ORAL ARGUMENT – 2-05-03
02-0120
HOFFMAN V. ZELTWANGER

TIMMS: I'm going to address the two issues that are before the court today. The first one is whether the tort of intentional infliction of emotional distress (IIED) should be permitted in a case in which the plaintiff has sued for and obtained a judgment for sexual harassment based upon the same facts? The second issue is whether the tort of intentional infliction, if it is to be allowed in this setting, what behavior is deemed to be extreme, outrageous, atrocious and intolerable in the context of a sexual harassment case?

In deciding the context in which we will observe the tort of intentional infliction, I think it's helpful to return to the roots of that tort. The tort was created in the restatement so that if someone behaves in a manner that is beyond all possible bounds of decency, and intentionally or recklessly inflicts severe emotional distress on someone, then the second person has a cause of action. It was created with the intent to make sure that someone has a cause of action and a remedy.

OWEN: My first question is, let's assume that the plaintiff doesn't allege another cause of action. Does the defendant have to prove that they could recover under assault and battery, or the sexual harassment statutes in order to negate IIED? Whose burden is that?

TIMMS: I think that that could be handled in a wide variety of ways. I think the best examples of that are how it's generally handled when someone comes in and pleads something like DTPA rather than legal or medical malpractice. And how that is usually handled is that the defendant generally will file something like special exceptions or motion for summary judgment basically pointing out in this context you do not have this particular cause of action available to you.

JEFFERSON: Or it would be easier if the statute says that the exclusive remedy exist somewhere else. Right? Where you wouldn't have to prove there's another potential cause of action but the statute itself says there is no other remedy available for this sort of thing.

TIMMS: If the statute said that.

JEFFERSON: But this one doesn't.

TIMMS: Right. We are not arguing preemption. We are arguing in this case that the reason that we have this tort, the essence of the tort is to fill in gaps. To be a gap filler.

O'NEILL: We have said it's a gap filler, and you started your argument by saying in this case where we did have a jury question and finding of sexual harassment. What if that question had been submitted and the jury had not found sexual harassment. How do we treat that situation? Then

is it a gap filler? I mean are we talking theory?

TIMMS: There may be cases if we're going to observe the true gap filler nature of the tort where the facts are fairly complex. And it may be iffy that a plaintiff can establish this other tort. In this case sexual harassment. It may be under a different set of facts. Then it would seem to me that if you can't decide on the basis of the pleadings or on the evidence on motion for summary judgment, that it would be appropriate to submit both of them to the jury and if the jury says no it's not an assault and battery, or no it's not an invasion of a right to privacy, then you have your fallback tort that you submitted to the jury.

O'NEILL: But then that's a factual analysis and we're not just looking at whether someone can legally claim another cause of action.

TIMMS: I think what it is, is it's maybe a little bit of both in that again if someone has another tort but it's one that's difficult to establish, we certainly ought not to pull the rug out from under their intentional infliction claim at the outset and give them a shot to establish the other tort...

O'NEILL: Which is a factually intensive inquiry.

TIMMS: I would imagine that there are some cases that would have to go to a jury. The vast bulk of cases you can call them on the pleadings. Because this is a routine type tort that's pled in all kinds of situations where there's sexual harassment, racial discrimination and you name it in which there is plainly another cause of action _____.

O'NEILL: But the jury could find couldn't it as a factual matter that the animus behind the defendant's activities here was not so much sexual or racial, but it was just pure harassment. So they might not go under the sexual harassment claim, but still think it's extreme and outrageous. I'm just trying to understand how we evaluate this without getting into an intensive factual inquiry.

TIMMS: Right. First of all, this case is a typical sexual harassment case. So let's talk about this case for a second and then maybe I can finish addressing your question by talking about GTE, which I see as being somewhat different. This case is typical sexual harassment. The supervisor is harassing the lady. She thinks he wants to have a sexual relationship.

OWEN: Does it matter to you whether you can actually recover or not, or is the inquiry this kind of thing whether you ultimately recover or not is covered by another tort? That's the distinction I'm trying to get at. Do you have to actually be able to recover: Go to a jury and get a judgment. Or are you saying that whether or not a jury would ultimately find for this person this is the type of thing that should go under the sexual harassment statutes or tort for assault and battery or whatever?

