Torts/Sexual Harassment - Extreme and Outrageous Conduct: Wyoming Recognizes Workplace Sexual Misconduct as the Basis for an Intentional Infliction of Emotional Distress Claim - Kanzler v. Renner

Clay Mahaffey

Follow this and additional works at: https://scholarship.law.uwyo.edu/land_water

Recommended Citation

This Note is brought to you for free and open access by Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Land & Water Law Review by an authorized editor of Law Archive of Wyoming Scholarship.

INTRODUCTION

On August 22, 1995, Sharon Kanzler, a former dispatcher for the Cheyenne Police Department, filed a claim in state district court alleging intentional infliction of emotional distress arising from David Renner's inappropriate sexual advances.1 Renner, a Cheyenne police officer, filed a motion for summary judgment on January 10, 1996. The court granted the motion on the grounds that Renner's conduct was not sufficiently outrageous to present an issue to a jury.2 On appeal, the Supreme Court of Wyoming reversed, holding that summary judgment was not appropriate under the circumstances because Kanzler had presented sufficient evidence to support her claim and, more significantly, that sexual misconduct within the workplace can give rise to a claim of intentional infliction of emotional distress.3

Kanzler worked as a police dispatcher for the Cheyenne Police Department from July 12, 1982, through August 14, 1991.4 During her employment, she met and befriended Renner.5 Kanzler claims that in March of 1991 Renner's behavior toward her drastically changed. Over the following weeks, Renner made offensive and unwelcome advances, each act more aggressive than the last.6

Kanzler alleges that during this period Renner followed her, intimidated her, touched her, and finally attacked her.7 Kanzler also claims that as a result of Renner’s actions she could no longer perform her job and was forced to resign.8 Ms. Kanzler began visiting a counselor who diagnosed her

2. Id. at 1340-41.
5. Brief for Appellant at 5, Kanzler, 937 P.2d 1337.
7. Id. at 1339-40.
8. Id. at 1340.
with post traumatic stress disorder associated with the work incidents.⁹ As a result of these events, Kanzler filed suit against Renner in Laramie County District Court. This case eventually came before the Wyoming Supreme Court under the name *Kanzler v. Renner.*¹⁰

This note will describe the basic tenets of sexual harassment jurisprudence, at intervals using the cases which have arisen from the events alleged by Kanzler as illustrative examples. The analysis considers the significance of the Wyoming Supreme Court’s decision in *Kanzler v. Renner* within the broader context of sexual harassment law.¹¹ The note argues that the *Kanzler* decision is important because it exposes individuals to personal liability for sexual harassment. The analysis also describes the benefits and drawbacks of using state tort law as a supplement or substitute for causes of action under federal antidiscrimination statutes.

**BACKGROUND**

*Development of Legal Actions Based Upon Sexual Harassment*

Sexual harassment claims are a relatively recent legal development, yet they have had a tremendous impact on America’s business and judicial communities. One writer suggested, “sexual harassment is one of the most significant labor issues of the 1980s,” and there is no indication the subject

---

9. Id.

Kanzler filed suit against the City of Cheyenne and against David Renner in his individual and official capacities. She claimed that both defendants had violated Title VII of the Civil Rights Act of 1964 and asserted that Renner was liable for intentional infliction of emotional distress. *Ball,* 845 F. Supp. at 805-06. (Kanzler also claimed that the city had denied her equal protection under 42 U.S.C. § 1983 and claimed that the city was liable under a public policy tort theory. The court rejected these claims. Id.) The City of Cheyenne moved for summary judgment, but the court held that issues of material fact precluded granting such a motion on Kanzler’s Title VII claim. *Id.* at 810. Defendant Renner also moved for summary judgment as to all claims Kanzler asserted against him. The district court granted Renner’s motion. *Id.* at 813-14. The City prevailed at a bench trial on May 18, 1994. Brief for Appellant at 3, *Kanzler,* 937 P.2d 1337.

On appeal to the United States Court of Appeals for the Tenth Circuit, Kanzler contested the district court’s entry of summary judgment in favor of Renner. *Ball v. Renner,* 54 F.3d 664 (10th Cir. 1995). The court of appeals affirmed the dismissal of Kanzler’s Title VII claim against Renner, but reversed the dismissal of the intentional infliction of emotional distress claim—instead ordering that the state tort law claim should be dismissed without prejudice so that it might be brought before a state court. *Id.* at 664-65.

