John S. West
ALLRED, MAROKO & GOLDBERG

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Intentional infliction of emotional distress in employment

YOU MIGHT BE OUTRAGED AT WHAT IS NOT OUTRAGEOUS FOR PURPOSES OF THE TORT CLAIM

From the perspective of available remedies, few statutory schemes are as generous to plaintiffs as California's Fair Employment and Housing Act ("FEHA"), Government Code section 12900 et seq. Depending upon the facts of an individual case, FEHA allows plaintiffs who successfully assert claims in an employment setting to be awarded back pay, front pay, reinstatement, compensatory damages for pain and suffering, punitive damages and injunctive relief. On top of that, successful FEHA plaintiffs are entitled to recover attorney's fees and, in the discretion of the court, expert witness fees from the defendant. (Cal. Gov. Code, § 12965(b).)

Given the broad remedies available under FEHA, including the ultimate hammer of attorney's fees to a successful plaintiff, why would a plaintiff ever consider asserting a tort claim against his former employer for intentional infliction of emotional distress, commonly referred to as "IIED"? Case law suggests that pleading an IIED claim in the context of adverse employment actions can be far more difficult than pleading a FEHA claim in the same setting. Perhaps most important of all, the assertion of an IIED claim may open the door for a defendant to conduct discovery regarding the plaintiff's emotional history that might be unavailable if the claim were brought solely under FEHA.

Although the elements of a FEHA claim are easier to establish than the elements of an IIED claim, FEHA imposes its own technical requirements which, if not fulfilled by the plaintiff, operate to bar claims under the statute. For example, FEHA requires plaintiffs to exhaust administrative remedies before filing suit. The statutory scheme imposes a limitations period for the filing of an administrative charge and another limitations period for the filing of a lawsuit after exhaustion of administrative remedies.

When only a tort will do

As a result of FEHA's technical requirements, employment law attorneys are likely to encounter situations in which FEHA claims cannot be asserted. In those situations, attorneys are forced to assert tort claims such as IIED.

A plaintiff's inability or failure to comply with FEHA's statutory requirements is often readily apparent. Perhaps the most obvious situation is that of a plaintiff whose FEHA claim is time barred by either a failure to file a timely administrative charge with the Department of Fair Employment and Housing, or by the failure to file a lawsuit within one year from the Department's issuance of a "right to sue" letter. In those kinds of situations, the IIED tort is an obvious lifeboat for the plaintiff and his attorney.

It is also possible, however, that the unavailability of FEHA remedies may not become apparent until sometime after a lawsuit has been filed. For example, the fact that the plaintiff's administrative charge was untimely may not become apparent until the discovery phase of a lawsuit. To protect against those kinds of eventualities, it might be prudent for the attorney to assert a backup tort claim for IIED in the original complaint. On this point, it may be appropriate to let the California Supreme Court have the final word: "A responsible attorney handling an employment discrimination case must plead a variety of statutory, tort and contract causes of action in order to fully protect the interests of his or her client. ... Although the common law theories do not per se 'relate to discrimination,' they are nonetheless a standard part of a plaintiff's arsenal in a discrimination case." (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 74.) So, regardless of an attorney's feelings about the IIED tort in employment cases, the tort is at least worth consideration.

Certain kinds of discrimination claims easily lend themselves to the assertion of an IIED claim. On the other hand, the law has shown a reluctance to recognize IIED claims in settings where other forms of adverse employment action are involved. As will be shown, IIED claims that arise out of employment face possible workers' compensation preemption, and may face other considerable challenges in meeting the requirements of the IIED tort. It may be surprising to learn that many forms of conduct by an employer that are illegal, and that easily qualify as adverse action for FEHA purposes, are deemed insufficient to support an IIED claim.

Attorneys who handle IIED claims in the employment context should begin anticipating legal challenges at the complaint drafting stage. Those challenges will remain, in one form or another, through discovery and trial. Through careful planning, it is possible to navigate an IIED claim through the treacherous waters described in this article.

IIED in employment law: caveat for WC preemption

Any IIED claim brought in the employment context must be assessed against the possibility of workers' compensation preemption. In general, California Labor Code section 3600 "establishes the exclusive jurisdiction of the workers' compensation system by furnishing an employer immunity from civil liability for any injury sustained by an employee ... arising out of and in the course of his or her employment." (*LeFiell Mfg. Co. v. Superior Court* (2012) 55 Cal.4th 275, 283.)

Under that sweeping principal, tort claims arising out of the vast majority of an employer's ordinary adverse actions toward an employee are preempted.

