ORAL ARGUMENT — 9/10/98
98-0028
GTE V. BRUCE

LAWYER: This is an intentional infliction of emotional distress case that arises in an employment context. As Justice Grant said in the CA's opinion: It cries out for guidance from this court on how that should apply.

The case presents basically two issues that have great import on employment law in Texas, the first of which is, whether or not the worker's comp act's exclusive remedy provisions would bar a common law action for intentional infliction of emotional distress. The second issue is whether or not the type of allegations in this case, and specifically the ones made in this case against GTE, supervisor rises to the level of intentional infliction of emotional distress and whether or not they're egregious enough.

There are a couple of facts that the court needs to keep in mind as we look at this case, which are very important. First of all is, that the plaintiffs chose not to sue Morris Shields, who was the supervisor who they alleged did these acts. They chose not to sue him but they tried to predicate GTE's liability on his actions. The other is, that the actionable behavior in this case occurs over a very short period of time. Because of the statute of limitations in this case the behaviors that they complain of must occur after March 1992. That's further limited by the fact that when the complaint was made to GTE they instituted an investigation, took remedial action...

ABBOTT: What finding did you get on the limitation's issue?

LAWYER: We lost on it.

ABBOTT: So why are you saying that limitations limit the scope of the claim?

LAWYER: It limits the evidence that can support their finding.

ABBOTT: What objections did you make of that evidence?

LAWYER: I don't believe any were necessary.

ABBOTT: Let's be clear though. What objections did you make to the evidence?

LAWYER: There were none made at the trial.

ABBOTT: So the evidence came in with no objections, and you lost on the jury issue?

LAWYER: Yes. To address that issue, the reason that no objection was necessary was

because that if we rejected and the judge excluded it, and the jury found as they did they would not have before them the evidence that they attempt to predicate their finding. But our contention is, that evidence is legally insufficient to support the finding on whether or not this conduct was egregious or not.

With regard to the type of complaints and behavior complained of here, as Justice Grant said in the opinion: It's much like the type of behavior you would see from a high school of college football coach: There was yelling; there was cursing; there was threatening behavior; there was embarrassment; there was harassment; and some off-color remarks. As he said: That's much the kind of behavior that we see on a football field.

HECHT: The workplace is not a football field.

LAWYER: No, but the test is whether or not it's a behavior of conduct that's tolerated by a civilized society.

HECHT: Well not just anywhere. It might not be nearly as bad as in a professional wrestling ring, but that's not the workplace.

LAWYER: I would not have chosen the football coach analogy. I think a better analogy is your local mall. It's the type of behavior that in public is tolerated at a local shopping mall. It's the type of behavior that occurs and is tolerated in a lot of public forums.

ABBOTT: If someone were at a local shopping mall, and went around screaming in the face of some shoppers there, do you not think that security is going to hall them out of the shopping mall?

LAWYER: That's not the question. It's whether or not it becomes actionable.

ABBOTT: You said that it's the type of behavior that is accepted at shopping malls. And my point is, are you saying that in a shopping mall security would not haul out of the shopping mall someone who runs up into the face of someone and starts screaming and yelling at them?

LAWYER: In all likelihood, yes, they would. What this case is not, is it is not a sexual harassment or a discrimination case. What we have to look at are the jury findings in this case that 1) that it was Morris Shields who intended to inflict intentional emotional distress.

ABBOTT: In that regard, let me focus on jury issue no. 6. The jury found that Shields was a vice principal of GTE. Why does that not bind GTE?

LAWYER: They found that he was a vice principal, but that doesn't get us to the type of person that can bind us. One of the problems with the argument...

ABBOTT: Are you familiar with *Hammerly Oak*?

LAWYER: Yes.

ABBOTT: Under *Hammerly Oaks*, being that he was found to be a vice principal, and assuming that can be upheld, why would that not mean that his conduct is therefore the conduct of GTE?

LAWYER: The problem is in which context? And one of the problems here is in attempting to determine whether the intent of Shield's is transferrable for the intentional infliction of emotional distress claim, or whether it is the intent that would get them outside the worker's compensation statute. And those, I think, were inconsistent because if you look at that finding coupled with the finding that he did it within the course and scope of his employment, based on this court's opinion...