11. This note is devoted to the issue of workplace sexual harassment. The separate issue of qualified immunity for municipal employees will not be addressed here.
has lost significance in the 1990s.\textsuperscript{12}

Early in this century, women seeking to recover for mental distress and humiliation arising from illicit sexual advances would also need to establish an underlying tort, such as assault and battery or trespass.\textsuperscript{13} In 1976, however, the first Title VII sexual harassment case was decided.\textsuperscript{14} Following this decision, plaintiffs began to bring successful actions under Title VII of the Civil Rights Act of 1964 and state antidiscrimination laws.\textsuperscript{15}

Though plaintiffs may bring a sexual harassment claim exclusively under Title VII or a state civil rights statute, employees who feel they have been sexually harassed often add a pendent tort claim, or proceed with a suit based solely under one or more theories of tort liability.\textsuperscript{16} Frequently used tort theories include: negligent retention, negligent failure to supervise and train managers, defamation, infliction of emotional distress, invasion of privacy, assault and battery, and malicious prosecution.\textsuperscript{17}

\textit{Sexual Harassment Claims Under Title VII: Quid Pro Quo and Hostile Environment}

Sexual harassment is actionable under Title VII of the Civil Rights Act of 1964 as a form of sex discrimination.\textsuperscript{18} The Act makes it unlawful for an employer to “discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”\textsuperscript{19} Case law, EEOC guidelines, and several important Supreme Court cases have fleshed out what kind of employment practices violate Title VII.

\begin{footnotes}
\begin{enumerate}
\item Arthur J. Marinelli, Jr., \textit{Title VII: Legal Protection Against Sexual Harassment}, 20 AKRON L. REV. 375 (1987). Marinelli and other commentators cite an influential definition of sexual harassment offered in CATHARINE A. MACKINNON, \textit{SEXUAL HARASSMENT OF WORKING WOMEN}, 1 (1979). Sexual harassment is defined therein as “the unwanted imposition of sexual requirements in the context of a relationship of unequal power.” \textit{Id.}
\item Ronald M. Green & Richard J. Reibstein, \textit{Employer’s Guide to Workplace Torts} 201 (1992). Because state antidiscrimination laws are predominantly modeled after federal antidiscrimination laws and interpreted like their federal counterparts, this note focuses on Title VII of the Civil Rights Act of 1964.
\item \textit{Id.} at 201.
\item \textit{Id.} at 201-04. The authors provide a concise description of each tort theory within the sexual harassment/workplace context.
\item See generally Marinelli, supra note 12, for a complete discussion of the early case law in which various courts, and the U.S. Supreme Court, came to recognize sexual harassment as an actionable form of sex discrimination under Title VII.
\end{enumerate}
\end{footnotes}
From these sources, two basic categories of sexual harassment have emerged, each reflecting a different factual situation. The two categories are 1) quid pro quo, and 2) hostile environment. Quid pro quo harassment occurs when a manager or supervisor makes an employee’s terms or privileges of employment, such as wages or advancement, contingent upon that employee’s submission to sexual advances or demands.

In the early 1980s, courts began to recognize what they called an “abusive” or “hostile” work environment as a form of sex discrimination that violated Title VII. The United States Supreme Court endorsed this view in the watershed case, *Meritor Savings Bank v. Vinson.* In *Meritor*, the Court held that even absent an “economic” or “tangible” quid pro quo, unwelcome and inappropriate sexual behavior could constitute prohibited sexual harassment where, “such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.” As the Court carefully pointed out, however, “for sexual harassment to be actionable it must be sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.”

The Supreme Court revisited the issue of what a plaintiff must show to establish actionable hostile work environment harassment in *Harris v. Forklift Systems.* In *Harris*, the Court expanded the holding in *Meritor*, explaining that Title VII can be violated without actual psychological injury to the victim, so long as an environment would reasonably be perceived, and is perceived, as hostile or abusive. Thus, after *Harris*, the plaintiff has a twofold burden to demonstrate a hostile work environment. First, she must show that a reasonable person would find the environment hostile or abusive. Second, the plaintiff must show a subjective perception that the envi-

21. Id. at 243.
24. Id. at 65.
25. Id. at 67.
26. 510 U.S. 17 (1993). Prior to the *Harris* decision there was a split among the Circuits regarding whether harassment must seriously affect the victim’s psychological well being. Another unsettled issue was whether courts should assess the abusive work environment by the standard of a reasonable person or of a reasonable woman. Compare Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986), with Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991).
27. *Harris*, 510 U.S. at 22.
The *Harris* court noted that lower courts should weigh all the circumstances when determining whether an environment is hostile. *Harris* also set forth specific factors lower courts may consider when reviewing sexual harassment claims. By allowing courts to consider the victim's psychological damage as an indication of an abusive environment, rather than as a prerequisite to recovery, the overall result of the *Harris* decision was to make it easier for victims to make a prima facie showing in lawsuits using a hostile work environment as grounds for the action.

A recent Supreme Court case, *Oncale v. Sundowner Offshore Services, Inc.*, resolved the issue of whether same-sex sexual harassment could violate Title VII. The Court unanimously held that it could, but that the plaintiff must "always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted 'discriminat[ion] ... because of sex.'" The Court also reaffirmed the *Harris* standard. The applicable standard in determining whether a work environment is objectively hostile is that of a *reasonable person*.

In order to recover for either quid pro quo or hostile environment harassment, the plaintiff must further show that the alleged harassment occurred and that the conduct was unwelcome. In order to establish that the conduct was unwelcome, courts will consider whether or not the plaintiff complained about the conduct either informally or through a formal procedure, or otherwise indicated the conduct was offensive.

