An Outrageous Response to "You're Fired!"

William Corbett
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WILLIAM R. CORBETT**

"[W]hile the loss of a job is often devastating to an employee and at times unfair, these considerations do not play a role under our employment-at-will doctrine, and our exceptions to this law, such as sex discrimination, are only based on the underlying discriminatory motivation of the decision maker."

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** Frank L. Maraist Professor of Law, Paul M. Hebert Law Center of Louisiana State University. I thank Professor Alex Long for helpful comments on an earlier draft.
CONCLUSION

INTRODUCTION

“You’re fired!” Donald Trump popularized this terse and jarring declaration on the television show The Apprentice. The catch phrase became the signature line of the television show and spawned “You’re Fired” merchandise and copycats, but Trump was not the only person to become associated with the evocative declaration. As sadistically entertaining as the statement may seem when used by television characters, when real people are fired from real jobs, the sentence seems far less entertaining. When people are fired, many file lawsuits, and in the United States many lose those lawsuits because of our unique employment-at-will doctrine, which provides that, absent variation from the default rule, an employer can discharge employees without a job-related reason without incurring liability. In some cases, people are fired from their jobs for reasons that seem unrelated to job performance and sometimes seem quite unfair. To many, the


3. The British version of the show, a spin-off of the United States version with Trump, also used “You’re fired.” See The Apprentice: You’re Fired, WIKIPEDIA, http://en.wikipedia.org/wiki/The_Apprentice:_You%27re_Fired! (last visited Sept. 22, 2013). In the United States, the chairman and CEO of World Wrestling Entertainment, Inc., Vince McMahon, had his on-air television persona scream in a raspy voice, “You’re fired!” at numerous employees of the organization, usually wrestlers, in on-air skits. See You’re Fired!, WIKIPEDIA, http://en.wikipedia.org/wiki/You%27re_Fired! (last visited Sept. 22, 2013). In one such skit, McMahon spewed the declaration at Donald Trump, who was a guest character on several WWE shows. See WWE Raw—Vince McMahon Says “You’re Fired” to Donald Trump, YOUTUBE (Mar. 22, 2010), http://www.youtube.com/watch?v=GPXcuSL5nN0. Other characters have been known for their use of the catch phrase, including Mr. Cosmo Spacely, CEO of Spacely Sprockets on the 1960s and 1980s television cartoon series The Jetsons. See You’re Fired!, supra.

4. See infra Part I.

5. For laws and jurisdictions that require it for termination, the definition of good or just cause invariably includes unsatisfactory job performance, failure to comply with work rules or policies, and economic reasons unrelated to the employee’s work performance. See, e.g., Montana Wrongful Discharge from Employment Act of 1987, MONT. CODE ANN. §§ 39-2-903(5) (2011) (“Good cause’ means reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer’s operation, or other legitimate business reason.”). Although the Montana statute does not expressly state that economic circumstances of the employer may constitute “good cause,” the case law has recognized that economic reasons fit within the statutory language: “other legitimate
combination of an unfair termination from a job and a legal regime that
denies redress seems downright outrageous!

A particularly troubling and seemingly common set of
terminations involves women being fired for reasons related to their
appearance or other reasons related to their sex. Although there are
differences and nuances among the cases, at the simplest, they involve
women being fired from jobs because they are, in the view of their
superiors, either not sufficiently attractive or too attractive. Although it
may seem that under such facts women could successfully sue for sex
(or other) discrimination, this often is not the case.

One of the latest cause célèbre termination cases to provoke a
collective sense of outrage is the case of Melissa Nelson, a dental
assistant who was fired by her employer, dentist James Knight. Dr.
Knight realized that he found Ms. Nelson “irresistible” and feared he
might try to have an extramarital affair with her. As a result, and after
his wife demanded it, he fired Ms. Nelson. Ms. Nelson, like most people
who lose their jobs, thought she had been wrongfully terminated, and
she sued. Unfortunately, Ms. Nelson was not in Heaven, or even
Montana, but Iowa, which is one of the forty-nine employment-at-
will states. So, under what theory could she sue Dr. Knight? Like so
many other wrongfully terminated employees, she turned to the
employment discrimination statutes and sued for sex discrimination.
In a story that has been replayed almost innumerable times, a
“wrongfully discharged” employee sued her former employer for

classifies good cause as “personal reasons” and “economic reasons.” See MICHEL DESPAX,
JACQUES ROJOT, & JEAN-PIERRE LABORDE, LABOUR LAW IN FRANCE 153, 156-58 (2011). To similar
effect is the convention of the International Labour Organization on termination of
employment: “The employment of a worker shall not be terminated unless there is a valid
reason for such termination connected with the capacity or conduct of the worker or based
on the operational requirements of the undertaking, establishment or service.” Termination

6. See, e.g., Katie R. Eyer, That’s Not Discrimination: American Beliefs and the Limits of
Anti-Discrimination Law, 96 MINN. L. REV. 1275, 1347 (2012) (observing that “most
employees have expansive beliefs about non-just-cause terminations, believing that a wide
array of factually unjustified firings are unfair and unlawful, despite the fact that at-will
employment remains the norm in most states”).


