

Court of Appeals No.
35967-7-II

**BEFORE THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II**

GINA STRONG, *Plaintiff/Appellant*

v.

JIM TERRELL, *Defendant/Respondent*

COURT OF APPEALS
STATE OF WASHINGTON
07 AUG 20 11 2:01
BY *[Signature]* DEPUTY

APPELLANT'S REPLY BRIEF

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ARGUMENT

1. Defendant's Procedural Arguments.

A. Defendant Terrell's argument that Mrs. Strong's claims should be deferred to arbitration are without merit.

Defendant Terrell argues that Mrs. Strong's claims should have been brought as grievances pursuant to the collective bargaining agreement between her union and the Evergreen School District. [Respondent's Brief, pp. 45-49]. The apparent thrust of this argument is that Mrs. Strong's tort claims against Defendant Terrell should be deferred to arbitration.¹ This argument is not well taken. But it is important for the Court, before weighing Defendant Terrell's other points, to consider that he advances his deferral argument without a shred of authority. It is advanced solely to interpose a procedural roadblock to allowing a jury to weigh his conduct with respect to Mrs. Strong, and without acknowledging that this Court recently rejected the same argument in a companion case. *Wright v. Terrell*, 135 Wn.App. 722, 728-29, 145 P.3d 1230 (2006).

Most important, this action has nothing to do with the Evergreen School District. It is a tort action against an individual administrator of the school district that employed both Plaintiff and Defendant. Defendant

¹ Defendant Terrell is without authority to compel the school district to arbitrate these claims and has not attempted to join the school district in this action as a co-defendant.

Terrell is the primary actor in this drama. The claims against him are tort actions pure and simple.

Mrs. Strong does not base her claims upon the nature of her supervision by Defendant Terrell. She seeks damages from Defendant Terrell as the result of tortious misconduct in which he engaged while he was in a position of authority over her. Just because he was Mrs. Strong's supervisor, not every act in which he engaged with respect to her can be written off as "supervision." What if he had struck Mrs. Strong? Does he claim that his position as supervisor would convert a battery into "supervision," and that the only remedy would be to pursue a contract grievance under the collective bargaining agreement? Such a result would be ludicrous, and it is not supported by any authority cited by Defendant Terrell.

Most important, however, a review of the collective bargaining agreement's grievance procedure indicates that it clearly applies to disputes between bargaining unit employees *and the school district*, and not to claims by bargaining unit employees that their supervisors or co-workers have committed torts against them.

Grievances or complaints arising *between the District and its employees* within the bargaining unit defined in Article I herein, with respect to matters dealing with the interpretation or application of the terms and conditions of this Agreement, shall be

resolved in strict compliance with this Article. *Wright v. Terrell, supra*, 135 Wn.App. at p. 738, n.6.

A recent case involving similar issues is *Smith v. Bates Technical College*, 139 Wn.2d 793, 991 P.2d 1135 (2000). There, a public employee who was covered by a collective bargaining agreement with a grievance procedure and arbitration clause was discharged. She arbitrated her discharge, and won. She also sued the employer for the *tort* of wrongful discharge. The trial court dismissed the wrongful discharge claim, but the Supreme Court reversed, noting that “Bates [the employer] fails to acknowledge additional and distinct remedies would be available to Smith [the employee] were she allowed to sue in tort.” *Bates, supra*, 139 Wn.2d at 805. The Court was referencing general damages, which are not available in a breach of contract action.²

Defendant Terrell points to no authority which would prevent Mrs. Strong from maintaining a tort action against her supervisor merely because the terms and conditions of her employment were regulated by a collective bargaining agreement. Indeed, such authority, if it existed, would amount to an extensive retreat from the holding in *Smith v. Bates*. Defendant Terrell does not even explain why the principles of *Smith v.*

² The Court also held that Bates was not required to exhaust her administrative remedies with the Public Employment Relations Commission [PERC], for much the same reason; that is, that PERC was without authority to award the scope of damages which would be available in a Superior Court tort action. That reasoning is also relevant to the present case. *See, Bates, supra*, 139 Wash.2d at 819.

