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Outside Counsel

Rethinking Tort Claims In Employment Discrimination Cases

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For many years it has been the common practice of New York plaintiffs' attorneys, when drafting complaints primarily asserting claims for employment discrimination under federal, state and local statutes, to "tack on" claims for intentional infliction of emotional distress (IIED) and/or negligent infliction of emotional distress (NIED). Notwithstanding the fact that these claims are very rarely successful in the employment context, counsel continue to plead such claims, presumably because they perceive these claims to give them leverage in settlement negotiations because of the uncapped damages that are available for such tort-based claims, or otherwise.

Given the long and unbroken line of authority applying New York law and rejecting such claims in the employment context, except in cases of the most extreme employer misconduct, plaintiffs' counsel should rethink whether it is wise and appropriate to continue to include claims for IIED and NIED in common employment discrimination complaints. Such claims are not only routinely dismissed on pre-answer motions, but given the wealth of authority on the subject, the assertion of such claims now may be frivolous to the point of warranting sanctions, depending upon the facts of the individual case.

Intentional Infliction Claims

There are several, often insurmountable, hurdles that must be met to successfully plead a claim of intentional infliction of emotional distress in an employment context under New York law. In order to plead a claim for IIED, New York law requires a plaintiff to plead: (1) extreme and outrageous conduct; (2) intent to cause, or reckless disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and the injury; and (4) severe emotional distress.[1]

There are several, often insurmountable, hurdles that must be met to successfully plead a claim of IIED in an employment context under New York law.

The element of a claim for IIED most often the focus of a pre-answer motion to dismiss is the outrageousness element, which the New York Court of Appeals has described as the "one most susceptible to determination as a matter of law."[2] The threshold for pleading outrageousness is a high one. Only conduct that is so outrageous, going beyond all possible measures of decency as to be considered intolerable in a civilized community, will be considered sufficient. Thus, in any context, the outrageousness standard will rarely be met.

Mindful of New York's strong employment-at-will doctrine and the protections provided by the federal, state and local anti-discrimination statutes, however, courts have been particularly wary of claims for IIED in the employment context, and have held plaintiffs to a very high standard for pleading outrageousness. In fact, the rare instances in which courts applying New York law have sustained a claim for IIED in the employment context have involved allegations of sexual discrimination and a significant sexual battery, such as rape or a sexual touching.[3] Courts have gone so far as to specifically hold that a "garden variety" battery is insufficient, and to meet the standard, a plaintiff must have suffered a significant battery of a sexual nature.[4] In that it is the rare case that will involve a significant sexual battery, and most discrimination cases do not involve a battery or sex-based claims at all, practitioners should be mindful of this precedent before attempting to plead a claim for IIED in a federal employment action.

While the outrageousness element has traditionally been the focus of a court's analysis of whether a plaintiff has properly pled a claim for IIED, since the Supreme Court's decisions in *Bell Atl. v. Twombly* and *Ashcroft v. Iqbal*, federal courts have increasingly examined whether a plaintiff has met pleading standards with respect to showing "severe" emotional distress as well. Some courts have held that to meet the *Twombly* and *Iqbal* standards for pleading "severe" emotional distress, a plaintiff must delineate both the symptoms and a medically diagnosable ailment that he or she has suffered from as a result of the alleged wrongdoing.[5] Thus, formulaic, non-specific recitation that plaintiff has suffered "severe" emotional distress will no longer be sufficient to plead that requisite element

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of a claim for IIED.

Even assuming that a plaintiff in an employment case is able to adequately plead the elements of a claim for IIED, to be successful on such a claim, the plaintiff will often have the additional hurdle of demonstrating that his or her employer should be held vicariously liable for the offending conduct. While vicarious liability is often an issue, to one degree or another, in any claim based on wrongful conduct by a coworker or superior, showing vicarious liability is more difficult with respect to an IIED claim than many other claims. For an employer to be held vicariously liable for its employee's outrageous conduct on an IIED claim, such conduct must have been committed in furtherance of the employer's business and must have been reasonably expected by the employer.[6] It will be the rare case indeed where an employee can in good faith plead, much less prove, that an employee engaged in a significant battery of a sexual nature in furtherance of his or her employee's business and that the employee should have reasonably expected such conduct.

Negligence Claims

A plaintiff seeking to plead a cause of action for negligent infliction of emotional distress in an employment context bears the same burden of establishing outrageousness that is required to plead an intentional infliction claim.[7] There are, however, additional barriers to a claim of NIED. For example, an NIED claim in an employment context may be barred by New York's Workers' Compensation Law, which provides employees with an exclusive remedy for injuries sustained by an employer's negligence.[8]

Additionally, to successfully state a claim for NIED in New York, a plaintiff must plead and establish that the subject outrageous conduct either unreasonably endangered the plaintiff's physical safety or caused the plaintiff to reasonably fear for his or her physical safety.[9] Further, in that the claim is based on negligence, to be successful, an NIED plaintiff will have to plead and show a "special duty" owed to him or her, and in the usual case, an employer does not owe any special duty to an employee, because it has an obligation to treat all employees in the same manner.[10] Thus, in the employment context at least, a claim for NIED is even less frequently appropriate than a claim for IIED.