28. Roberts & Mann, *supra* note 14, at 280. However, another writer has described how confusion regarding the application of the objective/subjective standard has survived in cases following *Harris*. She also argues that *Harris* did not definitively end the debate as to whether harassment should be judged by a "reasonable woman" standard, or by a "reasonable person" standard. See Sarah E. Burns, *Evidence of a Sexually Hostile Workplace, What Is It and How Should It Be Assessed After Harris v. Forklift Systems, Inc.?*, 21 N.Y.U. REV. L. & SOC. CHANGE 357 (1994-95).

29. *Harris*, 510 U.S. at 23. The Court held that the following factors are proper considerations: frequency of the discriminatory conduct; severity of the conduct; whether it is physically threatening or humiliating or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. Id.

30. Id.

31. Burns, *supra* note 28, at 398-99. Burns argues that *Harris* corrects former anomalies in the case law which were contradictory to the goals of Title VII.


33. Id. at 1002 (Ginsburg, J., concurring).

34. Id. (emphasis added).

35. FELIU, *supra* note 20, at 223.

36. Id. at 242. This evidence will not always be present, especially if the employee fears the repercussions of lodging such a complaint. Id. at 241-43.
Who May Be Held Liable for Sexual Harassment Under Title VII

A. Employer Liability

Title VII forbids discrimination on the part of employers. The Act defines the term “employer" as, “a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person." The phrase “and any agent” within the statute has given rise to debate over whether Congress intended the Act to impose liability only on employers, or also on individuals.

In the case of quid pro quo harassment, courts have held that the employer is vicariously liable for the actions of a supervisory employee, even if the employer had no knowledge of the harassment, under the theory of respondeat superior. When a victim alleges hostile environment harassment, however, the employer may not be liable for the actions of an employee unless the employer knew, or should have known, of the harassment, or the employer failed to take remedial measures with regard to harassment about which it should have known.

In Meritor, the Supreme Court suggested that courts should look to agency principles for guidance in determining employer liability under Title VII. According to agency principles, an employer is liable for harassment by an employee when the employee acts within the scope of his authority, or when the employee has apparent authority and there is reliance on that authority by another. Thus, the Meritor decision makes clear there are limitations on employer liability for the acts of its employees, but the decision provided limited guidance to lower courts.

B. Individual Liability: Supervisors and Co-Workers

The most controversial hostile environment cases have been those in which plaintiffs assert claims against supervisors and co-workers. In these cases, the issue is whether or not Title VII imposes liability on individuals,

37. See supra note 28 and accompanying text.
43. 14A C.I.S. § 387.
44. Meritor, 477 U.S. at 72. The Court suggested the limitations on employer liability are correlated with the actual supervisory authority of the employee whose conduct is in question.
not whether liability should be transferred to the employer. The circuit courts have interpreted the term “agent” in the statute in two basic ways: One holds individuals liable under Title VII while the other does not.45 First, some courts have viewed the term “agent” as deepening the pool of potential defendants under Title VII to include supervisory and management personnel who discriminate in the workplace.46 Second, other courts view the term as merely broadening the circumstances in which corporations and other organizational “employers,” as defined by the statute, may be liable for imputed acts of individuals.47

In Ball v. Renner, the Tenth Circuit adopted the approach that an individual must exercise supervisory or managerial authority over the victim to be liable as an “employer” under Title VII.48 The court of appeals stated that in order to hold agents liable as if they were employers, “those agents must be the equivalent or near-equivalent of true employers: Persons who exercise employer-like functions vis-a-vis the employees who complain of those persons’ unlawful conduct.”49

Alternatively, there is a persuasive argument that Congress did not intend Title VII to create any individual liability.50 As the Ninth Circuit Court of Appeals stated in Miller v. Maxwell’s, “the obvious purpose of this [agent] provision was to incorporate respondent superior liability into the statute.”51 The Miller court and others also considered the Title VII statutory scheme itself as an indicator that Congress did not intend to impose individual liability on employees.52

State Tort Law Claims

The tort considered by many to be best suited to application in the sexual harassment context is intentional infliction of emotional distress.53 In

45. The Court of Appeals for the Tenth Circuit accurately described the state of the law in Ball v. Renner, 54 F.3d 664, 666 (10th Cir. 1995). See also Lukens, supra note 39, at 316-24. Compare Paroline v. Unysis Corp., 879 F.2d 100 (4th Cir. 1989), with Grant v. Lone Star Co., 21 F.3d 649 (5th Cir. 1994). The Supreme Court has yet to resolve this circuit split.
46. Ball, 54 F.3d at 666.
47. Id.
48. Id. at 668.
49. Id. The court concluded that Renner was not liable as an employer under Title VII because there was no proof he exercised any supervisory authority over Kanzler.
50. See Miller v. Maxwell’s Int’l Inc., 991 F.2d 583 (9th Cir. 1993), and Grant v. Lone Star Co., 21 F.3d 649 (5th Cir. 1994).
51. 991 F.2d at 587.
52. Id. To support this conclusion, courts look to the congressional decision to define “employers” as having at least fifteen employees, so as to protect small entities from the cost of litigating discrimination claims. Id.
53. Mark Mclaughlin Hager, Harassment as a Tort: Why Title VII Hostile Environment Liability Should Be Curtailed, 20 CONN. L. REV. 375, 404 (1998). For a brief outline of other tort theories that have been advanced in sexual harassment claims, see generally Krista J. Schoenheider, Comment, A
most states the tort of intentional infliction of emotional distress requires three elements: the conduct must 1) be extreme and outrageous; 2) be intentional or reckless; and 3) cause severe emotional distress.\textsuperscript{54}