Bates should not apply in this case, other than to make the general assertion that Mrs. Strong's claims are subject to the grievance procedure of the collective bargaining agreement because federal labor law favors arbitration.

The policy behind *Smith v. Bates* is, however, quite applicable to this case.

But *Bates*' argument ignores the fundamental distinction between a wrongful discharge action based in tort and an action based upon an alleged violation of an employment contract or a CBA. As we have explained, the tort of wrongful discharge seeks to vindicate the public interest in prohibiting employers from acting in a manner contrary to fundamental public policy. Because the right to be free from wrongful termination in violation of public policy is independent of any underlying contractual agreement or civil service law, we conclude *Smith* should not be required to exhaust her contractual or administrative remedies. *Smith v. Bates, supra*, 139 Wn.2d at 808-09.

The tort claims asserted by Mrs. Strong amount to an assertion of her right to be free from wrongful injury in her workplace at the hands of her co-workers. These tort claims have nothing to do with any underlying contract. Does Defendant Terrell now suggest that collective bargaining agreements should contain provisions restricting supervisors from engaging in a laundry list of tortuous conduct? Even a first-year law student knows that such an agreement would fail for lack of sufficient consideration. Mrs. Strong properly commenced her tort actions in Superior Court and she was not required to arbitrate them as contract

violations pursuant to the collective bargaining agreement's grievance procedure. In the present case, Mr. Terrell apparently argues that employees may not recover general damages if they prosecute tort claims against their supervisors, because those claims must be brought as breach of contract actions pursuant to their collective bargaining agreements. Clearly, it has not been the policy of the courts to insulate supervisors from liability for their on-the-job tortuous conduct. Such a result in the present case would be simply wrong.

B. Defendant Terrell's Notice of Tort Claim arguments are without merit.

Plaintiff Strong filed an initial action against Defendant Terrell and others on July 23, 2004. She commenced this action (as a co-plaintiff with her two co-workers Charlotte Wright and David Larson [plaintiffs in *Wright v. Terrell, supra*] on November 22, 2004. A notice of tort claim was served to the school district on July 26, 2004, and an amended notice of tort claim – substantively identical – was served to the school district on September 23, 2004. The school district never responded to either the first or second notice of tort claim.³ This failure to ever respond or even to investigate Plaintiff's claim, undermines the Defendant's policy argument

³ In point of fact, Mrs. Strong had previously complained in writing about Mr. Terrell's conduct and the school district whitewashed her complaints, leaving Mr. Terrell to torment her for another year until he was discharged.

that a claim filing is necessary to allow a governmental entity an opportunity to investigate and settle claims.⁴

Nonetheless, as the trial court ruled, Plaintiff's first lawsuit could have been dismissed on the basis that she had not complied with the tort claim statute. [CP 573] Defendant Terrell, however, failed to raise the procedural defense in that case, and even if he had successfully done so, nothing would have prevented Plaintiff from re-filing her substantive claim after complying with the tort claims statute.

No substantive rulings were made in Plaintiff's first action before it was consolidated *long after the 60-day claim period had run*, with her second action, which was also commenced after the 60-day claim period had run.

Plaintiff would have been allowed to take a voluntary non-suit in her first action prior to initiating the second action. Defendant Terrell confuses procedural with substantive defenses when he argues that Plaintiff Strong is claim-splitting.

2. Defendant's Substantive Arguments.

A. Plaintiff has advanced an actionable civil rights claim.

⁴ Whether the tort claim statute can even preclude claims against Defendant Terrell for acts outside of the scope of employment is a very murky question, which appears to have been answered in the negative by the plurality opinion in *Bosteder v. City of Renton*, 155 Wn. 18, 117 P.3d 316 (2005). Plaintiff has argued that the acts of which she complains clearly fall outside of the scope of Defendant Terrell's employment, and will not reiterate those arguments here. Plaintiff's opening brief at pp. 31-35.