ABBOTT: Now, let's go back. The conduct of a vice principal of a corporation is tantamount to the conduct of the corporation; do you agree with that?

LAWYER: In most circumstances, yes.

ABBOTT: What circumstance can you cite a case for that it is not?

LAWYER: In the _____ circumstances that were discussed in the *Medina* case, where there are three types of situations where intentional acts can possibly come out of the _____, so that the exclusivity provisions don't apply. It does not fit in this case where you have his activities as a vice principal in the course and scope of his employment that they are complaining about.

ABBOTT: In *Medina*, the court did not talk about the concept of vice principal.

LAWYER: No, but it talked about alter ego. It talked about when the complained of action is directed by the corporation.

ABBOTT: Assume with me for a second if the court were to conclude that the conduct a vice principal means that it's conduct of a corporation, would you not then agree that the intentional conduct was intentional conduct attributable to GTE?

LAWYER: If the court does that, yes. And then you have to look at whether or not the conduct was extreme and outrageous as a matter of law sufficient to hold GTE liable.

ABBOTT: What is your argument, if you have one, that Shields is not the vice principal of GTE?

LAWYER: I do not have an argument that he is not the vice principal. The argument when you're looking at the question of whether the exclusivity provisions in the contract apply is whether or not the type of conduct that they complain of is such that the intent makes it an intentional tort of GTE to take it outside the specific provisions of the contract(?)

And that's exactly what we have here. We have an argument that because of the way the evidence is in this case, that the exclusivity provisions would bar the recovery for intentional infliction of emotional distress primarily because it has to be the intent of GTE. As set out in *Medina*, there are two situations when it becomes the intent or the intentional tort of GTE: 1) where the person by reason of ownership or control is the alter ego of the corporation; and 2) where they are specifically authorized to do the act that is complained of. Neither one of those exists in this situation. This is more analogous to the situation that *Medina* discussed where you have a supervisor who commits the act. While in *Medina*, the court did not address this question and reserved it to a future time, I think that time is now, to determine whether or not or what standards will be used in establishing when an employee or supervisor's act can be deemed the intentional act of the corporation so that worker's comp does not apply.

HANKINSON: Under the second possibility of your test that the corporation has specifically authorized the person to do the act complained of, does that mean in this instance we know that these acts were done in connection with the act of supervising the employees. And GTE did specifically authorize Mr. Shields to supervise these employees. Now they apparently did not authorize the particular manner in terms of his abusive conduct, but they did authorize him to do the act complained of, which is supervising the employees?

LAWYER: I think that's drawing it a little too narrowly.

HANKINSON: How should we draw it then?

LAWYER: The acts complained of is not the supervision, but the particular acts that they have alleged, because they have not come in and said he was a bad supervisor, or his supervision amounted to outrageous conduct. There are particular acts that they outlined both in their pleadings in discovery and at trial that you look to. So I think if you say the act they are complaining of is supervision, that's not an accurate narrowing of it.

Now while they did specifically authorize him to supervise there is nothing in the record that shows that they authorized any of these acts. In fact, the evidence in the record is the exact opposite. When the complaints were made, they investigated, they sent an investigation team in from home office, they interviewed not just the complaining parties, they interviewed the witnesses, they interviewed Mr. Shields, then they sent in a team to do remedial training. They also put a letter of reprimand in Mr. Shield's personnel file. And the evidence is, after that, it got better, that he did not have these frequent incidents like they complain of. And that's one of the things that I think is very important in showing that it was not specifically authorized.

One of the things that you worry about from a public policy standpoint is if the worker's comp. statute does bar these types of actions, it still does leave a remedy for the person in this case. It gives them the option of filing a worker's comp claim. But not only that, it does fit into the system that the legislature enacted in the worker's comp. statute, which was to bring some certainty to the employment situation, where you have someone who alleges that they were injured at work.

ABBOTT: Did you handle this case below?

LAWYER: I did not file it.

ABBOTT: So you don't know why a comp claim was not filed?

LAWYER: No. My guess is that they elected to proceed in this manner because of the damage difference.

ABBOTT: I would like to focus a little bit on the outrageousness. Why is it that you believe there cannot be an aggregation of conduct to achieve the outrageousness standard?

