and outrageous... conduct is [often] in [and of] itself important evidence that the distress... existed.” Restatement, supra.

IIED claims frequently appear in the context of sexual harassment complaints. While most courts agree that employment suits involving sexual harassment complaints generally do not constitute sufficient grounds for an IIED action, some have held that where the sexual harassment is especially egregious, an IIED claim may be appropriate. See Poole v. Copland, Inc., 348 N.C. 260, 498 S.E.2d 602 (1998) (action for IIED held where former employee presented evidence that sexual harassment by coworker was so extreme it would cause severe emotional distress in any person with ordinary sensibilities); Busby v. Truswal Sys. Co., 551 So. 2d 322 (Ala. 1989) (supervisor’s ongoing sexual harassment towards female employees, which included a constant barrage of lewd gestures and crude comments, was egregious enough to establish claim for IIED); Howard University v. Best, 484 A.2d 958 (D.C. 1984) (female faculty member made out prima facie case of IIED based on repeated sexual harassment by male dean).
Under the theory of respondeat superior, a corporate employer may be held vicariously liable for an IIED offense committed by a subordinate employee, provided the conduct upon which the action is based either fell within the scope of his employment or was ratified by the employer. However, because most of the tortious conduct alleged in IIED claims falls beyond the scope of the offender’s employment, employers are rarely held liable for their employees’ torts under the ‘scope of employment’ provision. See, e.g., Busby, 551 So. 2d at 327. In most cases, vicarious liability will be imposed through the ‘ratification’ provision, which requires only that: (a) the employer had actual knowledge of the tortious conduct; (b) based on this knowledge, the employer knew the conduct constituted a tort; and (c) the employer failed to take adequate steps to remedy the situation. See Coates v. Wal-Mart Stores, Inc., 127, N.M. 47, 976 P.2d 999 (1999) (substantial evidence to support IIED claim brought by two sexually harassed employees against employer where harassment was particularly egregious and had been witnessed by employer’s high level personnel); Ford v. Revlon, Inc., 153 Ariz. 38, 734 P.2d 580 (1987) (employer incurred liability for IIED after failing to address numerous complaints made by employee, over a period of several months, regarding sexual harassment by manager).

II. INVASION OF PRIVACY

Another tort employees frequently use in actions against their employers is invasion of privacy. “One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.” Restatement (Second) of Torts § 652A (1977). Most states recognize four distinct actions within the larger tort of invasion of privacy: (1) unreasonable intrusion upon another’s seclusion; (2) appropriation of another’s name or likeness; (3) unreasonable publicity to another’s private life; and (4) publicity portraying another in an unreasonable false light. Id. Within the context of employment litigation, the most common invasion of privacy actions pertain to unreasonable intrusion upon the seclusion of another
(hereinafter “unreasonable intrusion”) and unreasonable publicity given to the private life of another (hereinafter “unreasonable publicity”). Harty, supra, at 34-35.

A cause of action for unreasonable intrusion arises when “one… intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or [upon] his private affairs… if the intrusion would be highly offensive to a reasonable person.” Restatement, supra, § 652B. This action “differs from the other forms of invasion of privacy in that it does not require a plaintiff to prove [that] the defendant communicated facts about his private life to the general public.” Harty, supra, at 35 (citing Restatement, supra, cmt. a). In order to establish a claim for unreasonable intrusion, a plaintiff need only show that: (a) the “defendant intentionally intruded upon the seclusion the plaintiff cast about his person and affairs;” and (b) any reasonable person would have found the intrusion highly offensive. Harty, supra (internal citations omitted).

The first element will be fulfilled only where an actual intrusion occurred. Thus, failed attempts to search through an employee’s personal belongings, or gather information about his private concerns, are not considered intrusions for the purposes of this action. See Saldana v. Kelsey Hayes Co., 178 Mich.App. 230, 443 N.W.2d 382 (1989) (dismissal of claim based on letter sent by employer to employee’s doctor, where doctor did not respond); Cort v. Bristol-Myers Co., 385 Mass. 300, 431 N.E.2d 908 (1982) (action for unreasonable intrusion dismissed where employees refused to answer objectionable questions contained in employer questionnaire). However, where intention leads to execution, thereby establishing the existence of an intrusion, the question becomes one of whether said intrusion was highly offensive.