Respondent contends that Plaintiff has not alleged or established a protected constitutional right which was violated by Defendant Terrell. [Respondent's brief at pp. 38-39]. Not so, by any means. Plaintiff is entitled to continued employment with the school district during good behavior by virtue of Washington State Law, RCW 28A.400.300(1), and her collective bargaining agreement. *Peninsula School District No. 401 v. Public School Employees of Peninsula*, 130 Wn.2d 401, 409, 924 P.2d 13 (1996).

Even without the enhanced interest in her employment that arises from a statute and labor agreement providing that she may be discharged only for cause, Plaintiff enjoys a protected right to pursue her occupation.

Thus, while it is clear that pursuing a lawful private profession or occupation is *a protected right under the state and federal constitutions*, it is equally clear that such right is not a fundamental right, requiring heightened judicial scrutiny.

....

Because the right to pursue a trade or profession *is a protected right* but not a fundamental right, we apply a rational basis test. *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 222, 143 P.3d 571 (2006) [emphasis added].

Fundamental right or not, the Washington Supreme Court tells us that Plaintiff Strong has a *protected right* under the federal constitution. *See also, Loudermill v. Cleveland Bd. of Educ.*, 488 U.S. 941, 109 S. Ct. 363, 102 L. Ed. 2d 353 (1988).

Federal courts also recognize that the right to pursue both a particular occupation and a particular job is protected by the federal constitution.

The right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within both the 'liberty' and 'property' concepts of the Fifth and Fourteenth Amendments. *Greene v. McElroy*, 360 U.S. 474, 492, 3 L. Ed. 2d 1377, 79 S. Ct. 1400 (1959); *see also Truax v. Raich*, 239 U.S. 33, 41, 60 L. Ed. 131, 36 S. Ct. 7 (1915) ("the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure"); *Cowan v. Corley*, 814 F.2d 223, 227 (5th Cir. 1987).

"The Constitution only protects this liberty from state actions that threaten to deprive persons of the right to pursue their chosen occupation. State actions that exclude a person from one particular job are not actionable in suits . . . brought directly under the due process clause." *Bernard v. United Township High Sch. Dist. No. 30*, 5 F.3d 1090, 1092 (7th Cir. 1993). "It is the liberty to pursue a calling or occupation, and not the right to a specific job, that is secured by the Fourteenth Amendment." *Id.* (quoting *Wroblewski v. City of Washburn*, 965 F.2d 452, 455 (7th Cir. 1992)). *Piecknick v. Commonwealth of Pennsylvania*, 36 F.3d 1250, 1259-60 (3d Cir., 1994).

Plaintiff submits that she was deprived of her *federally protected right or privilege* to pursue private employment or her lawful occupation by her supervisor, who was acting under color of the authority given to him by the school district, a municipal corporation created by state law. RCW 28A.400.300(1) (legislative grant of hiring and firing authority to

school districts). This is all that the statute requires. Title 42 USC § 1983 provides, in part, as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress,

How was Plaintiff deprived of her right? Because Defendant Terrell's abusive behavior interfered with her ability to engage in her occupation to such a pervasive extent that its value to her was substantially diminished.

When I received the job at Evergreen School District, it was a dream come true for me as a single mother with two children. The benefits offered in combination with the hours of the position were ideal and I enjoyed the type of work.

....

His [Defendant Terrell] harassment and behavior toward me began to make me physically sick every morning before work and nervous during the day. I began to have anxiety attacks, and heart palpitations and great depression. I was not aware that emotional distress could cause such harm to a body. I had never experienced this before. I was vomiting every morning, I had difficulty sleeping, I had horrible nightmares, and I would wake up in cold sweats. [CP 344 (*Gina Strong's answer to interrogatory # 8*)].