Many states, including Wyoming, have adopted the Restatement (Second) of Torts formulation of the tort, including the influential definition of “extreme and outrageous” conduct contained in section 46, comment d.\textsuperscript{55} Comment d defines outrageous conduct as conduct which goes “beyond all possible bounds of decency,” and is “to be regarded as atrocious, and utterly intolerable in a civilized community.”\textsuperscript{736} It further states, “liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, and other trivialities.”\textsuperscript{537}

The tort of intentional infliction of emotional distress has, however, been difficult for courts to apply with uniformity.\textsuperscript{55} Courts that adhere to the Restatement formulation of intentional infliction of emotional distress are faced with the dilemma of giving meaning to the phrase “extreme and outrageous conduct.”\textsuperscript{739} Defining this phrase has proven to be quite a challenge. In the words of the Restatement, “the liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.”\textsuperscript{736} Beyond these rudimentary guidelines, however, courts are left to sort out on a case by case basis what type of conduct qualifies as outrageous.\textsuperscript{561}


55. Kanzler v. Renner, 937 P.2d 1337, 1341 (Wyo. 1997). The court first adopted the Restatement formulation of the tort of intentional infliction of emotional distress in \textit{Leithead v. American Colloid Co.}, 721 P.2d 1059 (Wyo. 1986). \textit{RESTATEMENT (SECOND) OF TORTS: OUTRAGEOUS CONDUCT CAUSING SEVERE EMOTIONAL DISTRESS § 46(1) (1965)}, reads as follows: “One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.”

56. \textit{RESTATEMENT (SECOND) OF TORTS § 46} cmt. d.
57. \textit{Id.}
58. Daniel Givelber, \textit{The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct}, 82 COLUM. L. REV. 42, 43 (1982). When the Wyoming Supreme Court recognized the tort, it noted that 37 jurisdictions had also done so by 1977, and stated, “The tort of intentional infliction of emotional distress as described in § 46 of the Restatement can be safely characterized as the general rule in the United States.” \textit{Leithead}, 721 P.2d at 1066.

59. \textit{RESTATEMENT (SECOND) OF TORTS § 46(1)}.
60. \textit{Id.} § 46, cmt. d. The Restatement further provides, “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.”

61. Givelber, supra note 58, at 42. Givelber states, “the term 'outrageous' is neither value free nor exacting. It does not objectively describe an act or series of acts; rather, it represents an evaluation of behavior.” \textit{Id.} at 51. He concludes, “there is little evidence that this tort will ever provide the basis for principled adjudication, it has provided and probably will continue to provide the basis for achieving
In *Leithead v. American Colloid*, the Wyoming Supreme Court recognized intentional infliction of emotional distress as a valid cause of action while simultaneously circumscribing its limitations. Later decisions reflect the court's continued uncertainty regarding what is to be considered extreme and outrageous conduct. In *Wilder v. Cody Country Chamber of Commerce*, for instance, the court divided over which of the plaintiff's claims presented sufficient evidence of extreme and outrageous conduct and which did not.

In *Garcia v. Lawson* the court again divided over a determination of whether the plaintiff had presented sufficient evidence of outrageous conduct. The majority in *Garcia* viewed the alleged conduct as irresponsible, unprofessional, and insensitive, but not sufficient to satisfy the strict requirements of the Restatement. The dissenters, in contrast, believed the plaintiff had presented evidence of extreme and outrageous conduct that could be presented to a jury, and criticized the majority for never expounding a standard by which conduct can be evaluated.

Some jurisdictions have held that when sexual harassment is alleged as the basis for a claim of intentional infliction of emotional distress, the harassing behavior alone does not rise to the requisite level of outrageousness to make out a cause of action. Instead, these jurisdictions require the plain-
tiff to show harassment “plus” something more. In a Third Circuit decision, for example, the court said, “the extra factor that is generally required is retaliation for turning down sexual propositions.”

**Principal Case**

The Wyoming Supreme Court began its decision in *Kanzler v. Renner* with an account of the facts alleged in the case. The facts include an instance in which Renner followed Kanzler as she drove home from work. Renner also made frequent visits to the radio room where Kanzler worked, and stared at her for extended periods as she attempted to perform her job. On one occasion, Renner approached her, pulled her toward him, and began to slow dance with her. She pushed him away and told him to leave her alone. Finally, Renner attacked Kanzler on May 1, 1991, in a utility closet in the dispatch room. Renner followed Kanzler into the closet, closed the door, and attempted to detain her there.