An intrusion will be deemed highly offensive where the plaintiff can show that the defendant’s intrusion either served an illegitimate purpose or was made in an inappropriate manner. See Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123 (Alaska 1989) (dismissing
claim and holding that purpose of employee drug test was legitimate where intoxication could result in peril and property damage, and manner of test administration was appropriate where employees were given advance notice and allowed to select test date). An employer’s purpose in conducting the test will be deemed legitimate where “the importance… in assessing the employee’s efficacy in his work outweighs… [his] right to… [privacy].” Harty, supra, at 36.

Causes of action for unreasonable publicity develop as a result of the “public disclosure of private facts.” Washington State Human Rights Comm’n v. City of Seattle, 25 Wash.App. 364, 607 P.2d 332 (Wash. Ct. App. 1980). Statements giving rise to this type of action usually contain factually accurate information that is embarrassing or of a comparably secretive nature. See, e.g., State v. Eighth Judicial Dist. Court ex rel. County of Clark, 118 Nev. 140, 42 P.3d 233 (2002). In order to establish a claim for unreasonable publicity, a plaintiff must prove that: (a) the defendant publicized a matter regarding the plaintiff’s private life; (b) a reasonable person would be highly offended if a comparable matter regarding his private life was publicized; and (c) the matter is not a legitimate public concern. Restatement, supra, § 652D. See, e.g., Karch v. BayBank FSB, 147 N.H. 525, 794 A.2d 763 (2002); Kureczka v. Freedom of Information Comm’n, 228 Conn. 271, 636 A.2d 777 (1994); Eddy v. Brown, 715 P.2d 74 (Okl. 1986).

Unreasonable publicity is probably the most frequently used invasion of privacy action in employment litigation, though unreasonable intrusion actions tends to be asserted in relation to a far wider range of claims – the most prevalent of these being sexual harassment. See, e.g., Phillips v. Smalley Maint. Servs. Inc., 435 So. 2d 705 (Ala. 1983). Unreasonable intrusion is also commonly used to redress highly invasive investigations or surveillances, drug tests administered in a highly offensive manner, unreasonable searches of employees’ belongings, and employment decisions based on employees’ off duty activities. See, e.g., Twigg v. Hercules
A plaintiff who has successfully established an improper and unauthorized invasion of his private affairs under any of the four theories recognized by the Restatement will receive compensation for the resulting emotional injuries and for any additional damage that he can prove to have been causally connected to said invasion. Restatement, supra, § 652H, cmts. b-c. An employer may be held vicariously liable for an invasion of privacy claim based on an act committed by one of his employees, provided the employer ratified the offending act.

III. DEFAMATION

Employment disputes also quite frequently center around the tort of defamation. Defamation can be defined most simply as a communication about another that impeaches his reputation and adversely affects his associations and dealings with others. Most employment disputes arise out of statements made by plaintiffs’ former employers to employees or other employers about why said employees were disciplined or terminated. Harty, supra, at 47.

“The law of defamation embraces the twin torts of libel and slander.” Theisen v. Covenant Medical Center, Inc., 636 N.W.2d 74, 83 (Iowa, 2001) (internal quotations omitted). Libel refers to those communications that are written or otherwise recorded, whereas slander refers to communications that are published verbally. Restatement (Second) of Torts §§ 568-570 (1977). Traditionally, libel is considered to be the more serious of the two offenses, as these communications – and the injuries they cause – are thought to be more permanent.

However, while many jurisdictions continue to treat the two differently, the truth is that advances in media and communications technology have so blurred the line between them that it is now nearly impossible to distinguish one from the other. Id. § 568, cmts. a-h. See, e.g.,
Rosenberg v. Helinski, 328 Md. 664, 675, 616 A.2d 866, 871 (1992) (“It is unnecessary to draw nice distinctions in deciding whether… oral comments made [by the defendant] to a television news camera and recorded on film for broadcast constitute libel or slander”).

Causes of action for defamation are meant to compensate plaintiffs for the unprivileged publication of false information resulting in injury to their reputations. Harty, supra, at 47. See, e.g., Fleming v. Rose, 350 S.C. 448, 567 S.E.2d 857 (2002). Thus, an actionable claim for defamation requires proof of: “(a) a false and defamatory communication concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.” Restatement, supra, § 558.

