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Damages - Intentional Infliction of Emotional Distress in the Workplace: Defining Extreme and Outrageous Conduct in North Dakota's Job Description

Angela M. Elsperger

DAMAGES—INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS IN THE WORKPLACE: DEFINING EXTREME AND OUTRAGEOUS CONDUCT IN NORTH DAKOTA'S JOB DESCRIPTION

Swenson v. Northern Crop Ins., Inc., 498 N.W.2d 174 (N.D. 1993)

I. FACTS[1]

In February 1986, Defendant-Appellee, Northern Crop Insurance, Inc. (NCI),[2] hired Plaintiff-Appellant, Catherine Swenson (Swenson), as a secretary/clerk in Williston, North Dakota.[3] From February 1986 to November 1986, Swenson worked closely with the office manager, Rick Wallace (Wallace), to become familiar with the functions of the office.[4] In November, Wallace resigned from the office-manager position and recommended Swenson for the position.[5] Swenson approached John Krabseth (Krabseth), who was the chief officer and stockholder of NCI, and requested the opportunity to apply for the position.[6] Krabseth advised Swenson that "she need not apply because he wanted a man for the position."[7] According to Swenson, Krabseth informed her that he knew he could hire a woman more cheaply than a man, but that he wanted to fill the position with a young man who was fresh out of college.[8] Swenson questioned Krabseth whether his apprehension stemmed from her job performance, and he assured her that he had no complaints about her work but "'just need[ed] a man here.'"[9] Swenson offered to take the position for $10.00 an hour, even though Wallace received about $12.00 per hour as office manager.[10] Krabseth responded that he felt that a woman should not receive $10.00 per hour and that a man belonged in the management position.[11] He felt that men should receive such a wage because

1. Because this case was reviewed on appeal from a summary judgment and order, all facts were considered by the North Dakota Supreme Court in a light most favorable to the party opposing the summary judgment, or the claimant, Ms. Swenson. Swenson v. Northern Crop Ins., Inc., 498 N.W.2d 174 (N.D. 1993). Thus, the facts in this Comment are also presented in the light most favorable to Swenson.

2. NCI is a North Dakota corporation which was incorporated in 1984. Brief for Appellees at 1, Swenson v. Northern Crop Ins., Inc., 498 N.W.2d 174 (N.D. 1993) (No. 920219).

3. Swenson v. Northern Crop Ins., Inc., 498 N.W.2d 174, 176 (N.D. 1993). This was an appeal from the second suit filed by the Plaintiff-Appellant against the Defendants-Appellees. *See infra* note 26 (discussing the history of this case).

4. Brief for Appellant at 6, Swenson v. Northern Crop Ins., Inc., 498 N.W.2d 174 (N.D. 1993) (No. 920219).

5. *Swenson*, 498 N.W.2d at 176.

6. *Id.*

7. Appellant's Brief at 6, *Swenson* (No. 920219).

8. *Id.* During the hiring period, Swenson also overheard conversations between Wallace and Krabseth in which Krabseth insisted he wanted to hire a young man for the position, disregarding Wallace's advice that Swenson was the most qualified for the position. *Id.*

9. Appellant's Brief at 7, *Swenson* (No. 920219) (quoting the defendant).

10. *Id.*

11. *Id. See also* Swenson v. Northern Crop Ins., Inc., 498 N.W.2d 174, 176 (N.D. 1993).

men have families to support but that a woman simply should not get paid that much.[12]

In spite of Krabseth's resistance, Swenson submitted her application to the Board of Directors, and, notwithstanding Krabseth's objections to hiring a woman, was hired as office manager at $10.00 per hour on December 3, 1986.[13] Following Swenson's appointment, Krabseth allegedly continued to make derogatory and sexist comments, persisted that he needed a man in the management position, and vocalized his plans to restructure the office by creating positions for a computer operator and a program specialist.[14] He always spoke in the context that he needed men to fill the positions.[15]

On January 20, 1987, Krabseth demoted Swenson back to secretary/clerk at $6.00 per hour and informed her that as a component of his reorganization plan, he would be hiring a man at a higher wage.[16] After Swenson's demotion, the Board of Directors responded to the plans spearheaded by Krabseth and restructured NCI's personnel system.[17] Swenson was not given notice of the new positions and, thus, did not have the opportunity to apply.[18]

After being exposed to the alleged gender discrimination, Swenson claimed that agony permeated her life.[19] Swenson was a recovering alcoholic and felt herself being lured to alcohol; yet, she did not succumb to the temptation.[20] Swenson stated that Krabseth was aware of her deteriorating emotional condition because he knew that she began attending Alcoholics Anonymous meetings over her lunch hour so that she could remain alcohol-free.[21]

Eventually, Krabseth gave Swenson the "silent treatment" by refraining from speaking with her, refusing to discuss her employment

12. *Id.* Swenson informed Krabseth that she was a single mother and had children to support, but Krabseth was unmoved by this information. *Id.* at 182.

13. *Id.* at 176. Even though Swenson earned more as a result of her promotion from secretary/clerk, which was paid $7.50 per hour, to office manager, which was paid $10.00 per hour, she earned approximately $5,000 per year less than Wallace had made in the office-manager position. *Id.*

14. *Id.*

15. Appellant's Brief at 8, *Swenson* (No. 920219).

16. *Swenson*, 498 N.W.2d at 176. The Board of Directors later remedied the salary decrease by reinstating the $7.50 per hour salary, which Swenson had previously earned as secretary/clerk, and stating that the $6.00 per hour salary was an error. *Id.* at 183 n.6.

17. Appellee's Brief at 3, *Swenson* (No. 920219). Krabseth was commissioned as the manager; Tom Hove (Hove) was hired as a training and program specialist; and Terry Skarphol (Skarphol) was hired as an accountant and computer operator. *Id.* at 2-3.

18. *Swenson*, 498 N.W.2d at 183. Swenson claimed that she was qualified to fill the computer operator position, but she was demoted "to answering the phone, typing, and filing for two men in positions that her former position had been equal to or greater than in status." *Id.*

19. Appellant's Brief at 10, *Swenson* (No. 920219).

20. *Id.*

21. *Id.* Swenson argued that Krabseth was aware of her condition because she requested a lunch hour extended by five to ten minutes so that she could attend the Alcoholics Anonymous meetings. *Swenson*, 498 N.W.2d at 176-77.

with NCI, and avoiding any contact with her.[22] On March 13, 1987, Swenson resigned as an employee of NCI because of her deteriorating physical and mental condition and the stress generated by Krabseth's conduct.[23]

Subsequently, Swenson brought suit in Williams County District Court against NCI and Krabseth alleging gender discrimination,[24] violations of the North Dakota Equal Pay Act,[25] and intentional infliction of emotional distress.[26] The trial court granted Defendants-Appellees summary judgment on each claim.[27] Although Swenson appealed each summary judgment to the North Dakota Supreme Court, this Comment is confined to the issue of whether the trial court appropriately granted Defendants-Appellees' Motion for Summary Judgment on the intentional infliction of emotional distress claim.[28] The North Dakota Supreme Court reversed and remanded the decision of the trial court, *holding* that the determination of conduct as extreme and outrageous does not rest on the actor's conduct alone, but rather, the conduct must be considered in conjunction with the existence of an employment relationship and knowledge of susceptibility.[29]

II. LEGAL HISTORY

Intentional infliction of emotional distress is a modern tort that was delineated primarily by legal scholars who observed that courts occasionally awarded compensation for mental anguish.[30] The legal scholars

22. *Id.* at 183.

23. Appellant's Brief at 10, *Swenson* (No. 920219). By November 1987, Swenson had deteriorated to the point in which representatives of the Human Service Center had found her cowering between vending machines. *Id.* Swenson eventually placed herself into treatment at an addiction center and completed the program by December 1987. *Id.*

24. *See* N.D. CENT. CODE ch. 14-02.4 (1991 & Supp. 1993).

25. *See* N.D. CENT. CODE ch. 34-06.1 (1987 & Supp. 1993).

26. Appellant's Brief at 5, *Swenson* (No. 920219). Prior to filing in Williams County District Court, Swenson filed a gender discrimination complaint with the North Dakota Labor Commission. *Id.* at 4. The Commission denied her complaint. *Id.* Swenson appealed and was issued a "Notice of Right to Sue" letter. *Id.* Swenson filed a complaint in the United States District Court, District of North Dakota. Appendix for Appellee at 157, Swenson v. Northern Crop Ins., Inc., 498 N.W.2d 174 (N.D. 1993) (No. 920219). The United States District Court dismissed Swenson's complaint because the court did not have subject-matter jurisdiction. Appellees' Brief at 1, *Swenson* (No. 920219).