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> [W]hen the misconduct attributed to the employer is actions which are a normal part of the employment relationship, such as demotions, promotions, criticism of work practices, and frictions in negotiations as to grievances, an employee suffering emotional distress causing disability may not avoid the exclusive remedy provisions of the Labor Code by characterizing the employer's decisions as manifestly unfair, outrageous, harassment, or intended to cause emotional disturbance resulting in disability.

(*Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 160.)

The rationale underlying that preemption is often referred to as the "workers' compensation bargain." The California Supreme Court explained that "the basis for the exclusivity rule in workers' compensation law is the 'presumed "compensation bargain," pursuant to which the employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability.'" (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 708.)

On the other hand, the law recognizes that an employer's conduct toward an employee can be so exceptional as to fall outside of the bargain. "But where an employer's conduct implicates considerations of substantial public policy, interests beyond those of the employer and employee are involved. These interests are not protected by workers' compensation law and therefore must be accommodated outside the compensation bargain." (*Shoemaker v. Myers* (1992) 2 Cal.App.4th 1407, 1418-1419.) "The Legislature ... did not intend that an employer be allowed to raise the exclusivity rule for the purpose of deflecting a claim of discriminatory practices." (*Accardi v. Superior Court* (1993) 17 Cal.App.4th 341, 352, disapproved on other grounds in *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798.)

Numerous cases have allowed employment-based IIED claims to proceed despite workers' compensation preemption. "[W]ork-related injury discrimination is not a normal risk of the compensation bargain. (Citation omitted.) Thus ... emotional distress claims are not barred by the exclusivity rule to the extent they seek emotional distress damages for the alleged work-related injury discrimination." (*Fretland v. County of Humboldt* (1999) 69 Cal.App.4th 1478, 1492.) A broader expression of that principle was provided in *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1101: "Just as the individual employment agreement may not include terms which violate fundamental public policy (*Ibid.*), so the more general 'compensation bargain' cannot encompass conduct, such as sexual or racial discrimination, 'obnoxious to the interests of the state and contrary to public policy and sound morality.'"

The key to avoiding workers' compensation preemption, both in the pleading and summary judgment stages of any lawsuit, lies in tethering IIED claims to conduct that violates FEHA. "[I]f the complaint states viable claims ... under the FEHA, the workers' compensative exclusivity doctrine presents no bar to [plaintiff's] claims, and the complaint is not subject to a general demurrer on this ground." (*M.F. v. Pacific Pearl Hotel Management LLC* (2017) 16 Cal.App.5th 693, 700.) Conversely, cases suggest that if an IIED claim is not tethered to conduct in violation of FEHA, that claim is likely to be deemed preempted by workers' compensation exclusivity. In *Shoemaker v. Myers* (1990) 52 Cal.3d 1, for example, the Supreme Court held that an IIED claim based on harassment and termination, but not based on alleged illegality, was preempted by the workers' compensation laws. "The kinds of conduct at issue (e.g., discipline or criticism) are a normal part of the employment relationship. Even if such conduct may be characterized as intentional, unfair or outrageous, it is nevertheless covered by the workers' compensation exclusivity provisions." (52 Cal.3d at 25.) Similarly, in *Jones v. Department of Corrections and Rehabilitation* (2007) 152 Cal.App.4th 1367, 1382, the Court of Appeal held:

> Because we conclude Jones did not establish discrimination her causes of action for emotional distress fail to the extent they are tethered to the discrimination claim. Further, independent basis for disposing of these causes of action for emotional distress is that they are barred by the exclusivity rule of workers' compensation. Even if the discriminatory conduct Jones complained about 'may be characterized as intentional, unfair or outrageous, it is nevertheless covered by the workers' compensation exclusivity provisions.'

Even if an IIED claim based on discrimination or harassment is not deemed preempted by workers' compensation laws, that claim can still fail on its own merits. As will be shown, conduct violative of FEHA may not be outrageous enough to satisfy the requirements of the tort.

Individually assessing the tort claim

Not all claims that satisfy FEHA will support an IIED claim. The potential disconnect between the two theories emerges from a comparison of their vastly different legal elements.

The elements of a cause of action for intentional infliction of emotional distress are (1) extreme and outrageous conduct by the defendant performed with the intention of causing, or reckless disregard for the probability of causing, emotional distress to the plaintiff, (2) severe or extreme emotional distress in the plaintiff, and (3) actual and proximate causation of the plaintiff's emotional distress by the defendant's outrageous conduct. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050.)

