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## An Analysis of Intentional Infliction of Emotional Distress Claims in the Virginia Workplace

Stephen Allred  
*University of Richmond School of Law*

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## AN ANALYSIS OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIMS IN THE VIRGINIA WORKPLACE

*Dr. Stephen Allred \**

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\* University Professor, University of Richmond School of Law.

## INTRODUCTION

Linda Bodewig enjoyed her job as a cashier at her local K-Mart in Oregon, and she had worked there without incident until the evening of March 29, 1979.<sup>1</sup> That evening, she was ringing up the sale of some curtains for a customer named Alice Golden, but when she called out the price, Golden told her that the curtains were on sale and that Bodewig was overcharging her.<sup>2</sup> Bodewig asked a coworker to go check the price of the curtains, and as Golden accompanied the coworker to go to the aisle where the curtains were displayed, Bodewig set aside Golden's purchases and continued to check out other waiting customers.<sup>3</sup>

Golden returned about ten minutes later, and then asked Bodewig what she had done with her money.<sup>4</sup> Bodewig replied, "What money?" and Golden answered that she had left twenty dollars on top of the merchandise she had stacked on the counter, and that it was now missing.<sup>5</sup> Golden became loud and argumentative, which soon attracted the attention of the K-Mart manager.<sup>6</sup> After a check of the surrounding area and an audit of the cash register revealed no missing money, the manager then told Bodewig to accompany a female assistant manager to the women's public restroom, where she would be strip-searched in order to prove to Golden that she didn't have the money on her person.<sup>7</sup> Golden was allowed to watch as Bodewig removed all her clothes except her underwear, at which point Golden said further disrobing was unnecessary, as she could see through Bodewig's underwear and there was no money there.<sup>8</sup>

Bodewig then returned to her work station at the checkout counter and completed her shift.<sup>9</sup> When Bodewig came back to work the next day, however, she was told to work her register along with a second employee, which Bodewig understood to mean that she was under surveillance.<sup>10</sup> Angry and embarrassed, Bodewig quit her job

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1. The paraphrased description of this incident is taken from *Bodewig v. K-Mart, Inc.*, 635 P.2d 657, 658–60 (Or. Ct. App. 1981).

2. *Id.* at 658–59.

3. *Id.* at 659.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 660.

at the K-Mart when her shift ended that day.<sup>11</sup> But rather than simply moving on, Linda Bodewig brought a tort action in the Oregon court for intentional infliction of emotional distress, seeking damages against both her former employer and Golden.<sup>12</sup> Bodewig, a modest woman in her twenties, alleged that as a result of her being subjected to a strip search and close monitoring by her employer, she experienced “two or three sleepless nights, cried a lot and still [got] nervous and upset when she [thought] about the incident.”<sup>13</sup>

Like numerous other courts around the country, the Oregon courts had recognized the tort of intentional infliction of emotional distress by the time Linda Bodewig brought her claim.<sup>14</sup> Indeed, the notion that an employee could seek damages for the tort of outrageous conduct on the part of his or her employer was being increasingly accepted in many state courts in the 1970s. In one of the first major cases, the 1970 decision of *Alcorn v. Ambro Engineering, Inc.*, the California Supreme Court held that the tort claim could succeed where an employer simply condoned the use of profane and abusive epithets made by a supervisor to his employees.<sup>15</sup> Other courts soon followed California’s lead in taking a broad view of intentional infliction of emotional distress claims.<sup>16</sup> But Virginia courts would not be among them. For although the tort of intentional infliction of emotional distress is recognized in Virginia, the standards for successfully making the claim are extraordinarily high. While some state courts seem to have readily embraced the tort, Virginia courts have largely looked with disfavor on intentional infliction of emotional distress claims.

This Article first traces the development of the tort of intentional infliction of emotional distress as applied to the workplace in the Commonwealth of Virginia in Part I, and offers some observations about the significant hurdles a plaintiff may face in trying to successfully hold an employer accountable for conduct that many in

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11. *Id.*

12. *Id.* at 658, 660.

13. *Id.* at 662.

14. *See, e.g., Rockhill v. Pollard*, 485 P.2d 28, 29 (Or. 1971).

15. 468 P.2d 216, 217–18 (Cal. 1970).

16. For a comprehensive look at (and critique of) the emergence of the tort of intentional infliction of emotional distress in the workplace, see Dennis P. Duffy, *Intentional Infliction of Emotional Distress and Employment at Will: The Case Against “Tortification” of Labor and Employment Law*, 74 B.U. L. REV. 387, 389–90 (1994).

our society would deem unacceptable. After reviewing the evolution of the doctrine since it was first recognized in Virginia nearly fifty years ago in Part II, Part III returns to the incident described above involving Linda Bodewig and her employer, and offers an analysis of how her case would likely be decided in the Virginia courts today—and whether that decision would be the right one.

#### I. EARLY RECOGNITION OF DAMAGES FOR EMOTIONAL DISTRESS IN VIRGINIA TORT CLAIMS

The term “emotional distress” is not self-defining, and is one that historically has been viewed with some skepticism.<sup>17</sup> This part traces the origins of tort claims for emotional distress in Virginia to show how the courts first dealt with the issue in the context of negligence and defamation claims, and how that analysis foreshadowed the development of the tort of intentional infliction of emotional distress. As will be explored in the next section, the tort of intentional infliction of emotional distress is a relatively recent phenomenon, one that presents difficult issues, including what counts as “severe emotional distress” and how to calculate damages. However, it is important to note that damages for emotional distress had been sought by plaintiffs seeking recovery using traditional tort claims in Virginia for many years before the emergence of the intentional infliction of emotional distress tort.

One of the first Virginia cases to consider the question of whether the tort of negligence on the part of a defendant might subject him or her to damages arising from emotional distress suffered by a plaintiff is *Connelly v. Western Union Telegraph Co.*<sup>18</sup> In that 1902 case, the Supreme Court of Appeals of Virginia recognized the claim of negligently inflicted emotional distress, but added that “mental anguish and suffering resulting from mere negligence, unaccompanied with injuries to the person, cannot be made the basis of an action for damages.”<sup>19</sup> The plaintiff Connelly had not alleged any physical injury, only shock and outrage for the failure of Western Union to timely notify him of his father’s death

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17. See, e.g., David J. Leibson, *Recovery of Damages for Emotional Distress Caused by Physical Injury to Another*, 15 J. FAM. L. 163, 163–64 (1976–77) (noting that courts were initially reluctant to accept the idea of damages for emotional distress in the late 19th and early 20th century, reflecting the view that “insanity and other emotional illnesses were considered to be the result of one’s own sins”).

18. *Connelly v. W. Union Tel. Co.*, 100 Va. 51, 53, 40 S.E. 618, 619 (1902).

19. *Id.* at 55, 65, 40 S.E. at 620, 624.

and subsequent funeral, and so the court dismissed his claim.<sup>20</sup> This became known as the “physical impact rule,” which limited the ability of plaintiffs to recover damages for emotional distress in negligence cases.<sup>21</sup>

In addition to negligence claims, the Virginia courts considered the question of damages for emotional distress in defamation cases. The 1932 case of *Bowles v. May*<sup>22</sup> is illustrative. In that case, a defamation claim was brought by a husband who was upset with his neighbor, Bowles, who had entered his house and insulted his wife, Mrs. May.<sup>23</sup> The plaintiff also claimed that Bowles had spread rumors among their neighbors about his wife’s alleged infidelity.<sup>24</sup> A few days after this incident, Mrs. May suffered a stroke, and her husband sought damages for her mental suffering.<sup>25</sup>

Although the court focused primarily on the question of whether a qualified privilege to defamation on the part of the defendant Bowles existed, the court went on to address the issue of independent recovery for willfully inflicted emotional distress, stating:

There is a sharp conflict in the authorities as to whether there can be a recovery for fright or mental shock unaccompanied by contemporaneous injury when the action is based upon mere negligence. However, it seems settled in Virginia that there can be no recovery for mental

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20. *Id.* at 67, 40 S.E. at 624. The court adhered to the common law rule that damages for emotional distress alone, as an independent cause of action, were never allowed. The court added, however, that where there is a personal injury, emotional distress is a proper element of damages. *Id.* at 55, 40 S.E. at 620.