27. Appellant's Brief at 5, *Swenson* (No. 920219).

28. *Id.* at 2.

29. Swenson v. Northern Crop Ins., Inc., 498 N.W.2d 174, 186 (N.D. 1993).

30. *See generally* Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939) [hereinafter Prosser, *A New Tort*]; William L. Prosser, *Insult and Outrage*, 44 CAL. L. REV. 40 (1956) [hereinafter Prosser, *Insult and Outrage*]. *See also* Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 42 (1982) (stating that the tort was developed largely by legal scholars, rather than by the courts).

urged such compensation for emotional distress and defined a tort which is now recognized by courts and the *Restatement (Second) of Torts*.[31]

Courts have been cautious to accept freedom from mental distress as an independent legal protection.[32] This modern tort was not recognized by English common law courts nor early American courts.[33] In the 1930s, the *Restatement of Torts*[34] reflected courts' reluctance to recognize a legal protection for peace of mind and a duty not to cause mental distress by expressly rejecting liability for the intentional infliction of emotional distress except in cases of assault or special carrier liability for insult.[35] Magruder and Prosser were leading scholars who criticized the 1934 *Restatement*.[36] They demonstrated that courts had previously provided recovery for emotional distress, bringing forth cases such as *Wilkinson v. Downton*,[37] described as the leading case that "broke through the shackles of the old law."[38] Courts particularly permitted recovery by considering relief for distress a "parasitic" damage.[39] For example, if a claim-

31. *See supra* note 30 (citing scholarly articles which urged the adoption of the independent tort). *See, e.g.*, Agarwal v. Johnson, 603 P.2d 58, 66 (Cal. 1979) (acknowledging the right to relief for emotional distress alone); *see also* RESTATEMENT (SECOND) OF TORTS § 46 (recognizing an independent tort claim for the intentional infliction of emotional distress).

32. *See* Roberts v. Saylor, 637 P.2d 1175, 1178 (Kan. 1981) (recognizing courts' hesitation to accept independent legal protection from mental distress even when the plaintiff was intentionally invaded). *See also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 55 (5th ed. 1984) (stating that the law has been slow to recognize protection for freedom from emotional distress).

33. *See* Hatfield v. Max Rouse & Sons Northwest, 606 P.2d 944, 953 (Idaho 1980) (describing the reluctance to recognize claim and citing Lynch v. Knight, 11 Eng. Rep. 854 (1861) and Allsop v. Allsop, 157 Eng. Rep. 1292 (1861)). *See also* 4 STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 16:33, at 1014 (1983 and Supp. 1993) (describing the development of the tort).

34. Restatement of Torts § 46 (1934).

35. *Id.* Comment c of the *Restatement* provided that the "interest . . . in freedom from mental and emotional disturbance is not . . . regarded as of sufficient importance to require others to refrain from conduct intended or recognizably likely to cause such a disturbance." RESTATEMENT OF TORTS § 46 cmt. c (1934). *See* Contreras v. Crown Zellerbach Corp., 565 P.2d 1173, 1175 (Wash. 1977) (describing the evolution of the RESTATEMENT OF TORTS § 46).

36. *See supra* note 30 (providing sources which question the accuracy of the *Restatement*'s summary of the law).

37. [1897] 2 Q.B.D. 57.

38. Magruder, *supra* note 30, at 1045 (describing *Wilkinson* as a classic example of aggression directed specifically at the plaintiff); Prosser, *A New Tort*, *supra* note 30, at 881 (describing Downton's conduct as an unusually heartless kind); Wilkinson v. Downton, [1897] 2 Q.B.D. 57. In *Wilkinson*, the defendant was held liable for the emotional distress he caused when as a practical joke he told the plaintiff that her husband had been injured in an accident and was in the hospital with two broken legs. *Id.* at 58. KEETON ET AL., *supra* note 32, at 60. *See* RESTATEMENT (SECOND) OF TORTS § 46 cmt d, illus. 1 (1965); SPEISER ET AL., *supra* note 33, at 1015 n.9 (labeling *Wilkinson* as the leading early case allowing recovery).

For other cases first recognizing recovery for emotional distress, see Nickerson v. Hodges, 84 So. 37, 38-39 (La. 1920) (allowing recovery when the insane plaintiff was subjected to mental distress when practical jokesters buried a "pot of gold" knowing that plaintiff would open the treasure in front of a gathering, but only dirt was found in the pot; so plaintiff was convinced that she had been robbed until her death); Great Atlantic & Pacific Tea Co. v. Roch, 153 A. 22 (Md. 1931) (allowing plaintiff recovery for physical injuries caused by shock of fright when plaintiff opened a package that she thought was bread, but instead was a dead rat that was packaged by the defendant and intended for the plaintiff).

39. Magruder, *supra* note 30, at 1049 (considering damages "parasitic" because they were permitted if they could be brought with a conceivably recognized tort). Magruder noted that an

ant brought a claim for a recognized tort such as a battery, the claimant could recover for emotional distress stemming from the battery.[40] Prosser urged the courts to abandon their "parasitic" damage approach and to recognize an independent tort claim.[41]

The writers of the *Restatement* reconsidered and reversed their position in 1948 by recognizing intentional infliction of emotional distress as an independent tort.[42] The 1965 *Restatement* retained the 1948 position and maps the elements of the tort which have been adopted by courts.[43]

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established rule was recognized and set forth in the RESTATEMENT OF TORTS § 47(b) that if an actor is liable for an invasion of a legally protected interest of another, emotional distress caused by such conduct may be considered when assessing damages. *Id.* Thus the damages were "parasitic" to an already protected interest. *Id.* If some independent tort could be fashioned, no matter how technical, there was an actionable claim and a peg upon which to hang mental damages that allowed courts to freely permit recovery. Prosser, *A New Tort*, *supra* note 30, at 880.

40. *See* Gadsden General Hospital v. Hamilton, 103 So. 553, 554 (Ala. 1925) (allowing recovery for emotional distress for the false imprisonment of the plaintiff); Valencia v. Milliken, 160 P. 1086, 1088 (Cal. Ct. App. 1916) (permitting the plaintiff recovery for mental suffering caused by rape); Kline v. Kline, 64 N.E. 9, 10 (Ind. 1902) (holding that the plaintiff may recover damages for emotional distress caused by an assault); Sturgeon v. Sturgeon, 30 N.E. 805 (Ind. Ct. App. 1892) (allowing full compensation for mental pain the plaintiff directly suffered as a result of assault and battery).

The recognition of emotional distress, even secondarily, was an important stage in the evolution of the tort because, as a scholar prophetized, the treatment of any element of damages as a parasitic factor belongs essentially to a transitory stage of legal evolution which will soon be recognized as an independent basis of liability. Magruder, *supra* note 30, at 1049 (citing 1 STREET, THE FOUNDATIONS OF LEGAL LIABILITY 470 (1906)); Prosser, *A New Tort*, *supra* note 30, at 880 (citing 1 STREET, THE FOUNDATIONS OF LEGAL LIABILITY 470 (1906)).

41. Prosser, *A New Tort*, *supra* note 30, at 881. Proponents of providing independent protection for freedom from emotional distress considered reasons for not adopting such protections, but found them unconvincing. *See, e.g., id.* at 875-79. Prosser recognized the difficulty of valuation of emotional damages, but he noted that this difficulty existed regardless of the existence of actual physical injury. *Id.* at 875. Therefore, he concluded, the difficulty of valuing emotional damages was an unpersuasive reason to deny damages in one case while granting them in the other. *Id.* Prosser also reasoned that the fear of inviting a flood of litigation for trivial and fraudulent claims could not properly keep the courts from recognizing a separate claim for emotional damages. *Id.* at 877. He opined that the law must provide remedies for deserving wrongs, regardless of the amount of work for the courts. *Id.* Prosser was confident that the inherent checks in the judicial process would minimize the speculated difficulties. *Id.* at 878.

