ORAL ARGUMENT – 10/19/04
02-1076
CREDITWATCH & QUANT V. JACKSON

LAWYER: By its holding, reversing the TC's summary judgment of the respondent's intentional infliction of emotional claim, the CA construed legally, permissible conduct as extreme and outrageous, and failed to require the competent summary judgment evidence that the alleged emotional distress was severe.

There is no evidence in the summary judgment record of action or conduct so outrageous in character and so extreme in degree to go beyond all possible bounds of decency and regardless of atrocious and utterly intolerable in a civilized community, which is the standard that this court has uniformly required all intentional infliction of emotional distress claims to be adhered to.

And as this court recently held in Texas Farm Bureau v. Sears, the mere fact of an apparent motive by defendant is not enough to support liability. There must be an act or conduct which by itself is extreme and outrageous in order to fill the requirements of intentional infliction of emotional distress.

So what are the acts that we have alleged? There was an alleged legally, permissible demand by the employer Creditwatch to its at will employee Blevins, that she should no longer allow a previously terminated employee Jackson, to continue rooming with her.

HECHT: Why do you think that's legally permissible? What in the world is it the business of an employer who its employee is rooming with?

LAWYER: I think that that is something that employer has a right to control when you have confidential and sensitive information.

HECHT: What was that information? It's only in the Blevin's affidavit. Nobody else says what it is.

LAWYER: According to the respondent's own evidence, that confidential - she refers to it as confidential and sensitive information. This was a credit reporting bureau, which dealt with airlines and has very specific formulas and pricing that would have been of competitive value, and had confidentiality employments with all of the employees, including the employee Blevins.

HECHT: But I don't understand. I mean under that theory Blevins couldn't ever have any kind of a roommate. He might leak this stuff to her roommate.

LAWYER: You have an employer that has terminated an employee and has a legitimate

concern that there will be communication of confidential and sensitive information to that terminated employee.

HECHT: But why would you have any more concern that it would be communicated to a terminated employee than John Doe, whoever it might be?

LAWYER: I think you would have a concern not necessarily about the communication, but the use of that information when you have someone who has been terminated.

OWEN: But isn't that just clearly a fact issue for the jury to decide whether that's a legitimate claim or just a pretext for actually having some personal vendetta against her?

LAWYER: And that's why I think the teaching of Sears is important. You don't just look at the motive. That's not enough. You have to look at the actual act. And the actual act that was made the basis of the claim was this threat to terminate Blevins if she did not ask her guest to no longer room with her.

O'NEILL: That would be true if Blevins were asserting a claim. There's a disconnect for me on the at will employment argument and the argument that - I mean it strikes me that this is the type of case, whether it's extreme or outrageous or not, it's the type of case that doesn't fit any sort of typical scenario where an employer reaches beyond the employment context to a former employee. So I don't understand the at will employment argument.

LAWYER: The significance of the at will employment is that Creditwatch has the right to terminate an at will employee.

JEFFERSON: What if it was a husband and wife: wife terminated, but living with the husband. Could the employer say these two should no longer live together because they may share confidential information? How hard is this what you say is the authority of an employer to regulate whom its employees live with?

LAWYER: Assuming that there weren't protected class issues involved that came into play, all those being aside such as we have here, I think the employer has a right whether it's good judgment, bad judgment, good management, bad management to terminate or threaten to terminate an at will employee for any reason.

JEFFERSON: So under my example they could say if you continue the marriage or continue residing in the same household, then you will be terminated and that's okay. That's under at will employment theory.

LAWYER: I think if an employer were to articulate a reason like that it would be bad judgment, it may be bad management, but I don't think...

BRISTER: Even if it's illegal, does that automatically make it an intentional infliction of emotional distress? Suppose your employer said you can't live with somebody who is a Muslim. It might be clear violation of equal protection or various civil rights acts. Would it necessarily be an intentional infliction of emotional distress on the person who is evicted?

LAWYER: I think if it's not legally permissible action, I think when we're in the employment context you might get a different result. I'm somewhat - I believe that that would probably come within the ambit of the court's recent ruling in LaRoche, because that would be a statutory issue and therefore it would be subsumed within the statutory remedies, which this court thought that when you have such a statutory remedy you don't have intentional infliction of emotional distress.