21. Although most states recognize a cause of action in tort for negligent infliction of emotional distress, a minority of them adhere to the “physical impact rule,” which requires a contemporaneous physical injury or impact to recover for negligent infliction of emotional distress. Douglas Bryan Marlowe, Comment, *Negligent Infliction of Mental Distress: A Jurisdictional Survey of Existing Limitation Devices and Proposal Based on an Analysis of Objective Versus Subjective Indices of Distress*, 33 VILL. L. REV. 781, 792 (1988). “The purpose of the rule requiring physical impact is to prevent ‘illusory or imaginative or faked’ claim.” *Id.* at 791 (quoting *Zelinsky v. Chimics*, 175 A.2d 351, 354 (Pa. Super. Ct. 1961)); see also RESTATEMENT (SECOND) OF TORTS § 436A cmt. b (AM. LAW INST. 1965). Today, the majority of states apply either the “zone of danger” or “physical manifestation” rules. See Marlowe, *supra* at 796–98, 796 n.91; see also RESTATEMENT (SECOND) OF TORTS §§ 313, 436, 436A. The zone of danger rule permits recovery for emotional injuries resulting from witnessing physical harm to another or from fearing physical harm to oneself, provided that plaintiff was actually threatened by physical harm. Marlowe, *supra* at 794, 799. The physical manifestation rule requires that a plaintiff exhibit a physical injury or symptom as the “direct and natural result of the initial emotional distress” suffered. *Id.* at 795.

22. 159 Va. 419, 166 S.E. 550 (1932).

23. *Id.* at 424–28, 166 S.E. at 551–53.

24. *Id.* at 425, 166 S.E. at 552.

25. *Id.* at 424–26, 166 S.E. at 552.

anguish and suffering resulting from negligence unaccompanied by contemporaneous physical injuries to the person.<sup>26</sup>

Rejecting the argument that calculating mental injuries is too difficult an endeavor for a court or a jury to undertake, and that the damages would more often be more assumed than real, the *Bowles* court held that

severe mental shock may be the direct and proximate cause of wreck to the nervous system, the consequence of which may be a visible physical injury. When such fright is due to a wilful [sic], wanton and vindictive wrong, recovery is generally permitted, notwithstanding the fact that there is no contemporaneous injury from without.<sup>27</sup>

However, the court held that Mr. May did not prove by clear and convincing evidence that Bowles' statements caused Mrs. May's stroke, and reversed the trial court's ruling in Bowles' favor.<sup>28</sup>

Returning to negligence claims, the "physical impact rule" announced in *Connelly v. Western Union Telegraph Co.*<sup>29</sup> continued until 1973, when the Supreme Court of Virginia decided the case of *Hughes v Moore*.<sup>30</sup> In that case, Toy Hughes crashed his car into the front porch of one Sue Etta Moore, who was standing inside her house looking through the window when she heard and saw Hughes' car crash right in front of her.<sup>31</sup> Moore sued Hughes for personal injury, and Moore's physician testified at her trial that she was "experiencing physical pain in her body from the emotional disturbance and that her condition presented a serious mental problem."<sup>32</sup> He added that "[t]he pain was real, and 'not imaginary.'"<sup>33</sup> Her physician further opined that "there was a 'causal connection' between the automobile striking plaintiff's home and her emotional and physical condition."<sup>34</sup>

The *Hughes* court noted that Virginia courts had permitted recovery in the past for mental distress and physical injuries unaccompanied by actual physical contact where the injuries were

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26. *Id.* at 433, 166 S.E. at 555.

27. *Id.* at 433, 437, 166 S.E. at 555–56.

28. *Id.* at 437–38, 166 S.E. at 557.

29. 100 Va. 51, 53–54, 40 S.E. 618, 619 (1902).

30. 214 Va. 27, 197 S.E.2d 214 (1973).

31. *Id.* at 28, 197 S.E.2d at 215.

32. *Id.* at 28–29, 197 S.E.2d at 215–16.

33. *Id.* at 29, 197 S.E.2d at 216.

34. *Id.* at 29, 197 S.E.2d at 216.

caused by a willful, intentional tort.<sup>35</sup> The *Hughes* court cited as authority for the proposition that mental distress and physical injuries unaccompanied by actual physical contact could be grounds for recovery the earlier case of *Moore v. Jefferson Hospital, Inc.*<sup>36</sup> There, the actions of a hospital employee named Phyllis Hatter who entered an operating room and prevented a physician from performing surgery on the plaintiff were held to constitute an intentional tort on her part, which, even without actual physical contact with the plaintiff, caused him physical and mental injury.<sup>37</sup>

The *Hughes* court then set out the new standard for negligence liability, rejecting the earlier “physical impact rule” (i.e., that a plaintiff could recover for emotional distress manifesting itself physically, but only if the negligence that caused the emotional distress also caused contemporaneous physical injury).<sup>38</sup> The court held:

[W]here conduct is merely negligent, not willful, wanton, or vindictive, and physical impact is lacking, there can be no recovery for emotional disturbance alone. We hold, however, that where the claim is for emotional disturbance and physical injury resulting therefrom, there may be recovery for negligent conduct, notwithstanding the lack of physical impact, provided the injured party properly pleads and proves by clear and convincing evidence that his physical injury was the natural result of fright or shock proximately caused by the defendant’s negligence. In other words, there may be recovery in such a case if, but only if, there is shown a clear and unbroken chain of causal connection between the negligent act, the emotional disturbance, and the physical injury.<sup>39</sup>

The court concluded that Sue Etta Moore’s inability to feed her baby due to a lack of milk, the onset of her menstrual period while she was nursing, and her diminishing breasts—all resulting from her nervousness after witnessing Toy Hughes’ car crash into her home—constituted physical injuries naturally resulting from fright and shock.<sup>40</sup> Thus, *Hughes* clarified that a plaintiff need not suffer contemporaneous physical injury (i.e., physical impact) to recover for emotional distress so long as the emotional distress

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35. *Id.* at 29–30, 197 S.E.2d at 216–17.

36. *Id.* at 29–30, 197 S.E.2d at 216–17 (citing *Moore v. Jefferson Hosp., Inc.*, 208 Va. 438, 158 S.E.2d 124 (1967)).

37. *Moore*, 208 Va. at 441, 158 S.E.2d at 126–27.

38. *Hughes*, 214 Va. at 34, 197 S.E.2d at 219.

39. *Id.* at 34, 197 S.E.2d at 219. In this way, the Virginia court joined the majority of jurisdictions in abandoning the “physical impact rule.” *See supra* note 21.

40. *Hughes*, at 28–29, 35, 197 S.E.2d at 215, 220.



physically manifested itself and there was an “unbroken chain of causal connection between the negligent act, the emotional disturbance, and the physical injury.”<sup>41</sup>

The evolution of mental distress claims arising from negligence, then, is one that gradually tipped more in favor of the plaintiff. Specifically, the abandonment of the “physical impact rule” in favor of a rule that looked at the natural consequences of witnessing something distressing meant that more plaintiffs could recover damages. That evolution might have boded well for plaintiffs when the Supreme Court of Virginia recognized the new tort of intentional infliction of emotional distress just one year later; after all, if the court was willing to broaden the chances for plaintiffs to win damages for mental distress in the context of negligence claims, they might be willing to do so in other contexts as well. But as will be explained below, such was not to be the case.

## II. THE EMERGENCE OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIMS IN VIRGINIA

Up until the mid-1970s, plaintiffs in Virginia could only recover damages for emotional distress arising from negligence cases, or the occasional defamation cases. But new possibilities opened up in 1974 when the Supreme Court of Virginia recognized the tort of intentional infliction of emotional distress for the first time in *Womack v. Eldridge*.<sup>42</sup>

The specific facts of this case are remarkable. Rosalie Eldridge was employed by Richard Seifert and his attorney to obtain a photograph of Danny Lee Womack. Seifert’s attorney planned to use Womack’s photograph “as evidence in the trial of Seifert, who was charged with sexually molesting two young boys.”<sup>43</sup> In order to obtain a photograph of Womack, Rosalie Eldridge went to his home, telling him she was “a Mrs. Jackson from the newspaper and that she was writing an article on Skateland,” where Womack worked as a coach.<sup>44</sup> He agreed to have her take his picture, and that photograph was later used as one of a series presented in court to the

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41. *Id.* at 34, 197 S.E.2d at 219.