42. RESTATEMENT (SECOND) OF TORTS 18-21 (Tent. Draft No. 1, 1957) (providing the RESTATEMENT OF TORTS § 46 (Supp. 1948)). The tentative draft of the *Restatement (Second) of Torts* acknowledged the rapid development of the "new tort" and the need for a more limited statement which would set boundaries. RESTATEMENT (SECOND) OF TORTS 21 (Tent. Draft No. 1, 1957). The tort has become known as the intentional infliction of emotional distress or, in some jurisdictions, as the tort of outrage. *See, e.g.*, Contreras v. Crown Zellerbach Corp., 565 P.2d 1173, 1174 (Wash. 1977) (referring to such a claim as the tort of outrage).

43. RESTATEMENT (SECOND) OF TORTS § 46 (1965). The *Restatement* essentially outlines four elements of the tort: (1) the defendant must act intentionally or recklessly, (2) the conduct must be extreme and outrageous, and (3) the conduct must be the cause of (4) severe emotional distress. *Id. See also* Givelber, *supra* note 30, at 46 (summarizing the tort's elements).

Even though many courts adopt all of the elements of the *Restatement*, Givelber states in his article that the extreme and outrageous component is essentially the entire tort. *Id.* The tort is purported to combine both intentional and unintentional torts by requiring the complainant to show a palpable injury which is reminiscent of negligence or unintentional tort, rather than just an awareness of injury, which is reminiscent of intentional tort. *Id.* at 50. Givelber's collapse of the elements and focus on the actor's extreme and outrageous conduct extinguish the negligence aspect and merge the tort into a single issue: whether conduct is extreme and outrageous. *Id.* at 51.

The emphasis on the intentional aspect of the tort has made the suit less expensive than a negligence claim; experts are not needed to show causation or extent of injury because the extremity and outrageousness of the conduct presumes damage. *Id. See* Kentucky Fried Chicken Nat'l

The second *Restatement* supplied a caveat which urged that development of the tort should not be hindered.[44]

Notwithstanding the caveat which has successfully encouraged the development of the tort, limitations have been incorporated to impede expansion of the intentional infliction of emotional distress claim. The primary limitation has been the extreme and outrageous conduct requirement.[45]

Independent liability occurs only when the defendant's conduct rises to the level of extreme and outrageous, even though the defendant's conduct might be intentionally tortious, criminal, malicious, or of the sort entitling the plaintiff to punitive damages.[46] Liability has been found only where 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 civilized [society]."[47] The element of extreme and outrageous conduct has been characterized as circumstances in which a "recitation of the facts to an average member of the community would arouse his resentment against the actor and lead him to exclaim, 'Outrageous!'"[48]

Prosser states that there are two reasons for the extreme and outrageous conduct limitation.[49] One is that the "rough edges of our society" require plaintiffs to withstand a certain amount of inconsiderate and unkind acts since the law does not afford a remedy for all harmful or trivial acts.[50] There must still be a liberty to express an unflattering opin-

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Management Co. v. Weathersby, 607 A.2d 8 (Md. 1992) (citing Givelber's theory that the tort has been reduced to a single element). *But see* Buckley v. Trenton Savings Fund Soc., 544 A.2d 857, 865 (N.J. 1988). The *Buckley* court decided that the emotional distress was not severe and, therefore, did not address the outrageous conduct element. *Id.* The court reasoned that each prong of the tort must be met before relief may be granted. *Id.*

44. RESTATEMENT (SECOND) OF TORTS § 46 (1965). The caveat encouraged development of the tort because the law in this area was in the stage of growth and the limits of the tort had not been determined. *Id.* at cmt. c.

45. Prosser, *Insult and Outrage*, *supra* note 30, at 43; Prosser, *A New Tort*, *supra* note 30, at 888.

46. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965); Prosser, *Insult and Outrage*, *supra* note 30, at 44. *See, e.g.*, Kentucky Fried Chicken Nat'l Management Co. v. Weathersby, 607 A.2d 8, 17-18 (Md. 1992) (Bell, J., dissenting) (clarifying that the jurisdiction had adopted the language of comment d).

47. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965); Prosser, *Insult and Outrage*, *supra* note 30, at 44. *See, e.g.*, Pavilon v. Kaferly, 561 N.E.2d 1245, 1251 (Ill. App. Ct. 1990) (citing comment d and finding that defendant's acts and their cumulative effect could constitute outrageousness to a reasonable jury).

48. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965); Prosser, *Insult and Outrage*, *supra* note 30, at 44 (citing RESTATEMENT OF TORTS § 46 cmt. g (Supp. 1948)). *See, e.g.*, Beeman v. Safeway Stores, Inc., 724 F.Supp. 674, 680 (W.D. Mo. 1989) (citing comment d).

49. Prosser, *Insult and Outrage*, *supra* note 30, at 44.

50. *Id. See also* RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965). *See, e.g.*, Lagies v. Copley, 168 Cal. Rptr. 368, 377 (Cal. Dist. Ct. App. 1980) (citing comment d).

ion[51] and to require "a certain toughening of the mental hide," because the law will not intervene every time someone's feelings are hurt.[52] Society must allow "safety valves through which irascible tempers might legally blow off steam."[53]

Prosser's second reason for the extreme and outrageous conduct limitation is that instances of petty insult, indignity, and annoyance or threat lack the assurance that genuine emotional distress occurred or, if genuine, that the distress was of the severity to warrant compensation.[54] Lines must be drawn to determine recovery.[55] The line has been drawn at the threshold of extreme outrage for the intentional infliction of emotional distress claim.[56]

The *Restatement* recounted the roles of the court and jury when applying the elements of the tort.[57] The court first decides whether a jury could reasonably determine the defendant's conduct to be so extreme and outrageous as to permit recovery.[58] Where reasonable minds could differ, the jury determines whether the particular circumstances give rise to sufficiently extreme and outrageous conduct as to result in liability for the defendant.[59] The *Restatement*'s suggested role for the court has been criticized, however. In *Wornick v. Casas*,[60] the concurrence expressed that there were no legal standards by which a court could distinguish conduct which was outrageous from conduct which was not outrageous.[61] The concurrence in *Wornick* predicted that many courts would embark on an "endless wandering over a sea of factual circumstances . . . blown about by bias and inclination, and guided by nothing steadier than the

51. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965); Prosser, *Insult and Outrage*, *supra* note 30, at 44. *See, e.g.*, Gomez v. Hug, 645 P.2d 916, 927 (Kan. Ct. App. 1982) (stating that there must still be room to express an unflattering opinion and adopting comment d).

52. Magruder, *supra* note 30, at 1035. *See, e.g.*, Agarwal v. Johnson, 603 P.2d 58, 67 (Cal. 1979) (stating that there is no occasion to intervene each time one's feelings are hurt).

53. Magruder, *supra* note 30, at 1053. *See also* RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

54. Prosser, *Insult and Outrage*, *supra* note 30, at 44-45. Prosser provides an example where one who had been called a "son of a bitch" claimed that his health was permanently impaired because of the expression. *Id.* at 45. Prosser recognized that others who have been called the same without significant impairment would have legitimate doubts as to whether such harm merited compensation. *Id. See, e.g.*, Caldor v. Bowden, 625 A.2d 959, 963 (Md. 1993) (recognizing inherent problems with distinguishing a "true claim" from a false one and separating the "trifling annoyance" from the serious wrong).

55. Prosser, *Insult and Outrage*, *supra* note 30, at 45.

56. *Id.*

57. RESTATEMENT (SECOND) OF TORTS § 46 cmt. h (1965). *See, e.g.*, *In re* Grimm, 784 P.2d 1238, 1246 (Utah Ct. App. 1989) (indicating that the jurisdiction had previously adopted the *Restatement*'s role for the court).

58. RESTATEMENT (SECOND) OF TORTS § 46 cmt. h (1965).

59. *Id.*

60. 856 S.W.2d 732 (Tex. 1993).

61. Wornick v. Casas, 856 S.W.2d 732, 736 (Tex. 1993) (Hecht, J., concurring).

personal preferences of [those guarding the helm] who change [course] with every watch."[62]

An indication that conduct is extreme and outrageous may arise from an abuse of the defendant's position, or specifically, the defendant's relationship with the plaintiff, which may give the defendant an actual or apparent authority over the plaintiff.[63] Examples of possible relationships in which an abuse of a position may make the defendant liable are abuses of authority by police officers, school officials,[64] landlords,[65] and collecting creditors.[66] While the *Restatement*'s examples of relationships do not include the employment relationship between an employer and an employee, or a supervisor and a subordinate, many jurisdictions have considered the employment relationship as a factor when determining whether the defendant's conduct is outrageous.[67] Courts have been cautious to recognize intentional infliction of emotional distress in the workplace because "[t]he workplace is not always a tranquil world where civility reigns" and conflict can be expected because the interaction

62. *Id.* at 737.