The day after the attack, she reported the incidents to her superiors, and they agreed she should not work for several days. She returned to work her regular shift on May 6, but became emotionally distraught and left early, fearful that she would encounter Renner. Kanzler began seeing a counselor and was diagnosed with post-traumatic stress disorder and depression in connection with the events at work. Kanzler resigned August 14, 1991.

Because Wyoming has adopted the Restatement (Second) of Torts scheme for dealing with the tort of intentional infliction of emotional distress, the court utilized the Restatement as a fundamental part of its analysis. The court referred to Restatement section 46 comments h and j. Under these guidelines, the court, initially determines the outrageousness of the defendant’s conduct and the severity of the plaintiff’s emotional distress.

1469 (3d Cir. 1990) in support of their conclusion that in the sexual harassment context a plaintiff will generally need to make out more than the harassment alone to recover under intentional infliction of emotional distress.

68. *Andrews*, 895 F.2d at 1487.
69. *Kanzler v. Renner*, 937 P.2d 1337, 1339 (Wyo. 1997). Kanzler alleged a series of incidents in which Renner either followed her, or was seen parked near her home in the early morning hours after her shift ended. *See also* Ball v. Renner, 54 F.3d 664, 665 (10th Cir. 1995).
70. *Kanzler*, 937 P. 2d at 1339.
71. *Id.* Kanzler also alleges another occasion where, in the presence of another officer, Renner put his arm around her and pulled her toward him. In response, she hit his arm away, said “don’t,” and fled the room. She also claims that Renner behaved intrusively regarding her relationship with officer Greg Ball.
72. *Id.* at 1339-40.
73. *Id.* at 1340.
74. *Id.*
75. *Id.*
76. *Id.* *See* *Restatement (Second) of Torts* § 46 (1965).
77. *Restatement (Second) of Torts* § 46 cmt. h reads:
The court also consulted section 46 comment d of the Restatement in order to establish a working definition of “extreme and outrageous” conduct.\(^a\)

In two previous decisions the court had recognized that certain conduct within the employment context may rise to a level of outrageousness sufficient to provide a basis upon which a plaintiff could recover for the tort of intentional infliction of emotional distress.” In Kanzler, however, the court expressly held that “inappropriate sexual conduct within the workplace can, upon sufficient evidence, give rise to a claim of intentional infliction of emotional distress.”\(^b\)

Another important part of the court’s decision was an examination of other intentional infliction of emotional distress cases based on charges of workplace sexual misconduct.\(^c\) The court approvingly cited a Utah Supreme Court opinion on the subject of a general policy toward sexual harassment.\(^d\) The cited language suggests society has ceased to see sexual harassment in the workplace as a frivolous occurrence, and instead sees sexual harassment as a “corrosive” element in the workplace that has more to do with the abusive exercise of power than with sexual play.\(^e\)

Though the court considered a wide array of decisions, it never expressly adopted a harassment “plus” test, as have other jurisdictions. The court did, however, discern several recurring factors other courts use to assist in the determination of whether particular workplace conduct qualifies

---

78. See supra note 56 and accompanying text.
79. Kanzler, 937 P.2d at 1341. The previous decisions in which the court indicated outrageous conduct might occur within the employment context were Leithhead v. American Colloid Co., 721 P.2d 1059 Wyo. 1986), and Wilder v. Cody Country Chamber of Commerce, 868 P.2d 211 (Wyo. 1994).
80. Kanzler, 937 P.2d at 1341-42 (emphasis added).
81. Id. at 1342 n.2. One decision presumed sexual harassment in the workplace is by its very nature outrageous. Another required that a claim of outrageous conduct in the employment context include sexual harassment plus some sort of retaliation. The cases, respectively, are: Fisher v. San Pedro Peninsula Hosp., 214 Cal.App.3d 590, 262 Cal.Rptr. 842, 858 (1989), and Lang v. Seiko Instrument USA, Inc., No. 96-5398, 1997 WL 11301 (E.D. Pa. Jan. 14, 1997).
82. Id. at 1342. The Wyoming Supreme Court cites Retheford v. AT & T Communications of Mountain States, Inc., 844 P.2d 949, 978 (Utah 1992). Retheford had been emphasized in the appellant’s brief and cited previously by the Wyoming Supreme Court. See Brief for Appellant at 20-21, Kanzler, 937 P.2d 1337; and Wilder, 868 P.2d at 224.
83. Kanzler, 937 P.2d at 1342.
as sufficiently outrageous to present a jury question. The factors are: 1) abuse of power, 2) repeated incidents/pattern of harassment, 3) unwelcome touching/offensive, non-negligible physical contact, and 4) retaliation for refusing or reporting sexually motivated advances.

Since Kanzler’s allegations fell under the rubric of at least two of the above factors, the court concluded that reasonable persons could differ in their conclusions whether Renner’s conduct was extreme and outrageous. Thus, the court held it was appropriate for a jury to consider the question of whether Renner’s conduct rendered him liable to Kanzler.