TIMMS: It may depend on the reasons that recovery is difficult frankly. For example, if I sit on my defamation case for more than 1 year, and I realize I don't have a defamation case

anymore if I bring it the day after the statute of limitations pass, it does not matter that you can't recover on your defamation case. You let it lapse and you had a decent one and you let it go. And you can't make up for it by bringing in intentional infliction claim.

OWEN: But you're basically saying that the defendant would have to come in and plead defamation against itself and prove defamation in order to say, therefore, I'm not liable for IIED. Isn't that problematic?

TIMMS: There's a problem frankly. The US SC said you can't use intentional infliction in a defamation case.

OWEN: Pick another tort.

TIMMS: But if you pick another tort. I think that that happens all the time in say legal malpractice claims where people may have a host of claims that they bring and at some point the defendant needs to, while it's in the TC, say that's not the proper cause of action. And I don't think that the defendant has to plead it against himself, but he does need to point out at some point you can't bring the claim in this context.

PHILLIPS: Some of these cases are academic to me because Mr. Webber has said it. Could he have been in the course and scope of his employment when he was doing this kind of _____?

TIMMS: No. I don't see how - this seems like a traditional frolic to me.

PHILLIPS: Even if there's all this proof about his supervisor, and that supervisor's supervisor, and so on up the chain encouraging this kind of conduct and discouraging the plaintiff?

TIMMS: What we are into is the first line of supervisors. Webber, Turicchi, what kind of powers were they given as supervisors. I don't think under the standards set out in Hammerly v. Oats, that they meet it here.

PHILLIPS: It's certainly possible that they could be within the course and scope. However, it's possible it could be ratified in certain factual situations. Correct?

TIMMS: Not in this case. But in other situations. There are other cases where it could have been ratified.

PHILLIPS: And your reply brief at page 13 says that you can always still bring an IIED case against an individual along with sexual harassment?

TIMMS: No.

PHILLIPS: In your brief it says you bring sexual harassment against the company and IIED against the individual.

TIMMS: If the facts will support it. But that was my example of a situation in which you obviously still might need to have the intentional infliction cause of action. Because in this case for example, that was the only claim that Ms. Zeltwanger had against Jim Webber was intentional infliction of emotional distress because there was no sexual harassment claim against him. The sexual harassment claim could only be filed against the company.

PHILLIPS: So in that event if the case proceeded to trial against an individual for IIED and the jury found some facts that were justified, with the corporation being liable for that individual's conduct, you could still have the result that you are complaining about here under your analysis. Isn't that true? I mean the company could be liable for sexual harassment directly under the statute and also be liable by _____ affair or ratification for the individual's IIED?

TIMMS: I don't think that that's what they did here.

PHILLIPS: It's gone here because he's severed.

TIMMS: I understand the problem, and I probably have not thought through that issue as much as I should have. I suppose that that is possible if it went forward against the individual.

PHILLIPS: Now is it also possible that an individual could practice intentional infliction of emotional distress for a year or two, and then progress on to sexual harassment? 1998 to 2000 nothing sexual.

TIMMS: Just abusive conduct. Screaming in their faces and whatnot.

PHILLIPS: And trying to publically humiliate them.

TIMMS: And then we move into sexual harassment at some other point.

PHILLIPS: In that instance would your argument still hold?

TIMMS: First of all I do think that that's outside normal human behavior. But we have an unusual person let's say. I think what we need to do is when there is activities, actions taken that fall within a traditional tort or cause of action, such as sexual harassment, that what you need to do is take all of those actions that relate to the sexual harassment literally and sort of set them off to one side, and then you analyze what is left. And if what is left is wholly outside the sexual harassment is possibly an IIED claim, that could go to a jury and generate separate, independent damages...

O'NEILL: But that's a fact question isn't it? I mean how do you tell what's motivated by sexual or racial sort of harassment and a _____? I mean in this case the yelling

during the performance review, is that sexual harassment or not? How would we know that the jury did or did not find that to be sexual harassment verses just plain old harassment? It's hard for me to see again how we can parse through it factually. If the rule you're proposing is simply if a jury allows recovery under any other theory there could never be IIED. I can sort of understand that argument with this being merely gap filler. Are you trying to limit this rule to just strictly that context only if the jury finds an alternative cause of action?

TIMMS: There are all kinds of rules that could come out of the decision in this case. The most narrow one would be if you have a sexual harassment judgment based upon the same conduct, then...

O'NEILL: But again, how do you determine?