63. RESTATEMENT (SECOND) OF TORTS § 46 cmt. e (1965). Prior to the recognition of the tort of intentional infliction of emotional distress, the leading case of a defendant's abuse of some relationship with the plaintiff was *Janvier v. Sweeney*, [1919] 2 K.B.D. 316, in which the defendant, who was a private detective, represented himself as a police officer and threatened to charge the plaintiff with espionage unless she surrendered evidence in her possession. Prosser, *Insult and Outrage*, *supra* note 30, at 47-48 (citing Janvier v. Sweeney, [1919] 2 K.B. 316). Another case prior to the recognition of the tort was *Johnson v. Sampson*, 208 N.W. 814 (Minn. 1926), in which school officials threatened to send a high school girl to reform school unless she falsely confessed to sexual intercourse with various men. Johnson v. Sampson, 208 N.W. 814, 815 (Minn. 1926); *but see* Walker v. Tucker, 295 S.W. 138, 139 (Ky. 1927) (denying recovery for emotional distress to a school girl plaintiff when the defendant intended to humiliate and shame the plaintiff by calling her a bastard to teachers, classmates, and people in the community). Recovery for emotional distress was allowed in *Janvier* and *Johnson*, and each was incorporated into the second *Restatement*'s illustrations of when abuse of a relationship or position may indicate extreme and outrageous conduct. RESTATEMENT (SECOND) OF TORTS § 46 cmt. e, illus. 5 & 6 (1965).

64. RESTATEMENT (SECOND) OF TORTS § 46 cmt. e (1965). *See, e.g.*, Rudis v. National College of Education, 548 N.E.2d 474, 478 (Ill. App. Ct. 1989) (noting comment e in regard to school authorities, but stating that plaintiff was not a young school girl but was a career woman who was not bullied or threatened with public disgrace).

65. RESTATEMENT (SECOND) OF TORTS § 46 cmt. e (1965). *See* Aweeka v. Bonds, 97 Cal. Rptr. 650, 652 (Cal. Dist. Ct. App. 1971) (recognizing that landlords have been held to be in a position of authority and that the landlord/tenant relationship was a factor to consider); Ruane v. Murray, 380 N.W.2d 362, 364 (S.D. 1986) (citing comment e when a tenant brought a claim against a landlord for intentional infliction of emotional distress).

66. RESTATEMENT (SECOND) OF TORTS § 46 cmt. e (1965). *See, e.g.*, Bundren v. Superior Court of County of Ventura, 193 Cal. Rptr. 671, 674 (Cal. Dist. Ct. App. 1983) (stating that although the creditor possesses a qualified privilege to protect an economic interest, the creditor may be liable for outrageous conduct, particularly when the creditor is aware of the debtor's susceptible condition).

67. *See* Churchey v. Adolph Coors Co., 759 P.2d 1336, 1350 (Colo. 1988) (recognizing that outrageous conduct may occur in the employment situation); Pavilon v. Kaferly, 561 N.E.2d 1245, 1251 (Ill. App. Ct. 1990) (recognizing that, particularly because of the threat of job loss, the impact of outrageous conduct is exacerbated when the defendant is also plaintiff's employer). *See also* SPEISER ET. AL., *supra* note 33, § 16:21, at 1094 (stating that some courts have considered the employment relationship a significant factor in determining liability). *But see* Leibowitz v. Bank Leumi Trust Co., 548 N.Y.S.2d 513, 521 (App. Div. 1989) (failing to consider the employment relationship as a factor).

between employers and employees is different than that between "friends at a summer picnic."[68]

Another indication that conduct is extreme and outrageous may arise from the defendant's knowledge that the plaintiff is peculiarly susceptible to emotional distress because of a physical or mental condition.[69] Conduct continued with the knowledge of plaintiff's susceptibility "may become heartless, flagrant, and outrageous," while it may not have been had the defendant not known of the plaintiff's susceptibility.[70] The historically leading case in which the defendant's knowledge of the plaintiff's susceptibility to emotional distress was relevant in the determination of whether recovery would be allowed was *Nickerson v. Hodges*,[71] which involved an insane plaintiff who was subjected to emotional distress when practical jokesters buried a "pot of gold" knowing that, in front of a crowd, the plaintiff would open the "treasure" only to find dirt.[72] For the remainder of her life, the plaintiff was convinced that she had been robbed.[73]

The tort has also been applied in cases in which alleged workplace discrimination has occurred, but jurisdictions have reached varied results in determining whether the alleged discrimination is extreme and outrageous.[74] The jurisdictions' varying results stem from the courts' prelimi-

68. Kentucky Fried Chicken Nat'l Management Co. v. Weathersby, 607 A.2d 8, 16 (Md. 1992).

69. RESTATEMENT (SECOND) OF TORTS § 46 cmt. f (1965).

70. *Id.*

71. 84 So. 37 (La. 1920).

72. Nickerson v. Hodges, 84 So. 37, 38-39 (La. 1920).

73. *Id. Nickerson* was incorporated into the *Restatement*'s illustrations of when knowledge of plaintiff's susceptibility may demonstrate outrageous conduct. RESTATEMENT (SECOND) OF TORTS § 46 cmt. f, illus. 9 (1965). *See* Mellaly v. Eastman Kodak Co., 597 A.2d 846, 848 (Conn. Super. Ct. 1991) (citing comment f and considering the supervisor's knowledge of the employee's alcoholism as knowledge of the employee's susceptibility to distress). *But see* Sterling Drug, Inc. v. Oxford, 743 S.W.2d 380, 382-83 (Ark. 1988) (holding that even though defendant had knowledge of plaintiff's susceptibility due to a recent divorce, the conduct did not rise to the sufficient level because the law "does not open the [courtroom] doors . . . [for] every slight insult or indignity").

74. *See* Linebaugh v. Sheraton Michigan Corp., 497 N.W.2d 585, 586 (Mich. Ct. App. 1993) (stating that the trial court erred in granting summary judgment to defendant when a sexually compromising cartoon of the female plaintiff and a male co-employee was circulated in the workplace); Foster v. Albertsons, Inc., 835 P.2d 720, 722, 728 (Mont. 1992) (recognizing that a directed verdict on the independent tort was inappropriate when the plaintiff was sexually harassed and fondled at work); Kryeski v. Schott Glass Technologies, 626 A.2d 595, 597-98 (Pa. Super. Ct. 1993) (stating that the general rule in Pennsylvania is that sexual harassment alone does not rise to the level of outrageousness necessary to sustain an intentional infliction of emotional distress claim). *But see* Gaiters v. Lynn, 831 F.2d 51, 53-54 (4th Cir. 1987) (holding that a country-western singer's racial allusions directed at an employee of the concert hall were not sufficient to maintain a claim for intentional infliction of emotional distress because, when taken in context, the defendant's words were not deemed by the court to be explicit or meanspirited, but were merely of the inconsiderate kind that did not rise to the level of intentional infliction of emotional distress); Hendrix v. Phillips, 428 S.E.2d 91, 93 (Ga. Ct. App. 1993) (concluding that a co-employee's acts, such as his depicting fecal matter moving through a colon, showing a hole in his crotch and requesting co-employee plaintiff to staple it shut, and gesturing in a lewd manner, were not sufficient to constitute a pattern of outrageous harassment but were merely tasteless and rude); Shea v. Cornell Univ., 596 N.Y.S.2d 502, 504 (App. Div. 1993) (stating that while discriminatory conduct was unacceptable and socially repugnant, it did not rise to the level of atrocity).

nary determinations of the "prevailing norms of society."[75] When a court determines that society should tolerate a defendant's conduct, it will grant summary judgment to the defendant; thus, whether summary judgment is avoided depends on the court's interpretation of societal tolerance.[76]

Since the 1915 decision of *Wilson v. Northern Pacific Railroad Co.*,[77] North Dakota courts have recognized a commitment to protecting one's freedom from emotional distress.[78] North Dakota juries were allowed to consider mental anguish when determining compensatory damages,[79] but it was not until 1989 in *Muchow v. Lindblad*[80] that the North Dakota Supreme Court recognized the intentional infliction of emotional distress as an independent tort.[81]

Muchow set forth three elements of the tort of intentional infliction of emotional distress.[82] Recovery is available when the defendant acts with "(1) extreme and outrageous conduct that is (2) intentional or reckless and that causes (3) severe emotional distress."[83] The North Dakota

75. King v. Kidd, Nos. 90-CV-1621, 91-CV-283, 1993 WL 326062, at *12 (D.C. Aug. 26, 1993) (citing RESTATEMENT (SECOND) OF TORTS § 46 (1965) and recognizing that what was considered trivial fifty years ago may be considered outrageous under today's social standards).