Sanctions

Practitioners should be careful, especially in the context of a federal action, not to plead an ill-founded IIED or NIED cause of action in an employment discrimination case. Doing so will not just invite the expense of defending a motion to dismiss such cause of action, but may open the practitioner up to the possibility of the imposition of sanctions. Pursuant to Rule 11(b) of the Federal Rules of Civil Procedure, by presenting a pleading to the court, an attorney certifies that the claims in the pleading "are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law."

Similarly, section 130-1.1(c)(1) of New York's Rules of the Chief Administrator of Courts includes in the definition of a frivolous claim for purposes of imposing sanctions a claim that "is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law." Given the unbroken and strong line of precedent in courts applying New York law with respect to IIED and NIED claims in the employment context, practitioners should be mindful of these standards before asserting such a claim.

For example, in the recent case of *Ahmed v. Gateway Group One*, a federal district judge in the Eastern District of New York imposed sanctions against an attorney, inter alia, for bringing an IIED claim in the context of his client's race and sex-based discrimination case. There, the complaint alleged that the plaintiff's supervisor was rude and verbally abusive to her, called her names and sent her home from work in an insensitive manner. Noting the wealth of precedent within the U.S. Court of Appeals for the Second Circuit and New York rejecting such claims in the context of employment discrimination cases, the court held that "there was no chance that this Court would deem the facts set forth in plaintiff's complaint sufficient to state a claim for IIED….no reasonable attorney could determine that plaintiff's IIED claim was 'warranted by existing law or by a nonfrivolous argument for extending, modifying or reversing existing law,' as required by Rule 11."[11] The *Ahmed* case should be viewed as a warning to plaintiffs' counsel who include IIED and NIED claims in their complaints without serious consideration of the merits of such claims.

Conclusion

While many plaintiffs' counsel in the employment area have routinely included IIED and NIED claims in complaints directed at claimed employment discrimination, such claims are rarely well-founded or sustainable under New York law. Historically, the only sanction that counsel have faced by including such ill-founded claims in their pleadings was the cost associated with defending almost uniformly meritorious motions to dismiss same. The *Ahmed* case may be an indication that courts are growing less tolerant of having to expend judicial resources dealing with such frivolous claims, and practitioners should carefully examine the facts of their client's case and think twice before "tacking on" a claim for IIED or NIED to an otherwise colorable claim for employment discrimination.

1. *Wilson v. Am. Broad*, 2009 U.S.Dist.LEXIS 60163, *22 (S.D.N.Y. March 31, 2009) (quoting *Conboy v. AT&T*, 241 F.3d 242, 258 (2d Cir. 2001).
2. *Howell v. New York Post*, 81 N.Y.2d 115, 122 (1993).
3. See *Gerzog v. London Fog*, 907 F.Supp. 590, 604 (E.D.N.Y. 1995); *Gilani v. NASD*, 1997 U.S.Dist.LEXIS 12287, **47-48 (S.D.N.Y. Aug. 18, 1997); *Alexander v. Westbury Union Free School Dist.*, 829 F.Supp.2d 89, 111 (E.D.N.Y. 2011).
4. See *Perks v. Town of Huntington*, 96 F.Supp.2d 222, 231 (E.D.N.Y. 2000).
5. See *Philips v. World Publishing*, 822 F.Supp.2d 1114, 1120 (W.D.Wash. 2011); *Payne v. Whole Foods Market Group*, 812 F.Supp.2d 705, 710 (E.D.N.C. 2011); *Javaheri v. JPMorgan Chase Bank*, 2011 U.S.Dist. Lexis 62152, *20 (C.D. Cal. June 2, 2011)
6. See *Elmore v. City of New York*, 15 A.D.3d 334, 335, 790 N.Y.S.2d 462, 463 (2d Dept. 2005); *Kirkman v. Astoria Gen. Hosp.*, 204 A.D.2d 401, 402, 611 N.Y.S.2d 615, 616 (2d Dept. 1994); *Carnegie v. J.P. Phillips*, 28 A.D.3d 599, 815 N.Y.S.2d 107 (2d Dept. 2006).
7. See *Naughright v. Weiss*, 826 F.Supp.2d 676, 698 (S.D.N.Y. 2011); *Schafer v. Hicksville Union Free School Dist.*, 2011 U.S.Dist.Lexis 35435, *47 (E.D.N.Y. March 31, 2011); *Sheila C. v. Povich*, 11 A.D.3d 120, 130, 781 N.Y.S.2d 342, 351, (1st Dept. 2004).
8. See N.Y. Workers' Comp. Law §§11, 29(6).
9. See *E.B. v. Liberation Publications*, 7 A.D.3d 566, 567, 777 N.Y.S.2d 133, 135 (2d Dept. 2004).
10. *Alexander*, 829 F.Supp.2d at 112.
11. 2012 U.S.Dist.Lexis 79386, **4-6 (E.D.N.Y. June 7, 2012).

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