Employment Tort Claims

Acknowledgements

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Chalana Williams, Crowell & Moring LLP (Summer Associate Program)
Kelly Rojas, EJC Seibel Fellow (Law Clerk)

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Intentional Interference

An "intentional interference with contract" in the employment context occurs when the employer interferes with a contract between the worker and a third party. The elements of intentional interference with contract are the following: (1) existence of a contract; (2) the tortfeasor's (in this context, the employer's) knowledge of the contract; (3) intentional procurement of its breach; and (4) resultant damages. *See Sorrells v. Garfinkel's*, 565 A.2d 285, 289 (D.C. 1989).

The alleged contract must be more explicit than just the expectation of continued employment, because the courts do not consider such an expectation a tangible contract. *See Dale v. Thomason*, 962 F. Supp. 181, 184 (D.D.C. 1997). It is equally important to note that the alleged "interferer" must not be a party to the contract interfered with; therefore, an employee of the company with whom the plaintiff has the contract cannot be liable for intentional interference with contract, because that employee is an agent of one of the parties to the contract. *See Press v. Howard Univ.*, 540 A.2d 733, 736 (D.C. 1988).

A similar cause of action may lie for intentional interference with business expectations. The D.C. Court of Appeals held in *Carr v. Brown*, 395 A.2d 79, 84 (D.C. App. 1978), "business expectancies, not grounded on present contractual relationships but which are commercially reasonable to anticipate, are considered to be property, and therefore protected from unjustified interference." Among those expectancies is "the prospect of obtaining employment or employees, or the opportunity of obtaining customers." *Id*. This tort might arise in the employment context when an employer, for example, interferes with an employee's ability to get a new job.

To sustain a claim for intentional interference with business relations, the worker needs to prove an "expectancy" that is "commercially reasonable" to anticipate. Be warned, however, that although there is authority to support this cause of action, courts are nonetheless reluctant to entertain it. This is a claim best brought in conjunction with other causes of action.

Under D.C. law, the statute of limitations to bring an interference claim is three years. *See* D.C. Code § 12-301(8) (2001).

Defamation

Most people do not ordinarily think about "defamation" in connection with the relations between employer and employee. Defamation principles, however, have become increasingly important on the job. According to one commentator, more than 40 percent of the reported defamation cases relate to the workplace.[113]

[113] Duffy, *Big Brother in the Workplace: Privacy Rights Versus Employer Needs*, 9 Indus. Rel. L. J. 30, 36 (1987).

Defamation encompasses both libel (written defamation) and slander (spoken defamation), and the elements are as follows: (1) the statement is false; (2) it was defamatory (injurious to the worker's reputation); (3) the statement was published (uttered, written, etc.) to a third party by the defendant with some degree of fault; and (4) the plaintiff was injured. *See Vereen v. Clayborne*, 623 A.2d 1190, 1195 (D.C. 1993).

A statement is considered to be defamatory if it could injure a worker in her trade, profession, or community standing. *See Howard Univ. v. Best*, 484 A.2d 958, 989 (D.C. 1984). Courts in this jurisdiction apply a high standard to determining if a statement is defamatory; it must be more than unpleasant or offensive, and must make the plaintiff seem "odious, infamous, or ridiculous." *Id.*

The statute of limitations for a defamation claim is only **one** year under D.C. law. *See* D.C. Code § 12-301(4) (2001). Defamation occurs at the time of publication, and its statute of limitations begins to run from that date. *See Foretich v. Glamour*, 741 F. Supp. 247, 252 (D.D.C. 1990). Because the statute of limitations is shorter here than with most torts, claimants need to act quickly in order to preserve their rights.

Defenses to Defamation

There are two common privileges (i.e., defenses) that apply to the tort of defamation. The first is consent and the second is the common interest privilege.

Consent is established if the defendant proves that (1) there was express or implied consent to the publication; (2) the statement was relevant to the purpose for which consent was given; and (3) the publication was limited to those with a legitimate interest in its content. *See Farrington v. Bureau of Nat'l Affairs*, 596 A.2d 58 (D.C. App. 1991).