TIMMS: Let me talk about that for a second. There is a very typical pattern in racial discrimination - let me just talk about sexual harassment cases. The harassment goes on. The victim is not responsive or is rejecting of the advances. And then we start in to this period where there is increasing discipline and belligerence toward the person. As Joan Zeltwanger said herself when she filed her first written complaint with the company, "I feel he is threatening my job because I did not respond to him sexually." And throughout all of the briefing and all of the testimony it is that those things, the things that occurred say at the review and what led up to the review arose out of her rejecting him sexually. And then the third thing that frequently happens in these cases is there is some sort of adverse employment whatever that occurs: the lady quits; she's demoted; she's not promoted; she's fired; whatever. And that is a typical sexual harassment case.

The more difficult case is say GTE where apparently there was some sexual harassment: obscene joke telling; profanity that included sexual terms, sexual connotations. But it was all mixed in with this other behavior, which was just simple harassment. And he was not a typical sexual harasser. He was just a harasser frankly that included some sexual stuff.

ENOCH: But if he only harassed women, then how do we decide that that wasn't sexual harassment, that was just some harassment?

TIMMS: The women were the ones who sued. I do know who filed complaints in Arkansas before he came here. Some of the witnesses, however, were male and had experienced the same conduct. But in GTE, I think that's a case where you can legitimately ask the question, What do we do with the sexual harassment here? Does the rule in this case preclude a GTE? And that's where I think you need to take the sexual harassment conduct and sort of package it and set it aside, and look at the rest of the conduct. And to me in GTE there's lots of other conduct besides the vulgarity of the language and the joke telling.

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RESPONDENT

LEVINGER: I think the biggest problem with Roche's arguments is that they apply erroneous legal principles to a one dimensional view of the evidence. It really just disregards the appropriate legal sufficiency standards that apply here.

There are really three problems I think with the Roche absolute rule that they are arguing for. Apart from the fact it wasn't even raised in the TC. They now say that this is something that could be decided on the pleadings and, yet, it was never asserted by special exceptions or anything else.

First of all it requires this court to legislate effectively. Secondly, the rule is illogical and it's unworkable. And thirdly, I think it takes the language of Standard Fruit v. Johnson, which is the origin of this gap filling language, and misapplies it to the facts of this case which are very different because the facts here go well beyond sexual harassment. Now let me return to the legislating point. They denied that this is a preemption argument. But I will say this. When Roche says that intentional infliction is a gap filler tort that's not available for sexual harassment, the necessary premise of their argument is that the TCHRA is what fills the gap. And yet that's just not so. You read the language, and you read the legislative history and it shows that the TCHRA is not an exclusive remedy. It doesn't preclude common law claims, including intentional infliction. And the CAs, none of which they cite in their briefs, are unanimous on that score. They say that allowing intentional infliction actually furthers the purposes of the act by providing a plaintiff an additional means of redress.

HECHT: But it would do the same if there weren't an act at all. There's nothing you can recover under the act that you can't recover under IIED. So why have the act?

LEVINGER: I think the act was a product of legislative compromise where they were essentially trying to import title 7 down to the state level. That's really all it was. There was no effort on the part of the legislature to make it the exclusive remedy or to preclude any common law claims. I think that's clear from the, particularly provision 21.211...

HECHT: I'm just trying to understand though from your argument why would you ever even have the act, because you can't conceive of circumstances that you couldn't win on under IIED without the act?

LEVINGER: There would be sexual harassment. There would be racial harassment.

HECHT: But you could win under the IIED.

LEVINGER: It may not rise to the level of intentional infliction as a matter of law, or as a matter of fact. That's clear as a bell in the case law that you can have sexual harassment and racial harassment. It just doesn't rise to the level of IIED. Certain conduct does. This, I believe, is one of those cases as found by the TC and found by the CA and the jury unanimously.

Their argument that essentially the victim of sexual harassment can use IIED to in essence circumvent the statute or the caps that are in place under the TCHRA. First of all, I think that argument kind of begs the question, because it assumes that the TCHRA is exclusive. Which it's not. But beyond that, I don't think that's a legitimate fear. I think the fear is overblown. To begin with, the plaintiff has to prove the elements of intentional infliction, including severe emotional distress, which goes well beyond what's required under the TCHRA.