By contrast, an employer can violate the anti-discrimination prohibitions of FEHA through an adverse employment action "even if the employer harbored no animosity or ill will against the employee or the class of persons." (*Wallace v. County of Stanislaus* (2016) 245 Cal.App.4th 109, 128.) Apart from FEHA's lack of any requirement of intent or ill will, claims under FEHA turn on vastly different criteria than IIED claims.

While there are variances among the required elements of a FEHA claim, a few examples of FEHA claims illustrate the

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vast difference between the requirements of the statute and the requirements of the tort. While the statute requires outrageous conduct on the part of the defendant, none of the various FEHA claims contains an equivalent requirement. In discrimination cases other than ones based upon disability, for example, "the plaintiff must provide evidence that (1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive." (*Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 355.)

To establish a FEHA disability discrimination claim, "a plaintiff must first establish a prima facie case of discrimination by showing that 'he or she (1) suffered from a disability, or was regarded as suffering from a disability; (2) could perform the essential duties of the job with or without reasonable accommodations[;] and (3) was subject to an adverse employment action because of the disability or perceived disability.'" (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 926.)

In FEHA retaliation cases, "a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042.)

Illegal may not be outrageous enough

The biggest hurdle a plaintiff faces in trying to convert a discrimination claim into an IIED claim is the first element of the tort. The extreme and outrageous conduct that satisfies the first element of IIED has been described as "so extreme as to exceed all bounds of that usually tolerated in a civilized society." (*Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 832.) Certain conduct that violates FEHA, particularly conduct of a sexual nature, would easily meet that standard. Other forms of conduct prohibited by FEHA might not, however. You might be outraged at what is *not* outrageous enough to satisfy this element of the tort.

As a general rule, personnel decisions do not meet the outrageousness element of the IIED tort without more. "A simple pleading of personnel management activity is insufficient to support a claim of intentional infliction of emotional distress, even if improper motivation is alleged." (*Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 80.) Expanding on that principle, cases have gone on to hold that even personnel decisions that stem from discriminatory motives are, without more, insufficiently outrageous to satisfy the first element of the IIED tort.

Termination, if accompanied by other despicable conduct that violates public policy, will support an IIED claim. In *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493 ("*Alcorn*"), the plaintiff was an African American (whom the Supreme Court referred to as a "Negro") former employee of the defendant. A disagreement arose over whether it was appropriate for the plaintiff, who was not a union employee, to drive a particular truck to a work site. During the course of the discussion, a supervisor repeatedly directed ugly racial epithets at the plaintiff. Using the same racial epithets, that supervisor said that he did not want any African American employees and that all African American employees of the company would be fired. That supervisor then fired the plaintiff.

Reversing the sustaining of a demurrer to an IIED claim, the *Alcorn* Court held that by virtue of the plaintiff's race, sensitivity to racial insult and the power that the defendant wielded over the plaintiff through the employment relationship, a trier of fact could conclude that the defendants' conduct was outrageous, and that it caused the plaintiff to sustain severe emotional distress. Note the hesitation with which the Supreme Court held that the plaintiff had stated a cause of action:

> Although it may be that mere insulting language, without more, ordinarily would not constitute extreme outrage, the aggravated circumstances alleged by plaintiff seem sufficient to uphold his complaint as against defendants' general demurrer. 'Where reasonable men may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability.'

(*Alcorn*, 2 Cal.3d at 498-499.)

Some cases contain language indicating that any properly pled FEHA claim also establishes the "outrageous" element of the tort. According to the Supreme Court, "[i]f properly pled, a claim of sexual harassment can establish 'the outrageous behavior element of a cause of action for intentional infliction of emotional distress.'" (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1051.) A similar pronouncement is contained in *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 618: "Given an employee's fundamental, civil right to a discrimination free work environment ... by its very nature, sexual harassment in the work place is outrageous conduct as it exceeds all bounds of decency usually tolerated by a decent society. Accordingly, if properly pled, sexual harassment will constitute the outrageous behavior element of a cause of action for intentional infliction of emotional distress." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 618.)

It would be a mistake, however, for attorneys to assume that facts which satisfy the requirements of a FEHA claim will automatically satisfy the "outrageous" conduct requirement of the IIED tort. A number of cases make it clear that mere illegality may not be sufficient to satisfy that element of the tort.