76. *See generally supra* note 74 (citing cases from courts which have either granted or denied summary judgment on an intentional infliction of emotional distress claim). The judiciary increasingly acknowledges society's awareness of "subtle and not so subtle" gender discrimination. King v. Kidd, Nos. 90-CV-1621, 91-CV-283, 1993 WL 326062, at *20 (D.C. Aug. 26, 1993). This increased sensitivity has elevated conduct involving gender discrimination "from 'petty oppression' to outrageous and intolerable conduct." *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 46 (1965)).

Courts have recognized changing social conditions when determining whether conduct including racial epithets might be considered outrageous. Contreras v. Crown Zellerbach Corp., 565 P.2d 1173, 1177 (Wash. 1977) (citing Alcorn v. Anbro Engineering, Inc., 468 P.2d 216, 219 n.4 (Cal. 1970)). When courts recognize changing interpretations of societal norms, they are more apt to deny summary judgment and permit the plaintiff to present his or her facts to a jury. *See supra* note 74.

77. 153 N.W. 429 (N.D. 1915).

78. Wilson v. Northern Pac. R.R. Co., 153 N.W. 429, 435 (N.D. 1915). In *Wilson*, the defendant argued that the plaintiff could not recover without the presence of an injury other than fright. *Id.* at 435. The North Dakota Supreme Court stated that "[f]ortunately for the progress of the human race, we . . . are not jellyfish, but human beings . . . gifted with nerves and with feelings, and the law must be administered upon this assumption." *Id.*

79. *See, e.g.*, Binstock v. Fort Yates Pub. Sch. Dist. No. 4, 463 N.W.2d 837, 842 (N.D. 1990) (reiterating that a jury may properly consider "wounded feelings, mental suffering, humiliation, degradation, and disgrace" when determining compensatory damages). The North Dakota Legislature incorporated damages for mental anguish and emotional distress into North Dakota Century Code section 32-03.2-04 as noneconomic damages. N.D. CENT. CODE § 32-03.2-04 (2) (Supp. 1993) (providing economic and noneconomic damages for wrongful death or injury to person). *See also* Jacobs v. Anderson Bldg. Co., 430 N.W.2d 558 (N.D. 1988) (applying section 32-03.2-04 in a wrongful death action).

80. 435 N.W.2d 918 (N.D. 1989).

81. Muchow v. Lindblad, 435 N.W.2d 918, 924 (N.D. 1989). While *Muchow* was the first time that the North Dakota Supreme Court recognized the tort, the Eighth Circuit Court of Appeals recognized in Hanke v. Global Van Lines, Inc., 533 F.2d 396, 399 (8th Cir. 1976) the North Dakota Federal District Court's assumption that North Dakota would follow the trend and recognize such a tort.

82. *Muchow*, 435 N.W.2d at 923-24.

83. *Id.* at 924. The *Muchow* court provided that the degree of outrageousness of the defendant's conduct may be considered in the determination of the severity of the emotional distress. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 46 cmts. j & k (1965)). Although the plaintiffs in *Muchow* suffered from sleep loss and weight loss, the North Dakota Supreme Court did not require

Supreme Court in *Muchow* focused on the threshold element of extreme and outrageous conduct and instituted a seemingly stringent precedent.[84]

The contemporary tort of intentional infliction of emotional distress has experienced tensions in its relatively limited history. Because of the functional nature of the tort, courts have applied the tort to various contexts, but jurisdictions have deviated in their application of the tort's elements, particularly when defining the extreme and outrageous conduct element of the tort. Some jurisdictions have rigidly applied the tort's elements to a set of facts with a historical definition of extreme and outrageous conduct.[85] Other jurisdictions, however, have been more liberal in their application of the tort's elements, defining extreme and outrageous conduct by society's contemporary perception of tolerance.[86] Jurisdictions' varying applications of the tort's elements affect intentional infliction of emotional distress claims. A jurisdiction's requirements for a showing of extreme and outrageous conduct strongly indicate who will

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bodily harm to the plaintiffs as a prerequisite for recovery; rather, emotional anxiety was sufficient to satisfy the distress element. *Id.* at 919, 924.

The North Dakota Supreme Court looks at the degree of outrageousness of conduct to determine the presence of severe emotional distress. *Id.* at 924. This fosters two interpretations. One interpretation is that, contrary to Daniel Givelber's hypothesis, the North Dakota Supreme Court requires a showing of severe emotional distress. *See* Givelber, *supra* note 43 (discussing Givelber's hypothesis). Therefore, consistent with this interpretation, the tort in North Dakota has not been diluted to the sole element of extreme and outrageous conduct. The second interpretation is that if the defendant's conduct is so extreme and outrageous, the severity of the emotional distress suffered by the plaintiff is self-evident. *See id.* (discussing Givelber's hypothesis). This interpretation holds true to Givelber's hypothesis that when the court focuses on the degree of outrageousness and allows it to prove severe emotional distress, the tort solely resembles an intentional tort and sheds its unintentional tort characteristics, such as requiring proof of causation. *Id.* This result makes an intentional infliction of emotional distress claim inviting to plaintiffs because the cost of litigation is significantly reduced. *Id.*

The second interpretation is more likely to be the case in North Dakota, particularly since the North Dakota Supreme Court has outlined three elements to the tort, rather than four. *Muchow*, 435 N.W.2d at 924. By combining the causation element with the intent element, the North Dakota Supreme Court has reduced the tort to intent, conduct, and result, which are reminiscent of intentional tort. *See id.* This reduction eliminated proof of causation, which was the unintentional aspect of the tort. *See id.* Thus, Givelber's hypothesis seems evident in North Dakota. *See* Givelber, *supra* note 43.

Prior to the *Restatement*, many jurisdictions required a physical impact by the defendant, but by the 1930s, the trend was to eliminate the impact requirement as long as there was outrageous conduct which resulted in the severe emotional distress. *See, e.g.*, Hatfield v. Max Rouse and Sons Northwest, 606 P.2d 944, 953 (Idaho 1980) (citing RESTATEMENT OF TORTS § 46 (Supp. 1948)).

84. *Muchow*, 435 N.W.2d at 924. *See supra* text accompanying notes 46-48, 50-51 (outlining the *Restatement's* comments adopted by the North Dakota Supreme Court).

In *Muchow*, the plaintiffs were family members of a woman whose body was found in a river. *Muchow*, 435 N.W.2d at 919. The plaintiffs filed suit against the investigating officer for intentional infliction of emotional distress because without conducting any serious investigation and despite obvious signs of foul play, the officer immediately concluded that the death was a suicide. *Id.* The officer described the "grim details" of the suicide, and after the plaintiffs challenged his findings, he accused the plaintiffs of merely appeasing their guilt for not giving the victim support and love while she was alive. *Id.* The *Muchow* court denied recovery and concluded that the summary judgment was properly granted because reasonable persons could not differ as to whether the investigating officer's conduct was extreme and outrageous. *Id.* at 925.

85. *See generally supra* notes 74-76 (discussing courts' varying results after applying the tort's extreme and outrageous conduct element).

86. *Id.*

prevail upon a motion for summary judgment. The North Dakota Supreme Court has recently delineated the underlying factors which comprise extreme and outrageous conduct in the workplace in *Swenson v. Northern Crop Ins., Inc.*[87]

III. CASE ANALYSIS

In *Swenson v. Northern Crop Ins., Inc.*,[88] the North Dakota Supreme Court addressed the independent legal protection of emotional well-being in the workplace by expanding and clarifying the tort of intentional infliction of emotional distress.[89] The court expanded the application of the tort to the workplace and clarified the prerequisites necessary to avoid summary judgment based on extreme and outrageous conduct.[90] In *Swenson*, the Defendants-Appellees argued that summary judgment was proper because Swenson had not established the first element of the tort set forth in *Muchow v. Lindblad*,[91] extreme and outrageous conduct.[92]

Former Chief Justice Erickstad,[93] who wrote for the court, implemented the *Muchow* standard to determine whether the trial court's summary judgment was appropriate.[94] In finding that the summary judgment ruling was unsuitable for the circumstances involved in *Swenson*, the court stated that the focus should not be exclusively on the defendant's allegedly discriminatory conduct and words.[95] In addition to the allegedly discriminatory conduct, the court considered the context and background of the conduct, or the presence of a relationship and knowledge of plaintiff's susceptibility to distress, to determine whether reasonable minds could differ as to whether conduct was extreme and outrageous.[96] The court underscored the danger of viewing the allegedly discriminatory conduct in a vacuum, detached from the surroundings in which it occurred.[97]

Former Chief Justice Erickstad regarded the employer-employee relationship as a factor to consider when determining the outrageousness

87. 498 N.W.2d 174 (N.D. 1993).