An inference which can be easily drawn from this evidence is that Defendant Terrell's unauthorized behavior toward Plaintiff Strong amounted to an unreasonable deprivation of her federally protected right

to enjoy her public employment or legal occupation. Plaintiff Strong is entitled to have this Court view all reasonable inferences which can be drawn from the evidence in the light most favorable to her. Respondent's assertion that the record does not support an inference that Defendant Terrell's conduct towards Plaintiff caused her physical symptoms [Respondent's brief, p.40] is simply wrong. What is lacking in the record is even a shred of evidence tending to show that Defendant Terrell's conduct *did not* cause Plaintiff's symptoms. Also lacking is any evidence whatsoever tending to show that Plaintiff did not suffer from the physical symptoms she reasonably attributes to the abuse she was regularly receiving from her supervisor.

The US Supreme Court long ago addressed the issue of whether a partial taking of a property interest amounts to a taking.

Various aircraft of the United States use this airport -- bombers, transports and fighters. The direction of the prevailing wind determines when a particular runway is used. The northwest-southeast runway in question is used about four per cent of the time in taking off and about seven per cent of the time in landing. Since the United States began operations in May, 1942, its four-motored heavy bombers, other planes of the heavier type, and its fighter planes have frequently passed over respondents' land and buildings in considerable numbers and rather close together. They come close enough at times to appear barely to miss the tops of the trees and at times so close to the tops of the trees as to blow the old leaves off. The noise is startling. And at night the glare from the planes brightly lights up the place. As a result of the noise, respondents had to give up their chicken business. As many as six to ten of their chickens were killed in one day by flying into the

walls from fright. The total chickens lost in that manner was about 150. Production also fell off. The result was the destruction of the use of the property as a commercial chicken farm. Respondents are frequently deprived of their sleep and the family has become nervous and frightened. *US v. Causby*, 328 US 256, 259, 66 S.Ct. 1062, 90 L.Ed.2d 1206 (1946).

In a case of first impression, the Court held that the government's military over-flights of the Causbys' chicken farm amounted to the taking of an easement, for which the family should be compensated. The government had argued that the airspace above the chicken farm belonged to it, and thus there was no taking, but the Court focused, instead, on the reduction in utility experienced by the Plaintiffs with respect to their land.

The path of glide for airplanes might reduce a valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field. Some value would remain. But the use of the airspace immediately above the land would limit the utility of the land and cause a diminution in its value. 328 US at 262.

The partial-taking concept has been extended to employment interests. In *Soloman v. Philadelphia Housing Authority*, 143 Fed. Appx. 447, 452-54 (3d Cir., 2005), the Third Circuit recognized that a *suspension* of an employee who was entitled to be disciplined or discharged for cause is subject to due process requirements.

What, really, is the distinction between suspending Plaintiff Strong, and continually picking at her until she became physically ill as a result? One definition of *deprive* is "to take something away."

WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1988, Merriam-Webster, Inc.) at p.341. Plaintiff Strong has identified a clear and recognized federal right; it is the province of a jury to decide whether she was deprived of that right by Defendant Terrell because his conduct substantially reduced its value to her. He had no right to do so, as demonstrated by his subsequent discharge from his position as supervisor, but while he was employed as supervisor, he was acting under color of state law.

B. Plaintiff's state tort claims should be decided by a jury.

This court is presented with the question as to what type of conduct by a supervisor toward his subordinate in the workplace is sufficient to allow a jury to decide whether the torts of intentional infliction of emotional distress or negligent infliction of emotional distress have been committed.

Plaintiff argued in her opening brief that the Court should consider the 1) the special relationship between a supervisor and subordinate; 2) the totality of the supervisor's conduct, as opposed to isolated incidents of abusive behavior; 3) the presumption present in Washington law that ordinarily, the jury, and not a judge, evaluates the tort-feasor's conduct; and 4) that the facts in the record, and all reasonable inferences to be

drawn from them must be considered in the light most favorable to Plaintiff.