A defamatory communication includes any false statement, which is represented as being true, that tends to damage another’s image and “lower him in the estimation of the community or deter third persons from associating or dealing with him.” Restatement, supra, § 559. In order to prove that a statement is defamatory, a plaintiff must show that: (a) at least one of its possible meanings is defamatory; and (b) those persons to whom it was communicated did in fact interpret it as having a defamatory meaning. See, e.g., Spivak v. J. Walter Thomas U.S.A., Inc., 258 A.D.2d 364, 685 N.Y.S.2d 247 (1999); Crowley v. North American Telecommunications Ass’n, 691 A.2d 1169 (D.C. 1997). A plaintiff need not prove that the statement tainted his reputation among the entire community. Rather, proof that it unfavorably altered a substantial minority’s perception of him will suffice. See, e.g., Matheson v. Stork, 239 Neb. 547, 477 N.W.2d 156 (1991); Solomon v. Atlantis Development, Inc., 147 Vt. 349, 516 A.2d 132 (1986).

Some libelous or slanderous communications are considered per se defamatory. Communications are defamatory per se if they impute to the defamed individual either: (1) a
criminal offense; (2) a loathsome disease; (3) a matter incompatible with his business, trade, profession or office; or (4) serious sexual misconduct. Restatement, supra, § 570. Where the statement in question is per se defamatory, that plaintiff need not establish any proof of injury. Rather, such proof will be assumed or inferred from the nature of the statement. Harty, supra at 47. Communications that are not defamatory per se are known as either libel per quod or slander per quod, and are recognized only on the condition that plaintiffs can show some specific injury.

However, defamatory communications will only provide a basis for recovery where they can be shown to have been comprised of false or misleading statements of fact. Porter, supra, at 71. Truth is considered to be an absolute defense, therefore, factually accurate statements about employees are not actionable, regardless of the defendants’ intentions, except in the most unusual cases. Id. Similarly, vulgar names or derogatory comments that are clearly aimed at upsetting an employee, rather than persuading others of their truth, may not be used as a basis for defamation claims. Offensive expressions of opinion are also not defamatory. See, e.g., Moyer v. Amador Valley Junior High Sch. Dist., 225 Cal.App.3d 720; McGrath v. TCF Bank Sav., FSB 502 N.W.2d 801 (Minn.Ct.App. 1993).

Defamation generally requires a plaintiff to prove that the defendant published the defamatory statement by communicating it to a third person. Restatement, supra, § 558. It may also be proven that a defendant published the defamatory communication through his agents, or even through non-verbal communication. See, e.g., Dominguez v. Food Stores v. Davidson, 266 Kan. 926, 974 P.2d 112 (1999); General Motors v. Piskor, 277 Md. 165, 352 A.2d 810 (1976). However, in most defamation cases, non-verbal communications alone will not provide sufficient proof of publication, as is required for plaintiffs to establish a legitimate claim.
Under the doctrine of self-compelled publication, employees may assert defamation claims where they themselves communicated the defamatory statement, but were allegedly forced to do so by former employers’ actions. See, e.g., Overcast v. Billings Mutual Ins. Co., 11 S.W.3d 62 (Mo. 2000); Churchev v. Adolph Coors Co., 759 P.2d 1336 (Colo. 1988); McKinney v. Santa Clara County, 110 Cal. App. 3d 787 (1980). However, many jurisdictions still refuse to recognize this doctrinal theory. See, e.g., Gonselves v. Nissan Motor Corp. in Hawaii, Ltd., 100 Haw. 149, 58 P.3d 1196 (2002); Sullivan v. Baptist Memorial Hosp., 995 S.W.2d 569 (Tenn. 1999); Atkins v. Industrial Telecommunications Ass’n, Inc., 660 A.2d 885 (D.C. 1995).