Still not outrageous enough

In *Light v. California Department of Parks and Recreation* (2017) 14 Cal.App.5th 75, 102, the Court of Appeal described a variety of retaliatory conduct

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by one of the defendants, Dolinar, that was not sufficiently "outrageous" for IIED purposes even when considered in the aggregate. That conduct included refusing to listen to the plaintiff's complaints about retaliation, encouraging efforts to silence the plaintiff, awarding a commendation to the harasser and participating "in the Department's retaliation against Light (including denying promised training and shifting Light's work location)." (14 Cal.App.5th at 102.) The *Light* court held that even though "a reasonable trier of fact could conclude Dolinar acted improperly, and likely contributed to the Department's violation of FEHA's anti-retaliation provision, her actions are common – though ultimately misguided – supervisory actions." (*Ibid.*) On that basis, *Light* affirmed the grant of summary judgment in favor of that defendant on the plaintiff's IIED claim.

Even some forms of sexual harassment are likely to be insufficient to give rise to an IIED claim. In *Hughes v. Pair* (2009) 46 Cal.4th 1035, the guardian of a minor sued a trustee of the minor's trust for intentional infliction of emotional distress and sexual harassment in a professional relationship pursuant to California Civil Code section 51.9. She alleged that the trustee made crude sexual comments and tried to obtain sexual favors from her in exchange for financial concessions to the minor. The Supreme Court held that the defendant's conduct was not severe or pervasive enough to alter the conditions of the business relationship (i.e., did not legally amount to sexual harassment) and that the defendant's "inappropriate comments fall far short of conduct that is so 'outrageous' that it 'exceed[s] all bounds of that usually tolerated in a civilized community.'" (46 Cal.4th at 1051.)

Likewise, not all acts of retaliation satisfy the requirements of the tort.

> As we shall discuss, we conclude there was substantial evidence to support the jury's finding that respondents engaged in unlawful retaliation. Nevertheless, appellant's argument fails as to the intentional infliction claim. A 'series of subtle, yet damaging, injuries' is sufficient to constitute retaliation; however, it does not necessarily rise to the 'extreme and outrageous' standard required for an intentional infliction of emotional distress claim.

(*McCoy v. Pacific Maritime Association* (2013) 216 Cal.App.4th 283, 295.)

Significant ED is insufficient to satisfy the "severe" element

IIED requires a plaintiff to allege, and then to prove, that he or she suffered "severe" emotional distress as a result of the defendant's outrageous conduct. By contrast, there is no such requirement in the context of a FEHA claim. "'[P]roof of the elements of the tort of intentional infliction of emotional distress is not a prerequisite for the recovery of compensatory damages [under the FEHA] for mental anguish and humiliation.'" (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1246-1247.) In particular, it has been recognized that "garden variety" emotional distress is compensable in the setting of a FEHA claim. (*Doyle v. Superior Court* (1996) 50 Cal.App.4th 1878, 1881.)

The IIED tort imposes a very high bar to establishing that element. "Severe emotional distress means, then, emotional distress of such substantial quantity or enduring quality that no reasonable man in a civilized society should be expected to endure it." (*Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 397.)

At the outset, it should be noted that a plaintiff must not only suffer "severe" emotional distress, he or she must also plead facts supporting that element. In the absence of such factual allegations, an IIED claim is vulnerable to dismissal. "Here, Plaintiff offers only the conclusory allegation that he suffered 'severe and extreme mental and emotional distress' as a result of Hasbrouck's conduct ... This allegation is insufficient because Plaintiff must allege facts that demonstrate he suffered 'emotional distress of such substantial quantity or enduring quality that no reasonable man in a civilized society should be expected to endure it.'" (*Steel v. City of San Diego* (S.D. Cal. 2010) 726 F.Supp.2d 1172, 1191-1192.)

Perhaps the best way to illustrate how high the bar is set as to the "severe" emotional distress element is through consideration of the kinds of emotional suffering that have been held to be insufficient to satisfy that element. Anguish is insufficient to meet that standard. "Every employee who believes he has a legitimate grievance will doubtless have some emotional anguish occasioned by his belief that he has been wronged." (*McKenna v. Permanente Medical Group, Inc.* (E.D. Cal. 2012) 894 F.Supp.2d 1258, 1274-1275.) The *McKenna* court went on to hold that the plaintiff's anguish was insufficient to satisfy the requirements of IIED. In *Lappin v. Laidlaw Transit Inc.* (N.D. Cal. 2001) 179 F.Supp.2d 1111, 1126, an IIED claim was held to be insufficient because, among other things, the only evidence of emotional distress was a psychologist's recommendation that the plaintiff "not return to work for approximately three weeks after the incident" and the plaintiff's declaration stating that the "whole thing upsets me" and that she had trouble eating after the incident. In *Hughes v. Pair*, *supra*, the California Supreme Court held that a plaintiff's allegations of "discomfort, worry, anxiety, upset stomach, concern, and agitation as the result of defendant's comments..." were insufficient to constitute the requisite severe emotional distress for purposes of the IIED tort. (*Hughes*, 46 Cal.4th at 1051.)