88. Swenson v. Northern Crop Ins., Inc., 498 N.W.2d 174 (N.D. 1993).

89. *Id.*

90. *Id.*

91. *See supra* text accompanying notes 82-84 (discussing the *Muchow* standard as invoked in Muchow v. Lindblad, 435 N.W.2d 918 (N.D. 1989)).

92. *Swenson*, 498 N.W.2d at 181.

93. *Id.* at 176. Justice Ralph J. Erickstad was Chief Justice of the North Dakota Supreme Court at the time that *Swenson* was heard and served as Surrogate Judge pursuant to North Dakota Century Code section 27-17-03 (1991). *Id.* at 176 n.1.

94. *Id.* at 181.

95. *Id.*

96. *Id. But see infra* text accompanying notes 110-114 (discussing Justice Levine's suggestion that mere gender discrimination may be sufficient to avoid summary judgment).

97. *Swenson*, 498 N.W.2d at 186.

of conduct and adopted the *Restatement*'s comment e,[98] even though the comment does not refer to an employment context as an example of a relationship that may give rise to an abuse of authority.[99]

In conjunction with the allegedly discriminatory conduct and the employment relationship, the court found significant the defendant's knowledge of plaintiff's particular susceptibility to emotional distress and adopted the *Restatement*'s comment f.[100] While the defendant's knowledge was not per se conclusive for the court, the knowledge was relevant in determining whether the conduct was extreme and outrageous.[101]

In reaching its decision, the court recognized that, in the characterization of outrageousness and the degree of outrageousness necessary to avoid summary judgment, jurisdictions have addressed the element of extreme and outrageous conduct differently.[102] Although jurisdictions have generally allowed judges to initially determine whether reasonable

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98. *Id.* at 185. *See supra* note 63-67 and accompanying text (stating that comment e of the *Restatement* provides that when the defendant holds a position of authority or relationship, either actual or implied, abuse of such authority goes to the extremity and outrageousness of the defendant's conduct).

99. *Swenson*, 498 N.W.2d at 185. Even though the *Restatement* did not refer to the employment relationship, the court recognized that other jurisdictions have expanded the *Restatement*'s rationale to an employment context and adopted the same approach. *Id. See* Agarwal v. Johnson, 603 P.2d 58, 66-67 (Cal. 1979) (considering an employment relationship when an employer shouted racial epithets at an employee); Alcorn v. Anbro Engineering, Inc., 468 P.2d 216, 217-219 (Cal. 1970) (stating that the plaintiff's employee status entitled the plaintiff to a greater degree of protection from insult than would have been entitled to a stranger when defendant shouted slurs such as "goddam niggers" at the plaintiff); Robinson v. Hewlett-Packard Corp., 228 Cal. Rptr. 591, 603 (Cal. Dist. Ct. App. 1986) (concluding that the employment relationship aggravated the circumstances surrounding the racial slurs and epithets); Gomez v. Hug, 645 P.2d 916, 922 (Kan. Ct. App. 1982) (stating that the relative positions of the parties were important considerations when, in a five to fifteen minute tirade, the employer repeatedly called the plaintiff slurs such as "fucking spic"); Kentucky Fried Chicken Nat'l Management Co. v. Weathersby, 607 A.2d 8, 14-15 (Md. 1992) (recognizing the employment relationship as a factor to consider when determining the outrageousness of the conduct); Contreras v. Crown Zellerbach Corp., 565 P.2d 1173, 1176 (Wash. 1977) (determining that when one in a position of authority makes racial slurs, jokes, and comments, the abusive conduct gives added impetus to the outrageousness of the conduct). *But see* Ramirez v. Allright Parking El Paso, Inc., 970 F.2d 1372, 1376 (5th Cir. 1992) (stating that a young person replacing an elderly employee who was divested of his seniority was nothing more than an "ordinary employment dispute" and the employment relationship was not given special consideration). *See also supra* notes 63-67 and accompanying text (discussing the application of comment e to various relationships, including the employment relationship).

100. *Swenson*, 498 N.W.2d at 186. *See supra* notes 69-73 and accompanying text (stating that comment f provides that when the defendant has knowledge of plaintiff's susceptible condition, such knowledge goes to the outrageousness of the conduct).

101. *Swenson*, 498 N.W.2d at 186. For cases that consider a defendant's knowledge of plaintiff's susceptibility in the workplace, see Woods v. Graphic Communications, 925 F.2d 1195, 1204 (9th Cir. 1991) (taking into account the plaintiff's susceptibility when the defendant refused to file a requested grievance for racial discrimination); Agarwal v. Johnson, 603 P.2d 58, 67 (Cal. 1979) (showing that racial epithet was said knowingly to humiliate); Alcorn v. Anbro Engineering, Inc., 468 P.2d 216, 218 n.3, 219 n.4 (Cal. 1970) (noting the particular susceptibility of a racial minority to discriminatory conduct which is personified by the civil rights movement); Robinson v. Hewlett Packard Corp., 228 Cal. Rptr. 591, 604 (Cal. Dist. Ct. App. 1986) (recognizing a racial minority may be susceptible to racial slurs). *See also supra* notes 69-73 and accompanying text (discussing the application of comment f when defendant has knowledge of plaintiff's susceptibility to distress).

102. *Swenson*, 498 N.W.2d at 183. *See infra* notes 104-106 (recognizing variations among jurisdictions applying the tort's elements).

minds could differ as to the extremeness and outrageousness of the defendant's conduct,[103] there is a variance among the jurisdictions as to when reasonable minds could differ.[104] Some courts have rigidly applied the extreme and outrageous conduct element to the facts, seemingly requiring a pattern of bizarre behavior.[105] Other courts, evidently willing to allow development of the tort in nontraditional instances, such as in the employment context, have held that the extreme and outrageous conduct element is a question for the jury in particular instances.[106]

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103. *See supra* notes 57-59 and accompanying text (discussing courts' application of comment h which provides for the roles of the judge and jury).

104. *Swenson*, 498 N.W.2d at 183 n.7, 184 n.8. To illustrate this acknowledged split among the jurisdictions, the *Swenson* court provided cases from other jurisdictions which have addressed the issue. *Id.* at 183-84.

105. *Id.* at 183 n.7 (citing cases applying the extreme and outrageous conduct test in the employment context). *See* Spence v. Maryland Casualty Co., 803 F. Supp. 649, 673 (W.D.N.Y. 1992) (concluding that harassing and taunting by supervisors would not be sufficient as a matter of law to state a claim, even though such a claim was not available to claimant because he was an at-will employee); Ramirez v. Allright Parking El Paso, Inc., 970 F.2d 1372, 1376-77 (5th Cir. 1992) (concluding that age discrimination was not extreme and outrageous conduct as a matter of law); Katzer v. Baldor Electric Co., 969 F.2d 935, 939 (10th Cir. 1992) (deciding that firing an employee because of a handicap was not extreme and outrageous as a matter of law); Meek v. Michigan Bell Telephone Co., 483 N.W.2d 407, 410 (Mich. Ct. App. 1991) (concluding that sexist remarks and religious degradation by a supervisor were not extreme and outrageous as a matter of law); Wilson v. Monarch Paper Co., 939 F.2d 1138, 1145 (5th Cir. 1991) (concluding that because the experienced employee of thirty years was stripped of his duties and demoted to an entry level position, defendant's conduct avoided summary judgment, but that the decision may have been different without the employee's vast experience); Daemi v. Church's Fried Chicken, Inc., 931 F.2d 1379, 1389 (10th Cir. 1991) (holding that racial slurs or demotion were not extreme and outrageous conduct as a matter of law); James v. International Business Machines Corp., 737 F. Supp. 1420, 1429-30 (E.D. Pa. 1990) (stating that even if the intentional infliction of emotional distress claim were not barred by workers' compensation, discriminatory conduct alone would not be extreme and outrageous conduct as a matter of law); Leibowitz v. Bank Leumi Trust Co., 548 N.Y.S.2d 513, 521 (App. Div. 1989) (holding that racial slurs, religious discrimination, and gender discrimination were not extreme and outrageous conduct as a matter of law); Dean v. Ford Motor Credit Co., 885 F.2d 300, 307 (5th Cir. 1989) (finding that harassment by the employer was not extreme and outrageous conduct, but denying summary judgment because the plaintiff had been set up for a crime); Wells v. Thomas, 569 F. Supp. 426, 433-34 (E.D. Pa. 1983) (terminating plaintiff on the basis of age discrimination was not extreme and outrageous conduct as a matter of law).

