EMPLOYMENT TORTS

Jessica Stender\(^1\)
Roberta Steele
Goldstein, Demchak, Baller, Borgen & Dardarian
300 Lakeside Drive, Suite 1000
Oakland, California 94612
Phone: (510) 763-9800
Fax: (510) 835-1417
www.gdblegal.com

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Introduction

During recent years, there has been an increase in claims brought against employers arising under the general category of employment torts. These tort theories are widely used, sometimes in an attempt to overcome statutory caps, or to provide additional bases for employer liability. Tort theories are also appealing to plaintiffs who have failed to meet the administrative prerequisites for filing under federal or state employment discrimination laws or who wish to include supervisors as defendants, either to establish individual liability or to avoid removal of their claims to federal court. Additionally, employment torts may be used to increase the economic viability of what would otherwise be a wrongful discharge claim for contract damages only.

Some of the most often utilized torts in employment litigation, and the ones which will be addressed below, are intentional infliction of emotional distress, defamation (libel and slander), intentional interference with employment contracts, invasion of privacy, assault and battery and negligent hiring, training and retention.

I. INTENTIONAL INFILCTION OF EMOTIONAL DISTRESS

One of the most common torts claims brought by plaintiffs against employers is intentional infliction of emotional distress, also referred to as the tort of outrage. 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 to the other results from it, for such bodily harm.” To establish a cause of action for intentional infliction of emotional distress, a plaintiff must show: (1) extreme and outrageous conduct; (2) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and injury; and (4) severe emotional distress. It is well established that criticism of an employee’s job performance, abrasive interrogations, unjustified reprimands, opposition to unemployment benefits, excessive supervision, or negative evaluations alone do not constitute outrageous conduct on the part of the employer. See, e.g., Barber v. Whirlpool Corp., 34 F.3d 1268 (4th Cir. 1994); Spence v. Maryland Casualty Co., 995 F.2d 1147 (2nd Cir. 1993); Brown v. Freedman Baking Co., 810 F.2d 6 (1st Cir. 1987); Larson v. Koch Ref. Co., 1995 U.S. Dist. Lexis 1995 (Minn. Dist. Ct. 1995); Anderson v. Dunbar Armored, Inc., --- F.Supp.2d ----, 2009 WL 2568062 (N.D. Ga. 2009 (employer’s act of “badgering” employee about her work performance did not constitute extreme and outrageous behavior); Gonzales v. City of Martinez, --- F.Supp.2d ----, 2009 WL 1883768 (N.D. Cal. 2009) (holding that personnel management decisions such as job reassignment, “even
if improper motivation is alleged” are not sufficiently outrageous to support claim for intentional infliction of emotional distress).

Some courts have further held that “‘insults, harsh or intimidating words, or rude behavior ordinarily do not result in liability even when intended to cause distress.’” Dawson v. Entek Intern., --- F.Supp.2d ----, 2009 WL 2731348 (D. Or. 2009) (internal citations and quotation marks omitted) (holding that plaintiff’s allegations that co-workers called him “faggot,” “queer,” and other derogatory terms causing him to feel shame, fright, grief, humiliation, embarrassment, anger, disappointment, and worry did not constitute conduct that “extraordinarily transcends the boundaries of socially acceptable behavior”). See also Merfeld v. Warren County Health Servs., 597 F.Supp.2d 942 (S.D. Iowa 2009) (holding that alleged conduct of employer, including subjecting pregnant employee to public discussion and ridicule concerning her pregnancy, prior miscarriage, and medical restrictions, and superior stating intent to make employee’s life miserable when employee was contending with the complications of a pregnancy-related medical issue was not ‘outrageous’ as element of intentional infliction of emotional distress); Lorenzi v. Connecticut Judicial Branch, 620 F.Supp.2d 348 (D. Conn. 2009) (demeaning speech, unfair job appraisals, denial of pay raises and promotions, discrimination on the basis of race and/or national origin, and retaliating against employee for complaining about such discrimination do not meet standard for finding that conduct was extreme and outrageous; Sloan v. U.S., 603 F.Supp.2d 798 (E.D. Pa. 2009) (holding that conduct of co-worker which included racial epithets and threats of violence were not sufficiently outrageous). Some jurisdictions routinely hold that in employment disputes, even those involving discrimination and harassment, a claim will rise to the level of intentional infliction of emotional distress in only the most unusual of cases. See, e.g., Slater v. Susquehanna County, 613 F.Supp.2d 653 (M.D. Pa. 2009); Booth v. Intertrans Corp., 1995 U.S. Dist. LEXIS 7593 (E.D. La. 1995).