LAWYER: I think it's fairly simple, because it takes away a certainty of law. And it's much I like I showed in my mathematical equation that I like to illustrate this with: it's zero, plus zero, plus zero, plus zero equals one, you never have any certainty. No employer in this state would be able to know when nonoutrageous behavior had crossed the line to become outrageous behavior. And that's really the crux of the problem, because you have to have predictability in the workplace. You have to have the ability to know when you need to go in and to take care of problems. And the next problem that arises from it is the uncertainty of - depending on the jury - that pool that you have or the jury that you select, conduct that may be outrageous to one jury in Bowie county may not be to the next jury.

GONZALEZ: But the flip-side of that is also true. If the court was to reverse this case, this would be taken or read by some in the workplace that this is acceptable conduct, and the company will not be liable for this type of conduct. They don't have to correct these abuses.

LAWYER: One of the problems is the ad hoc way in which intentional infliction cases are coming up through the employment situation. In *Franco*, this court decided that accusations with regard to being a thief were not sufficient to constitute outrageous conduct. Does that mean to the employers that they can go back and accuse every one of their employees of being thieves? I don't think so.

GONZALEZ: But there is more to this case than that.

LAWYER: Yes. But if you look at each individual act that's complained of, which the

CA did, none of them by themselves arise to the level that it would be outrageous.

GONZALEZ: But in the aggregate it's pretty outrageous.

LAWYER: It could be considered that. But I think the question as Judge Grant framed it was when did the supervisor cross the line, or did he cross the line? What this court has to do is add certainty to the law so that employers that are out there in the future trying to decide whether this conduct is going to be considered outrageous know with some certainty what behavior will be tolerated and what won't. And the problem with aggravation is it doesn't give you that guideline to go with.

PHILLIPS: Haven't all our previous cases involved a discharge situation?

LAWYER: No, they have not.

PHILLIPS: What are the other ones that have been situations like this - an employee remains an employee brings a suit for this tort?

LAWYER: There are cases that didn't involve a discharge situation. I believe the *Warnick* case, did not ultimately involve a discharge. I know there are several CA cases that did not involve discharges. And the 5th circuit has dealt with that also in the *McCo*_____ case.

ABBOTT: Assuming the court considers all of the conduct regardless of whether or not it happened before March 1992, do you believe that the showing of a pornographic video tape would not rise to the level of being outrageous conduct?

LAWYER: No, I don't, because of the context in which it was shown, the inference surrounding it.

ABBOTT: What do you mean by that?

LAWYER: The evidence shows that it was a Tim Allen videotape that was being shown and apparently tagged on at the end of it was what followed on HBO or SHOWTIME as the following program. And it was not mandatory viewing. It was something that was shown after a Christmas party. So it's in an optional situation.

ABBOTT: And in what office was that videotape shown?

LAWYER: In his office.

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RESPONDENT

LAWYER: My clients have been fighting this battle since 1994, and they wanted to be here at the end. Of course, this is the end. This is kind of an odd situation for me. When you represent a plaintiff normally plaintiffs are the ones that request the court for a new expansion of law. But in this case, GTE occupies that position. For the first time, GTE is asking this court to hold that a mental condition brought about by the gradual build-up of emotional stress over a period of time and not by an unexpected injury causing event, is compensable under the Texas Worker's Compensation Act. That's new law. And if you're going to adopt that law, you're going to have to overrule the *Maxin* case, and you're going to have to overrule the *Brown* case.

Now keep in mind in this case, the plaintiffs in this case did not file a worker's compensation claim. And by the way, I tried this case. And the reason we didn't file a worker's compensation case, is because if we had, as you well know, GTE would have laughed themselves silly. You may have noticed in the amicus brief that Vincent and Elkins filed in this case, they didn't say anything about this compensability. The reason they didn't say anything about this compensability argument is, is because they are afraid they will have to eat their words in a later case if this court should buy that argument. Because you're going to be making a major expansion in Texas worker's compensation law when you hold a mental condition under the circumstances presented by this case to be compensable.

ENOCH: Do you concede essentially what Justice Grant talked about that for this court to enunciate a principle that included the conduct and its employment place to be outrageous conduct, just totally intolerable by a civilized society, is a function of whether you're on a football field or in a workplace?