O'NEILL: But you're not claiming that here. LaRoche doesn't have any implication in this case is that right?

LAWYER: I think it does to the extent that there is any facts which were the gravamen of the harassment claims which were brought forward and abandoned. To the extent that there is any conduct which would be the focal point other than the two acts which the Ft. Worth CA identified, which was the threat to terminate the at will employee and the at will employee's request to her guest to no longer room with her. Those are the two facts that the Ft. Worth CA identified as still being made the subject of the intentional infliction claim.

WAINWRIGHT: Do we have to believe that Creditwatch's conduct was clearly legitimate employment action in order to find that there was no outrageous conduct here?

LAWYER: No. I don't believe we do. I think what you have here is when you have an employer with an at will employee, they can make a request of that at will employee as long as it is not subsumed within some sort of statutory or illegal request. I think if they are an at will employee that employer has the right to do so.

HECHT: You said threatened in the brief about 25 times. I'm uncomfortable with that. You say at one point this court, meaning this court, has further acknowledged that it may be necessary for Texas employers to threaten their employees in order to exercise the rights in the management of their business. And you cite the Sears and Bruce cases which cite the restatement. And I understand that the restatement says mere threats are not intentional infliction of emotional distress. But I don't know that it's fair to say that the court has condoned threatening in it's sort of a general sense.

LAWYER: When I make that reference it's not as respondent claims that we say that threatening somebody with physical harm or assault would be permissible because that's just a threat. This is a threat to do something which is legally permissible. In this case, Blevins has an absolute right to ask a roommate and ask her guest to leave. So we've got two legally permissible acts neither of which get anywhere close to the requirements of being extreme and outrageous that

are required by the longstanding standards in Twyman.

And as this court recently emphasized in LaRoche, business enterprises and managers, business enterprises must be afforded some latitude to exercise the rights in a permissible way even when that creates unpleasantness for some of the people involved.

HECHT: It's very hard to see this in any context that is remotely legitimate. This was a fellow who is a very bad actor by all accounts, who's following this lady after she leaves. These are not legitimate business interests. They may not be intentional infliction of emotional distress, but they certainly are not legitimate business interests are they?

LAWYER: I think when you have terminated an employee and you have that terminated employee rooming and living as a guest with one of your employees and you put them on notice, which the record shows that she was put on notice several months before he actually made the request that she cease ____, puts that on notice. I think that's a legally permissible act and I think that does come within the ambit of appropriate employment.

I think that also and the equally important issue is, whether we have any act here which rises to a level of extreme and outrageous conduct which is outside the bounds of decency as contemplated by the court's longstanding standard in Twyman.

O'NEILL: Well extreme and outrageous. Okay. You do some pretty extreme and outrageous things, which you would have to admit that. Now you can't consider them because it's statute of limitations. They can't form the basis. But there is extreme and outrageous conduct that occurs several years before. There is evidence from which a jury could infer repercussions from her rejecting his advances. And that he then had a vendetta to fire her and get her evicted. You seem to be focusing on this one point in time, but how can you look at that in a vacuum without looking at the whole context?

LAWYER: I think that if she had pursued her statutory right, which all of those facts revolve around the gravamen of her complaint relating to her statutory claim for sexual harassment. And so if she - the fact that she chose or unsuccessfully failed to pursue the statutory claims, I think takes those facts out of play and you have to find a actual conduct which is what the CA and even the respondent concedes on page 6 of her brief that you have to find conduct after the statute of limitations arise and which is not part of the sexual harassment claim. So the only conduct that we have is this post-termination conduct where Creditwatch is alleged to have requested an at will employee to cease rooming with a guest of a formerly terminated party.

O'NEILL: So for us to decide this as a matter of law, do we have to start with the proposition that an at will employer can require an at will employee to live or not live with a particular person? That's within an employer's ability to do. I mean we have to condone that act to be able to say as a matter of law this could never be extreme or outrageous?

LAWYER: I think as a threshold matter if you don't have that act and it's a legally permissible act, you don't even get to the second part of the analysis...