42. 215 Va. 338, 342, 210 S.E.2d 145, 148 (1974).

43. *Id.* at 339, 210 S.E.2d at 146.

44. *Id.* at 339, 210 S.E.2d at 146.

child victims of abuse in an effort to have them identify the perpetrator.<sup>45</sup> Thus, Womack, who had absolutely no connection to the child molestation case, was placed in the position of possibly being accused by the victims in open court of committing a heinous crime.<sup>46</sup> Even though the young boys did not identify Womack as the perpetrator, Womack argued that the mere use of his image in the court proceeding under these circumstances was outrageous conduct, falsely implicating him as a possible child molester.<sup>47</sup>

The court recognized Womack's claim for intentional infliction of emotional distress and set forth the elements of the claim as follows:

[A] cause of action will lie for emotional distress, unaccompanied by physical injury, provided four elements are shown: One, the wrongdoer's conduct was intentional or reckless. This element is satisfied where the wrongdoer had the specific purpose of inflicting emotional distress or where he intended his specific conduct and knew or should have known that emotional distress would likely result. Two, the conduct was outrageous and intolerable in that it offends against the generally accepted standards of decency and morality. This requirement is aimed at limiting frivolous suits and avoiding litigation in situations where only bad manners and mere hurt feelings are involved. Three, there was a causal connection between the wrongdoer's conduct and the emotional distress. Four, the emotional distress was severe.<sup>48</sup>

The court held that a plaintiff could recover in the absence of physical injury.<sup>49</sup>

Applying the four elements of the tort, the court found that there was evidence that Eldridge's conduct was extreme and outrageous, that a reasonable person would have "recognized the likelihood of the serious mental distress that would be caused in involving an innocent person [like Womack] in [a] child molest[ation] case[]," and that Womack's emotional distress was severe.<sup>50</sup>

There are two key hurdles a plaintiff must clear in order to successfully claim intentional infliction of emotional distress: the second and fourth elements of the tort. Assuming that the first element—intentional action—is met, the plaintiff must meet the

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45. *Id.* at 339, 210 S.E.2d at 146.

46. *Id.* at 339, 210 S.E.2d at 146.

47. *Id.* at 339–40, 210 S.E.2d at 146–47.

48. *Id.* at 342, 210 S.E.2d at 148.

49. *Id.* at 342, 210 S.E.2d at 148.

50. *Id.* at 342, 210 S.E.2d at 148.

second requirement, that of outrageous conduct.<sup>51</sup> In both the employment and nonemployment contexts, the courts generally rely on Section 46 of the Restatement (Second) of Torts, which requires that the plaintiff prove that the defendant's conduct was

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. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim "Outrageous!"<sup>52</sup>

This must be more than the hurt feelings or perceived slights that may occur in the typical American workplace. If the complained-of conduct by a supervisor or other employer representative does not rise to the requisite level, it is dismissed as being among those "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities" to which the employee "must necessarily be expected and required to be hardened."<sup>53</sup>

Not surprisingly, the court in *Womack v. Eldridge* held that Rosalie Eldridge's conduct on behalf of her employer in subjecting Danny Lee Womack to potential incrimination as a child molester was outrageous.<sup>54</sup> It is worth noting, however, that while the facts in *Womack* presented an extreme scenario, clearly meeting the second element of the tort, the decision may have set such a high bar for what constitutes "outrageous conduct" that the Virginia courts, returning to *Womack* as a touchstone, might have viewed the cases that were to follow as falling short of the mark. In other words, since the seminal case for intentional infliction of emotional distress was based on such extraordinary facts, it is fair to ask to what extent subsequent cases that didn't quite rise to the level of those extraordinary facts were somehow deemed less outrageous, and thus viewed in an unfavorable light towards the plaintiff. In this way, the second element of the tort may not have been an easy one to meet.

Assuming the third element—causal connection—is met, some courts (including those in Virginia) have also set a very high standard in order to meet the fourth element, proof of severe emotional

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51. *Id.* at 342, 210 S.E.2d at 148.

52. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (AM. LAW INST. 1965).

53. *Id.*

54. *Womack*, 215 Va. at 342–43, 210 S.E.2d at 148–49.

distress.<sup>55</sup> The Supreme Court of Virginia's 1991 ruling in *Russo v. White*<sup>56</sup> illustrates that difficulty. In that case, Patricia Russo went on a single date with Burton White, and then decided she did not want to date him again.<sup>57</sup> He began stalking her, calling her house and hanging up on her 340 times in two months.<sup>58</sup> Russo brought an intentional infliction of emotional distress claim against White, alleging that as a proximate result of his intentional conduct, she experienced "nervousness, sleeplessness, stress and its physical symptoms, withdrawal from activities . . . [and] lack of concentration at work."<sup>59</sup> She argued that White's conduct offended any sense of decency or morality, and that although White did not speak during the calls, both she and her daughter were threatened because of the frequency of the calls.<sup>60</sup>

The *Russo* court had no trouble finding that White had acted intentionally, thus satisfying the first element of the tort.<sup>61</sup> Turning to the second element, the court elaborated on what constituted outrageous behavior, stating:

[I]t is insufficient for a defendant to have "acted with an intent which is tortious or even criminal." . . . Even if a defendant "has intended to inflict emotional distress," or his conduct can be "characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort," the requirement of [outrageousness] has not been satisfied. . . . "Liability has been found only where the conduct has been 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."<sup>62</sup>

The plaintiff was able to show a causal connection between White's actions and her reaction, but she was not to succeed in her claim.<sup>63</sup> Turning to the fourth element, the Supreme Court of Virginia held that Russo's emotional distress did not rise to the level

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55. The Supreme Court of Virginia, in *Ruth v. Fletcher*, 237 Va. 366, 377 S.E.2d 412 (1989), noted that although *Womack* permitted recovery under a claim of intentional infliction of emotional distress, the Court was "careful to add limiting language" to the fourth element of the tort (severe emotional distress) so as to set a very high bar. *Id.* at 373, 377 S.E.2d 416.

56. 241 Va. 23, 400 S.E.2d 160 (1991).

57. *Id.* at 25, 400 S.E.2d at 161.

58. *Id.* at 25, 400 S.E.2d at 161.

59. *Id.* at 25, 400 S.E.2d at 161–62.

60. *Id.* at 26, 400 S.E.2d at 162.

61. *Id.* at 26, 400 S.E.2d at 162.

62. *Id.* at 27, 400 S.E.2d at 162.

63. *Id.* at 27, 400 S.E.2d at 163.

of severity that was required to sustain her claim because she merely “alleged that she was nervous, could not sleep, experienced stress, . . . and was unable to concentrate at work.”<sup>64</sup> Thus, the court found that the alleged effect was “not the type of extreme emotional distress that [was] so severe that no reasonable person could [have been] expected to endure it.”<sup>65</sup> The court noted that:

The term “emotional distress” travels under many labels, such as, “mental suffering, mental anguish, mental or nervous shock . . . . It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea.” . . . But liability arises only when the emotional distress is extreme, and only where the distress inflicted is so severe that no reasonable person could be expected to endure it.<sup>66</sup>

In rejecting Russo’s argument that her condition constituted severe emotional distress, the court stated: “There is no claim, for example, that she had any objective physical injury caused by the stress, that she sought medical attention, that she was confined at home or in a hospital, or that she lost income.”<sup>67</sup> These requirements, grafted onto the Restatement’s standard, meant that it was quite unlikely that a plaintiff would prevail, absent physical injury resulting from the outrageous conduct.

Justice Hassell’s dissent in *Russo* focused on the majority’s finding that the plaintiff failed to satisfy the *Womack* requirement of severe emotional distress.<sup>68</sup> “[N]o reasonable person could or should be expected to endure the injuries endured by Russo,” he stated.<sup>69</sup> More importantly, the dissent took issue with the majority’s finding that Russo alleged no objective physical injury.<sup>70</sup> This was unnecessary, Justice Hassell explained, because “physical injury is not an element required to establish the tort of intentional infliction of emotional distress.”<sup>71</sup>

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64. *Id.* at 27–28, 400 S.E.2d at 163.