This is a most unusual case because punitive damages were awarded here under the 1987 version of ch. 41, it's that old of a case, where there were no caps for intentional torts. Under the 1995 version of ch 41, which probably governs 99.9% of all cases in system, the punitives are capped. And I would suggest to you that the punitives as capped under intentional infliction would roughly equal the TCHRA capped compensatory and punitive damages plus attorney's fees. The point I'm making is that there's sort of equivalency between the two torts. So it's not like you can just circumvent the TCHRA.

OWEN: But you're getting both. You stacked both.

LEVINGER: No. You don't stack both. Because in this case you've eliminated duplication. There is no duplication between the two causes here. We elected not to receive certain elements under the TCHRA so as to avoid duplication with the intentional infliction. And there's never been any complaint about how that was done. So there's really no stacking.

And I would make one final point, and that is, if anybody thought that punitives were still excessive you could use the BMW v. Gore case to argue that in relation to the TCHRA they are too high. First, that argument was never made here. So I think the fear is overblown.

The rule they are asserting for is also unworkable and it's illogical. I think J. Phillips pointed out some of that where he pointed to Roche's admission on page 13 of their reply brief, that intentional infliction will lie against the harassing supervisor, presumably because you can't sue that person under the TCHRA. Well if that's true, and it is true, then the employer would be vicariously liable for the intentional infliction. And that's what happened under the GTE case, and that's what happened in this case.

PHILLIPS: You say that's what happened in this case?

LEVINGER: It is what happened in this case because under question 12, the jury was entitled to conclude that not only was Webber acting in the course and scope of his employment, but that he was also a vice principal. Both of which were sufficient to impose liability vicariously upon Roche even apart from Roche's independent conduct.

PHILLIPS: Is there anything in the record about how much Webber settled for, or who paid that settlement?

LEVINGER: I know, but it's not in the record.

WAINWRIGHT: Let's go back to your legislative point. I'm not sure I understand it. IIED is a creation of common law isn't it?

LEVINGER: Yes.

WAINWRIGHT: What's your argument again?

LEVINGER: My argument is that when they say that IIED is a gap filler tort, the necessary premise of what they are saying is that TCHRA must fill that gap. And, therefore, you don't need IIED. The problem with that premise is that TCHRA is not an exclusive remedy. It doesn't preclude common law claims, including intentional infliction. So even the legislature has made it very clear that intentional infliction is a tort that may be asserted in a case provided you can make out the elements. And to accept their argument essentially would be to legislate. It would be to read something into the statute, the TCHRA that's not there.

PHILLIPS: This is a pretty new tort. Its pretty new nationally and its very new in Texas. We're still struggling with the contours of what it means. And in standard _____ say it didn't mean that every automobile accident turned into that because you drank too much. And now we're looking at does it mean this when there's roughly a statutory remedy out there. I don't think that's legislating. The statute is there. We have our common law hats on trying to make the common law make sense in light of a world of written rules.

LEVINGER: I just view their gap filling argument as being the flip side of the same coin of a preemption argument that the CA's have rejected again and again.

PHILLIPS: It doesn't have to be preempted. Clearly we have the power to say any violation of the statute is also a tort in Texas. We can do that.

LEVINGER: It wouldn't make any sense to do it. And that's really my next point. And that is, Roche's rule would lead to this perverse result where verbal harassment, ie the GTE case would give rise to intentional infliction, but sexual harassment would not. That's their rule.

O'NEILL: It seems to me that in the discussion we said more importantly, and when we talked about more importantly we seem to focus on the threat of physical violence, that there was charging, that there was the fear of being hit, that there was a fear of physical contact, that doesn't appear to exist in this case.

LEVINGER: Well we do have some of that in this case. Certainly not to the degree that existed in GTE.

O'NEILL: But where does she contend that she was afraid of being physically assaulted?

LEVINGER: When she was in the car and he was sitting less than two feet away from her, and he was riding with her more and more frequently on these field trips as time went by, her testimony was that he was literally beating on the dashboard with his fists causing her...

O'NEILL: And there was evidence in GTE of beating fists on desks and things. But it seemed to be the thing that took it over the top was the charging, the fear of actual imminent physical assault. And you would agree that there's none of that here?

LEVINGER: I would agree not to the degree in GTE. We have other, I think more insidious conduct that's going on in this case that's different in character, but no less extreme and outrageous than in GTE. That's my view of the case, and I think that's what the evidence supports.