The publication of certain kinds of communication may be subject to a privilege against suit. Harty, supra, at 47. A defamatory communication is privileged if it is published to a someone that has a legitimate interest in knowing the substance of the defamatory statement. Id. Such communications may either be protected by an absolute privilege or a conditional privilege, depending on the context in which they are made. Id. Statements concerning employees’ work performance are absolutely privileged if the employer publishes them within a judicial or quasi-judicial proceeding. Restatement, supra, § 585 cmt. c. On the other hand, statements about employees are conditionally privileged if they are communicated among persons with a mutual interest in the subject matter, or if the person making the statement has a duty of disclosure to a third party. Restatement, supra, §§ 595-96. However, an employee may then prove that the statement – though subject to a conditional privilege – was made with malice, in which case the employer may still be held liable for a defamation action. Harty, supra, at 47.

IV. INTENTIONAL INTERFERENCE WITH EMPLOYMENT CONTRACTS

Employment suits often arise out of one party’s interference with an employment contract of another. One who by improper means or unfair competition intentionally sabotages or otherwise interferes with another’s prospective or existing contractual relations may be sued

For a plaintiff to recover on a cause of action for intentional interference with prospective contractual relations, there must be: (a) an existing expectancy; (b) knowledge of this expectancy on the part of the defendant; (c) intentional interference with the expectancy; (d) causation; and (e) damages. In order to receive a judgment for a cause of action alleging intentional interference with existing contractual relations, a plaintiff must show: (a) an valid contractual relationship; (b) knowledge of the relationship on the part of the interfering party; (c) intentional interference with the performance of the contract; (d) causation; and (e) damages. ABA Model Jury Instructions for Business Litigation §§ 2.01 – 2.09 (1987).

Interference claims commonly occur in three employment contexts: (1) where a former employer provides an unfavorable post-employment reference resulting in the former employee’s loss of a potential new position; (2) where an employer seeks to enforce a non-competition agreement; and (3) where a supervisor or manager interferes with an employee’s job performance or contributes to the event of that employee’s termination. Harty, supra, at 47.

Liability for a cause of action based on tortious interference with an existing or prospective contract may extend to supervisors and managers as well as to former employers. Porter, supra, at 88. However, “absent a showing of bad faith or improper motive, courts have found that a corporation is not capable of interfering with its own contract and that… [a manager or] supervisor, as part of the corporation, is not” either. Id. at 91-92. Provided all hiring, assessment, and termination decisions concerning said employee were within the defendant’s discretion, he was acting within the scope of his employment, an action for tortious interference will not stand, unless a plaintiff can prove bad faith or improper motives. Id.
An employer’s best defense against liability for intentional interference is a legal justification; that is, proof that either he, the employer, or another, as his agent, acted with a proper motive for the advancement of a legitimate interest. Restatement, supra, § 767. Truth is also a defense. All employers enjoy the privilege of immunity from any such claims arising from their provision of truthful post-employment references. Restatement, supra, § 772.

V. NEGLIGENT HIRING, RETENTION, TRAINING, AND SUPERVISION

A number of successful actions have recently been brought against employers, alleging negligence in the hiring, retention, training, and supervision of workers with criminal, violent, or otherwise wrongful propensities, and seeking compensation for injuries resulting from those workers’ tortious acts. See, e.g., Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 340 S.E.2d 116 (1986); Giles v. Shell Oil Corp., 487 A.2d 610 (D.C. 1985); Abbott v. Payne, 457 So.2d 1156 (Fla. Dist. Ct. App. 1984). All four types of this employer negligence action are composed of: (a) a legal duty to conform with a certain standard of conduct, so as to protect others from unreasonable risk; (b) a failure to conform to the requisite standard of conduct; (c) a resulting loss or injury to another’s interests; and (d) a reasonably close causal connection between said loss or injury and the conduct that preceded it. Porter, supra, at 101.

The most frequently brought of these claims are for negligent retention and negligent supervision. To establish an employer’s liability for negligent retention or supervision, a plaintiff must prove only that: (a) the employer knew, or should have known, that one of its employees was behaving in a dangerous or otherwise incompetent manner; and (b) the employer nevertheless retained or failed to adequately reprimand or supervise the employee. See, e.g., Mardis v. Robbins Tire & Rubber Co., 669 So. 2d 885, 889 (Ala. 1995).

To prove liability for negligent training, a plaintiff must show that the defendant failed to provide an employee with the necessary instructions or information an employee in his position
would need, and that employee proceeded to injure someone as a result. Porter, supra, at 112. Liability for negligent hiring will be imposed where employers have breached their affirmative duty to pursue an “investigation into the pertinent employment-related background of... [any] prospective new employee... before extending... [an] offer of employment.” Harty, supra, at 7.