Defendant counters by 1) arguing that his conduct amounted to nothing more than ordinary supervisory behavior; 2) isolating his individual unpleasant interactions with Plaintiff, while arguing that, well this conduct, standing alone, might seem rude, but it's not really so bad; 3) ignoring the fact that his treatment of Plaintiff made her physically ill (objective symptomatology); 4) refusing to address the impact of the totality of his conduct upon Plaintiff; and 5) refusing to acknowledge that he was fired by the school district for abusing his employees and lying about it to his supervisor (scope of employment arguments). Defendant's arguments are not well taken.

Plaintiff discussed her analysis of Washington caselaw regarding the tort of intentional infliction of emotional distress in her opening brief. Courts in other jurisdictions also support the arguments that Plaintiff makes in support of allowing a jury to decide whether Defendant's total conduct toward Plaintiff was tortious.

In determining whether a claim of intentional infliction of emotional distress (IIMD) should go to jury, a trial court considers: (1) the position the defendant occupied; (2) whether the plaintiff was peculiarly susceptible to emotional distress, and if the defendants knew this fact; (3)

whether the defendants' conduct may have been privileged under the circumstances; (4) whether the degree of emotional distress the defendants caused was severe as opposed to merely annoying, inconvenient or embarrassing to a degree normally occurring in a confrontation between these parties, and; (5) whether the defendants were aware that there was a high probability that their conduct would cause severe emotional distress, and they consciously disregarded it. *Seaman v. Karr*, 114 Wn. App. 665, 59 P.3d 701 (2002), citing Restatement 2d of Torts s.46, Comments e, f and g.

In the present case, the Defendant occupied the position of supervisor. As discussed *infra*, there is precedent that indicates that a supervisor-employee relationship should give rise to a higher standard of conduct on behalf of the supervisor, requiring less egregious conduct to satisfy the "outrageous conduct component of IIMD. Second, the Defendant knew that the Plaintiff was emotionally susceptible to his conduct and that there was a high probability that his conduct would cause severe emotional distress, as the plaintiff cried in front of him on at least one occasion.

1. Similar Degree of Misconduct Cases.

A number of cases that have been allowed to go to the jury involve “outrageous conduct” that is of similar severity to that of Defendant Terrell.

A jury award was upheld in favor of a real estate agent against a home purchaser for infliction of mental distress by means of insulting and profane language. *Ford v. Hudson*, 276 S.C. 157, 276 S.E.2d 776 (1981). Defendant doctor bought a house from plaintiff real estate agent. He was dissatisfied with the house and confronted plaintiff and rudely quarreled about the house and about plaintiff's responsibility to make the repairs. Defendant, who lived next door to plaintiff, burst into plaintiff's home unannounced on at least two occasions and began cursing her in a loud, vicious manner. He behaved similarly during at least one incident in public. Defendant threatened physical harm. Witnesses described defendant's conduct as “cruel” and “vicious.”

In *Samms v. Eccles*, 11 Utah 2d 289, 358 P2d 344 (Utah 1961), the plaintiff, a woman, suffered anxiety and fear for her personal safety, because of the defendant's repeated telephonic solicitations to have illicit but consensual sexual relations with him over a six month period.

A cause of action for reckless infliction of emotional distress was upheld for conduct involving pictures of the dead body of plaintiff's spouse, child, sibling, and parent, even though plaintiff was not present at

display of the pictures and the allegedly tortuous conduct did not physically impact the plaintiff. *Williams v. City of Mineola*, 575 So.2d 683, 1991 Fla. App. LEXIS 711 (Fla. Dist. Ct.App. 1991).

Allegations that the defendant lenders' agent threatened debtors that if they did not accept settlement demand they would suffer terrible consequences, be subject to criminal charges, and find themselves in federal prison, together with allegations that lenders' actions were taken intentionally to cause debtors harm, and that they suffered substantial harm from these actions, were sufficient to state a claim for intentional infliction of emotional distress. *FDIC v. S. Praver & Co.*, 829 F. Supp. 439, 1993 U.S. Dist. LEXIS 11054 (D. Me. 1993).