65. *Id.* at 28, 400 S.E.2d at 163.

66. *Id.* at 27, 400 S.E.2d at 163 (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (AM. LAW INST. 1965)).

67. *Id.* at 28, 400 S.E.2d at 163.

68. *Id.* at 28–29, 400 S.E.2d at 163–64 (Hassell, J., dissenting).

69. *Id.* at 29, 400 S.E.2d at 164 (Hassell, J., dissenting).

70. *Id.* at 30, 400 S.E.2d at 164 (Hassell, J., dissenting).

71. *Id.* at 30, 400 S.E.2d at 164 (Hassell, J., dissenting). Justice Hassell noted that Russo’s amended motion alleged significant emotional distress, as follows: “As a proximate result of defendant’s intentional acts, plaintiff suffered severe emotional distress resulting in nervousness, sleeplessness, stress and its physical symptoms, withdrawal from activities which might necessitate plaintiff leaving her daughter at home, lack of concentration at

This was an extraordinarily important addition: the Supreme Court of Virginia abandoned the “physical impact rule” for cases involving negligence with its 1973 ruling in *Hughes v. Moore*, but after recognizing intentional infliction of emotional distress claims a year later in *Womack v. Eldridge*, the court subsequently pared back the scope of *Womack* with its 1991 holding in *Russo v. White*. In *Russo*, the court added the requirement that a plaintiff in an intentional infliction of emotional distress case prove “objective physical injury caused by the stress, [or] that she sought medical attention, [or] that she was confined at home or in a hospital,”<sup>72</sup> and that the plaintiff prove the tort by “clear and convincing evidence.”<sup>73</sup>

To place this in a broader context, consider that in the 1970s, as intentional infliction of emotional distress claims began to be recognized by courts across the country, those courts at first required that whatever emotional distress the plaintiff might have experienced manifest itself in some physical injury to the body, such as no longer being able to breast feed or suffering a significant weight loss—that is, a physical injury to the body resulting from the emotional distress. In later decades, however, many state courts dropped this requirement and instead simply required objective evidence of mental distress.<sup>74</sup> This distinction is important, as the objective evidence could simply be testimony from a doctor that the plaintiff was suffering from nightmares, or dizziness, or experienced periods of sadness and depression. These constitute “objective evidence of emotional distress” but not a “physical injury to the body.” But in Virginia, *Russo* represented a tightening of the tort’s requirements, adhering to a physical injury standard at a time when other courts seemed to be more open to claims of emotional distress.<sup>75</sup>

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work to the point where she received a reprimand.” *Id.* at 29, 400 S.E.2d at 164.

72. *Id.* at 28, 400 S.E.2d at 163.

73. *Id.* at 28, 400 S.E.2d at 162.

74. See, e.g., *Rodriguez v. Cambridge Hous. Auth.*, 823 N.E.2d 1249, 1254–55 (Mass. 2005) (failing to change door locks on rental property which allowed home invasion to take place caused shock to plaintiff who witnessed harm to a loved one; shock was sufficient to constitute severe emotional distress); *Robel v. Roundup Corp.*, 59 P.3d 611, 620 (Wash. 2002) (employee who was mocked for her back injury and was called vulgar names suffered severe emotional distress); *GTE Southwest Inc. v. Bruce*, 998 S.W.2d 605–19 (Tex. 1999) (employees who were harassed by supervisor experienced anxiety and fear, sought medical treatment, and were prescribed medication to alleviate their problems suffered severe emotional distress).

75. Not that Virginia courts were alone in tightening the standard. For example, in

Against this background, we now turn to application of the intentional infliction of emotional distress tort in the Virginia workplace.

A. *Intentional Infliction of Emotional Distress Claims in the Workplace*

The Virginia courts have considered a number of cases in which employees or former employees have brought claims of intentional infliction of emotional distress against their employers. Five cases are discussed in chronological order below. Unfortunately for the plaintiffs in each of these cases, the Virginia courts refused to recognize the workplace actions they complained about as rising to the level of “outrageous conduct.” As the cases demonstrate, sometimes employees are subject to rude, unfair, or demeaning treatment by their supervisors, but that does not mean they can meet the standard for intentional infliction of emotional distress in Virginia.

In our first case, plaintiff Fred Seitz was faced with a choice of resignation or termination by his employer, Phillip Morris.<sup>76</sup> Although Seitz had worked for Phillip Morris for more than eight years, had received several promotions, and was the recipient of excellent performance evaluations, he was called into his immediate supervisor’s office one day and was “informed . . . without more specific detail of numerous complaints that had surfaced in recent weeks regarding the way and manner [in which] he conducted himself with vendors.”<sup>77</sup>

His supervisor told him that if he resigned, “he would get severance and vacation pay, and the [company] would tell potential employers he resigned.”<sup>78</sup> If he was terminated, however, then he would not get any benefits and prospective employers would be told

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1992 the North Carolina Supreme Court held in *Waddle v. Sparks*, 414 S.E.2d 22, 27–28 (N.C. 1992), that a plaintiff in an intentional infliction of emotional distress claim had to show a severe and disabling injury, defining the term “severe emotional distress” to mean “emotional or mental disorder, such as . . . neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so.” *Id.* at 26, 28. The plaintiff in *Waddle* merely was upset, angry, and had trouble sleeping, and thus failed to demonstrate that she experienced “severe emotional distress.” *Id.* at 28.

76. *Seitz v. Philip Morris, Inc.*, 6 Va. Cir. 428, 428 (1986) (Richmond City).

77. *Id.* Seitz’s supervisor would only say that he “used coercive and unethical tactics” in dealing with the vendors. *Id.*

78. *Id.*

of the alleged problems Sietz experienced with vendors.<sup>79</sup> Not surprisingly, Seitz chose to resign.<sup>80</sup> Soon thereafter, however, he brought a claim for intentional infliction of emotional distress against Phillip Morris.<sup>81</sup>

The court held that Seitz's claim failed to meet the first element of the intentional infliction of emotional distress tort—specifically, that there was no allegation of a specific purpose on the part of Seitz's supervisor “to inflict emotional hurt or an allegation defendant so intended his specific conduct or knew or should have known emotional injury would result thereby.”<sup>82</sup> Thus, the defendant employer's demurrer to his count of emotional distress was sustained.<sup>83</sup>

Our second case involved former employee Joseph Ellison, who brought a claim of intentional infliction of emotional distress against his former employer, St. Mary's Hospital in Richmond, alleging that he had been treated so badly that he had to leave his employment.<sup>84</sup> Ellison claimed the hospital “gave him unfair work assignments, criticized his work in front of others, told him he had an ‘attitude problem,’ took him into an office and questioned him about drug use, gave him a choice of submitting his resignation or being fired, and barred him from the hospital grounds.”<sup>85</sup>

The court held that Ellison's allegations, even if true, did not rise to the level of “extreme and outrageous” conduct needed to prevail under Virginia precedent.<sup>86</sup> The court stated that Ellison's allegations

do no more than detail a scenario carried out daily in the workplace. Every day, workers are criticized about their job performance and are undoubtedly given assignments which they feel are unfair and not part of their job description. Such conduct can hardly be given the dignity of being elevated to the level of “outrageous and intolerable in that it offends against the generally accepted standards of decency and morality.” To make such actions as plaintiff alleges actionable would be to create chaos in the work place. Workers must not be so

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79. *Id.*

80. *Id.*

81. *Id.* at 428, 431.

82. *Id.* at 431–32.

83. *Id.* at 432.

84. *Ellison v. St. Mary's Hosp.*, 8 Va. Cir. 330, 330–31 (1987) (Henrico County).

85. *Id.* at 332.