However, employers have been held liable for intentional infliction of emotional distress for such actions as subjecting employees to second-hand cigarette smoke and requiring an employee to submit a urine sample for drug testing in the presence of another employee. See, e.g., Kelly v. Schlumberger Tech. Corp., 849 F.2d 41 (1st Cir. 1988); Carroll v. Tennessee Valley Authority, 697 F. Supp. 508 (D.C. Col. 1988).

One of the more frequent uses of intentional infliction of emotional distress claims is in complaints for alleged sexual harassment. See, e.g., Hill v. New Jersey Dept. of Corrections, 776 A.2d 828 (N.J. Super 2001); Lawson v. Straus, 750 So. 2d 234 (La. App. 1999); Laughinghouse v. Risser, 786 F. Supp. 920 (D. C. Kan. 1992); American Road Service Company v. Inmon, 394 So. 2d 361 (Ala. 1981). Most courts recognize that ordinary employment suits involving sexual discrimination will not establish a cause of action for intentional infliction of emotional distress. See, e.g., Daniels v. C.L. Frates & Co., --- F.Supp.2d ----, 2009 WL 2230803 (W.D. Okla. 2009) (dismissing plaintiff’s emotional distress claim because allegations that she was subjected to a continuing hostile work environment and was transferred to a less desirable position after reporting the harassment were not sufficiently outrageous to support the claim). However, some courts have held that egregious sexual harassment may rise to the level of intentional infliction of emotional distress. See Wilson v. Monarch Paper Co., 939 F.2d 1138, 1144 (5th Cir. 1991); see also Skidmore v. Precision Printing & Packaging, Inc., 188 F.3d 606 (5th Cir. 1999) (upholding claim for intentional infliction of emotional distress where co-worker touched plaintiff sexually, kissed her neck, pulled her to his waist as she bent over, suggested she lick him from head to toe,
and circulated false rumors about her sexual activity despite knowing the rumors were causing trouble in her marriage; *Kanzler v. Renner*, 937 P.2d 1337 (Wy. 1997) (claims involving an employer demonstrating intimidating behavior toward employee, including hugging, kissing and rubbing his crotch against her leg provided sufficient evidence to go before a jury); *Hill v. New Jersey Dept. of Corrections*, 776 A.2d 828 (N.J. Super 2001) (holding that conduct involving sexual harassment may rise to the level of outrageousness necessary to provide a basis of recovery for the tort of intentional infliction of emotional distress); *Stabler v. City of Mobile*, 844 So. 2d 555 ( Ala. 2002) (holding that Alabama recognizes the tort of outrage in cases involving egregious sexual harassment).

Under the theory of respondeat superior, an employer may be held vicariously liable for an employee’s intentional torts (including intentional infliction of emotional distress) if the employee was acting within the scope of his employment when he committed the tort. However, as with many employment torts, the allegedly tortuous conduct cited in claims for intentional infliction of emotional distress is frequently outside the line and scope of the offending employee’s employment. See, e.g., *Doe ex rel. Doe v. White*, 627 F.Supp.2d 905 (C.D. Ill. 2009) (holding that teacher’s sexual abuse of students was not within scope of employment and thus, no respondeat superior liability for intentional infliction of emotional distress existed on part of school district); *Busby v. Truswal Sys. Co.*, 551 So. 2d 322, 327 (Ala. 1989); See also *Youngblood v. Alliance Pharmaceutical et al*, 95-2796, 1998 U.S. LEXIS 15786 (E.D. La. Sept. 30, 1998) (applying Louisiana state and federal law to conclude that the intentional act of the tortfeasor was neither primarily employment rooted, nor reasonably incidental to the performance of his employment duties and granting summary judgment in favor of defendants).