The common interest privilege is a qualified one, most frequently used in the context of employment references. This privilege has three elements: (1) the statement is made in good faith; (2) by a person who reasonably believes that she has a legitimate interest in making the statement; (3) to a person with a similarly legitimate interest in hearing it. *See Columbia First Bank v. Ferguson*, 665 A.2d 650, 655 (D.C. 1995). This qualified privilege is also applicable to performance evaluations. Like most qualified privileges, it can be overcome if a plaintiff can prove that the statements were made with malice. *Id.* at 656.

Intentional Infliction of Emotional Distress

Intentional infliction of emotional distress is a popular claim for plaintiffs to bring in employment-related cases. Because it is a tort, a plaintiff can receive punitive damages for this claim, and such damages are not subject to any statutory caps. However, courts are very skeptical about intentional infliction of emotional distress claims and plaintiffs rarely prevail on them, even in the most seemingly egregious circumstances. Thus, an attorney should bring this claim only in particularly outrageous circumstances.

In order to set forth a claim of intentional infliction of emotional distress in D.C., a claimant must allege (1) extreme and outrageous conduct that (2) intentionally or recklessly caused (3) severe emotional distress to another. *See Cooke-Seals v. District of Columbia*, 973 F. Supp. 184, 188 (D.D.C. 1997). The plaintiff must demonstrate that the employer's actions were "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Sere v. Group Hospitalization, Inc.*, 443 A.2d 33, 37 (D.C. 1982).

Courts have held that an action by an employer that violates public policy may qualify as intentional infliction of emotional distress. *See Howard Univ. v. Best*, 484 A.2d 958, 986 (D.C. App. 1984) (violation of D.C. Human Rights Act.). Moreover, employers are held to heightened standards of behavior when they have employees "who it is reasonable to assume are particularly susceptible to emotional distress." *Drejza v. Vaccaro*, 650 A.2d 1308, 1313 (D.C. App. 1994) (refusing to dismiss claim by rape victim against police interrogator). In such a situation,

> "The extreme and outrageous character of the conduct may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity. The conduct may become heartless, flagrant, and outrageous when the actor proceeds in the face of such knowledge, where it would not be so if he did not know."

Id., quoting Restatement (Second) of Torts, § 46, comment (f).

As noted earlier, courts in this jurisdiction are extremely wary of emotional distress claims in the employment context. *See, e.g. Cooke-Seals v. District of Columbia*, 973 F. Supp. 184, 188-89 (D.D.C. 1997) (dismissing emotional distress claim based on allegations that employee was subjected to "unmeritorious investigation" and "negative and false employment references"); *Schoen v. Consumers United Group, Inc.*, 670 F. Supp. 367, 379 (D.D.C 1986) (no intentional infliction in reduction of job security, title and pay); *Duncan v. Children's Nat'l Med. Ctr.*, 702 A.2d 207, 211-12 (D.C. 1997) (no intentional infliction when employer forced pregnant employee to quit or to work in a position which would expose fetus to radiation); *Smith v. Union Labor Life Ins. Co.*, 620 A.2d 265, 270 (D.C. 1993) (no intentional infliction when employee dismissed without prior disciplinary procedures). Thus, in order to avoid dismissal of the case, the plaintiff must establish distress "of so acute a nature that harmful physical consequences might be . . . likely to result." *Sere*, 443 A.2d at 37 (quoting *Clark v. Associated Retail Credit Men*, 105 F.2d 62, 65 (D.C. Cir. 1939)). Alternatively, according to the *Restatement (Second) of Torts* (which the D.C. courts follow in setting standards for the tort), "[i]t is only where [the alleged distress] is extreme that the liability arises . . . . [t]he law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it." *Restatement (Second) of Torts* § 46, cmt. j (1965). S*ee, e.g., Crowley v. North Am. Telecoms. Ass'n*, 691 A.2d 1169, 1171 (D.C. 1997).