LAWYER: You have a whole series of things. Now what you're speaking of is one situation where this guy would charge these ladies, get right up in their face and scream and yell at them, and yell FUCK and Mother FUCK, and Shit. Now ladies and gentlemen, do any of you under any stretch of the imagination think that's acceptable conduct? Anywhere? Whether it's in a mall, in a workplace, it's just not. Well it might be one place - Paris Island. If you're a marine boot. But these ladies they are not marine boots.

HECHT: But places like drilling rigs is pretty vigorous.

LAWYER: But there were other things. He would have Rhonda Bruce come in and stare at her for hours on end. The dirty language - and I realize I am not suggesting to you that these ladies are Pollyanna's. They've heard bad words before. But they don't want to hear them at work. And they asked this guy repeatedly to stop using those words. They didn't want to hear them. But he never did until the company finally came down on him.

ABBOTT: What's your answer to the problem posed by opposing counsel, and that is, that take individually if these events were one-time events, such as, only one time did Shields say a cuss word to the women, that alone probably would not be outrageous conduct? But the way he

did it for such a long period of time you argue amounts to outrageous conduct. At what point in time did it amount to outrageous conduct? What kind of bright line can be established for lawyers and litigants in the future that would let them know that, well after doing this for 10 days, 100 days, 2 years, when does it become outrageous conduct?

LAWYER: I don't know that you could ever be that precise. I think you're going to have to let a jury determine that. But let me say this, you ask when does it become outrageous conduct? When does it become actionable as intentional infliction of emotional distress? I can tell you at one point when it becomes, it becomes when it gets so serious that it causes severe emotional distress for the victims. In this case, these three ladies.

ABBOTT: Let me try to put it to you this way. Let's assume we rule in your favor on that particular issue, and then the very next day, we get a case up here where a woman at work was yelled at with cuss words for 1 day, and she went home and cried, and was distraught, and felt like she needed to go see a doctor because of it, because of one day's worth of events, how should we rule in that case based upon a precedent that would be in your favor in this case?

LAWYER: And you're ruling on the facts de novo?

ABBOTT: Let's assume we are.

LAWYER: You might not find it under those circumstances. In fact, there's a lot of Title 7 law that does say that mere offensive utterances alone are not sufficient to be sexual harassment. Now I know that's not what we are talking about here. But there is some analogy to be drawn here.

ABBOTT: But what would we tell the lawyers why they lose in that case as opposed to you winning in your case?

LAWYER: You ask why do you aggregate the conduct? The reason you do it is because that's the real world. That's the way it is out there. You don't look at isolated events. People don't have mental problems. People don't have the kind of problems these ladies experienced. It's the real world out there. You've got to look at all these things in the aggregate. That's the way it is. Why would you not look at things in the aggregate? I realize again, to answer you question, I can't sit here and tell you the line is right here. I can't tell you that. But the juries can. And that's what we have juries for.

ENOCH: Earlier my question had to do with if you are conceding the distinction that Grant made between conduct on the football field and the office, then you went on to say it's offensive anywhere. So let me be more specific about it. If this was a football player in highschool arguing about being disturbed by the conduct of the coach, is it your position that this conduct rises to outrageous conduct such that it's intolerable in a civilized society?

LAWYER: Probably not, because it happens every day. But I guess the point I don't understand is this, these people aren't football players. They are ladies. This was a job. This wasn't the football field. They have to work for a living. They don't have any choice. They need the money.

OWEN: If the remarks had been made to a 6'6 - 250 male, would we have a different case?

LAWYER: It would be different.

OWEN: In the workplace?

LAWYER: I won't sit here and tell you it's absolutely outrageous if it's made to a 6' male. Since I wrote my brief, the US SC has decided two significant cases about supervisor liability: *Faragagr v. City of Boca Raton,* and *Burlington Industries v. Ellerth*.

OWEN: Were those Title 7 cases?