Plaintiffs may nonetheless hold employers liable for intentional infliction of emotional distress where it can be demonstrated that the employer adopted or ratified the tortuous conduct of its supervisory employees. However, a defendant employer’s mere failure to respond to claims of harassment is insufficient. See *Dawson v. Entek Intern.*, --- F.Supp.2d ----, 2009 WL 2731348 (D. Or. 2009). To establish ratification, a plaintiff must prove that: (1) the employer has actual knowledge of the tortuous conduct; (2) based on this knowledge, the employer knew the conduct constituted a tort; and (3) the employer failed to take adequate steps to remedy the situation. See, e.g., *Potts v. BE & K Construction Co.*, 604 So. 2d 398, 400 (Ala. 1995).

II. INVASION OF PRIVACY

Another tort frequently used by employees in claims against their employers is invasion of privacy. According to the Restatement (Second) of Torts § 652 (1977), “one who invades the privacy of another is subject to liability for the resulting harm to the interests of the other.” Id. Liability for invasion of privacy attempts to compensate plaintiffs for emotional harm caused by improper and unauthorized intrusion into private affairs. Restatement (Second) of Torts § 652H cmts. b-c. Most states recognize four types of invasion of privacy claims: (a) unreasonable intrusion upon the seclusion of another; (b) appropriation of the other’s name or likeness; (c) unreasonable publicity given to the other’s private life (i.e. public disclosure of private facts); (d) publicity that unreasonably places the other in a false light before the public. Restatement (Second) of Torts § 652 (1977).
As with intentional infliction of emotional distress, claims for invasion of privacy are often made in the sexual harassment context. See, e.g., Allstate Ins. Co. v. Ginsberg, 863 So. 2d 156 (Fla. 2003); Busby v. Truswal System Corp., 551 So. 2d 322 (Ala. 1989); Phillips v. Smalley Maint. Servs. Inc., 435 So. 2d 705 (Ala. 1983); Hamrick v. Wellman Products Group, 2004 WL 2243168 (Ohio App. 2004). When complaining of alleged sexual harassment, plaintiffs generally proceed under the “unreasonable intrusion” theory of invasion of privacy. Intrusion upon seclusion occurs when one intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, and the intrusion is highly offensive to a reasonable person. Restatement (Second) of Torts § 652B (1977).\(^2\)

See Roth v. Farner-Bocken Co., 667 N.W.2d 651 (S.D. 2003) (claims were sufficient to state a cause of action under theory of intrusion upon seclusion where an employer inadvertently opened a letter addressed to a former employee regarding that employee’s age discrimination claim, read the entire contents of the correspondence after realizing that it was directed to the former employee and then proceeded to photocopy the correspondence and give copies to other co-workers); Johnson v. Kmart Corp., 723 N.E. 2d 1192 (Ill. Ct. App. 2000) (issue of material fact found as to whether an employer committed tort of unreasonable intrusion where employer deceived employees by obtaining highly personal information regarding family members, medical issues, relationships, and offspring through use of undercover informants).

An employer can be held liable for invasion of privacy committed by an employee where it ratifies the offending conduct. See, e.g., Busby v. Truswal System Corp., 551 So. 2d 322 (Ala. 1989). As with vicarious liability for other intentional torts, the employee’s actions must be “so closely connected in time, place, and causation to his employment duties that it constitutes a risk of harm fairly attributable to the employer’s business.” Pinero v. Jackson Hewitt Tax Service Inc., --- F.Supp.2d ---, 2009 WL 1605147, at *6 (E.D. La. 2009) (holding that allegations that employee of tax return preparer threw away customer’s confidential tax information and intentionally publicized customer’s private information stated invasion of privacy claim against tax return preparer, as employer, under theory of vicarious liability because this conduct was sufficiently connected to her employment duties so as to constitute risk attributable to tax preparation business).

Another commonly claimed theory in employment-related lawsuits is the “public disclosure of private facts.”\(^3\) See, e.g., Kureczka v. Freedom of Information Comm’n, 636 A.2d 777 (Conn. 1994); Washington State Human Rights Comm’n v. City of Seattle, 607 P.2d 332 (Wash. Ct. App. 1980). Under this theory, an invasion of privacy occurs where an employer publicizes a private or personal fact about an employee and no legitimate business purpose is served by the disclosure. See, e.g., Eddy v. Brown, 715 P.2d 74 (Okla. 1986); Bratt v. Int’l Business Machines Corp. Inc., 467 N.E. 2d 126 (Mass. 1984). See also, Karraker v. Rent-A-Center, Inc., 239 F.Supp.2d 828 (C.D. Ill. 2003) (claims against employer were sufficient to state a cause of action where allegations that results of psychological tests were placed in employees’

\(^2\) The Restatement 2d of Torts, § 652B, defines intrusion upon seclusion as “one who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to the liability to the other of invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.”