86. *Id.* at 331.



thin-skinned as to allow themselves to be unnerved by the rough and tumble of everyday life.<sup>87</sup>

Our third case involved a plaintiff named Lorine Spence, who brought an intentional infliction of emotional distress claim against her employer, arguing that the company's failure to make timely payments mandated by the Industrial Commission of Virginia as a result of Spence's job injury award was outrageous conduct.<sup>88</sup> The court disagreed, stating that the employer's "failure to make payments and subsequent filing of court actions and appeals questioning liability simply does not equate with the extreme and outrageous conduct necessary for an emotional distress claim without accompanying physical injury described in *Womack*."<sup>89</sup>

In our fourth case, a former employee of the Norfolk Sheriff's Department, Queen Starks, brought an intentional infliction of emotional distress claim against her former employer,<sup>90</sup> alleging that a co-worker, Diane Woods, had stated to other employees that Starks was a lesbian and had said to her that she didn't want another employee to "catch anything" from her.<sup>91</sup> Applying the *Russo* standard, the court rejected Stark's claim, stating: "Instances of pettiness, vindictiveness, rudeness, and mendacity among employees of large organizations and, indeed, among mankind, are innumerable."<sup>92</sup> The court concluded that the acts in question were "not so outrageous and extreme as to go beyond all possible bounds of decency."<sup>93</sup>

The court also found Starks' claim wanting with respect to the fourth element of the tort, severe emotional distress, noting that Starks only alleged severe emotional distress and severe depression, which the court defined, with the help of Webster's Dictionary, as "[d]ejection; sadness; [or] gloom."<sup>94</sup> Stated the court: "Dejection, sadness, and gloom are emotions almost everyone who enters the workplace suffers at some time. Without more, they are hardly

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87. *Id.* at 332.

88. *Spence v. E.S.I.S., Inc.*, 18 Va. Cir. 366, 366–67, 372 (1989) (Virginia Beach City). The court added that since Spence had failed to meet one of the prongs of the *Womack* test, it need not look to the other three. *Id.* at 372–73 (citing *Johnson v. McKee Baking Co.*, 398 F. Supp. 201, 209 (W.D. Va. 1975)).

89. *Id.* at 373.

90. *Starks v. McCabe*, 49 Va. Cir. 554, 554 (1998) (Norfolk City).

91. *Id.* at 555.

92. *Id.* at 558–59.

93. *Id.* at 559.

94. *Id.*

‘so severe that no reasonable person could be expected to endure’ them.”<sup>95</sup> The court ruled that Starks’ “bare assertion”<sup>96</sup> that her co-worker’s statements caused her “severe emotional distress and severe depression” did not satisfy the fourth element, and sustained the defendant employer’s demurrer.<sup>97</sup>

Finally, we have the 2011 case of Paul Blakeman, who brought an intentional infliction of emotional distress claim against his employer when he was fired for testing positive for cocaine as a result of a random drug test.<sup>98</sup> Blakeman complained that his employer failed to adhere to the in-house collection procedure and then refused to invalidate the drug test.<sup>99</sup> The court held that requiring an employee to submit to a random drug test did not constitute outrageous conduct; thus, Blakeman did not meet the second prong of the four part test.<sup>100</sup> Further, the court held, Blakeman did “not allege any objective physical injury caused by the stress” of having to take a drug test, nor did he require medical attention, and thus he did not meet the fourth prong of the test either.<sup>101</sup>

As is seen from these decisions, Virginia employees typically do not prevail in their intentional infliction of emotional distress claims. Faced with the high standard of meeting the second element of the tort—“outrageous conduct”—as set forth in *Womack*, coupled with the fourth element’s physical injury standard set forth in *Russo*, it would appear that the Virginia courts are willing to abide a wide range of mistreatment by employers without finding liability for intentional infliction of emotional distress.<sup>102</sup> However, in recent years a line of cases has developed in which Virginia employees have had greater success against their employers: claims involving sexual harassment. We turn to those cases in the following section.

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95. *Id.*

96. *Id.*

97. *Id.*

98. *Blakeman v. Emergency USA*, 83 Va. Cir. 269, 269–70 (2011) (Fairfax County).

99. *Id.* at 270.

100. *Id.* at 278–79.

101. *Id.* at 278.

102. As these cases show, the fourth element of the tort, severity, “is perhaps the most difficult to apply to the facts of a case.” *Calloway v. Commonwealth*, 99 Va. Cir. 400, 417–18 (2018) (Augusta County) (plaintiff, a visitor to a prison, “was upset, and crying” and “shocked, frightened, and felt degraded and humiliated” when she was subjected to a strip search, but the court rejected her claim that she suffered severe emotional distress).

B. *Development of the Russo Exception: Sexual Harassment and Employer Liability for Intentional Infliction of Emotional Distress*

A number of cases show that sexual harassment claims that arise in the workplace will be treated differently than might be expected under the *Russo* doctrine. As noted above, *Russo v. White* stands for the proposition that allegations of stress, humiliation, embarrassment, injury to reputation, and mental anguish unaccompanied by objective physical injury, medical attention, or lost income are not sufficient to support a claim for intentional infliction of emotion distress.<sup>103</sup> But what if an employee brings a sexual harassment case framed as a tort claim for intentional infliction of emotional distress? The answer has changed over the course of the last two decades.

In 1991, the Richmond City Circuit Court decided the case of *Hazlewood v. Mabe*.<sup>104</sup> There, employees of Richmond Newspapers claimed that a coworker, Mabe, “made undesirable, sexually suggestive physical contact with [them]; namely, in the form of pinching, grabbing, and/or fondling the plaintiff’s posterior or genitals, in a sexually suggestive manner.”<sup>105</sup> The plaintiffs alleged Mabe’s conduct “detrimentally affected their psychological well-being and has consequently interfered with their ability to adequately perform their duties in the work place . . . and that the plaintiffs have each suffered tremendous emotional distress, both at the work place and intruding on their home lives.”<sup>106</sup> Applying the *Russo* standard, the court held that the plaintiffs had failed to show severe distress, such as objective physical injury, seeking medical treatment, home or hospital confinement, or lost wages, and granted the defendant employer’s demurrer.<sup>107</sup>

A significant shift began a few years later, however, with the 1997 decision in *Hygh v. Geneva Enterprises, Inc.*<sup>108</sup> That case involved Vernetta Hygh, a receptionist at a car dealership called Geneva Enterprises.<sup>109</sup> Her supervisor, a general sales manager

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103. *Russo v. White*, 241 Va. 23, 28, 400 S.E.2d 160, 163 (1991).

104. 24 Va. Cir. 289 (1991) (Richmond City).

105. *Id.* at 290.

106. *Id.* at 293.

107. *Id.*

108. 47 Va. Cir. 569 (1997) (Fairfax County).

109. *Id.* at 570.

named Beltran, continually subjected Hygh to “sexually suggestive, harassing comments and acts.” Beltran’s harassment culminated on August 23, 1996, when, during work hours and upon Beltran’s suggestion, Hygh and Beltran first drove to a store and purchased a CD for Hygh to play in her car.<sup>110</sup> Rather than returning to the car dealership, however, Beltran drove to a secluded spot, parked the car, grabbed Hygh by the neck and attempted to force her to perform a sex act on him.<sup>111</sup> She resisted, and then resigned from her job a few days later.<sup>112</sup>

Hygh brought a number of claims against Beltran and the company, including a claim for intentional infliction of emotional distress, before the Fairfax County Circuit Court.<sup>113</sup> The employer demurred, arguing that Hygh failed to plead the necessary elements of an intentional infliction of emotional distress claim under *Hughes*—specifically, that she did not sufficiently allege the required elements of intentional conduct, a nexus between defendant’s conduct and the emotional distress, nor the severity of the distress.<sup>114</sup>

Hygh argued that her claim satisfied the necessary elements, and “that the only element in question [was] whether [her] emotional distress was severe.”<sup>115</sup> She “alleged ‘objectively verifiable evidence’ of her distress including, but not limited to, inability to return to work or college and consultation with mental health care professionals.”<sup>116</sup>

The court held that a victim of sexual assault experiences trauma which greatly differed from the type suffered by the plaintiff in *Russo*, in which the court required a showing of physical injury resulting from the outrageous conduct.<sup>117</sup> Rather, held the court, the plaintiff, “an alleged victim of sexual assault, need not plead with graphic specificity any additional objective physical injury.”<sup>118</sup> The court said: “The victim of a sexual assault clearly experiences severe emotional distress that no reasonable person

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110. *Id.*

111. *Id.* at 570, 574.

112. *Id.* at 570.

113. *Id.* at 569.

114. *See id.* at 569, 571.

115. *Id.* at 574.