LAWYER: They were Title 7. The issue was, under what circumstances would an employer be held liable for sexual harassment of a supervisor of a subordinate employee? I noticed in Mr. Mercy's brief that he said, that agency law doesn't apply in the employment context. I'm here to tell you, the US SC will find that news if you look at the *Faragagr and the City of Burlington* case. Let me read you something they said, and I realize this is not a Title 7 case, but I suspect the court may be having trouble with supervisor liability, because that seems to be a common problem. The court says this: The agency relationship of Ford's contact with an employee subjected to a supervisor's sexual harassment, and the victim may well be reluctant to accept the risk of blowing the whistle on a supervisor. When a fellow employee harasses, the victim can walk away, or tell the offender where to go, but it may be difficult to offer such responses to a supervisor whose power to supervise, which may be to hire and fire and to set work schedules and pay rates does not disappear when he chooses to harass through insults and offensive gestures rather than directly with threats of firing or promises of promotion. Recognition of employer liability when discriminatory misuse of supervisory authority alters the terms and conditions of a victim's employment, is underscored by the fact that the employer has a greater opportunity to guard against misconduct by supervisors than by common workers. Employers have greater opportunity and incentive to screen them, train them, and monitor their performance. The SC in those cases has held employers to be absolutely liable for supervisor's conduct.

GONZALEZ: Mr. Morris Shields, the jury found is the culprit here, and he's the one that did all these bad things. And yet, you made no attempt to get a judgment against him?

LAWYER: No. As the court can appreciate, he would be judgment proof for the most part. I won't say absolutely, but it would be difficult to collect anything, I'm sure.

GONZALEZ: So you did not even sue him?

LAWYER: No, didn't sue him. I saw no need to. Let's talk about Mr. Shields and GTE. GTE is a corporation. GTE can't act. They can't intend. They can't do anything except through an agent. Now, in the case that I think is significant, it's an old case, it's *Fort Worth Elevator's Company v. Russell,* 70 S.W.2d, 1934. They said: Look, when you're dealing with a corporate employer there are certain type of agents who we're going to say absolutely and under all circumstances act for the employer. Their acts are the corporate employer's acts. And then they list them: 1, 2, 3, 4. Mr. Shields fills the bill on 2 separate occasions: he had the authority to hire and fire; and he was the head of the department. And the jury found that to be the case in the charge in this case.

Now, I don't get this argument that GTE is not liable. If you don't impute Mr. Shield's conduct to GTE, how does GTE act? Who acts for GTE? How do they intend anything?

HECHT: But assuming that the board of directors at GTE wanted to keep this from happening, and all of their supervisors are in your view GTE, how do they do that? They are not entitled to notice. A person wouldn't have to report it. As Judge Abbott asked earlier, an employee could come in and say: Well for the last 6 months, I've just been under unbearable stress because of all of these things that the evidence shows happened in this case.

LAWYER: The best way I can answer that, let me encourage the court to read the *Faragagr* case, and the *Burlington Industries* case. They talk about supervisor liability almost at nausea. They give every possible scenario and they address that one in particular and they say: Look, you're right, you can't control every single act. But when a company, a corporation puts a person like Shields out there and they tell him: You're a supervisor, you exercise supervisory authority. And if he does exercise supervisory authority, and that's what he was doing in this case, they can't say: well, now, we're going to accept your good acts, but we're not going to accept your bad acts.

HECHT: But Title 7 seems easier to identify than intentional infliction of emotional distress?

LAWYER: I can tell you, if you hold this case as comp barred, the next sexual harassment case you see under Tecra(?), you're going to see this same defense that it's comp barred, and then you're going to have a problem because normally there is some disposition to try to follow...

PHILLIPS: I don't think that's Justice Hecht's question.

HECHT: No, I'm not saying it's comp barred. I'm not assuming that it's comp barred. What I am saying is, that it seems one thing to train supervisors not to commit Title 7 violations. It seems another thing to train them and not to intentionally inflict emotional distress and be liable

for their failure to do so. It's harder to identify.

LAWYER: I would agree with that.

HECHT: It's easy to say: Don't sexual assault your employees, that's easy. But to say: Don't yell at them, that's harder.

LAWYER: Let me mention the facts in this particular case. You understand GTE had lots of notice about this guy. They had problems with him in 1988 in Jacksonville, Arkansas.

HECHT: But notice is not required of his actions. Notice to GTE - he is GTE in your view. So notice to the board of directors is not necessary.

LAWYER: I was thinking your question was, you have your board of directors, which is the supreme authority.