\(^3\) The Restatement 2d of Torts, § 652D, defines the tort of public disclosure of private facts as “one who gives publicity to a matter concerning the private life of another is subjected to liability to the other in invasion of its privacy, if the matter publicized is of a kind that: (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.
files with potential to be distributed without regard to any business reasons for viewing the documents). These claims often involve the disclosure of medical information. Id. See also, Mitnau v. Fairmont Presbyterian Church, 778 N.E.2d 1093 (Ohio Ct. App. 2002) (court found a triable issue of fact where a church website posted a statement regarding its music director’s issues with severe depression and related hospitalization). For a viable invasion of privacy claim, the purportedly private facts must be of a “highly personal or intimate nature.” However, no such claim will lie when the facts at issue, despite being highly personal, are already in the public domain. Rodrigues v. EG Systems, Inc., --- F.Supp.2d ----, 2009 WL 2245653 at *2 (D. Mass. 2009) (holding that employee had no protected privacy interest in fact that he was cigarette smoker, where he admitted to smoking openly in public and to openly purchasing cigarettes, and supervisor had issued written warning to employee after observing pack of cigarettes in plain view on dashboard of employee’s vehicle).

Other examples of invasion of privacy claims made by employees against employers include actions pertaining to highly invasive investigations or surveillance, drug tests administered in a highly offensive manner, and unreasonable searches of an employee’s belongings. See O’Brien v. Papa Gino’s of America, Inc., 780 F.2d 1067 (1st Cir. 1986); Stevenson v. Precision Std., Inc., 762 So. 2d 820 (Ala. 1999). However, courts have dismissed invasion of privacy claims if employer surveillance in the workplace is not found to be “highly offensive.” See, e.g., Hernandez v. Hillsides, Inc. et al., 211 P.3d 1063, 1082 (Cal. 2009) (holding that summary judgment for employer on employees’ invasion of privacy claim was appropriate where surveillance system was narrowly tailored in space, time, and scope, and was prompted by legitimate business concerns, and where employer made “vigorous efforts to avoid intruding on plaintiffs’ visual privacy” and plaintiffs were not at risk of being monitored or recorded and were never actually caught on camera.) Further, some jurisdictions have found liability for invasion of privacy where an employer makes employment decisions based upon an employee’s off duty activities. See Talley v. Washington Inventory Serv., 37 F.3d 310 (7th Cir. 1994); Brantley v. Surles, 765 F.2d 478 (5th Cir. 1985).

Lastly, employees may bring invasion of privacy claims against employers for publicizing information about them that puts them in a false light. As to this tort, the Restatement provides that “[o]ne who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.” Restatement (Second) of Torts § 652(E). In the context of this tort, “publicity” means that the matter is made public, by communicating it to the public at large, or to so many persons that it is substantially certain to become public knowledge. Restatement (Second) of Torts § 652(E), Comment a. Thus unlike the “publication” requirement in a defamation claim, which includes communication to a third person, the “publicity” requirement in a false light invasion of privacy claim is not satisfied if the defendant communicates the information at issue about plaintiff to just one person or even a small group of people. See L-S Industries, Inc. v. Matlack, --- F.Supp.2d ----, 2009 WL 331385 at *5-6 (E.D. Tenn. 2009) (holding that plaintiff-former employee’s allegations of communications sent by former employer to small group of individuals concerning possible disloyalty of plaintiff before he left its employment, without evidence that communications were communicated to public at large or to so many people that
III. DEFAMATION

Defamation is the unprivileged publication of false information which injures a person’s reputation. Harty, Frank B., *Employment Torts: Emerging Areas of Employer Liability*, 39 Drake L. Rev. 3. (1989-90). To establish a cause of action for defamation, a plaintiff must show: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. Restatement (Second) of Torts § 558 (1977). According to the Restatement (Second) of Torts § 559, (1977), “[a] communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” *Id.*