The problem as I see with Roche's rule is that there's really no stopping point to it. Workplace conduct that might be intentional infliction no longer would under the Roche rule if it included discrimination or harassment based on race, or based on age, or religion, or disability. Even assault or battery in their view would automatically per se take something out of the realm of intentional infliction. And that just makes no sense because it's the presence of that conduct that would tend to give rise to intentional infliction. It shouldn't cause it to evaporate.

HECHT: When you make that argument, the other side of the argument is, and, therefore, IIED should be an all pervasive presence, that what we didn't need until 1939 we now can't do without.

LEVINGER: Absolutely not. And the reason is, because you still need to make out the elements of IIED. You need to show intent.

HECHT: But as your cases show sometimes that's harder and sometimes it's easier on the same facts.

LEVINGER: But this is not essentially the same facts. They say that again and again, but it's not. And that really, I think underscores the problem with the Roche rule. The conduct here goes far beyond sexual harassment and certainly it began that way. But as time evolved, and I can talk about this more in connection with the legal sufficiency argument, it became something else. It became mean, and vicious, and destructive. In fact, strikingly in this case Webber admitted that he destroyed Joan Zeltwanger in the review.

HECHT: Don't you read our cases to say that if I'm her supervisor, and I look across at her and I say. I hate you for no reason. I understand that. I'm going to ruin your career here and fire you. Because this is employment at will and I can do that. That's not IIED?

LEVINGER: That alone would not be IIED. I think here we need to look at the totality of what happened and we have much more than simply a threat to terminate or something of that nature. We have a man who admitted that he destroyed her.

OWEN: We've had actual termination with certainly severe mental anguish, the fact that they were terminated, and we said that's not IIED. Even if it's done with ill will and malice we've said no.

LEVINGER: Here, I think we have all the attributes of conduct that would transform an ordinary employment dispute like that into something that's in the realm of it being outrageous.

OWEN: How is it different though? Isn't it where employees have actually been terminated for no reason, and it's been done very brutally. We've said no. How is that not just as bad or worse than these facts?

LEVINGER: Because here you have the three types of conduct that the Texas courts again and again would say transforms something into an ordinary employment dispute. You have repeated and ongoing abuse as in GTE. It may be different in character, but no different in outrageousness. You have an abuse of power or authority, and you have a mistreatment of an employee who's known not only by Webber but also by the company to be emotional vulnerable. I think it's those facts that make this case so incredible.

OWEN: If he had physically assaulted her, she would have a cause of action for assault and battery, and we would say because you have that you can't also get IIED.

LEVINGER: Then that would change the result in GTE. Because it was the physical assault...

OWEN: She was not physically touched. No one was physically touched in GTE.

LEVINGER: Right. But there was evidence that there was an assault. I think the word assault was even used in the opinion. And under the Roche rule, although they didn't assert it, they would have a remedy available for assault. So their rule would change the result in GTE. Their rule, I think, would even change the result in Morgan v. Anthony case, which was outside the workplace, but nonetheless that person was clearly assaulted - the one who had had somebody terrorize her as she was driving down the highway.

The Roche rule would cause a different result in Morgan v. Anthony because that person would have had a remedy for assault. It just goes to show that the Roche rule is unworkable. What we need to do is just look at the conduct and see if it amounts to extreme and outrageous...

OWEN: When we created the tort, we said that we were creating it for mental anguish situations where the law would not otherwise allow a recovery for mental anguish.

LEVINGER: I think, Your Honor, we need to look at the language of Johnson in context.

OWEN: I'm talking about Twyman. The original cases, the two cases adopting the tort said we recognize that there's a gap here in the law. Otherwise these people could not recover under any established theory. Which seemed to say to me that if you have a way of pleading a cause of action for the conduct, then IIED should not apply.

LEVINGER: I recall the language coming more out of Johnson. But even more to the point, I think this is a case that illustrates that there is a gap. The jury question that went to the jury on sexual harassment was very narrow. It talked in terms of unwanted sexual advances, sexual conduct, etc. That is extraordinarily narrow. The jury answered yes. But there is conduct here that went well beyond the reach of the conduct that was addressed in question no. 1.

SMITH: Would you argue that if she had not rebuffed him, that he would have taken the same or similar egregious actions? I mean that doesn't make any sense. Doesn't it all flow out of her rejection?

LEVINGER: It probably had it's origin in sexual harassment. But as time went by his conduct moved well beyond sexual harassment to downright meanness and vindictiveness.