A legal secretary's allegations that an attorney compelled her to forge a signature, continued to contact her even after she requested him to stop, and she suffered serious harm as a result and was bedridden for a week after the incident, were sufficient to state a claim against the defendant attorney for IIMD. *Brown v. Nutter, Mclennon, & Fish*, 11 Utah 2d 289, 696 P.2d 953 (Utah 1998).

Action allowed for IIMD where claimant's allegations of extreme and outrageous conduct were that defendant insurance company engaged in a deliberate pattern of harassment by terminating his benefits, by unilaterally reducing benefits to inadequate amount in violation of board

determination of higher amount, by demanding that claimant repay company large sums of money to which defendant knew that they were not entitled, and by deliberately by-passing claimant's attorney and contacting claimant directly. *Atkinson v. Farley*, 171 Mich. App. 784, 431 N.W.2d 95 (Mich. Ct. App. 1988).

Where plaintiff damaged windows of house where defendant and parties' children were staying, leaving them without protection from severe cold, defendant was entitled to maintain a counter-claim for IIMD. *Weisman v. Weisman*, 108 App. Div. 2d 852, 485 N.Y.S.2d 568 (N.Y. Sup. Ct. 1985).

The extreme and outrageous character of the conduct may arise from an abuse of a relation to another, such as where the actor has actual or apparent authority to affect the other's interest, such as in a debtor-creditor relationship. *Public Finance Corp. v. Davis* 66 Ill. 2d 85, 4 Ill. Dec 652 (Ill.1976). A claim of IIMD arose from the course of a collection effort. The debtor contended that in order to collect the money owed from her, the creditor called her and visited her home repeatedly and called her at the hospital while she was there with her sick child. The debtor also contended that she suffered from a nervous condition and had informed the creditor that she was particularly susceptible to emotional distress. There were no allegations that the creditor's agents had used abusive,

threatening, or profane language or otherwise conducted themselves in other than a permissible manner.

An employee was allowed to maintain an action against an employer for infliction of emotional distress, where plaintiff was fired for complaining about job safety practices. *Carsner v. Freightliner Corp.*, 69 Or. App. 666, 688 P.2d 398 (Or. Ct. App. 1984), *review den.* 298 Or. 334, 691 P.2d 483.

An action was allowed where an installment buyer of furniture who defaulted on payments and was ordered by the court to make payment could maintain outrage action against a furniture store where the manager refused to accept her payment out of a seeming desire to continue litigation. The buyer had purchased furniture on an installment account and when her payments became delinquent, the seller obtained a judgment for payment of the balance and for court costs. The buyer refused to pay court costs and the seller refused to accept payment of the balance without the additional payment for court costs. *Bell v. Dixie Furniture Co.*, 285 S.C. 263, 329 S.E.2d 431 (S.C. 1985).

In *Meiter v. Cavanaugh*, 40 Colo. App. 454, 580 P.2d 399 (Colo. Ct. App. 1978), the plaintiff and defendant entered into a specific performance contract under which the plaintiff was to purchase the defendant's home. The defendant refused to vacate the house at the agreed

upon time, threatening the plaintiff with legal action and implying that the courts would look favorably on his position, and refused to move. When the premises were finally vacated, the plaintiff found that they had been damaged. The court held that reasonable minds could differ on the question of whether this series of acts was “outrageous” and the question was properly submitted to a jury.

In the present case, Plaintiff Strong was picked on by her supervisor, Defendant Terrell, on virtually a daily basis for approximately two years. She submits that reasonable minds could differ on the question of whether the constant bullying was outrageous, and thus, that she should be allowed to tell her story to a jury. This Court, however, doesn’t even have to reach that point; the Court need only determine that the facts in the record create *a reasonable inference* that reasonable minds could differ on the question. The standard, in reviewing factual determinations of a trial court on summary judgment, is very low, as it should be, in order to avoid depriving Plaintiff of her right to have her case decided by a jury.