Defamatory communications which are written, printed or of similar nature are libelous, and verbal defamatory communications are slanderous. Restatement (Second) of Torts §§ 568-570 (1977). Many states analyze slander and libel separately, recognizing libel as the more serious wrong. Restatement (Second) of Torts §§ 568 cmts. (1977). Other states use a single set of rules for both. *Id.*

In the employment context, defamation usually involves employer statements to third parties, usually other employers, concerning why an employee was terminated or otherwise disciplined. Harty, Frank B., *Employment Torts: Emerging Areas of Liability*, 39 Drake L. Rev. 3, 47 (1989-90). If these statements are not privileged, they may be *per se* defamatory. Statements are defamatory *per se* if they impute to the defamed individual: (a) a criminal offense; (b) a loathsome disease; (c) a matter incompatible with his business, trade, profession or office; or (d) serious sexual misconduct. Restatement (Second) of Torts § 570 (1977). If the statement is *per se* defamatory, a plaintiff does not have to prove the statement injured his reputation. Harty Frank B., *Employment Torts: Emerging Areas of Liability*, 39 Drake L. Rev. 3, 47 (1989-90).


Truth and privilege are the primary defenses to a defamation claim. Harty, Frank B., *Employment Torts: Emerging Areas of Liability*, 39 Drake L. Rev. 3, 47 (1989-90). Truth is an absolute defense, and privilege may be either absolute or conditional, depending on the context in which the statement is made. *Id.* Because truth is an absolute defense, an employer may
disclose facts concerning an employee to a third person so long as the statements are not false. Id. The employer’s motivation for making the statement is entirely irrelevant under these circumstances. Id. See also Cooper v. Laboratory Corp. of Am. Holdings, 150 F.3d 376 (4th Cir. 1998) (plaintiff’s defamation claim was dismissed under the theory of truth where she filed a defamation claim after she was fired because her urine tested positive for alcohol. Plaintiff was diabetic and claimed that her urine tested positive because of glucose fermentation, yet the court found that the lab report was indeed true, as her urine did test positive for alcohol).

A defamatory communication is privileged if it is published to a person who has a legitimate interest in knowing the substance of the defamatory statement. Harty, Frank B., Employment Torts: Emerging Areas of Liability, 39 Drake L. Rev. 3, 47 (1989-90). A statement concerning an employee’s work performance is absolutely privileged if the employer publishes the statement within a judicial or quasi-judicial proceeding. Restatement (Second) of Torts, § 585 cmt. c. (1977). See also Miller v. Health Servs. for Children Found., 630 F.Supp.2d 44, 51 (D.D.C. 2009) (holding that employee’s termination letter submitted by employer to unemployment compensation board was subject to absolute privilege). A statement concerning an employee is conditionally privileged if the statement is communicated among persons with a mutual interest in the statement’s subject matter or if the person making the statement has a duty or obligation to disclose the statement to a third party. Restatement (Second) of Torts § § 595-96 (1976). See Bearden v. International Paper Company, 529 F.3d 38 (8th Cir. 2008) (court dismissed a plaintiff’s defamation claim where the communications at issue regarding his termination were between supervisory employees and pertaining to business matter); Nelson v. Wachovia Securities, LLC, --- F.Supp.2d ----, 2009 WL 2461739 (D. Minn. 2009) (holding that statements made by employer’s regional president and employee relations consultant in connection with employee’s termination for his threatening, violent and hostile treatment of co-worker were qualifiedly privileged since they arose out of an internal employment investigation); Schrader v. Eli Lilly and Co., 639 N.E. 2d 258 (Ind. 1994) (Court found that communication regarding the plaintiffs’ termination was not defamatory, even though approximately 1500 employees saw the communication on a company bulletin board, because the statements were made pursuant to a “qualified privilege of common interest.” The court further rejected the plaintiffs’ argument that the privilege was abused by excessive publication). If an employer proves that a defamatory statement is subject to a qualified privilege, then the employee must prove that the statement was made with actual malice. See Miller v. Health Servs. for Children Found., 630 F.Supp.2d 44, 51-52 (D.D.C. 2009) (defining malice in this context as “the doing of an act without just cause or excuse, with such a conscious indifference or reckless disregard as to its results or effects upon the rights or feelings of others as to constitute ill will”) (internal quotations omitted); Harty, Frank B., Employment Torts: Emerging Areas of Liability, 39 Drake L. Rev. 3, 47 (1989-90).