116. *Id.*

117. *Id.*

118. *Id.* at 574–75.

could be expected to endure.”<sup>119</sup> Therefore, the employer’s demurrer was overruled and Hygh could pursue her claim, even without a showing of physical injury.<sup>120</sup>

A case that arose three years later, *Padilla v. Silver Diner*, involved a server named Annamarie Padilla who worked at the Silver Diner restaurant.<sup>121</sup> For the entire eleven months she worked there, Padilla was subjected to continuous sexual harassment by a co-worker at the restaurant, Dominic Williams.<sup>122</sup> He “proposition[ed] her on numerous occasions in an extremely vulgar manner,” spanked her rear end, placed his face against her breasts, asked her when they were going to have sex, and once caused her to burn herself when he pushed her against a hot oven.<sup>123</sup>

Padilla repeatedly told Williams that she was not interested in him and was offended by his behavior.<sup>124</sup> She complained to her supervisor and the operating manager at the restaurant several times.<sup>125</sup> Other wait staff also complained about Williams and other employees, and even brought their complaints to the president and vice president of the company, but no action was ever taken.<sup>126</sup> Finally, Padilla stopped working at the Silver Diner, and brought her claim of intentional infliction of emotional distress against Williams and the company, claiming liability under the theory of respondeat superior.<sup>127</sup> She filed her claim in Virginia Beach City Circuit Court.<sup>128</sup>

As in the *Hygh* case heard in Fairfax County, the Virginia Beach City Circuit Court held that although *Russo v. White* stands for the proposition that “allegations of stress, humiliation, embarrassment, injury to reputation, and mental anguish unaccompanied by objective physical injury, medical attention, or lost income are not sufficient to support a claim for intentional infliction of emotional

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119. *Id.* at 575.

120. *Id.*

121. 63 Va. Cir. 50, 51 (2000) (Virginia Beach City).

122. *Id.*

123. *Id.* at 51.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 51–52.

128. *Id.* at 51.

distress,”<sup>129</sup> there was an exception to this rule. Specifically, stated the court,

*Russo* and its progeny addressed emotional distress claims that were “independent of any physical injury and unaccompanied by any physical impact,” . . . and clearly differ from cases involving physical or sexual assaults . . . . In the cases at hand, the Plaintiffs have sufficiently alleged physical and emotional injuries resulting from physical and sexual abuse by Williams and Miller. It is apparent that Miller’s and Williams’ alleged conduct was so outrageous and offensive as to cause the Plaintiffs severe emotional distress as well as physical injuries . . . . Additionally, the Plaintiffs told Williams and Miller on multiple occasions that their conduct was unwelcome, and it may be inferred that Williams and Miller intended to cause the Plaintiffs distress by continuing to sexually assault and harass them. Accordingly, the Defendants’ demurrer is overruled.<sup>130</sup>

Then, in a case decided the same year, *Oelgoetz v. Appalachian Appraisal Services*, Roanoke City Circuit Court held that where a female supervisor had engaged in unwanted propositioning of a male subordinate, his claim for intentional infliction of emotional distress properly survived the defendant’s demurrer, even though the court expressed skepticism about whether her conduct was “sufficiently ‘extreme and outrageous’ to overcome a Motion for Directed Verdict at the conclusion of the Plaintiff’s evidence.”<sup>131</sup>

In 2005, in *Hazzis v. Modjadidi* the Norfolk City Circuit Court heard extensive allegations of sexual harassment brought by dental hygienist Magdalend Hazzis.<sup>132</sup> Specifically, she alleged that Dr. Osama Modjadidi, a dentist and employee of Konikoff Family Dentistry, used his position of authority to “forcibly rub[] his body against hers, unsnap[] her bra when her hands were engaged with the film processor,” touch her buttocks and breasts, and make “several offensive sexual remarks.”<sup>133</sup> She claimed that this sexual harassment caused her “extreme mental and emotional anguish, physical injuries, and medical expenses.”<sup>134</sup>

The court compared the sexual harassment claim in *Padilla* to the claim brought by Ms. Hazzis, and determined that the physical injuries in *Padilla* were more pronounced than those complained

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129. *See id.* at 55; *see also* *Russo v. White*, 241 Va. 23, 28, 400 S.E.2d 160, 163 (1991).

130. *Padilla*, 63 Va. Cir. at 55 (citation omitted).

131. 51 Va. Cir. 334, 334–36 (2000) (Roanoke City).

132. 69 Va. Cir. 385, 385 (2005) (Norfolk City).

133. *Id.* at 385–86.

134. *Id.* at 386.

of by Ms. Hazzis.<sup>135</sup> But joining the other three circuit courts, the Norfolk Court held that their reasoning was analogous.<sup>136</sup> “Cases dealing with elements of physical sexual harassment are distinguishable from cases like *Russo* where the allegations dealt only with non-tactile torts.”<sup>137</sup> The court concluded that the “egregiousness and physical nature of the alleged conduct, along with the plaintiff’s claims of emotional distress to the point of vomiting blood [were] sufficient to overrule the Defendant[] [employer’s] demurrers.”<sup>138</sup>

The most recent case of this type was decided in 2012. There, in *Magallon v. Wireless Unlimited Inc.*,<sup>139</sup> the Fairfax County Circuit Court, relying on its earlier ruling in *Hygh*, found that the plaintiff alleged outrageous and intolerable behavior when she claimed her former manager called her sexually demeaning names, threatened her with violence, demeaned her character by accusing her of having sexual relations with the business owner, and took her car and house keys when she rebuffed his sexual advances.<sup>140</sup> The plaintiff had “sought medical attention for her fear, anxiety, depression, and frequent vomiting . . . [and] was prescribed Zoloft and another medication to control her vomiting” and post-traumatic stress disorder.<sup>141</sup>

As seen from these decisions, the Virginia circuit courts have evolved in their view of intentional infliction of emotional distress claims involving sexual harassment in the workplace. Although it is sometimes the case that the victim of sexual harassment can demonstrate the type of physical injury and need for medical attention envisioned by *Russo*, these courts seem to demonstrate quite a sympathetic view towards plaintiffs who do not produce that level of evidence. As the *Hygh* court stated, a sexual assault

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135. *Id.* at 388–89.

136. *Id.* at 389.

137. *Id.* at 389.

138. *Id.*

139. 85 Va. Cir. 460 (2012) (Fairfax County).

140. *Id.* at 462–63, 468–69.

141. *Id.* at 463.

victim “need not plead with graphic specificity any additional objective physical injury,”<sup>142</sup> as sexual assault victims experience “severe emotional distress that no reasonable person could be expected to endure.”<sup>143</sup>

Before we return to the plight of Linda Bodewig set forth at the beginning of this article, a brief detour is in order: what role does Workers’ Compensation play in these cases?

*C. The Relationship Between the Virginia Workers’ Compensation Act and Claims for Intentional Infliction of Emotional Distress*

Briefly stated, the Virginia Workers’ Compensation Act provides benefits for injuries by accident arising out of and in the course of employment.<sup>144</sup> The Act provides the exclusive remedy for employees seeking relief from such injuries, but both conditions must be met; that is, the injury must both arise out of the employment and in the course of employment.<sup>145</sup> In other words, as the Supreme Court of Virginia held in its first decision interpreting the Act, *Bradshaw v. Aronovitch*,<sup>146</sup>

[t]he expressions “arising out of” and “in the course of” the employment are not synonymous; but the words “arising out of” are construed to refer to the origin or cause of the injury, and the words “in the course of” to refer to the time, place, and circumstances under which it occurred.<sup>147</sup>

Elaborating on these terms, the *Bradshaw* Court explained that “[a]n accident occurs ‘in the course of the employment’ when it takes place within the period of the employment, at a place where the employee may reasonably be, and while he is reasonably fulfilling duties of his employment or engaged in doing something incidental thereto.”<sup>148</sup> Further, the court found, the Act requires “a causal connection between the conditions under which the work is

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142. *Padilla v. Silver Diner*, 63 Va. Cir. 50, 51 (2000) (Virginia Beach City) (quoting *Hygh v. Geneva Enters., Inc.*, 47 Va. Cir. 569, 575 (1997) (Fairfax County)).

143. *Id.*

144. *See generally* VA. CODE ANN. §§ 65.2-100 to -1310 (Repl. Vol. 2017 & Cum. Supp. 2019).