The court completed its tort analysis by focusing its attention on the second element of the tort, whether the plaintiff had suffered emotional distress. The court found that Kanzler’s allegations that she suffered from serious psychological maladies as a consequence of harassment, allegations supported by the diagnoses of three independent health professionals as well as her own testimony, constituted evidence sufficient to create a jury issue on the severity of her emotional distress.

ANALYSIS

The Wyoming Supreme Court’s decision in Kanzler v. Renner acknowledges the seriousness of sexual harassment within the workplace and recognizes that such conduct can result in compensable injury. The Kanzler decision, however, does little, if anything, toward expanding what type of workplace misconduct will result in liability for sexual harassment. This is because the criteria by which conduct is to be judged parallel the criteria which already exist under Title VII and traditional tort law. Nor does the decision affect the type of remedy available to victims of sexual harassment.

84. Id. at 1343.
85. Id.
86. Id. The court found that Kanzler alleged a series of repeated incidents in which Renner followed her, stared at her, and subjected her to sexual advances and physically intimidating behavior. In addition she alleged unwelcome non-negligible physical contact on the part of Renner, contact she repeatedly communicated was unacceptable.
87. Id.
88. Id. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j. (1965) reads in part: “[Emotional distress] includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea.” The Restatement cmt. j. also requires that the emotional distress be “so severe that no reasonable man could be expected to endure it.”
89. Kanzler, 937 P.2d at 1343-44.
90. Id. at 1341-42. The Wyoming Supreme Court cites with approval strong language from a Utah Supreme Court decision which emphasizes how the judicial system must reach decisions in conformity with the wider societal view of sexual harassment as a serious problem.
91. Roberts & Mann, supra note 14, at 273. Prior to 1991, the remedies available under Title VII for victims of sexual harassment were limited to back pay, lost wages, and reinstatement in the former job.
Thus, the most significant result of the Kanzler decision is not the type of conduct recognized as tortious, but who may be held liable for that conduct. Title VII, with its emphasis on employer discrimination, is often criticized as an unsatisfactory avenue of recovery when the acting person cannot be characterized as an employer or an agent within the statute.\textsuperscript{92} Title VII, therefore, is viewed as inadequate protection from harassment by a co-employee, business patron, or a small employer that does not meet the fifteen employee statutory requirement.\textsuperscript{93} Tort theories, such as the one utilized in Kanzler, provide a supplemental judicial tool necessary to render liable a segment of the workforce that could otherwise discriminate without repercussion.

Supplementation is necessary to accomplish several basic objectives. First, by expanding the class of people potentially liable for sexual misconduct, the likelihood increases that a victim of such conduct will be fully compensated. Next, holding individuals and employers alike liable for their own workplace misconduct is consistent with a policy of distributing liability in accordance with culpability.\textsuperscript{94} Lastly, imposing individual liability under the theory of intentional infliction of emotional distress provides a remedy to an important subset of cases where an individual in the work environment has engaged in egregious conduct, but where the employer cannot properly be held responsible.\textsuperscript{95}

Of course, any expansion in liability comes with attendant concerns. A common argument against intentional infliction of emotional distress as a cause of action is that it could potentially flood the courts with fraudulent claims and would greatly expand liability for every type of mental disturbance.\textsuperscript{96} Another argument against the tort is that it is too vague to apply. In the words of one commentator, "the tort of intentional infliction of emo-

\textsuperscript{92} Lukens, supra note 39, at 316. Lukens points out that courts are divided not only on whether non-supervisory employees can be individually liable under Title VII, but on whether there should be any individual liability under Title VII. Lukens argues that the statutory language and Congressional intent to eradicate discrimination in the workplace weigh in favor of using agency principles to hold individual defendants and their employers jointly and severally liable. id. at 308-09.

\textsuperscript{93} 42 U.S.C. § 2000e(b) (1994).

\textsuperscript{94} Hager, supra note 53, at 392-93. Hager's thesis is that in hostile environment cases where the conduct alleged is in the nature of a sexual overtone, rather than a pervasive discriminatorily environment, Title VII should not apply. He argues that the damage inflicted in this situation is less akin to discrimination than to a personal intrusion, and that tort law provides the appropriate remedy. id. at 379-85.

\textsuperscript{95} Marinelli, supra note 12, at 388.

\textsuperscript{96} Leithead v. American Colloid Co., 721 P.2d 1059, 1065 (Wyo. 1986). See also Keeton et al., supra note 66, at 57-65.
tional distress by outrageous conduct differs from traditional intentional torts in an important respect: it provides no clear definition of the prohibited conduct. The following discussion will address these concerns.

The Substance of the Kanzler Guidelines

The type of conduct designated as tortious in Kanzler is quite similar to conduct already prohibited under Title VII and traditional tort law. Thus, Kanzler does not mark a departure from existing law in terms of what conduct is prohibited. The following section explains the similarities between the factors set forth in Kanzler and pre-existing law.