As with many other employment torts, employer negligence claims are often brought in the context of sexual harassment. These claims are extremely popular among plaintiffs being sexually harassed by second-time-offenders, for plaintiffs can argue that the employer knew (often because of previous complaints) or should have known (because of the widespread or open nature of the conduct) of the sexual harasser’s tortious activity.

Claims based on employer negligence extend much greater liability upon employers than the traditional doctrine of respondeat superior. Under the latter, employers can only be found vicariously liability for their employees’ actions, and only for those “committed within the scope of the employee’s authority and in furtherance of the employer’s business.” Yet, under the theory of employer negligence, primary liability may be imposed on an employer for all “foreseeable acts of... [an] employee,” whether or not they were within the scope of his authorized duties, if they could have been prevented by reasonable diligence. Harty, supra, at 8.

However, as derivative state torts, employer negligence actions must hinge upon the underlying tortious act of an employee. See, e.g., Stevenson v. Precision Standard, Inc., 762 So. 2d 820, 824 (Ala. 1999); Phinazee v. Interstate Nationalease, Inc., 514 S.E.2d 843, 846 (Ga. App. 1999). Thus, employers may be able to avoid liability for alleged negligence where plaintiffs fail to bring or are unable to succeed upon their fundamental tort claims.

VI. FALSE IMPRISONMENT

False imprisonment claims are not new to employment litigation, and continue to play a role in this legal sector. According to the Restatement (Second) of Torts § 35 (1965), one who

The two main elements a plaintiff must establish in a false imprisonment action are that: (a) he was restrained, knowingly and against his will, by the defendant; and (b) defendant’s restraint was not legally justified. Faniel v. Chesapeake and Potomac Tel. Co. of Maryland, 404 A.2d 147, 150 (D.C. 1979) (citing Tocker, 190 A.2d at 824). Obviously, the “threshold question in… [such] action[s] is… whether a detention… occurred.” Faniel, 404 A.2d at 150. This is a multifaceted question, which turns upon various objective and subjective factors. Upon showing that a detention did in fact occur, a plaintiff must then prove that said detention was unlawful.

First of all, detention requires a showing of the defendant’s intention to restrain or confine the plaintiff. Restatement, supra. Not all restraints upon a person’s liberty of motion will constitute a willful detention, particularly in the employment context. “When an employer supervises its employees, it necessarily… restricts… [their] freedom to move from one place to another or in the direction that they wish to go, but, without more, such restriction is not a willful detention” in the sense that is required under the first element of false imprisonment. Randall’s Food Markets, Inc. v. Johnson, 891 S.W.2d 640, 645 (Tex. 1995) (internal quotations omitted). However, employment status does not result in the complete abolition of a person’s rights during work hours or on work premises. See Faniel, 404 A.2d at 151. Thus, a plaintiff must show that
his employer went a step beyond the general constraints employers are entitled to exercise over their subordinates, and confined him within boundaries the employer fixed. Restatement, *supra*.

Certain proofs pertaining to the plaintiff’s intentions and awareness are required as well. A false imprisonment action will not be recognized where the plaintiff was not aware of his confinement until after he had already been released, unless he suffered some tangible harm from said confinement. *Id.* Furthermore, where the plaintiff could reasonably have escaped from the boundaries of his confinement, without experiencing any harm or injury, his claim will most likely fail, for confinement must be complete in order to be actionable. *Id.* at § 36. However, if there was a reasonable means of escape available, but the plaintiff was unaware of its existence, his confinement will still be considered complete, and his claim will be allowed to proceed. *Id.*

For the purposes of a false imprisonment action, detention may be accomplished by violence, physical barriers, threat of violence or arrest, or by another form of unreasonable duress. *Fermino v. Fedco, Inc.*, 7 Cal.4th 701, 715, 872 P.2d 559, 567 (1994). “Where it is alleged that detention… [was] effected by a threat, [a] plaintiff must demonstrate that [the] threat was such as would inspire… a just fear of injury to… person, reputation, or property.” *Randall’s Food Markets, Inc.*, 891 S.W.2d at 645. In this same vein, “threats of future action… are not ordinarily sufficient in themselves to effect an unlawful imprisonment.” *Morales v. Lee*, 668 S.W.2d 867 (Tex.App. 1984). Furthermore, in considering the sufficiency of a threat allegedly used by defendant in detaining a plaintiff, courts tend to consider the relative size, age, gender, sophistication, and physical demeanor of the two parties, in addition to the actual words used in issuing said threat. *See, e.g.*, *Black v. Kroger Co.*, 527 S.W.2d 794 (Tex.Civ.App. 1975).