106. *Swenson*, 498 N.W.2d at 184 n.8 (citing cases that allowed "evidence of most *any* type of discrimatory conduct" to cross the summary judgement threshold). *See* Mass v. Martin Marietta Corp., 805 F. Supp. 1530, 1543-44 (D. Colo. 1992) (allowing alleged racial comments to pass summary judgment); Dreith v. National Football League, 777 F. Supp. 832, 838-39 (D.Colo. 1991) (determining whether age discrimination was extreme and outrageous conduct was an appropriate jury question); Woods v. Graphic Communications, 925 F.2d 1195, 1204 (9th Cir. 1991) (upholding racial discrimination as extreme and outrageous conduct); Guzman v. El Paso Natural Gas Co., 756 F. Supp. 994, 1003 (W.D. Tex. 1990) (denying summary judgment on the basis of discrimination); Franklin v. Portland Community College, 787 P.2d 489, 493 (Or. Ct. App. 1990) (finding that a continuing pattern of discrimination and racial epithets was sufficient for denying summary judgment); Beeman v. Safeway Stores, Inc., 724 F. Supp. 674, 680-81 (W.D. Mo. 1989) (stating that subtle gender discrimination raised a jury question); Butler v. Westinghouse Electric Corp., 690 F. Supp. 424, 430 (D. Md. 1987) (stating that discriminatory conduct should be a jury question); Robinson v. Hewlett Packard Corp., 228 Cal. Rptr. 591, 603-05 (Cal. Ct. App. 1986) (holding that conduct including racial slurs was a question to be presented to the jury); Gomez v. Hug, 645 P.2d 916, 922 (Kan. Ct. App. 1982) (holding that racial discrimination was an issue for the jury); Agarwal v. Johnson, 603 P.2d 58, 66-67 (Cal. 1979) (allowing the plaintiff to show less outrageousness than traditionally required to meet the threshold extreme and outrageous requirement); Contreras v. Crown Zellerbach Corp., 565 P.2d 1173, 1176-77 (Wash. 1977) (finding that the employer's ridiculing the plaintiff's race created a jury question); Alcorn v. Anbro Engineering, Inc., 468 P.2d 216, 218-19 (Cal. 1970) (holding that discriminatory conduct directed at employee was a question for the jury).

When the North Dakota Supreme Court determined that the emotional distress claim could not be dismissed as a matter of law, it reiterated that the decision would be "praised by some jurisdictions [but] much criticized by others."[107] The court adopted the more persuasive view which was more attuned to social conditions and awareness.[108] The North Dakota Supreme Court, speaking through Chief Justice Erickstad, stated that "in modern-day America, we realize that not only are all people created equal, but that the trend in the courts . . . is to expand upon that principle."[109]

In a special concurrence, Justice Levine alluded that the presence of alleged gender discrimination with nothing more may be enough to avoid summary judgment and raise a jury question.[110] Justice Levine expanded on the policy acknowledged by the majority that society is constantly changing so that "former custom does not prevent present practice from constituting extreme and outrageous conduct."[111] Justice Levine discussed two factors in determining whether gender discrimination was to be considered intolerable in a civilized society: the act of gender discrimination and its impact on the victim.[112] To Justice Levine, gender discrimination is outrageous because it "strips its victim of self-esteem, self-confidence[,] and self-realization."[113] Justice Levine emphasized the importance of a court denying summary judgment and giving the determination of outrageous conduct to a jury in this instance because if reasonable judges could disagree as to whether or not gender discrimination was outrageous, then reasonable jurors could, too.[114]

Present Chief Justice VandeWalle dissented to the majority's lenient application of the outrageousness requirement.[115] He contended that the

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107. *Swenson*, 498 N.W.2d at 186.

108. *Id.*

109. *Id.* Chief Justice Erickstad noted that this trend is reflected in North Dakota caselaw. *Id.* (citing Butz v. World Wide, Inc., 492 N.W.2d 88, 90 n.2 (N.D. 1992) (recognizing that both wives and husbands may bring a claim for loss of spousal consortium); Briese v. Briese, 325 N.W.2d 245, 247-49 (N.D. 1982) (stating that an economic partnership exists in a marriage); Hastings v. James River Aerie No. 2337, Etc., 246 N.W.2d 747, 749-52 (N.D. 1976) (recognizing that it would be unconstitutional to treat spouses differently in claims for loss of spousal consortium)).

110. *Swenson*, 498 N.W.2d at 187 (Levine, J., concurring).

111. *Id.* at 188. To exemplify her approach, Justice Levine provided an example of changing social mores from the 1873 case *Bradwell v. Illinois*, in which a woman could not practice law as a matter of law solely because of her gender. *Id.* at 187-88 (Levine, J., concurring) (citing Bradwell v. Illinois, 21 L.Ed. 442 (1873), and stating that surely a 1993 jury would find the exclusion in *Bradwell v. Illinois* outrageous).

112. *Id.* at 188. Justice Levine stated that "sex discrimination debases, devalues, and despoils." *Id.* She analogized being discriminated against on the basis of gender to being struck with lightning twice, once by the irrational gender-based discriminatory conduct and once again by the inability to do anything about it. *Id.*

113. *Swenson*, 498 N.W.2d at 188 (Levine, J., concurring).

114. *Id.* at 188-89 (Levine, J., concurring).

115. *Id.* at 189-90 (VandeWalle, C.J., dissenting). Chief Justice VandeWalle became the Chief Justice of the North Dakota Supreme Court after *Swenson* was heard.

court's decision was a deplorable deviation from the *Muchow* standards and would inevitably expand the scope of the tort.[116] Chief Justice VandeWalle was apprehensive that the majority's decision would make almost every claim of intentional infliction of emotional distress a jury question provoking unwarranted verdicts promulgated by sympathy for the plaintiff.[117] Relaying his apprehension, the Chief Justice expressed his great concern that the tort would not only expand to sexual harassment cases, but to cases invoking conduct which society considered to be "unacceptable," yet not meeting the *Muchow* standard as it has been applied.[118]

While it is apparent that the North Dakota Supreme Court has clarified and expanded the tort of intentional infliction of emotional distress in North Dakota, the analyses of the opinions of the North Dakota Supreme Court reflect the discourse among and within jurisdictions, as well as the controversial policy which is involved with the tort.

IV. IMPACT

By allowing Swenson to present her circumstances to a jury, the North Dakota Supreme Court has directed the course North Dakota courts will take in determining whether allegedly discriminatory conduct in the workplace is sufficient to avoid summary judgment on an intentional infliction of emotional distress claim. *Swenson* permits the independent tort claim of intentional infliction of emotional distress to be added to the arsenal of statutory claims prohibiting discrimination in the

116. *Id.* at 190. *See supra* text accompanying notes 82-84 (discussing the *Muchow* standard as invoked in Muchow v. Lindblad, 435 N.W.2d 918 (N.D. 1989)).

117. *Swenson*, 498 N.W.2d at 190 (VandeWalle, C.J., dissenting). Rather than looking at contemporary standards in the workplace, Chief Justice VandeWalle endorsed applying the more rigid standards delineated in *Muchow*, consistently with the historical characterization of outrageousness. *See id.*

118. *Id.* The Chief Justice asserted that he was not encouraging either condonance or toleration of gender discrimination but only that Krabseth's conduct could not as a matter of law fit the definition of intentional infliction of emotional distress as defined in *Muchow*. *Id.* Although the temptation "to let the end justify the means" was present for Chief Justice VandeWalle, it was "not good policy" for the Chief Justice. *Id.*

workplace.[119] Other jurisdictions might have come to the opposite conclusion with the *Swenson* fact pattern.[120]

The decision of the North Dakota Supreme Court will have an impact on employment relationships. The decision will impact not only the manner in which an employer conducts himself or herself with his or her employees, but also the manner in which an employer's attorney will advise employers. Attorneys must inform their employer-clients of statutory requirements as well as their potential exposure to an intentional infliction of emotional distress state tort claim.