IV. INTENTIONAL INTERFERENCE WITH THE EMPLOYMENT CONTRACT

According to the Restatement (Second) of Torts § 766A (1977), “one who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.” Id. To establish a cause of action for intentional interference with a contractual relationship, the plaintiff must show: (1) an
existing valid contractual relationship; (2) knowledge of the relationship on the part of the interfering party; (3) intentional interference with performance of the contract; (4) causation; (5) damages. A.B.A Model Jury Instructions for Business Litigation §§ 2.01-2.09 (1987).

According to the Restatement (Second) of Torts § 766B (1977), “one who intentionally and improperly interferes with another’s prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from the loss of the benefits of the relation.” Id. The elements of the tort of interference with a prospective business relation are: (1) an existing business expectancy; (2) knowledge of the expectancy on the part of the defendant; (3) intentional interference with the expectancy; (4) causation; and (5) damage. Hibbs v. K-Mart Corp., 870 F.2d 435 (8th Cir. 1989).

Interference with employment contracts generally arises in three different employment contexts: where a former employer provides an unfavorable post-employment job reference that results in the rejection of the employee for the new job; where an employer seeks to enforce a non-competition agreement; and where a supervisor or manager allegedly interferes with an employee’s job performance or causes the employee to be terminated. Harty, Franklin B., Employment Torts: Emerging Areas of Employer Liability, 35 Drake L. Rev. 3, (1990). While interference with contractual relations requires a valid existing contract, prospective interference requires only that an expectancy exist. Id. For interference with a prospective employment, most jurisdictions require that defendant’s conduct be malicious. See Stoller Fisheries, Inc. v. American Title Ins., 258 N.W. 2d 336 (Iowa 1977).

Generally, an employer or its agents cannot be held liable for tortuous interference with the employment relationship to which the employer is a party. Although the majority rule remains that a party to the contract cannot be liable for interference with contractual relations, several jurisdictions have permitted suits against employees for interference with contracts. See Cote v. Burroughs Wellcome Co., 558 F. Supp. 883 (E.D. Pa. 1987); Haigh v. Matusheta Electric Corp., 676 F. Supp. 1332 (E.D. Va. 1987).

The principal defense to an intentional interference claim is legal justification – whether the employer or agent acted with a proper motive to advance a legitimate interest. Restatement (Second) of Torts § 767 (1977). Truth is also a defense to an intentional interference claim, and employers may generally provide truthful post-employment references without incurring liability for intentional interference. Restatement (Second) of Torts § 772 (1977).

V. ASSAULT AND BATTERY

Assault and Battery provide individuals with a theory of recovery for unwanted, non-consensual contact, or the fear of such contact. Blakely, Allison C., Employer-Employee Relations: Employment Torts Come of Age: Increasing Risks of Liability for Employers and Their Insurers, 24 Tort & Ins. L.J. 268 (1989). According to the Restatement (Second) of Torts § 18 (1965), one is subject to liability for battery if: (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. Id.
Assault occurs where the alleged tortfeasor: (a) acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact; and (b) the other is thereby put in such imminent apprehension. Restatement (Second) of Torts § 33 (1965). To prove assault, the tortfeasor is not required to have the present ability to inflict injury, so long as the plaintiff had reasonable apprehension of injury. *Id.*

Employees typically bring assault and battery claims against employers in cases of sexual harassment or where there has been some other alleged physical contact between the employee and the employer. See *Mardis Robbins Tire & Rubber Co.*, 669 So. 2d 885 (Ala. 1995); *Crihfield v. Monsanto Co.*, 844 F. Supp. 371 (S.D. Ohio 1994). Additionally, assault and battery may stem from workplace investigations, polygraph and drug testing, and exposure to toxic substances in the workplace. See *Singer Shop-Rite Inc. v. Rangel*, 416 A.2d 885 (N.J. App. 1980), *cert. denied*, 425 A.2d 299 (N.J. 1980); *Walden v. General Mills Restaurant Group, Inc.*, 508 N.E. 2d 168 (Ohio App. 1986).