HECHT: But that's not an IIED here. I mean that's meanness and vindictiveness, that's just not IIED particularly in the workplace, or not?

LEVINGER: That's where I was heading when I was talking about repeated, and ongoing and so forth. We have a case here where the company basically empowered him to do what he did. Certainly his repeated and ongoing abuse, which lasted over two years, began with sexual jokes and innuendo. It soon escalated into public humiliation. Examples are well chronicled in the brief. As he became frustrated, he began threatening and scaring her in private places. And those examples are well chronicled in the brief culminating in the review at her home where the company dispatched her to go into his home, having already tipped him off to the complaint, and knowing that he was a harasser. The jury was entitled to find that this is very much reminiscent of the Sharon Lapinsky issue, where Sharon Lapinsky had a problem with her manager who was harassing her. She complained to the company, and their solution was to make him spend more time with her.

HECHT: If there had never been any sexual overtones to any of this would it be IIED?

LEVINGER: I think so. I think it would be very much like GTE, albeit in some ways more insidious, because a lot of his conduct was happening in private. Shields and GTE was sort of a equal opportunity harassment.

Here, we have among other things, the mistreatment of an employee who is known to be emotionally vulnerable. I think what's very important here is that Roche allowed Webber to find out about Joan Zeltwanger's complaint even though she requested confidentiality. Yet recklessly directed her to go into his home. Roche let Turicchi attend the review, but it gave her strict instructions just to be there physically and do nothing. The review of course was beyond

hostile.

OWEN: So anytime a company knows it's got an emotional, fragile person and she works for a difficult supervisor and they say you've got two choices, you can leave or you can keep working for him, that's IIED?

LEVINGER: In this case, the company admitted that Joan Zeltwanger should not have been forced to leave her employment in order to deal with this problem.

OWEN: I'm not asking about your case. I'm asking about just in the general workplace.

LEVINGER: I would say more specifically what the company should not do is direct an employee to go into the home of a person who's known to be a harasser, having tipped him off already that the victim has filed a complaint.

HECHT: But you can quit. You don't have to go. Just say I'm not going. I quit. If you stay it's IIED.

LEVINGER: Except under the facts of this case she was dependent upon her job. The evidence was that she was financially...

OWEN: Who isn't?

LEVINGER: The evidence in this case was that she was financially troubled. Webber knew it. He was capitalizing on it. The company knew that she was upset, vulnerable, having already lodged a complaint.

ENOCH: For sexual harassment is it just one time, or two times? What do you have to show to have a claim for sexual harassment?

LEVINGER: As I recall the development of law under title 7 it has to be pervasive is one of the elements.

ENOCH: Does IIED - is an element of that that it requires routine, often pervasive pattern? Is that a necessary element for IIED?

LEVINGER: It may be necessary, but I don't think it's sufficient.

ENOCH: Would one conduct that is beyond the pale(?) be sufficient for a claim of IIED?

LEVINGER: I believe it could and I've read cases to that effect.

ENOCH: Is it possible to have sexual - you could have a sexual event occur that would constitute IIED that would not constitute sexual harassment under the statute?

LEVINGER: I think that's possible.

ENOCH: Because it's not pervasive. It's not routine. It doesn't happen over a course of time...

LEVINGER: But it's outrageous.

ENOCH: Would the one time that he is looking through her underwear drawer, and she catches him, be on the pale(?)

LEVINGER: It was to this jury, and I think it is under the law.

ENOCH: Would that one event constitute sexual harassment under the statute?

LEVINGER: Probably not. For one thing it didn't happen again and again. But it was enabled by the company, and it happened at a time when he was sort of beyond the sexual element of his conduct.

ENOCH: If the court said that because there's a sexual harassment _____, the statute that IIED as a gap filler would not apply, and it would be possible for a sexual event to occur that's beyond the pale, there would be no remedy for the victim? Assuming you don't have assault. Assuming you don't have battery. Assuming you don't have rape. It is just an outrageous event that occurs of a sexual nature, but it's a one time event.

LEVINGER: That would be one instance where intentional infliction would serve as the gap filler. And the other instance I think would be in a case like this where the conduct has evolved far beyond sexual conduct as defined in jury question no. 1. So I think there could be a number of instances and you would have to draw the line on a case-by-case basis.

JEFFERSON: Do you agree with Ms. Timms that the way to analyze the case is to separate those acts that pertain to the TCHRA violation, and then consider conduct beyond that and determine whether that conduct in itself would support recovery under IIED?