145. *Id.* § 65.2-307 (Repl. Vol. 2017 & Cum. Supp. 2019).

146. 170 Va. 329, 196 S.E. 684 (1938).

147. *Id.* at 335, 196 S.E. at 686.

148. *Id.* at 335, 196 S.E. at 686.



required to be performed and the resulting injury.”<sup>149</sup> The court explained that “if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation . . . then it arises ‘out of’ the employment.”<sup>150</sup> The Act, however, “excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment.”<sup>151</sup> In other words, the danger to which the employee is exposed must be “peculiar to the work and not common to the neighborhood.”<sup>152</sup>

So what does this mean for an employee working in the Commonwealth of Virginia who suffers what he or she believes to be severe emotional distress stemming from the outrageous conduct of an employer? The answer depends on whether the court finds that the complained-of action meets the Act’s definition of an accident arising out of and in the course of employment.

For example, in *Abney v. Wimer*, the court considered the intentional infliction of emotional distress claim brought by Kimberly Abney against her employer, the J.C. Penney Company.<sup>153</sup> Abney was summoned to her supervisor’s office, where she was informed that she was fired.<sup>154</sup> Her supervisor then enlisted the aid of another employee, Nevin Wimer, in escorting Abner out of his office and off the store premises.<sup>155</sup> Abney claimed that Wimer assaulted her and “forcibly lifted her up and out of the chair and intentionally threw [her] to the floor causing [Abney] to break three bones in her right foot.”<sup>156</sup>

The employer argued that Abney’s intentional infliction of emotional distress tort claim was barred by the exclusivity provision of the Virginia Workers’ Compensation Act, and the court agreed.<sup>157</sup> Stated the court:

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149. *Id.* at 335, 196 S.E. at 686.

150. *Id.* at 335, 196 S.E. at 686.

151. *Id.* at 335, 196 S.E. at 686.

152. *Id.* at 335, 196 S.E. at 686.

153. 60 Va. Cir. 87, 87 (2002) (Norfolk City).

154. *Id.* at 87.

155. *Id.*

156. *Id.* at 87–88.

157. *Id.* at 88, 91.

Every event in this scenario, the Plaintiff's going into her supervisor's office to discuss a work-related matter, the termination, and the requests that Plaintiff depart from the premises, was work-related and, therefore, arose out of her employment. Even the alleged assault arose out of Plaintiff's employment, for it involved a work-related matter.<sup>158</sup>

Thus, the court found that Abney's injuries "arose out of [her] employment" with defendant J.C. Penney.<sup>159</sup> Further, Abney's injuries occurred at her place of employment, during working hours, and in circumstances directly related to her employment—or at least directly related to her discharge from employment.<sup>160</sup> Her exclusive remedy, therefore, was under the Virginia Workers' Compensation Act (which, of course, limited her potential damages, unlike an intentional tort claim).<sup>161</sup>

By contrast, in *Middlekauff v. Allstate Insurance Co.*, an employee named Texanna Middlekauff brought an action against her employer for intentional infliction of emotional distress stemming from harassment and verbal abuse from her supervisor.<sup>162</sup> Specifically, she alleged in her complaint that her supervisor, Tony Richards, "intentionally sought to humiliate her in front of other employees by making derisive comments concerning the fact that she was overweight, as well as sexist and other belittling remarks."<sup>163</sup> The trial court held that the action was barred by the exclusivity provision of the Virginia Workers' Compensation Act,<sup>164</sup> but the Supreme Court of Virginia held that her claim was not barred by the exclusivity provision because she did "not allege an 'injury by accident' 'arising out' of her employment."<sup>165</sup> Thus, the exclusivity provision did not bar Middlekauff's action and she could proceed with her intentional infliction of emotional distress claim against the defendant employer.<sup>166</sup>

The same result was reached with respect to the intentional infliction of emotional distress claim arising out of the sexual harassment in *Padilla v. Silver Diner*,<sup>167</sup> the case discussed earlier where

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158. *Id.* at 90.

159. *Id.*

160. *Id.*

161. *Id.*

162. 247 Va. 150, 439 S.E.2d 394, 395 (1994).

163. *Id.* at 151, 439 S.E.2d at 394, 395.

164. *Id.* at 151, 439 S.E.2d at 395–96 (citing VA. CODE ANN. § 65.2-307 (Repl. Vol. 1991)).

165. *Id.* at 154, 439 S.E.2d at 396–97.

166. *Id.* at 154, 439 S.E.2d at 396–97.

167. 63 Va. Cir. 50, 51–53, 55 (2000) (Virginia Beach City).

the waitress was continually harassed by her supervisor for more than a year. There, the court held:

The Act applies to injuries by accident arising out of and in the course of employment and occupational diseases. An injury is “by accident” when it (1) “appeared suddenly at a particular time and place and upon a particular occasion, (2) . . . was caused by an identifiable incident or sudden precipitating event, and (3) . . . resulted in an obvious mechanical or structural change in the human body.” An injury that is the result of the willful and intentional assault of either a fellow employee or a third person does not prevent the injury from being accidental within the meaning of the Act.<sup>168</sup>

Thus, held the court, while as a general rule an intentional tort of an employer or a fellow employee would be found to be within the scope of the Virginia’s Workers’ Compensation Act and thus the employee’s exclusive remedy,<sup>169</sup> the assault must be “personal to the employee and not directed against him as an employee or because of his employment.”<sup>170</sup>

In Padilla’s case, her fellow employees both admitted that they were trying to get her to succumb to their sexual advances; thus, their assaults were of a personal nature, directed against Padilla as a woman, not as an employee.<sup>171</sup> Therefore, the court concluded, the Virginia Workers’ Compensation Act did not bar Padilla’s claim as her injuries did not arise out of employment as required by the Act.<sup>172</sup> Further, held the court, Padilla “sufficiently alleged physical and emotional injuries resulting from physical and sexual abuse” by her fellow employees, their alleged conduct was outrageous, and they intended to cause her distress by continued sexual assault and harassment.<sup>173</sup> Thus, the defendant employer’s demurrer was overruled.<sup>174</sup>

In summary, if an assault, including sexual harassment, is not directed against an employee because of his or her employment,

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168. *Id.* at 53 (citations omitted).

169. *Id.* at 53; *Haddon v. Metro. Life Ins. Co.*, 239 Va. 397, 398–99, 389 S.E.2d 712, 713–14 (1990).

170. *Padilla*, 63 Va. Cir. at 53 (citing *Richmond Newspapers v. Hazelwood*, 249 Va. 369, 373, 457 S.E.2d 56, 58 (1995)); *see also* *City of Richmond v. Braxton*, 230 Va. 161, 162–65, 335 S.E.2d 259, 260–62 (1985) (holding that a sexual assault on a female employee was of a personal nature and not directed against the employee as part of the employment relationship).

171. *Padilla*, 63 Va. Cir. at 54.

172. *Id.*

173. *Id.* at 55.

174. *Id.*

then it does not “arise out of the employment.”<sup>175</sup> In those circumstances, if an employee brings an intentional infliction of emotional distress claim arising from such an assault or harassment, the Virginia Workers’ Compensation Act does not bar these claims because the injury is not a compensable injury by accident.<sup>176</sup>

### III. BACK TO THE BEGINNING: APPLYING VIRGINIA LAW TO *BODEWIG*

When we left our protagonist, Linda Bodewig, she had filed a claim for intentional infliction of emotional distress against her employer after Bodewig was strip-searched in an effort to assuage a customer’s concerns that she had stolen the customer’s money.<sup>177</sup> Like other courts, the Oregon courts applied the same four elements of the tort of intentional infliction of emotional distress: (1) intent; (2) outrageous conduct; (3) a causal connection between the conduct and the emotional distress; and (4) the emotional distress was severe.<sup>178</sup> The Court of Appeals of Oregon reversed the trial court’s grant of summary judgment, finding that a jury could find the employer acted intentionally, and that the manager’s conduct went “beyond the limits of social toleration and reckless of the conduct’s predictable effects” on Linda Bodewig.<sup>179</sup> Having satisfied the tort elements of intentionally engaging in outrageous conduct,

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175. *Hazelwood*, 249 Va. at 373, 457 S.E.2d at 58.