2. Special relationship cases.

The central theme of this case involves Defendant Terrell’s status as the supervisor of Plaintiff Strong. Accordingly, he stood in a special relationship to her.

Special relationships requiring a heightened duty of care, including an affirmative duty to act, have been held to exist where one party has power or authority over another. *Brewer v. Erwin*, 287 Or. 435, 458, 600 P.2d 398 (Or. 1979); *Harper v. Herman*, 499 N.W.2d 472, 1993 Minn. LEXIS 316 (Minn. 1993). These special relationships have been found in the following circumstances: between a doctor and a patient, *Emerson v. Magendantz*, 689 A.2d 409, 1997 R.I. LEXIS 69 (R.I. 1997); common carriers and their customers, *Andrews v. United Airlines*, 24 F.3d 39, 32 A.L.R.5th 729 (9th Cir. 1994), physician duty to known third parties, *Regents v. Univ. of Cal.*, 31 Cal. App. 4th 1195, 37 Cal. Rptr.2d 518 (Ca. Ct. App. 1995); insurer to insured, *Arambula v. Wells*, 72 Cal. App. 4th 1006, 85 Cal. Rptr. 2d 584 (Cal. Ct. App. 1999); innkeeper to guests, *Niece v. Elmview Group Home*, 131 Wn.2d 39, 929 P.2d 420 (1997); public utility to customer, *Clay Electric Coop., Inc. v. Johnson*, 873 So.2d 1182, 2003 Fla. LEXIS 2150 (Fla. 2003); researchers to human subjects, *Vodopest v. MacGregor*, 128 Wn.2d 840; 913 P.2d 779 (1996); landlord-tenant, *Warren v. June's Mobile Home Village & Sales, Inc.*, 66 Mich. App. 386, 391, 239 N.W.2d 380 (Mich. Ct. App. 1976); *Strauss v. Belle Realty Co.*, 65 N.Y.2d 399, 482 N.E.2d 34 (N.Y. 1985); landowners to the invited public, *Carter v. Kinney*, 896 S.W.2d 926, 1995 Mo. LEXIS 40 (Mo. 1995); lender to debtor, *Public Finance Corp. v. Davis, supra*, 66 Ill.

2d 85; and schools to students, *Uhr v. E. Greenbush Central Sch. Dist.*, 94 N.Y.2d 32, 720 N.E.2d 886 (N.Y. 1999); *Hoyem v. Manhattan Beach City Sch. Dist.*, 585 P.2d 851, 22 Cal. 3d 508 (Cal. 1978).

Courts in other jurisdictions have held that abuse of authority in general constitutes outrageous behavior. In *Warren v. June's Mobile Home Village & Sales, Inc.*, *supra*, 66 Mich. App. 386, 391, the owner of a mobile home village refused, apparently in retaliation for a tenant's complaints about bills and services, to approve a prospective purchaser of the tenant's trailer as a new tenant, thereby effectively blocking the sale. The court held that the abuse of a position of actual or apparent authority can constitute outrageousness.

“The extreme and outrageous character of a defendant's conduct may arise in a number of situations. It may occur by virtue of an abuse by defendant of a relationship which puts him in a position of actual or apparent authority over plaintiff or gives defendant power to affect plaintiff's interests. The landlord-tenant relationship is one such situation.”

See also, Brewer v. Erwin supra, 287 Or. 435, 458, (the court held that the tortious element can be found in the breach of some obligation, statutory or otherwise, that attaches to defendant's relationship toward plaintiff, and as has long been imposed on innkeepers, public carriers, and the like).

Under Oregon law, emotional distress damages are recoverable, even absent a showing of actual physical injury, when they arise from: a specific intent to inflict emotional distress; from intentional misconduct by a person in a position of responsibility and with knowledge that it would cause grave distress; or from conduct that infringes on some legally protected interest apart from the claimed distress. *In re Cope*, 280 B.R. 516, 2001 Bankr. LEXIS 1943 (Bankr. Or. 2001); *Bennet v. Baugh*, 154 Or. App. 397, 961 P.2d 883 (Or. App. 1998), *review allowed*, 327 Or. 431, 966 P.2d 222 (1998) (reversed on other grounds).