Under the doctrine of respondeat superior, an employer may be held liable for the assault and/or battery if its employee was acting within the line and scope of his employment when he committed the tort. See *Stevenson v. Precision Std., Inc.*, 762 So. 2d 820 (Ala. 1999); *see also, Baumeister v. Plunkett*, 673 So.2d 994 (1996) (applying Louisiana law and holding that a supervisor’s sexual assault on a co-employee was entirely extraneous to his employer’s interests and, therefore, that serving the master’s business did not actuate the servant at all); *Potts BE & K Construction Co.*, 604 So.2d 398 (Ala. 1992). Furthermore, an employer may be held liable for assault and battery where it ratifies the offending conduct. *Id.; see also, Edwards v. Hyundai Motor Mfg. Alabama, LLC*, 603 F.Supp.2d 1336, 1358 (M.D. Ala. 2009) (holding that plaintiff could not establish ratification by employer because there was no evidence employer actually knew that co-worker touched plaintiff in rude or offensive way, and thus granting summary judgment for employer on claim of vicarious liability for alleged assault and battery).

VI. **NEGLIGENCE SUPERVISION, TRAINING AND RETENTION**

Employers may be held directly liable for negligence towards employees resulting in harm. Frequently, negligence claims are used to establish liability on the part of the employer for retention of a supervisor who commits tortuous acts against employees, or for its failure to adequately supervise or train an employee. To establish an employer’s liability for negligent supervision, training or retention, a plaintiff must prove that the employer: (1) knew or should have known that one its employees was behaving in a dangerous or otherwise incompetent manner, and (2) that the employer nevertheless retained or failed to adequately train or supervise the employee. See *Daisley v. Riggs Bank, N.A.*, 2005 U.S. Dist. LEXIS 10232 (D.C. May 31, 2005); *Mardis v. Robbins Tire & Rubber Co.*, 669 So. 2d 885, 889 (Ala. 1995).

As with many other employment torts, negligent hiring, supervision and retention claims are often brought in the sexual harassment context. These claims are often brought where there is a second-time-offender sexual harasser, and 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) that the alleged harasser was committing tortious acts. See *Edwards v. Hyundai Motor Mfg. Alabama, LLC*, 603 F.Supp.2d 1336 (M.D. Ala. 2009) (holding that genuine issue of material fact existed as to negligent supervision claim as there was evidence that
employee engaged in repeated harassment of plaintiff and this tortuous behavior may have been widely known at the plant). Where an employer knew or should have known that an employee was likely to sexually harass others, it may be deemed negligent. See, e.g., B.C.B. Co., Inc. v. Troutman, 409 S.E.2d 218, 220 (Ga. App. 1991) (“a cause of action for negligence against an employer may be stated if the employer, in the exercise of reasonable care, should have known of an employee’s reputation for sexual harassment and that it was foreseeable that the employee would engage in sexual harassment of a fellow employee but he was continued in his employment”); Johnson-Kendrick v. Sears, Roebuck & Co., 39 Va. Cir. 314 (Va. Cir. Ct. 1996) (court held that a plaintiff’s claims were sufficient to state a cause of action where she had previously alerted management regarding coworker’s sexually inappropriate behavior and employer decided to retain that coworker); Doe v. Evans, 814 So.2d 370 (Fl. 2002) (court remanded case where a plaintiff alleged negligent hiring because the defendants had reason to know of a pastor’s previous improper sexual conduct).

Employers may also be directly liable for failing to train or for improperly training and/or educating its employees. Porter, Lindbergh, Employment Torts: High Risk Components of Wrongful Discharge Lawsuits, 548 PLI/Lit 65 (1996). If an employee fails to provide the employee with training, and the employee proceeds to injure someone as a result, the employer may be independently liable for the actions of its employee. Id.

When asserted against an employer, claims of negligent supervision, training and retention are derivative state torts that must hinge on underlying tortious conduct of an employee. See, e.g., Stevenson v. Precision Standard, Inc., 762 So. 2d 820, 824 ( Ala. 1999); Pinazee v. Interstate Nationalease, Inc., 514 S.E.2d 843, 846 (Ga. App. 1999). Moreover, some courts have held that negligence claims cannot be used to “bootstrap” Title VII liability into state common law. See Hathorn v. Boise Cascade Corp., 1998 U.S. Dist. LEXIS 18113, pp. 24-25 (S.D. Ala. 1998); Portera v. Winn Dixie of Montgomery, Inc., 996 F. Supp. 1418, 1438 (M.D. Ala. 1998). Thus, employers may be able to avoid liability for negligence where a plaintiff fails to bring or succeed on other tort theories.