HECHT: How do they keep this from happening? They don't want a jury trial. You say: well, everybody gets a jury trial. But they don't want a jury trial. They want to stop it - nip it in the bud. How do they do that?

LAWYER: Through training of their supervisors, and frankly, through just categorical flat directions not to do this sort of thing. This is not rocket science we're talking about. I mean the things that happened to these ladies, I don't think any of you, myself or anybody in this courtroom would have the slightest misunderstanding that conduct might be inappropriate.

GONZALEZ: Can you briefly summarize the notice that GTE had about Mr. Shields?

LAWYER: In 1988, he worked in Jacksonville, Arkansas. They filed grievances against him - his employees for essentially the same type of conduct, which he was guilty of here: cursing, the charging, that sort of thing.

SPECTOR: He was working for GTE at that time?

LAWYER: He worked for GTE in Jacksonville, Arkansas. So GTE sends in a supervisor to monitor him and they monitor him for 2 years, and they talk to the employees that work under him, and the employees for two straight years say the same thing that happened to these ladies virtually. He charges them. He uses bad language. In 1990, they still are having problems with him. So in 1991, they transfer him to Nash, Texas. The upper management, the top management or other management people, let me say this, they had plenty of notice about this guy. They knew he was an out-of-control supervisor, but they didn't care, the point is. They really didn't care. Because he was getting the job done, they don't have any trouble with the Paris Island drill instructor approach. If it gets results, that's okay.

SPECTOR: If they did not have notice, do you think under the facts of this case they would still be liable?

LAWYER: Again, if you read the *Faragagr*, and I'm not quoting that as the gospel, but I think this court in this area of whether it's intentional infliction or sexual harassment, there is going to have to be some effort made, I think to reconcile what direction the US SC is going in this area. And where they are going is they are saying: that employers are absolutely liable for supervisors. And they certainly would be liable for supervisors who are acting within the general scope of their authority, and that was Shields in this case. There is no question about that.

ABBOTT: After Shield's conduct with the plaintiffs in this case, GTE once again brought in supervisors to counsel and work with Mr. Shields. When did that happen, and what happened with it, and what was the result of it? In other words, did Shields correct his behavior after that?

LAWYER: He modified it a little bit. He didn't scream and yell as much, and he didn't curse as much, but he didn't stop it altogether. In my brief, I relate several instances that occurred after March 1992, which is when the supervisors came in. You may want to know about the limitation's thing, and that may be bothering you.

ABBOTT: All I'm thinking about is, what GTE could have done in order to deal with this, to preempt it, what companies would need to know to try to do in the future? In this particular case it seems like even after intervention they could not control him, and maybe termination would be the only option?

LAWYER: Well that's my view frankly. What they did was, they sent him a letter of reprimand and told these ladies there were going to have to live with it. And they had to live with it. They sure did. Because it was after that they really started having their problems. It was after that that they started to go to see the counselors and the psychologists because they were having problems. Actually it was really - that's one of the reasons that there was some delay in filing this action because until these ladies experienced severe emotional distress they had no cause of action. And that didn't occur until they realized they were having enough of a problem where they had to go see the psychologist and the psychiatrist, and that was well after March 1992.

GTE didn't do anything other than to give the guy a letter of reprimand.

ABBOTT: Quick question about the pornographic film. It was tagged onto the Tim Allen film. And it was shown in Mr. Shield's office. And why was it that the plaintiffs in this case saw it or had to see it?

LAWYER: They didn't have any choice. He told them to.

ABBOTT: He told them to stay in the room and watch the film?

LAWYER: He told them to stay there. Now one of the lady's work period ended and she left for the day. The other one, Linda Davis, still had to work. She didn't have any choice. It was there. It was during her work hours. She was working.

ABBOTT: But she couldn't have gone into her own office, because her office was adjacent to, but not in the same office as Mr. Shields?

LAWYER: Actually is was being shown in her office. Her office and Mr. Shield's office were essentially the same office. There was a partition. But the movie itself was being shown in Linda Davis' office. It was in front of them. They had watched a videotape of a party earlier. So that was okay.