Courts in jurisdictions have accepted the supervisor-supervisee relationship as fitting the special relationship standard. The Court of Appeals of Maryland upheld a claim of IIMD where a workplace supervisor ridiculed an employee's speech impediment, thereby causing tremendous nervousness, increasing the physical defect itself. *Harris v. Jones*, 281 Md. 560, 380 A.2d 611 (Md. 1977).

In *Robel v. Roundup Corporation, d/b/a Fred Meyer, Inc.*, 148 Wn.2d 35, 51-52, 59 P.3d 1158 (2001), the Washington Supreme Court acknowledged that a subordinate employee may be entitled to a greater degree of protection from insult and outrage by a supervisor with authority over her than from a stranger. Plaintiff urges this Court to remove all doubt regarding the special relationship of supervisor and subordinate, and

clearly articulate that our state will not tolerate the bullying and abuse of employees by their supervisors, especially in the arena of public employment.

3. Known susceptibility cases.

Defendant Terrell knew that Plaintiff Strong was emotionally affected by his petty insults and verbal abuse. “Usually I would just start crying and walk away, and he just smiled.” [CP 339, *deposition testimony of Gina Strong*]. Defendant Terrell continued to bully her despite this knowledge.

“The tort may arise where defendant acts notwithstanding the knowledge that plaintiff is peculiarly susceptible to emotional distress because of defendant's actions.” *Warren v. June’s Mobile Home Village & Sales, Inc supra.*, 66 Mich. App. 386, 391. *See also In re Cope supra*, 280 B.R. 516; *Bennet v. Baugh supra*, 154 Or. App. 397,

Quite separate and apart from his special relationship with Plaintiff, as her supervisor, Defendant Terrell’s continuing course of conduct toward Plaintiff should be carefully scrutinized on the basis of his prior knowledge that she was emotionally susceptible to his abuse.

4. Negligent infliction of emotional distress.

Defendant Terrell continues to argue that his conduct toward Plaintiff Strong amounted to nothing more than a mere workplace dispute.

[*Respondent's Brief* at pp. 32-36]. The mere fact that he was fired because of his abusive conduct toward his subordinates would seem, if anything, to create a genuine issue of fact on the question of workplace dispute, which must be resolved by a jury in this case.

Defendant's assertion [*Appellant's Brief* at p. 36] that the record does not contain evidence of objective symptomatology is without merit. Plaintiff Strong's physician prescribed anti-anxiety and anti-depressant medication; she vomited regularly before work; she experienced heart symptoms to the extent that her husband called 911 and Plaintiff was rushed to the emergency room. [CP 344]. Plaintiff attributes these physical symptoms to the distress she was experiencing as a result of Defendant Terrell's conduct toward her. Her description of the symptoms and her attribution of them to her emotional state at the time create an inference that the symptoms were caused by Defendant Terrell. Certainly, anti-anxiety and anti-depressant medication are not prescribed to individuals who are not experiencing a diagnosable emotional disorder. Why else would a physician prescribe such drugs? Based upon the state of the record in this case, a jury, and not this Court, or the trial court, should decide whether Plaintiff experienced objective symptomatology.

CONCLUSION

The trial court's order on summary judgment should be vacated and the matter remanded for trial on the merits on Plaintiff Strong's civil rights and state tort claims.

Dated this 20th day of August, 2007.



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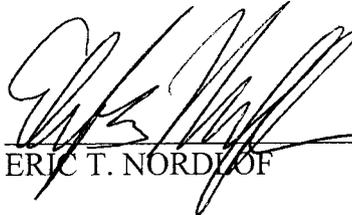
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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and accurate copy of the foregoing opening brief to:

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on this 20th day of August, 2007, by ordinary first class mail, with postage prepaid thereon.



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