O'NEILL: That's what I am saying. We have to find that's a legally permissible act.

LAWYER: I don't think you have to find that's a legally permissible act. But if you find it's a legally permissible act, I don't even think you get to the second part of the analysis. Because I don't think that that could by law be an outrageous and extreme act intolerable in a society.

O'NEILL: What if we decided it's not legally permissible?

LAWYER: Then you still have to go and examine the act itself to see whether it's so extreme and so outrageous to be outside the bounds of all decency in a civilized society.

JEFFERSON: In a civil society do employers regularly - is there briefing from anywhere or can you point us to any of authority that says this is a regular practice for employers to control their employee's roommates?

LAWYER: There is precedence for that. This court as I understand from many years ago has requirements that briefing clerks do not engage in social events with law firms and lawyers who have cases before this court. That is an instance where an employer is controlling the social acquaintances of its employees and I think that would be...

O'NEILL: Well we don't say that you can't live with someone who might have a case before this court.

LAWYER: I'm just giving the court a flavor. I think that...

BRISTER: The employee here was providing free housing was she not?

LAWYER: The record was that the employee was gratuitously - that the...

BRISTER: This court would probably have an objection if some law firm provided free housing to one of our briefing attorneys wouldn't we?

LAWYER: I won't certainly speak for this court. But I would presume so.

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RESPONDENT

SCHATTMAN: I think J. O'Neill and J. Wainwright asked a particularly important series of questions about the at will employment relationship. An employer, a law firm, can certainly tell its runner get this file or you are fired. The runner runs somebody over in his car on the way to the

courthouse, he was in the course and scope of employment. That would be an example of the employer being liable for a negligent harm caused by its do this or you are fired instruction to an at will employee. What makes this case interesting is this would be an intentional tort. As we all know, I was just following orders is not a defense for the person following the orders. And in this case it shouldn't be a defense for the person giving the orders.

O'NEILL: How much of the other evidence can we consider in determining whether - because that is barred by limitations I suppose. And so can we consider it as contextual evidence?

SCHATTMAN: Yes. It is barred under the statute of limitations for serving as the basis for Ms. Jackson's recovery. However, dating as far back as Klymann v. Klymann it's been recognized that in intentional infliction cases, you consider the totality of the circumstances. Throughout the length of the relationship between the parties, and indeed, as we've seen over the years, all other possible causes of severe emotional distress for the plaintiff no matter how far removed in time from the period in which they are claiming liability. So a jury could hear it for the purposes of determining as petitioners argued motivation: what is the context in which this behavior took place?

O'NEILL: In a sexual harassment claim let's say when she was terminated, she had filed a sexual harassment claim, that she was being terminated based upon sexual harassment. Could that claim encompass post-termination activities? In other words, could she say as part of this continuing harassment, after I was terminated, I was evicted and that's part of my sexual harassment claim I can seek recovery for?

SCHATTMAN: I've not seen a case like that. Certainly, the Texas Comm. on Human Rights Act and Title VII, both posit the existence of an employer/employee relationship at the time the wrongful conduct has occurred. There was a slight...

BRISTER: But if you're looking at the totality of the circumstances, if he had kept harassing her afterwards in the sexual context, we would certainly consider it. So why isn't this part of the sexual harassment claim that's barred?

SCHATTMAN: Because once she's no longer an employee, she does not have that remedy under the act.

SMITH: Couldn't it be considered like retaliation, which would be covered under that?

SCHATTMAN: There is a gray area, although I haven't seen any cases on it. But conceptionally if Ms. Jackson had been fired and as she's being escorted from the premises Mr. Quant punched her, in all fairness I think everyone would consider that part of the termination and possibly a retaliation claim. However, this is several months removed. So at that point while it's a continuing course of conduct, it's well outside the employment relationship of Ms. Jackson and Creditwatch and it's CEO, Mr. Quant.

HECHT: I suppose you agree that Creditwatch could have just said well, Jackson moved in with Blevins so we are firing Blevins. There wouldn't be anything wrong with that?

SCHATTMAN: Ms. Blevins would certainly be upset about it. Ms. Blevins in that scenario as an at will employee would not have any complaint unless she could then tie it to a retaliation claim for her association with the person who had opposed a hostile work environment practice.