VII. ARBITRATION OF EMPLOYMENT RELATED TORT CLAIMS

The case law is divided on the arbitrability of employees’ tort claims against employers in the context of employment contracts that include arbitration provisions. In terms of claims relating to allegations of sexual assault, some courts have held that such claims are outside the normal course and scope of employment, and thus, are not subject to mandatory arbitration. See Smith ex rel. Smith v. Captain D’s, LLC, 963 So.2d 1116, 1120-21 (Miss. 2007) (holding that plaintiff’s claim against employer for negligent hiring, supervision, and retention of manager who allegedly sexually assaulted plaintiff was “unquestionably” beyond the scope of arbitration clause that provided for arbitration of all “claims, disputes, or controversies arising out of or relating to... employment”); Hill v. Hilliard, 945 S.W.2d 948, 950 (Ky. Ct. App.1996) (holding that plaintiff’s claim of assault and battery against employer after manager allegedly raped her on business trip was not within scope of mandatory arbitration provision in employment contract for controversies “arising out of employment,” and noting that “[t]he mere fact that these tort claims might not have arisen but for the fact that the two individuals were together as a result of an employer-sponsored trip cannot be determinative”).
However, some courts have held that claims of employees relating to sexual assault are within the scope of such arbitration agreements. See Forbes v. A.G. Edwards & Sons, Inc., No. 08-CV-552, 2009 WL 424146, at *8 (S.D.N.Y. Feb. 18, 2009) (holding that sexual assault claim was “related to” plaintiff’s employment for purposes of arbitration when assault was committed by a member of upper management, occurred at work conference attended by plaintiff as part of her work responsibilities, and contributed to an alleged pattern of sexual harassment that had occurred at work); Barker v. Halliburton Co., 541 F.Supp.2d 879, 887 (S.D. Tex. 2008) (finding that plaintiff’s claims of, inter alia, negligent undertaking to provide training and intentional infliction of emotional distress arising from alleged sexual assault by State Department employee while in plaintiff’s living quarters overseas, were within scope of arbitration provision because plaintiff’s vicarious liability theories were “predicated on the failure of [defendant’s] employees to follow company policies regarding . . . sexual harassment.”).

In a recent case, the Fifth Circuit ruled that the plaintiff employee was not required to arbitrate claims related to an alleged sexual assault. Jones v. Halliburton, --- F.3d ----, 2009 WL 2940061 (5th Cir. 2009). In that case, the plaintiff, while working overseas, was allegedly drugged, beaten, and raped by several co-workers in her bedroom in employer-provided housing. The plaintiff further alleged that defendant’s medical personnel subsequently mishandled the rape kit and that human resources personnel interrogated her and told her to stay and “get over it” or return home. Id. at *2. After plaintiff brought suit, Halliburton moved to compel arbitration on the basis of an arbitration clause in her employment contract that required arbitration of all claims brought against the company “related to [her] employment.” Id. at *3.

The district court held that although the arbitration provision was valid and enforceable, plaintiff’s claims of, inter alia, assault and battery, intentional infliction of emotional distress, and negligent hiring, retention, and supervision of employees were not arbitrable. Id. at *3-4. The Fifth Circuit affirmed, noting with approval the district court’s disagreement with the reasoning of the above-cited Barker case, noting that “[j]ust because an assailant’s actions happen to be in violation of his employer’s policies, and those policies also govern plaintiff’s behavior, does not necessarily render the assault related to plaintiff’s employment for purposes of arbitration.” Id. at *9 (internal quotations omitted). The Court noted that despite the broad arbitration provision at issue and the strong federal policy in favor of arbitration, the plaintiff’s claims related to the alleged rape “fall beyond the outer limits of even a broad arbitration provision” and because they were not “related to [plaintiff’s] employment[,]” they were not within the scope of the arbitration agreement. Id. at *13.

**Conclusion**

There has been a steady increase of tort claims asserted in employment disputes. While most of these claims are brought under the theories of intentional infliction of emotional distress, defamation (libel and slander), intentional interference with employment contracts, invasion of privacy, assault and battery and negligent supervision, training and retention, plaintiff’s attorneys are increasingly creative in crafting theories of employer tort liability.