It follows that an IIED plaintiff must be prepared to affirmatively plead severe emotional distress in his or her complaint. Then, during the discovery phase of the case, the plaintiff must be prepared to factually substantiate the kind of severe emotional distress that will support an IIED claim. That burden carries through trial and may require the use of an expert witness.

Mental examinations and IIED claims

Sometimes the unavailability of a FEHA claim forces an attorney to assert an IIED claim in an employment context. When there is a choice in the matter, however, many attorneys are reluctant to assert the tort.

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Assuming that a plaintiff can clear the "severe emotional distress" hurdle in the pleading stage, he or she is likely to come face to face with the reason many attorneys are reluctant to assert IIED claims. The assertion of an IIED claim greatly increases the odds that the plaintiff will be required to submit to a mental examination pursuant to California Code of Civil Procedure section 2032.310 et seq. That statute allows a defendant to move the court for an order compelling such an examination "for good cause shown." (Code Civ. Proc., § 2032.320.) In general, and subject to important limitations described below, mental examinations may be ordered when the plaintiff has "placed [his or] her mental condition in controversy." (*Doyle v. Superior Court* (1996) 50 Cal.App.4th 1878, 1886.)

From the plaintiff's perspective, mental examinations are intrusive and sometimes outright embarrassing. From the legal perspective, plaintiffs' attorneys should be concerned that information obtained from mental examinations may enable a defendant to assert that factors other than the defendant's conduct are a substantial cause of the plaintiff's emotional distress.

Mental examinations are generally less of a concern for plaintiffs who assert FEHA claims because severe emotional distress is not a required element of such a claim. Under FEHA, a claim can proceed even when the "mental suffering Plaintiff claims 'does not exceed the suffering and loss an ordinary person would likely experience in similar circumstances,' and constitutes 'matters that are within the everyday experience of the average juror.'" (*Fritsch v. City of Chula Vista* (S.D. Cal. 1999) 187 F.R.D. 614, 632.) And, in cases "where a plaintiff alleges that she is not suffering any current mental injury but only that she has suffered emotional distress in the past arising from the defendant's misconduct, a mental examination is unnecessary because such an allegation alone does not place the nature and cause of the plaintiff's current mental condition 'in controversy.'" (*Doyle v. Superior Court* (1996) 50 Cal.App.4th 1878, 1887.)

Conversely, there is no IIED cause of action unless the plaintiff suffers emotional distress of an "enduring quality." (*Fletcher*, *supra*, 10 Cal.App.3d at 397.) That kind of distress often persists into litigation and is therefore likely to entitle the defendant to an order compelling a mental examination. "The mental condition of a person who is suffering ongoing mental distress is clearly 'in controversy' in an action seeking damages for that ongoing mental distress. The 'controversy' surrounding such a person's mental condition includes not only the nature and extent of the person's current mental injury but also the actual cause of this injury." (*Doyle*, *supra*, 50 Cal.App.4th at 1887.)

Conclusion

Many plaintiffs' employment law attorneys refrain from filing IIED claims to avoid subjecting their clients to mental examinations by defense experts. When IIED claims are asserted in the context of employment, as a result of necessity, as a precaution, or by choice, counsel would be well advised to pay close attention to the pitfalls inherent in such claims.

Care should be taken in the pleading stage to avoid preemption by workers' compensation exclusivity rules, to satisfying the particular elements of the IIED tort, and to tethering the IIED claim to a violation of public policy. During the discovery phase, plaintiffs' attorneys must be prepared to substantiate the kind of severe emotional distress that will support the tort claim. While such claims can and do succeed, the key to success lies in recognizing the difference between the tort and statutory claims.

John Steven West is a partner in the law firm of Allred, Maroko & Goldberg. *Since 1983, he has specialized in representing plaintiffs primarily in the area of employment law and in tort and business claims. His clients range from assembly-line workers to high-earning senior executives. Mr. West's practice ranges from pre-litigation negotiations to all aspects of litigation, including appeals. He recently represented clients successfully before the California Supreme Court in a case involving the special employment doctrine, obtaining a reversal of a prior published decision by the Court of Appeal. Mr. West is a frequent speaker before various attorney and business groups on issues in employment law. He has served as a court-appointed arbitrator in numerous civil disputes and is a regular contributor to Advocate on employment-law issues.*