HECHT: No. I'm just saying I don't like people to wear blue ties and I don't like people who room with Ms. Jackson, and this is an at will environment and I'm fired. There wouldn't be any problem with that?

SCHATTMAN: As you've presented it, I think that would be correct.

HECHT: So what makes it tortuous to give people a heads up and say if you don't this, then I'm going to terminate you?

SCHATTMAN: That certainly is the case as to Ms. Blevins. As to Ms. Jackson, however, it is not. There is no longer an employment relationship there. And saying you are going to be terminated unless you evict this person clearly is causing an emotionally, stressful situation to a person. We certainly as a society recognize the right to shelters as a basic human right. That's why we have things like Salvation Army.

BRISTER: They weren't throwing her out in the cold with nowhere else to go. They were saying there was one place she couldn't live. Right?

SCHATTMAN: That's true.

BRISTER: So under that theory, I should feel emotionally distressed if I can't live in River Oaks. Why is it emotional distress to tell me I could live anywhere in the world except one place?

SCHATTMAN: When it is done suddenly and in a retaliatory fashion as opposed to whether or not a person can afford it, that becomes a fact question for the jury.

OWEN: What about under J. Hecht's example. What if they just fired Ms. Blevins and said, you know you are living with Denise Jackson and she's to be terminated, or we don't like her, we are terminating you, too?

SCHATTMAN: As to Ms. Jackson she would have no claims.

OWEN: Why would she not have a claim? They are terminating her friend. Isn't that emotionally distress?

SCHATTMAN: Ms. Jackson, however, has not suffered the direct harm of the eviction or the outrageous conduct directed towards her. Ms. Blevins might have any number of different claims depending upon how a malicious _____ as a plea in the alternative. For example, if Mr. Quant is acting out of personal motivation, she could have a tortuous interference with business relationship claim based on her employment relationship with the entity Creditwatch.

BRISTER: So is every eviction an infliction of emotional distress?

SCHATTMAN: It's certainly distressful for the person being evicted.

BRISTER: So we don't need JV courts anymore. We just do it all IIED. Right?

SCHATTMAN: No. In the JP courts for the most part you are dealing with evictions that arise out of a default under contractual terms. At that point because of the breach of the contract to pay the lease, you have earned yourself the right to...

BRISTER: This lady has no contractual right to live where she lives?

SCHATTMAN: No. I believe there's a footnote in petitioner's briefing that this perhaps should have been brought by Ms. Jackson as a tortuous interference claim. That's why it couldn't be. Because there is no business relationship.

BRISTER: So the difference is, this is an IIED even though all the other evictions aren't because of the motivation?

SCHATTMAN: In part. Quite frankly under the recent opinion in Zeltwanger this is a gap. This is a case that doesn't fit any neat little box.

BRISTER: We didn't say in Zeltwanger that every complaint you have in life can be an IIED unless there is some other cause of action. We've never said that. This is when something is outrageous and there is no cause of action. Right?

SCHATTMAN: Yes. And it's the opinion of the CA that a jury of people in Tarrant county would find this outrageous conduct.

WAINWRIGHT: You amended your petition to drop the statutory sexual harassment claims. Prior to that time, we had said that IIED is a gap filler. We had not issued Zeltwanger prior to that time, however. If Zeltwanger had been issued as it came out this Summer, would you have still dropped the statutory harassment claims?

SCHATTMAN: I was still barred by the statute of limitations. It was filed by previous attorney. So that was the basis for dropping _____. Indeed that's the distinction.

WAINWRIGHT: What about substantively. Take the statute of limitations issue out of it. How would you have handled it after Zeltwanger? You have a petition with IIED, and statutory sexual harassment after Zeltwanger, which either would you have dropped before trial?

SCHATTMAN: I don't think I would have dropped either. I think the error by the plaintiff in Zeltwanger was quite frankly _____. They attempted in choosing a remedy as part of their election of remedy to get one from column A and two from column B in order to get around the statutory damage caps of the Texas Comm. on Human Rights Act.