A. Abuse of Power

The Kanzler court relied on the Restatement (Second) of Torts section 46 for its definition of intentional infliction of emotional distress. The Restatement indicates that conduct may be rendered outrageous because an actor abuses a situation in which he and another person are in positions of unequal power. In recognizing such behavior as outrageous, the court is in solid accord not only with the Restatement, but also with the very origins and early development of the tort.

Abuse of a position of power is also one of the conceptual foundations of liability for sexual harassment under Title VII. Quid pro quo harassment incorporates the idea of a person in a position of power over the employee in combination with an improper threat or action. Furthermore, hostile environment claims are buttressed when it can be shown that a person of authority was either complicit in the harassment, or took inadequate measures to discover or remedy harassment.

B. Repeated Incidents/Pattern of Harassment

The Wyoming Supreme Court found persuasive the position taken in the Massachusetts case, Boyle v. Wenk. In that case, the Supreme Judicial Court of Massachusetts held that incidents in a series are appropriately con-

98. RESTATEMENT (SECOND) OF TORTS § 46, cmt. e. (1965), reads in part: "The extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests."
100. Schoenheider, supra note 53, at 1463.
102. 392 N.E.2d 1053 (Mass. 1979). This case involved a series of phone calls and visits made by the defendant to the home of the plaintiff in the course of investigating the plaintiff's brother in law. The defendant engaged in various intimidating tactics, including calling the home at 1 a.m.
sidered in their totality, and that repeated harassment may increase the outrageoussness of isolated incidents which otherwise would not result in liability.\textsuperscript{103} Boyle, like Kanzler, involved unwelcome interaction between individuals.\textsuperscript{104} In both cases, as in some Title VII cases, a significant fact arises from the series of incidents; that is, the victim was able to express discontent with the harasser's actions and request that they stop.\textsuperscript{105}

A series of incidents is frequently used by a plaintiff who attempts to demonstrate a pervasive hostile environment. Hostile environment claims focus on the atmosphere at the place of employment.\textsuperscript{106} When a court tests for a discriminatory work atmosphere, a relevant part of the inquiry is the persistence of the conduct, the number of instances, and the totality of the circumstances in which the harassment occurred.\textsuperscript{107}

C. Unwelcome Touching/Offensive Non-negligible Physical Contact

In support of this criteria the court cites Bryant v. Better Business Bureau of Greater Md., Inc.\textsuperscript{108} The Bryant court concluded that there is something fundamentally outrageous about touching a woman in such a way as to penetrate her clothing or touching areas of the woman's body which are ordinarily taboo to anyone other than a physician or consensual sexual partner.\textsuperscript{109} The Bryant court had no trouble characterizing such behavior as "beyond all possible bounds of decency."\textsuperscript{110}

This factor obviously resembles the tort of battery. The Restatement Second of Torts states that an actor is liable for battery if he acts intending to cause a harmful or offensive contact with another person and such contact results.\textsuperscript{111} The Restatement defines a bodily contact as offensive if, "it offends a reasonable sense of personal dignity."\textsuperscript{112} Likewise, the Bryant court made clear that the kind of touching considered inherently outrageous entails something beyond casual touching.\textsuperscript{113}

\textsuperscript{103} Id. at 1055-56.
\textsuperscript{104} Id. at 1056.
\textsuperscript{105} The reader will recall that in order to make a prima facie showing of sexual harassment under Title VII, the plaintiff must show that the conduct was unwelcome. See supra note 35 and accompanying text.
\textsuperscript{106} FELIU, supra note 20, at 244.
\textsuperscript{107} Id.
\textsuperscript{108} 923 F. Supp. 720 (D.Md. 1996). This case involved a defendant who had, against the will of the plaintiff, kissed her on the lips, hugged her, fondled her breasts, slid his hand beneath her bra on more than one occasion, and slid his hand under her skirt on several occasions.
\textsuperscript{109} Id. at 748.
\textsuperscript{110} Id.
\textsuperscript{111} RESTATEMENT (SECOND) OF TORTS § 18 (1965).
\textsuperscript{112} Id. § 19.
\textsuperscript{113} Bryant, 923 F. Supp. at 746-47. The Bryant court distinguished another case in which it was held
D. Retaliation for Refusing or Reporting Sexually-motivated Advances.

Here the forbidden activity is akin to quid pro quo harassment actionable under federal law. The court cites Shaffer v. National Can Corporation as an illustrative case.114 The Shaffer court states that a certain level of repulsive behavior, including verbal 'propositioning,' and even solicitation for prostitution, will not be actionable under the civil law.115

Like Title VII, however, the Shaffer court draws the line between punishable and merely aberrant behavior when an actor in a position of authority attempts to induce behavior on the part of the recipient.116 Actual retaliatory action on the part of the actor will serve to elevate the behavior beyond the realm of insults or demeaning jokes.117 It is apparent that often an inquiry into whether inappropriate retaliatory action has occurred will be difficult to divorce from an inquiry into whether the actor has abused a position of power.