Awareness and prevention are the policies behind this decision which will undoubtedly act as a deterrence for discrimination. The employer must be aware of the content and context of his or her conduct. The danger of liability may encourage changes in the demeanor some employers exhibit towards employees. Unless the employer wagers that his or her peers would consider the conduct and context socially tolerable, to prevent liability, the employer must be cognizant of his or her conduct and the employee's susceptibility to distress.

Although *Swenson* pertained to the employment relationship, a potential for expansion of the relationship concept exists in circumstances in which actual or apparent authority of one person over another is present. Other jurisdictions have applied the relationship concept to police officers, school authorities, landlords, and collecting creditors.[121]

In addition to broadening the scope of *Swenson* by applying the relationship factor to relationships other than employment relationships, the *Swenson* analysis may be applied to modified fact patterns, such as when two of the three factors considered in *Swenson* are present but the third is lacking. For example, suppose discriminatory conduct and a relationship existed between the defendant and plaintiff, but no knowledge of a susceptibility was offered. The court has not answered whether such an

119. *See, e.g.*, N.D. CENT. CODE Ch. 14-02.4 (Supp. 1993) (also known as the North Dakota Human Rights Act). The statutory framework which denied Swenson recovery because of the statutory requirements has since been amended to more liberally provide recovery for parties seeking redress. *Swenson*, 498 N.W.2d at 190 (VandeWalle, C.J., dissenting). Chief Justice VandeWalle expressed concern that the unwarranted recognition of a claim for intentional infliction of emotional distress in Swenson's instance was simply a means for the majority to give Swenson a vehicle by which she could recover damages for Krabseth's alleged conduct toward her. *Id.* Chief Justice VandeWalle reiterated that by enacting the North Dakota Human Rights Act, the North Dakota Legislature had properly designated a remedy for such alleged conduct. *Id. See generally* Nicholas W. Chase, Comment, Civil Rights—Employment Discrimination: Modifying Federal Standards to Reflect Principles of State Law: The North Dakota Supreme Court's Examination of the *Hicks* Rationale Prompts the Court to Customize Its Own Standard to Review State-Based Employment Discrimination Claims, 70 N.D. L. REV. 207 (1994) (discussing claims brought pursuant to North Dakota Human Rights Act).

120. *See supra* notes 104-106 and accompanying text (describing the split among the jurisdictions).

121. *See supra* notes 63-67 and accompanying text (discussing positions or relationships that have lent themselves to liability in other jurisdictions).

instance is sufficiently within the *Swenson* framework to avoid a summary judgment or whether a lack of the factors considered in *Swenson* would require an application of the seemingly more rigid *Muchow* standard.[122] This potential application was left unresolved by the North Dakota Supreme Court, but the composition of the North Dakota Supreme Court has changed since the *Swenson* decision as well.[123]

If the court refuses to apply *Swenson* beyond its particular facts and if the conduct is not of the requisite outrageousness to avoid summary judgment for an independent tort claim, the emotional distress of the claimant may nevertheless be considered when measuring damages for other claims. Thus, a court would revert to the practice of considering emotional distress as a "parasitic" damage.[124]

Because some issues were neither briefed nor argued to the court, they were not considered by the court.[125] Therefore, the effect that the unconsidered issues will have on later cases is uncertain. Other jurisdictions have addressed some of the issues that were not discussed in *Swenson* with inconsistent results.[126]

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122. *See supra* notes 115-118 (discussing Chief Justice VandeWalle's concern that *Swenson* will greatly expand the tort). The *Swenson* analysis can be applied to facts similar to *Muchow* and a different outcome is plausible. To illustrate, *Muchow* involved a relationship of actual or apparent authority between the plaintiffs and the police officer. *See* Muchow v. Lindblad, 435 N.W.2d 918, 919 (N.D. 1989); RESTATEMENT (SECOND) OF TORTS § 46 cmt e (1965) (recognizing that police officers hold positions of apparent or actual authority); *see also supra* note 84 (discussing *Muchow*'s facts). Knowledge of susceptibility was also present in *Muchow* because the officer knew that the family was grieving the loss of a daughter. *See Muchow*, 435 N.W.2d at 919; *see also supra* note 84 (discussing *Muchow*'s facts). If the *Swenson* analysis were applied to the *Muchow* facts, it is plausible that the family would have been able to bring its alleged facts to the jury (even though former Chief Justice Erickstad distinguished *Muchow* because the police officer had knowledge of the decedent's suicidal tendencies).

123. Chief Justice Erickstad, who wrote the opinion of the court, and Justice Phillip Johnson, who sided with the majority, are no longer on the North Dakota Supreme Court. They were replaced by Justices Dale Sandstrom and William Neumann, who did not participate in the decision. Justice Levine and Justice Meschke are the only members remaining on the court who concurred in the decision. Chief Justice VandeWalle continues to serve on the court and was the sole dissenter in the decision. Thus, the further development of the tort of intentional infliction of emotional distress will be impacted by the views of the new justices on the court and whether they agree with the direction the tort has taken with *Swenson*.

124. *See supra* notes 39-41, 78-79 and accompanying text (discussing "parasitic" damages in general and in North Dakota).

125. Swenson v. Northern Crop Ins., Inc., 498 N.W.2d 174, 187 n.10 (stating that issues not considered by the court include the following: wrongful discharge, the exclusivity provision of the Workers' Compensation Act, the exhaustion of administrative remedies, and the possible distinctions between corporate liability and individual liability).

126. *See* Baker v. Weyerhaeuser Co., 903 F.2d 1342, 1348 (10th Cir. 1990) (stating that defendant's failure to take action against an employee who was a known sexual harasser of females constituted direct liability for inaction on the intentional infliction of emotional distress claim); Daniel v. Magma Copper Co., 620 P.2d 699, 703 (Ariz. Ct. App. 1980) (concluding that because termination was lawful, any recovery for intentional infliction of emotional distress based upon wrongful discharge must also fail); Lagies v. Copley, 168 Cal. Rptr. 368, 375 (Cal. Ct. App. 1980) (holding that the plaintiff was not confined to the exclusive remedy of the state Workers' Compensation Act); Pavilon v. Kaferly, 561 N.E.2d 1245, 1249-50 (Ill Dist. Ct. App. 1990) (stating that the state Human Rights Act did not preempt an intentional infliction of emotional distress claim because the tort furthered goals in addition to those addressed by the Act); Batson v. Shiflett, 602 A.2d 1191, 1204 (Md. 1992) (providing that a state claim for intentional infliction of emotional distress is not preempted by federal

In *Swenson*, the North Dakota Supreme Court has better defined and molded the tort of intentional infliction of emotional distress. However, the jury must make the ultimate determination of outrageousness based on its collective resolution of the threshold of societal tolerance, as long as the court finds that reasonable minds may differ.

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labor law); Watte v. Maeyens, 828 P.2d 479, 481 (Or. Ct. App. 1992) (noting that although terminating an employee without more does not constitute intolerable behavior, an employer's conduct, in the course of termination, may rise to the level of outrageous behavior); Wornick Co. v. Casas, 856 S.W.2d 732, 736 (Tex. 1993) (holding that the employer was exercising legal rights, which legally cannot constitute outrageous conduct); Commodore v. University Mechanical Constr., 839 P.2d 314, 322 (Wash. 1992) (holding that federal labor law does not preempt a claim for intentional infliction of emotional distress). *But see* Dwyer v. Smith, 867 F.2d 184, 194-95 (4th Cir. 1989) (concluding that failure of a Title VII claim necessarily precluded a state claim for intentional infliction of emotional distress because the factual predicate did not exist); Linebaugh v. Sheraton Michigan Corp., 497 N.W.2d 585, 589 (Mich. Ct. App. 1993) (stating that a corporate defendant was liable only for the acts of its employees that were within the scope of employment, thus the summary judgment for the defendant corporation was proper); Shea v. Cornell Univ., 596 N.Y.S.2d 502, 504 (App. Div. 1993) (providing that conduct was covered by the statutory Human Rights law but was not atrocious to sustain an intentional infliction of emotional distress claim); Venable v. GKN Automotive, 421 S.E.2d 378, 381 (N.C. Ct. App. 1992) (holding that the plaintiff's state claim for intentional infliction of emotional distress was preempted by federal labor law).