176. *Lichtman v. Knouf*, 248 Va. 138, 139–40, 445 S.E.2d 114, 114–15 (1994); *see also* *Reamer v. Nat’l Serv. Industries*, 237 Va. 466, 467–68, 470–71, 377 S.E.2d 627, 628–30 (1989) (woman working alone in a furniture store who was sexually assaulted by man who entered the store through employees’ entrance, forcibly took her into the bathroom, and raped her twice before robbing the store was victim of sexual assault that was personal to her and not directed at her because she was an employee, so her claims not barred by Workers’ Comp.); *City of Richmond v. Braxton*, 230 Va. 161, 162, 164–65, 335 S.E.2d 259, 260–62 (1985) (ticket-seller at city-owned theatre who was molested by her supervisor at the place of and during the hours of employment, did not suffer an accident arising out of the employment, since there was no causal connection between the injury and the employment as the finding that the employee would have been equally exposed to the risk of the hazard of being molested outside of work); *Morgan v. Brophy*, 94 Va. Cir. 301, 301–03 (2016) (Chesapeake City) (employee claim for intentional infliction of emotional distress against employer where her supervisor cursed her and shoved boxes at her was victim of an assault, and her injury did not arise out of the employment as it was personal, so the Workers’ Compensation Act did not bar her claim); *Morgan v. MDC Holdings, Inc.*, 54 Va. Cir. 45, 45, 52 (2000) (Fairfax County) (plaintiff was sexually assaulted by a fellow employee and her claim was not barred by the Workers’ Compensation Act).

177. *Bodewig v. K-Mart, Inc.*, 635 P.2d 657, 658–59 (Or. Ct. App. 1981).

178. *Id.* at 660–62.

179. *Id.* at 661–62.

the court then turned to the elements of causation and severe emotional distress, and held as follows:

If the facts presented are believed, plaintiff suffered shock, humiliation and embarrassment, suffering that was not merely transient. Plaintiff characterized herself as a shy, modest person, and said that she had two or three sleepless nights, cried a lot and still gets nervous and upset when she thinks about the incident. Concededly, this element of the tort has been, and still is, troublesome to courts. K-Mart contends there is no objective evidence of the distress, such as medical, economic or social problems. In *Rockhill v. Pollard*, . . . plaintiff became nervous and suffered from sleeplessness and a loss of appetite over a period of about two years. The court said: "Defendant belittles these symptoms, but it is the distress which must be severe, not the physical manifestations."<sup>180</sup>

The court concluded that Bodewig's distress "was more than that which a person might be reasonably expected to pay as the price of living among people."<sup>181</sup> The court concluded that Bodewig's evidence of severe emotional distress was sufficient to go to a jury.<sup>182</sup>

But what if Linda Bodewig was not an Oregon resident, but rather a resident of the Commonwealth of Virginia? How would she have fared then?

First, it seems clear that *Bodewig* could meet the first three elements of the tort of intentional infliction of emotional distress. In a somewhat analogous case decided in Virginia last year, *Calloway v. Commonwealth*, the Augusta County Circuit Court evaluated the claim of a visitor to a detention facility who was subjected to a strip search.<sup>183</sup> There, the court said:

It cannot be seriously contested that Calloway has pled the first three elements of IIED. First, she alleges that the VDOC employees acted intentionally, *i.e.*, that they knew they had no legal reason to detain her or subject her to a strip search; a jury could reasonably conclude that an officer should have known that an unwarranted strip search could likely cause emotional distress. Second, an unjustified strip search strikes the Court as so invasive a procedure that any reasonable person could (perhaps would) describe it as "outrageous," if not

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180. *Id.* at 662 (quoting *Rockhill v. Pollard*, 485 P.2d 28, 32 (Or. 1971)).

181. *Id.*

182. *Id.*

183. 99 Va. Cir. 400, 400 (2018) (Augusta County).

justified. Finally, Calloway clearly alleges a causal connection between the VDOC employees' conduct and the stress she claims. Those issues properly are jury questions.<sup>184</sup>

However, turning to the fourth element of the tort, severity, which the court characterized as “perhaps the most difficult to apply to the facts of a case,” the court held that the plaintiff failed to carry her burden.<sup>185</sup> Even though Calloway “was upset, and crying” and “shocked, frightened, and felt degraded and humiliated”<sup>186</sup> when she was subjected to the strip search, the court rejected her claim that she suffered severe emotional distress under the *Russo* standard.<sup>187</sup>

Recall that Patricia Russo experienced “nervousness, sleeplessness, [and] stress.”<sup>188</sup> Similarly, Linda Bodewig experienced nervousness, sleeplessness, and stress.<sup>189</sup> However, under the standard set forth in *Russo v. White*, Bodewig would fail to meet the fourth prong of the tort. She had no objective physical injury caused by the stress, she didn't seek medical attention, nor was she was confined at home or in a medical facility.<sup>190</sup>

Bodewig might also face an argument by the defendant employer, K-Mart, that the Virginia Workers' Compensation Act provided her exclusive remedy. The actions of the K-Mart manager in subjecting her to a strip search at her place of employment, during working hours, and in circumstances directly related to her employment (specifically, in response to a customer's accusation of theft by the employee), arguably led to her injury “by accident arising out of and in the course of employment.”<sup>191</sup> Bodewig's counter argument would be that there was no accident giving rise to an injury, and that would seem to be a convincing argument under the precedent set by *Middlekauff v. Allstate Insurance. Company*<sup>192</sup> as discussed above.

So let's assume the exclusivity provision of the Virginia Workers' Compensation Act would not bar Linda Bodewig's intentional infliction of emotional distress claim. As noted above, Bodewig would

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184. *Id.* at 418.

185. *Id.* at 417.

186. *Id.* at 418.

187. *Id.*

188. *Russo v. White*, 241 Va. 23, 25, 400 S.E.2d 160, 161 (1991).

189. *Bodewig v. K-Mart, Inc.*, 635 P.2d 657, 662 (Or. Ct. App. 1981).

190. *See id.*

191. *Padilla v. Silver Diner*, 63 Va. Cir. 50, 53 (2000) (Virginia Beach City).

192. 247 Va. 150, 439 S.E.2d 394 (1994).

not prevail in Virginia as she did in Oregon because of the exacting requirements of *Russo*. But why should this be the case, given the numerous Virginia circuit court holdings that employees who suffer from sexual harassment can prevail without meeting *Russo*'s additional requirement of the tort's fourth prong? More critically, why should this additional requirement be the law at all, since, as Justice Hassell made clear in his *Russo* dissent, physical injury is not a necessary element under traditional intentional infliction of emotional distress analysis? Frankly, it seems an odd result that a woman like Linda Bodewig, who is strip searched and who suffers the predictable response of sleeplessness, nervousness, and stress, will not recover damages, while an employee who is subjected to repeated propositioning at work, like Annemarie Padilla, can succeed on her claim.

A brief review of a century of Virginia court decisions concerning the issue of damages for emotional distress, arising in various tort contexts, shows that the Virginia courts have not been rigid in their approach, but rather have shifted their analysis over time as we gain a better appreciation for the nuances of mental suffering—what causes it, how it manifests itself, and what constitutes severity. This shift is evidenced, for example, in negligence cases, where the court abandoned the requirement of physical impact and moved to the broader standard of finding injury from “the natural result of fright or shock.”<sup>193</sup> No argument is made here to change the four basic elements of the intentional infliction of emotional distress claim. Requiring a plaintiff to show that a defendant intentionally engaged in outrageous conduct, that which “shocks the conscience,” is a fair burden; it is a standard that is appropriately difficult to meet (although as societal standards change, outrageousness may be even harder to demonstrate). But the question of what constitutes “severe emotional distress,” caused by the defendant, is one that the Virginia courts should show a willingness to reconsider. Lower courts have done so in some recent sexual harassment cases. Abandoning the extra burden *Russo* places on plaintiffs would lead to a better, fairer result in all circumstances involving employer and employee, not just in sexual harassment claims. The result would be a better workplace and a more balanced view of employee rights. Let us hope Virginia revisits the question again soon.

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193. *Hughes v. Moore*, 214 Va. 27, 34, 197 S.E.2d 214, 219 (1973).