IN THE SUPREME COURT OF TEXAS

NO. 02-0120

HOFFMANN-LA ROCHE INC., A/K/A "ROCHE," PETITIONER

v.

JOAN ZELTWANGER, A/K/A JOAN GONZALES, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

Argued on February 5, 2003

JUSTICE O'NEILL, concurring, joined by JUSTICE SMITH.

In attempting to cabin what has clearly become an amorphous and overused tort, the Court has fashioned a cure that is worse than the disease. The "gap-filler" approach that the Court adopts to determine the viability of a claim for intentional infliction of emotional distress is unworkable and ill-advised. The sounder jurisprudential course would be to once again emphasize the stringent threshold an employee must meet to assert an intentional-infliction claim based on conduct occurring in the workplace. The conduct presented in this case, although certainly repugnant and reprehensible, did not rise to the extremely high level we have set for this tort. Accordingly, I concur in the Court's judgment, but not its reasoning.

I

Under the approach that the Court adopts today, the availability of a remedy for sexual harassment would foreclose an intentional-infliction claim to the extent that the two claims are based upon the same facts. Though beguilingly straightforward in theory, the "gap-filler" approach presents myriad problems in application that will, I believe, ultimately prove to be unworkable.

For example, it is often difficult to discern whether the same facts will support different causes of action, forcing the fact-finder "to draw a virtually impossible distinction between recoverable and disallowed injuries." *Twyman v. Twyman*, 855 S.W.2d 619, 627 (Tex. 1993) (PHILLIPS, C.J., concurring and dissenting). In cases like this one, an employer would essentially be required to present evidence to show that the acts complained of were in fact sexually motivated, thus *supporting* a sexual harassment claim, in order to obtain summary disposition of a claim for intentional infliction of emotional distress.

Moreover, while some of a supervisor's allegedly abusive actions in the workplace may have sexual motivations, others may not. Thus, conduct that would support an intentional-infliction claim might not support a sexual harassment claim, and vice-versa. In this case, Zeltwanger alleges certain actions that she claims are separate and apart from those constituting sexual harassment, such as "public humiliation, verbal oppression, physical threats, abuse of power, and mistreatment of an employee known to be peculiarly susceptible to emotional distress." We simply cannot know until a jury returns its verdict whether or not particular alleged behavior was sexually motivated, and even then it will prove difficult if not impossible for reviewing courts to parse the potentially overlapping evidence that might support the jury's findings.

Adopting a categorical "gap-filler" approach in all cases presents other problems, as well. For instance, plaintiffs may choose to forego pleading other available remedies in hopes of obtaining a potentially more lucrative intentional-infliction recovery. This would have the untenable effect of forcing defendants to assume the burden of proving alternative means of recovery *against themselves* to avoid intentional-infliction exposure. And if the plaintiff does decide to plead multiple liability theories based on the same facts, what happens if the jury fails to find liability on any other claim but intentional infliction of emotional distress? Does the fact that the plaintiff did not sustain his or her evidentiary burden on an alternative claim create a gap that intentional infliction was designed to fill? For these reasons, I would decline to adopt a categorical gap-filler approach in this case, without foreclosing the possibility that it might be appropriate in some other.

II

Hoffman-La Roche alternatively challenges the legal sufficiency of the evidence to support Zeltwanger's claim for intentional infliction of emotional distress, whether we focus only on Roche's acts, as the court of appeals did, or on Webber's as well. Specifically, Roche claims there is no evidence of extreme and outrageous conduct as we have defined it for purposes of this tort. I agree that, as a matter of law, the record here will not support a claim for intentional infliction of emotional distress.

To recover damages for intentional infliction of emotional distress, a plaintiff must establish that: (1) the defendant acted intentionally or recklessly; (2) the defendant's conduct was extreme and outrageous; (3) the defendant's actions caused the plaintiff emotional distress; and (4) the resulting emotional distress was severe. *Standard Fruit & Vegetable Co. v. Johnson*, 985 S.W.2d 62, 65 (Tex.

1998). To be extreme and outrageous for purposes of this tort, the conduct must be "'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.'" *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993) (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965)). It is for the court to determine, in the first instance, whether particular conduct has met this high standard. *See GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 616 (Tex. 1999); RESTATEMENT (SECOND) OF TORTS § 46 cmt. h (1965).

Roche contends that, in cases involving sexual misconduct in the workplace, courts have reached irreconcilable results in attempting to define extreme and outrageous conduct, providing no clear guidance to employers. Roche urges us to articulate specific criteria delineating when sexual harassment in the workplace becomes so egregious that it will support a claim for intentional infliction of emotional distress. Extreme and outrageous conduct in this context, Roche contends, should be defined as behavior of a continuing nature which is physically abusive or so threatening of immediate and substantial physical abuse that a reasonable person would feel afraid.