LEVINGER: No, Your Honor. Because I deal with legions of cases that have come down in state and federal court allowing both the sexual harassment claim under the TCHRA or under title 7 and an intentional infliction claim to be asserted simultaneously. And the only issue under intentional infliction is, is the conduct sufficiently extreme and outrageous enough to rise to that level? There's not automatic legal bar against the assertion of intentional infliction claim. That's why you see literally hundreds of cases where both claims are asserted. You don't always succeed but at least it's not an automatic per se bar that no court to my way of thinking has ever accepted.

SMITH: Let me ask you one question about, what's your view on the standard of review in this court is your position the same as in any other court cases or is it up to elevated review that is provided by this type of IIED case?

LEVINGER: It's the typical legal sufficiency standard. There is kind of a threshold issue that you see in these IIED cases. And that is, could reasonable people have concluded or could reasonable minds differ as to whether this type of conduct is extreme and outrageous? And if the answer is yes, the TC must submit it. We crossed that bridge in this case because the TC did submit it, and we know now that reasonable minds could differ. In fact the reasonable minds unanimously concluded that it was extreme and outrageous. And now we go to the legal sufficiency test and just ask whether there is more than a scintilla of evidence that reasonable minds could differ as to whether the conduct was extreme and outrageous. That's the way I envision it, and that's they way I think GTE dealt with it.

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REBUTTAL

TIMMS: Let me quickly address the standard of review. I think that the facts are reviewed under a no evidence standard, so the worst of the facts are counted against us. But I disagree about how the restatement standard is used. That's not just a threshold inquiry for the TC. I believe that whether reasonable minds could differ is something that each court all the way up the line must view, and it's really viewed on a de novo basis on whether reasonable minds could agree that this behavior was atrocious.

There are two major problems with this case. The first one is that in order to rule in favor of Zeltwanger in this case, I think that this court will have to reject its gap filler approach that it has adopted towards intentional infliction. What Ms. Zeltwanger is advocating very clearly to this court is that intentional infliction should be, the door should be open, the gates thrown open, and it will be just another common law tort that is layered on top of every other tort that you have out there. That's what they are advocating and that's what I think would have to happen if you affirm this case.

The second thing is that if you affirm this case and allow the layering and then affirm on the facts in this case, then most sexual harassment cases will be IIED cases. They've done an excellent job with the facts, but when you get right down to it, the facts in this case are very typical. There are cases out there that are far worse than this one in which courts have held that it was not IIED as a matter of law. In fact, one of the cases in the Northern District, the plaintiff in that case was punished on the job because she refused to sleep with one of her customers. And that was not IIED as a matter of law. That is far beyond anything that happened in this case.

Even if you take their approach and move everything out to the side that was not overtly sexual harassment, you have precious little conduct that would be intentional infliction.

It is having the review go forward. There's a big dispute over that, that she felt like she had to go forward with the review. One time he yelled at her in the course of the review according to the plaintiff. The actual firing itself we can take off the table. That was presented to the jury, the jury found in Hoffman La Roche's favor with regard to her being laid off. So we have a jury verdict in our favor on that one.

Other than that, that's pretty much it. That's all that I can think of standing here today that occurred outside the context of what the sexual harassment would be. If you just look at Hoffman-La Roche's acts it also did very little. It goes back to the review, the one yelling incident, the vulgar joke telling atmosphere that Hoffman-La Roche supposedly allowed to crop up within its company, which is something that is plainly not intentional. It's negligence. So all of those acts just are not enough even when you start including all of Webber's sexual harassment actions. If we are going to layer IIED on top of every other tort that's out there, then even when you start looking at his actions they do not measure up in the context of other sexual harassment cases that courts have said are not intentional infliction as a matter of law.

WAINWRIGHT: You've mentioned before that you had some thoughts about GTE Southwest v. Bruce. Another case is _____ Casas recently where this court has addressed this issue. What were your thoughts and what are your thoughts as applied to this case? How do they apply to these facts? Which direction do they push us?

TIMMS: As I recall in those cases there was no gap filler argument raised. I think that the gap filler argument that we raise here fits within those cases. And I specifically discussed how I think it fits within the GTE case. And so I think that this court is not going to have to go back and overrule any of its prior authorities in order to rule in our favor in this case even on the gap filler issue.