“Submission to the mere verbal direction of another, unaccompanied by force or threats of any character, does not constitute false imprisonment and mere words are insufficient to effect
imprisonment if [the] person to whom they are spoken is not deprived of freedom of action."

*Grayson Variety Store, Inc. v. Shaffer*, 402 S.W.2d 424, 425 (Ky. 1966). Under circumstances such as these, courts will consider the plaintiff to have given his consent to be detained. Nor can a claim for “false imprisonment… be predicated on a person’s unfounded belief that he was restrained,” when in fact, he was not. *Lester v. Albers Super Markets, Inc.*, 94 Ohio App. 313, 317, 114 N.E.2d 529, 532 (1952). Thus, “where an employer… declines to terminate [an] interview… [with an employee, but] no force or threat of force is used,” there is no cause of action for false imprisonment, for the employee was free to leave of his own volition. *Id.*

Even where all of the above factors are properly addressed, an action for false imprisonment will not be maintained unless the detention was unlawful. *See, e.g.*, *Lewis v. Farmer Jack Div., Inc.*, 415 Mich. 212, 327 N.W.2d 893 (1982). Therefore, where an employer detains an employee for a reasonable period of time, with regard to a matter he has good reason to investigate, said employee will not be able to sue for damages under false imprisonment. Likewise, if the employer has managed to obtain a warrant for an employee’s arrest, the employee’s subsequent detention will not enable him to bring a claim for false imprisonment either.

False imprisonment claims brought in the employment context most frequently occur in situations when the employer has questioned one or more of his employees in relation to suspicions of merchandise theft or stealing from a cash register. However, as stated above, these situations will not give rise to liability if the investigations are conducted in a reasonable and respectful manner, and the employer manages to maintain his self control.

**VII. ASSAULT AND BATTERY**

Assault and battery are also familiar tort actions within the context of employment law. These claims provide individuals with a theory of recovery for unwanted, nonconsensual contact,
or for any fear caused by the apprehension of such contact. Blakely, Allison C., Employer-
Employee Relations: Employment Torts Come of Age: Increasing Risks of Liability for
superior, an employer may be held liable for acts of assault or battery committed by an
employee, where he was either acting within the scope of his employment when the tort was
committed, or where the employer knew about the tortious conduct and ratified its continued

A person is liable for battery where: (a) he acts intending to cause a harmful or offensive
contact with the person of the other or a third person, or an imminent apprehension of such a
contact; and (b) a harmful contact with the person of the other directly or indirectly results.
Restatement (Second) of Torts § 18 (1965). Liability for assault arises where a person: (a) acts
intending to cause a harmful or offensive contact with the person of the other or a third person,
or an imminent apprehension of such a contact; and (b) the other is thereby put in apprehension
of such contact. Restatement, supra, § 33.

Employees typically bring assault and battery claims against employers in cases of sexual
harassment or where there has been some other unwanted physical contact between an employee
and an employer. See, e.g., Mardis Robbins Tire & Rubber Co., 669 So. 2d 885 (Ala. 1995);
also stem from improperly executed workplace investigations, polygraphs and drug tests, or from
exposure to toxic substances in the workplace. See Singer Shop-Rite Inc. v. Rangel, 416 A.2d
CONCLUSION

The steady increase of tort claims being brought in employment disputes reflects the need for attorneys to become familiar with each tort’s elements and skilled at applying these elements to individualized facts. A wise plaintiff’s lawyer will combine tort-based claims with traditional employment law statutory claims in his or her client’s complaint to “pack the strongest wallop” against the defendant.

*The assistance of Farrah Celler, a legal intern at Wilentz, Goldman & Spitzer, in writing this article is gratefully acknowledged.