I agree with Roche that the legal standard for "extreme and outrageous conduct" sufficient to support an intentional-infliction claim has proved to be amorphous and often inconsistent. Since we first adopted the tort, it has been criticized as overly subjective and heavily value-laden. *See, e.g.*, *Twyman*, 855 S.W.2d at 629 (HECHT, J., concurring and dissenting). In the employment context, particularly, we have set an exceptionally high bar to prevent employers from facing liability for "ordinary employment disputes." *GTE Southwest*, 998 S.W.2d at 612-13. We have recognized that employers, in properly managing their businesses, must be afforded wide latitude

"to supervise, review, criticize, demote, transfer, and discipline employees," even though emotional distress will likely result. *Id*. at 612. In fact, we have held an employer's conduct to be sufficiently extreme and outrageous to support recovery for intentional infliction of emotional distress on only one occasion. *See id.* at 617. A close reading of that decision reveals that we applied a test very close to the one Roche advocates here.

In *GTE*, we recognized that an employee "may recover damages for intentional infliction of emotional distress in an employment context as long as the employee establishes the elements of the cause of action." *Id.* at 611. We cautioned, however, that an intentional-infliction claim "does not lie for ordinary employment disputes," *id*. at 612-13, but "only in the most unusual of circumstances." *Id.* at 613. In that case, three female employees sued GTE based upon their supervisor's abusive conduct. There was evidence that, like Webber, the supervisor continually told offensive jokes and engaged in sexual innuendo over the employees' repeated objections. *Id.* at 613. But there was additionally evidence that, in conjunction with that sexually harassing behavior, the supervisor repeatedly physically and verbally threatened and terrorized the employees. There was evidence, for example, that the supervisor

> was continuously in a rage, and that [he] would frequently assault each of the employees by physically charging at them. . . . [He] would bend his head down, put his arms straight down by his sides, ball his hands into fists, and walk quickly toward or "lunge" at the employees, stopping uncomfortably close to their faces while screaming and yelling. The employees were exceedingly frightened by this behavior, afraid that [he] might hit them. [A witness] testified that [the supervisor] charged the employees with the intent to frighten them. At least once, another employee came between [him] and [another employee] to protect her from [his] charge.

Id. at 613-14. There were numerous other occasions when the supervisor engaged in behavior that caused employees to feel immediately physically threatened. He would at least daily require one employee to come into his office and stand before him while he silently stared at her for as long as thirty minutes, on one occasion backing her into a corner and leaning over her while he engaged in verbal abuse. *Id.* at 614.

In sustaining the employees' judgment for intentional infliction of emotional distress, we emphasized "the severity and regularity of [the supervisor's] abusive and threatening conduct." *Id.* at 617. We emphasized that employers must have substantial leeway in supervising and disciplining employees, and that "[o]ccasional malicious and abusive incidents should not be condoned, but must often be tolerated in our society." *Id.* But we concluded that the supervisor in *GTE* exceeded that leeway by "regularly assault[ing], intimidat[ing], and threaten[ing]" workers such that the workplace became "a den of terror for the employees." *Id.* Thus, we made it clear that the bar an employee must meet to assert a claim for intentional infliction of emotional distress in the workplace is exceptionally high.

The conduct Zeltwanger alleges in this case, while certainly vulgar and reprehensible, is not comparable to the pattern of behavior established in *GTE*. While there is evidence that Webber pounded on the dashboard of Zeltwanger's car on one occasion, touched her hair on another, rifled through her underwear drawer – purportedly in search of her stereo – on yet another, and was verbally abusive in conducting Zeltwanger's performance review, there is no evidence that he "regularly assaulted, intimidated, and threatened" her in the manner that *GTE* requires. *Id*. There is no suggestion of a deviation from normal practices in requiring Zeltwanger to undergo a

performance review in Webber's home, given the company's structure, or in advising Webber that Turicchi would observe the review. While relying on a performance review compiled by a supervisor who could not be expected to be objective may reflect poor business judgment, it is not extreme and outrageous for purposes of supporting liability for intentional infliction of emotional distress. And while telling dirty jokes, discussing body parts, boasting of sexual prowess, flipping hair while referencing a "bad hair day," and delivering a cash prize through clenched teeth as though in a topless bar certainly constitute unacceptable workplace behavior supportive of a sexual-harassment claim, it does not, as a matter of law, amount to intentional infliction of emotional distress.

Undoubtedly, most conduct that would support a sexual-harassment claim is outrageous and intolerable, presumably the very reason the Legislature made such conduct statutorily actionable. But only when such behavior repeatedly becomes so forceful and intimidating that a reasonable person would feel immediately threatened or afraid can a court conclude with sufficient certainty that the actor intended to cause severe emotional distress or that severe emotional distress was the primary risk of the actor's conduct. *See Standard Fruit & Vegetable Co.*, 985 S.W.2d at 63. The record here reflects numerous instances of repugnant behavior and poor judgment. It does not, however, demonstrate a regular pattern of severely abusive behavior "'so outrageous in character, and so extreme in degree,'" as to support a claim for intentional infliction of emotional distress. *Twyman*, 855 S.W.2d at 621 (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965)).

III

Accordingly, I concur in the Court's judgment, but not its reasoning.

Harriet O'Neill
Justice

OPINION DELIVERED: August 27, 2004.