The statute of limitations to bring this claim is **three years** under D.C. law. *See* D.C. Code § 12-301(8) (2001).

False Imprisonment

False imprisonment is the restraint of a person's physical liberty by another without consent or legal justification. *See Faniel v. Chesapeake & Potomac Tel. Co. of Md.*, 404 A.2d 147, 150 (D.C. 1979). The essential elements of the tort are (1) the detention or restraint of one against his will, within boundaries fixed by the defendant, and (2) the unlawfulness of the restraint. *Id*.; *See also Tocker v. Great Atlantic & Pacific Tea Company*, D.C.App., 190 A.2d 822, 824 (1963).

This claim is most frequently brought in the context of investigations and interviews of employees. To meet the requirements of false imprisonment, [t]he evidence must establish a restraint against the plaintiff's will, as where she yields to force, to the threat of force or to the assertion of authority." *Faniel*, 404 A.2d at 151-52. That said, fear of losing one's job does not mean that the behavior was induced. *See, e.g.*, PROSSER, TORTS, supra § 11, at 106; *Moen v. Las Vegas International Hotel, Inc.*, 90 Nev. 176, 521 P.2d 370, 371 (1974).

The statute of limitations to bring this claim is only **one** year under D.C. law. *See* D.C. Code § 12-301(4) (2001).

Negligent Hiring and Supervision

An employer can be held liable for negligently hiring an incompetent or unfit employee if the plaintiff can show that the employer knew or should have known that another worker had a propensity to commit some sort of job-related misconduct. *See Moseley v. Second New St. Paul Baptist Church*, 534 A.2d 346 (D.C. 1987).

Similarly, if, during the course of employment, an employer becomes aware of a worker's unfitness and fails to take any action to correct the problem, the employer can be held liable for negligent supervision. *See Daka, Inc. v. McCrae*, 2003 D.C. App. LEXIS 752 (D.C. 2003) (Affirmed jury verdict in plaintiff's favor on negligent supervision claim where plaintiff provided evidence to his employer over several months that he was being subjected to sexual harassment). A plaintiff must establish that the employer was negligent or reckless (1) in giving ambiguous or improper orders, or (2) in supervising activities of its employees. *See Tarpeh-Doe v. United States*, 28 F.3d 120, 123 (D.C. Cir. 1994).

The statute of limitations to bring this claim is **three years** under D.C. law. *See* D.C. Code § 12-301(8) (2001).

Public Disclosure of Private Facts

"Public disclosure of private facts," also known as "unreasonable publicity," is a recognized claim of tort liability against an employer. Public disclosure of private facts occurs when an employer discloses information concerning the private life of another (in this context, an employee) that would be highly offensive to a reasonable person and is not of legitimate concern to the public. *Restatement (Second) of Torts, § 652D*. A situation involving this tort usually arises when an employer uses information about the employee or applicant received during the job application, screening, orientation, or medical examination process and may be maintained in the personnel record.

The disclosure must also concern genuinely private information, be sufficiently widespread, and unauthorized. For example, to be genuinely private the disclosure of details of a separation agreement may not be actionable, whereas disclosing information about an employee's psychiatric evaluation may be actionable. *See Wells v. Thomas,* 569 F. Supp. 426, 437 (E.D. Pa. 1983); *Wagner v. City of Holyoke,* 404 F.3d 504 (1st Cir. 2005).

See 10-272 Labor and Employment Law § 272.02.

Tort Claims against the Federal Government - Federal Torts Claims Act

The 1946 Federal Torts Claims Act provides a waiver of sovereign immunity where the federal government may be held responsible for the acts of its employees. *See* Jacob A. Stein, *Stein on Personal Injury Damages* § 5:26 (2006). **Liability will be imposed on the government for; "injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment** under the circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C.A. § 1346(b).

The Federal Tort Claims Act confers judgment through substantive state law against the federal government. *Id.* at § 2679. Thus, if no parallel liability exists under the applicable state law, under the Federal Tort Claims Act, the action must be dismissed. 28 U.S.C.A. § 1346.