Sufficiency of the Action

Any attempt to allocate legal responsibility for an act necessarily goes beyond defining a category of impermissible conduct to reasonably define a category of persons who are to be liable. Congress designed Title VII liability with limitations in mind. For this reason a majority of courts have begun to bar individual liability under Title VII in complaints of sexual harassment.118 Likewise, when state courts venture into the business of applying tort liability in the workplace, they consider who they want to hold liable.

In the Kanzler decision, the Wyoming Supreme Court discussed its view of the term "sexual harassment." The court viewed the term as defining something broader than Title VII sexual harassment, including a wide variety of both physical and verbal conduct.119 Yet, as discussed above, the court adhered to traditional concepts of what constitutes culpable conduct. Kanzler is broader than federal law because it allows the plaintiff to proceed against an individual who does not fall within the definition of "employer"

that the defendant's conduct was not sufficient to result in liability. The defendant had rubbed the plaintiff's back, kissed, and squeezed her against her will.

114. 565 F. Supp. 909 (E.D. Pa. 1983). The case involves a continued course of harassment in which the defendant insinuated the plaintiff's job might be in jeopardy if she did not comply with his requests for sexual favors. He eventually retaliated against her rejection of his advances by excluding her from company activities and treating her with disdain before other employees.

115. Id. at 916.

116. Id.

117. Id.

118. Lukens, supra note 39, at 305.

under Title VII.

One commentator has suggested that Title VII, even supplemented by state tort law claims, fails to adequately redress harm that should be compensable for workplace sexual harassment. The same commentator argues that, while traditional tort law is inadequate to deal with workplace sexual harassment, intentional infliction of emotional distress is potentially the most successful ground on which a victim can recover for mental harm. The commentator contends that intentional infliction of emotional distress claims depend on the ill-defined notion of outrageous conduct, and that judicial decisions are inconsistent on the subject of how sexual harassment falls within the overall rubric of conduct. The conclusion is that a new independent theory of tort liability is necessary to resolve the problem.

Another commentator argues that Title VII liability for hostile environment claims should be curtailed. Tort liability should fulfill the critical role of fashioning a remedy for sexual harassment claims. The commentator views the current formulation of the tort of intentional infliction of emotional distress as too restrictive to provide complete legal treatment of the issue of sexual harassment. Consequently, stringent adherence to the standards of "outrageousness" and "severe" harm should be relaxed.

The above mentioned commentators focus on fashioning a legal remedy which would apply to a broad range of conduct under the heading of sexual harrassment. Each proposes sweeping personal and vicarious liability under tort law. The Kanzer decision takes a moderate approach to resolving some of these problems. The factors identified in Kanzer provide needed clarity to the Restatement formulation of intentional infliction of emotional distress as applied to sexual harassment. Yet, instead of relaxing existing standards of evaluating conduct and damages, the court simply allowed an action in tort against an individual where none had been allowed under Title VII.

For this reason, the decision could go a long way toward making the

120. Schoenheider, supra note 53, at 1463. This article’s analysis predates 1991 amendments to Title VII allowing for punitive and compensatory damages.
121. Id. at 1481.
122. Id. at 1481, 1483.
123. Id. at 1485. Schoenheider proposes a new tort entitled "Sexual Harassment in the Workplace."
125. Id. at 324. Hager stops short of endorsing a new independent tort theory. Id.
126. Id. Hager states, "Severity of distress would then stand as an index of damages but not as a threshold to actionability ... Punishment and deterrence, not compensation, is the true soul of a legal policy against harassment." Id. at 433-34.
127. It is doubtful whether any new theory of tort liability or statutory cause of action could more clearly define sexual harassment, but would simply alter the standard by which conduct is judged.
tort of intentional infliction of emotional distress a satisfactory route by which victims who have been harmed by sexual harassment can recover against a particular harasser. On the other hand, the decision utilizes a stringent and traditional formulation of intentional infliction of emotional distress, thereby discouraging groundless claims and an undue increase in personal tort liability. The court has wisely avoided sacrificing reasonable restrictions on tort liability at the altar of a developing social policy against sexual harassment.

CONCLUSION

The Wyoming Supreme Court’s decision in *Kanzler v. Renner* marks an important milestone in the development of a remedy for sexual harassment in Wyoming. Underlying the decision is an understanding that traditional tort law may need to augment other avenues of recovery, such as Title VII, if victims of workplace sexual harassment are to have their damages redressed. In particular, by making individuals liable for workplace sexual harassment, *Kanzler* provides a solution for certain deficiencies that exist under Title VII.

By adhering closely to existing theories of liability, such as Title VII and traditional tort theories, the *Kanzler* court does not unnecessarily broaden the spectrum of conduct for which responsibility will lie. The *Kanzler* decision insures that the harm caused is serious and the conduct objectively repugnant. Furthermore, though open to debate, the decision provides necessary guidance to attorneys and district courts as to what constitutes outrageous conduct within the context of the tort of intentional infliction of emotional distress.

CLAY MAHAFFEY