Even if Zeltwanger had never been written, that's not how we practice law. When you elect a remedy, you elect an entire remedy not bits and pieces of it. And in fact, there was quite a bit of amusement at the courthouse that we as plaintiff's lawyers who had received a motion for summary judgment, read it, decided it was good, and dropped the claim that was challenged.

Quite frankly in looking at Zeltwanger a nuclear weapon was used when a scalpel might have sufficed. Because the error was the error of destruction in the election of remedies. Now I recognize that the intentional infliction is a gap filler tort and certainly _____ J. Hecht's opinions over the years challenging its viability as a cause of action. But the procedural mistake in Zeltwanger is the misuse of the election of remedies under this doctrine.

OWEN: That's not how we wrote it.

SCHATTMAN: I know. You asked me how I would practice the...

O'NEILL: How would you frame the issue in this case? Would you frame it as an employer's threat to terminate an at will employee if they don't evict a roommate who was a former employee of the company sufficient in itself to establish IIED?

SCHATTMAN: I think I would phrase it more on the lines of is an employer's action in achieving the eviction of a former employee sufficient to create a fact question whether or not it was extremely outrageous conduct. The focus is not necessarily the conduct towards Ms. Blevins. It's the conduct towards Ms. Jackson.

O'NEILL: I understand that. Where I'm struggling is, if we can't consider the conduct, which I think everyone would consider extreme and outrageous that happened 3 to 4 years before it's barred. I understand you to say that you can use that to inform the intent analysis. But how do you divorce that from the pattern of conduct that would hold up an IIED claim? What I'm hearing is that all we can look at for IIED is the eviction piece. Would you then term the question that alone, can that alone establish IIED?

SCHATTMAN: I think that's a fair reading of this court's precedent. For the purpose of was this extreme and outrageous conduct, we're looking at only the post-employment relationship conduct. But in terms of determining whether it was intentional tort we're looking at the entirety

of the relationship.

BRISTER: So how do we draw the line to say which evictions are going to be IIED and which are not?

SCHATTMAN: If the landlord is evicting the tenant for failure to pay the rent, I would think that's not intentional infliction of emotional distress. If an employer says kick your wife out or you are fired, it does raise questions..

BRISTER: So this is going to go pretty far.

SCHATTMAN: It might. I don't have a crystal ball to tell you the answer to that question. What we do see is an employer ____. And in these particular facts, can this present a jury question to a jury? I think we've got that.

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REBUTTAL

WAINWRIGHT: If the pre-termination conduct were considered, would you be making a different argument today?

LAWYER: Yes. I would. I think if the pre-termination conduct, which was part of the statutory claim of sexual harassment came in, clearly the allegations that were made, I think would be extreme and outrageous.

O'NEILL: But we've said for IIED purposes we have to look at the totality of the circumstances.

LAWYER: But the acts which are being focused upon and the acts which the CA looked at in which are the basis of the record are merely the act of the threatening of the at will employee and the subsequent request to the former employee to no longer room. Those are the acts which are part of the summary judgment record as being the acts upon which the intentional infliction claim is being predicated.

O'NEILL: So you say you can look at the totality of the circumstances, but only the circumstances that aren't time barred under another claim?

LAWYER: That is what the CA's opinion says, and the CA's opinion looked at the post-employment termination acts and these were the acts that the CA considered as being grounds for intentional infliction of emotional distress.

O'NEILL: But you would concede that if we can under the totality of the circumstances ____, we can reach back and look at that conduct that it would be extreme and outrageous as a matter

of law?

LAWYER: No. Because I think the Zeltwanger case says since those are statutory claims and the gravamen off all those claims are statutory claims, they would not be part of the intentional infliction cause of action. And the intentional infliction cause of action requires separate acts which were not part of the gravamen of the statutory claim.

Not only did the record fail to supply any extreme or outrageous act, the record is also devoid of the necessary element that respondent suffered severe emotional distress. The only evidence in the record produced by the respondent was that she had feelings of anger and confusion. And as this court made clear in the Parkway v. Woodruff case, severe emotional distress means more than mere worry and anxiety and anger. And as this court held in the GTE Southwest v Bruce, the degree of emotional distress that is required is emotional distress so severe that no reasonable person could be expected to endure it.