In the District of Columbia, an employee's behavior is within scope of his employment if the employee acted to serve his employer's interest. *See Kalil v. Johanns*, 407 F.Supp.2d 94 (D.C. 2005). An employee under this statute includes: "officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States." 28 U.S.C.A. § 1346(b). A deciding factor is the degree of control the United States can exercise over the person's work. *See* 20 Am. Jur. Proof of Facts § 375 (2006).

Procedure for Filing a Claim

A claimant must first file an administrative claim to the federal agency at bar. A Standard Form 95 is not required to present an FTCA claim, but is a convenient form for supplying the information necessary to bring such a claim. The administrative claim must include a brief notice or statement to the relevant federal agency containing a general description of the time, place, cause, and general nature of injury, as well as the amount of compensation demanded. *See* 28 U.S.C.A. § 2675(a); 20 Am. Jur. Proof of Facts § 375. Exhaustion of administrative remedies is a jurisdictional prerequisite to a FTCA claim. *See Koch v. U.S.*, 209 F.Supp. 2d 89 (D.C. 2002). The claimant cannot prosecute an action until a claim has been rejected by the agency or the agency has not acted within six months. *See Kirkland v. District of Columbia*, 789 F. Supp. 3 (D.C. 1992); 28 U.S.C.A. § 2672. A claimant may also file a case with the federal district court if they are not satisfied with the settlement or decision of the agency.

Exceptions of the Federal Torts Claims Act are listed under 28 U.S.C.A. § 2680(h). The most notable are the due care exception and the intentional torts exception. The due care exception bars government responsibility when the employee's actions were exercised under due care. The intentional torts exception bars government responsibility when the claim, "arise(s) out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse or process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C.A. § 2680(h). Note that some intentional torts remain unlisted under this statutory exception and may be open to action; trespass, conversion, and invasion of privacy. *See* Jacob A. Stein, *Stein on Personal Injury Damages* § 5:26 (2006).

Tort Claims against the D.C. Government

Before filing a tort claim against the D.C. government, the worker **must** notify the mayor in writing within **six months** of the injury. *See* D.C. Code § 12-309. The written notice must include the approximate time, place, cause, and circumstances of the injury or damage. Notice of claim letters must be received by the Office of Risk Management, and will be accepted on behalf of the mayor.

The mailing address for claims is:

Office of Risk Management
ATTN: Claims
441 4th Street, NW, Suite 800 South
Washington, DC 20001
(202) 727-8600

Claims filing instructions and forms can be found at:
http://orm.dc.gov/. See also, ORM Guide to Tort Liability Brochure at
http://wrmanual.dcejc.org/37.

Employment Related Tort Claims in Maryland

Maryland recognizes the same torts as discussed above. While you should do research specific to Maryland when attempting to bring these claims, the elements and contours of the law are sufficiently similar to those in D.C. that a full discussion of Maryland law is not necessary for purposes of this manual.

In addition, Maryland recognizes claims for fraudulent misrepresentation and deceit and negligent misrepresentation. A thorough discussion of these torts is beyond the scope of this manual, but they could be applicable. *See Miller v. Fairchild Indus.*, 629 A.2d 1293, 1302 (Md. App. 1993) and *Lubore v. RPM Assocs., Inc.*, 674 A.2d 547, 555 (Md. App. 1996).

Employment Related Tort Claims in Virginia

Virginia recognizes the same torts as the District of Columbia. As has been stated previously, a thorough discussion of the law of Virginia is beyond the scope of this manual. Advocates should note, however, that as a general rule, Virginia is less protective of the worker than the District of Columbia and Maryland.

In addition, under Virginia law, the **statute of limitations** begins when the cause of action accrues, not when the damage has been sustained. *See* VA. Code Ann. § 8.01-230; *Owens v. Combustion Engineering*, 279 F. Supp. 257 (1967).