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REBUTTAL

LAWYER: If the court reads *Faragagr* and *Burlington*, it would seem that Title 7 an agent is expressly included in the definition of an employer, and that's why the SC decided that there was liability. I don't think that that applies here, because we don't have that.

With regard to the *Warnick* case, I checked and it was a termination case. So from the CA's level we have cases that did involve termination, but we don't have any from this court.

The problem that you get into if you look at this cumulative problem is one of looking at quantity as opposed to quality. And what *Twyman* talked about in establishing this cause of action, is you look at the conduct, the quality of that conduct. And when you begin to cumulate conduct in looking at quantity as your test, there is no way to predict what conduct will become cumulated to become outrageous.

ENOCH: What would be wrong with fashioning a rule that had outrageousness of the conduct dependent on where it occurs? What would be wrong with saying on a football field cussing is not outrageous, but in the office context to women it is outrageous?

LAWYER: To make the rule place specific, I think would be un_____. You would have to get into - and this is why the court wants to stay out of it. Y'all don't want to get into the business of managing businesses.

ENOCH: But does that put outrageousness at the lowest common denominator as long as the defendant could establish that improper conduct occurs anywhere in this country that it's tolerated, and therefore, that kind of conduct could still be tolerated in the workplace?

LAWYER: No, I don't think it has us sink to the lowest common denominator. But I think

it was something that the restatement in formulating the comment to §46 kind of hinted at, which it said: Ruff edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language or occasional acts that are definitely inconsiderate and unkind.

GONZALEZ: This was a pattern of conduct. So you concede this was not occasional, it was a pattern of conduct?

LAWYER: If you look at the evidence, there is a laundry list of what occurred. Some of those occurred on one occasion. Some of them occurred on a couple of occasions.

GONZALEZ: The profanity?

LAWYER: The profanity apparently at the job site was rampant. Plaintiffs each admitted that they used it, too.

GONZALEZ: How big is Nash, Texas?

LAWYER: Nash, Texas is a suburb of Texarkana. It probably has 2,000 people.

GONZALEZ: Besides the school district, is this the biggest employer in Nash?

LAWYER: My guess is it probably is. But Nash, Texas is actually almost encircled by Texarkana. It's a bedroom community. One of the problems that you get into is the way that the plaintiffs have tried to pitch this case. They are pitching it as a hostile workplace case similar to a Title 7 case. And that's the kind of view that they want this court to have, but that's not the kind of view that's anticipated in a claim for intentional infliction of emotional distress.

BAKER: What is your viewpoint of the context of the setting that does involve intentional infliction of emotional distress, it's just not this kind of a situation? And are you saying the workplace is a place that cannot ever have that, because you've got to do what the comment says: You've got put up with that?

LAWYER: No. I think there are situations where you could have egregious enough conduct in the workplace to have an intentional infliction of emotional distress. The problem is when you have conduct like here that is not sufficient individually to be that, and off the top of my head I can't think of a situation, but I know there would be situations that an ordinary person would look at and they would say that conduct is outrageous. Considering the holdings from this court with regard to some of the conduct surrounding firings, I'm not sure that there would be to be honest.

OWEN: What remedy would the plaintiffs in this case have if they don't have a remedy under I.I.E.B?

LAWYER: They would have several remedies, one of which was a Title 7 claim for a hostile workplace environment. They would have a worker's compensation claim that they could file, and I think I've cited to the *Dresser* case in my brief that says, that this type of injury would be compensable. Those would be two. Depending on what their standing is, they could potentially have a 1983 discrimination type case. So there are other avenues that are available to them for redress.

GONZALEZ: Are there any reported cases where women in this situation have been successful in a workman's compensation claim?

LAWYER: Not that I know of.

GONZALEZ: All of this is theoretical?

LAWYER: Not from the standpoint of the type of claims that they are making, because they've alleged physical injuries that would get them in under the Labor Code.

OWEN: Under the worker's comp scenario, would they list different injuries and talk about values and all of that? Are these kinds of injuries part of that scheme?

LAWYER: These are not listed as specific injuries. But they are listed under the general injuries section. In other words, if you are entitled to recover if there is damage or harm to the physical structure of the body for any excitement or in celebration of those conditions. So with their allegations concerning gastritis, concerning lack of sleep those are things that could be recovered under worker's comp.