21, 2012), withdrawn and superseded by Nelson, 834 N.W.2d 64.

9. See Nelson, 834 N.W.2d at 66.

10. Montana is the lone state that does not have employment-at-will as its default rule,
having enacted the Montana Wrongful Discharge from Employment Act of 1987. MONT. CODE

11. "Is This Heaven?" "No, it's Iowa." FIELD OF DREAMS (Universal Studios 1989).
employment discrimination and lost. The employer moved for summary judgment in the district court and won. On appeal, the Iowa Supreme Court affirmed.

Whether or not one agrees with the Iowa Supreme Court’s decision in Nelson, the case illustrates the fact that employment discrimination laws do not provide redress for many unfair terminations. In the land of employment at will, what can provide a remedy for unfair discharges that a substantial segment of society considers outrageous, particularly terminations of women related to their appearance or other aspects of sex? This Article argues that outrage is the answer, but not just outrage expressed in op-eds, blogs, and news segments. The legal system has a tort designed for providing relief when the harmful conduct at issue outrages society. It is the tort of outrage or intentional infliction of emotional distress (“IIED”).

Three major themes from employment law scholarship inform this Article. First, recent scholarship has examined the migration of principles and doctrines between employment discrimination law and tort law. Second, many commentators have explored the relative difficulty of recovery on employment discrimination claims compared with other types of claims. Finally, it has long been noted that employment discrimination law inherently conflicts with employment at will, and the powerful employment-at-will doctrine is more influential—dictating the result in fringe cases that do not fit squarely within the protection of employment discrimination laws. In light of these three considerations, employment discrimination law need not be stretched to cover termination cases that are tinged with appearance-based or other sex-related discrimination. Instead, employment discrimination law should yield to, but also inform, tort law. The tort of IIED, although not currently filling this role effectively, could do so if infused with some tenets of employment discrimination law. Then, the amorphous concept of outrageous conduct would begin

12. See Nelson, 834 N.W.2d at 73.
13. Id.
14. For discussion and analysis of the Nelson decision, see infra Part II.A.
16. See, e.g., Eyer, supra note 6, at 1282 n.27 (discussing the relative lack of success and collecting other sources).
to take shape, and society could express its outrage at terminations like that of Melissa Nelson by providing a legal remedy. IIED could become a tort well-suited to patrolling the fringes of employment discrimination law and providing redress for outrageous terminations.

Part I of this Article provides an overview of employment at will and the very limited exceptions to the doctrine, including employment discrimination laws. Part II discusses the Nelson case, as well as other cases in which fired female employees claimed that appearance or some aspect of sex played a significant role in their terminations. These cases range from employees fired for being irresistible, or resistible, to sexual favoritism cases. Part III discusses the role of tort law in employment terminations, considering the track record of the two tort theories that most often have been asserted in termination cases—wrongful discharge in violation of public policy ("WDVPP") and IIED. This part discusses why WDVPP has provided a remedy in only a small set of termination cases, not including most appearance- and sex-based discharges. Part III also considers why IIED generally has not been a successful theory of recovery for employment terminations. Part IV considers developments in the law of IIED which suggest that the tort of outrage infused with employment discrimination tenets could yield a tort that would provide an effective remedy in appearance- and sex-tinged terminations like that in Nelson. Finally, Part IV explains why tort law is better suited than employment discrimination law to examine such cases, how tort law may provide redress for these terminations, and why a reconceptualized IIED is the appropriate tort to accomplish these goals.

I. "YOU'RE FIRED!" IN THE LAND OF EMPLOYMENT AT WILL

A. Employment at Will and Its Exceptions

Among all the nations of the world with developed labor law regimes, only the United States generally permits employers to fire employees without a job-related reason and without notice. Most nations' employment termination laws require a job-related reason, either personal or economic, for termination. See, e.g., Samuel Estreicher & Jeffrey M. Hirsch, Comparative Wrongful Dismissal Law: Reassessing American Exceptionalism 92 N.C. L. Rev. (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2238776. Canadian termination law is perhaps closest to that of the United States, permitting termination without cause as long as the employer provides notice. See id. (manuscript at 5); Rachel Arnow-Richman, Just Notice: Re-Forming Employment at Will, 58 UCLA L. Rev. 1, 49 (2010).
reason\(^{19}\) unless the at-will relationship has been modified under statutory or common law.\(^{20}\) Consequently, fired employees in almost all states, with the lone exception of Montana,\(^{21}\) who think they have been wrongfully terminated cannot obtain redress in the way that employees in other nations can—by suing their employers and demanding that the employer prove good cause for terminating them.\(^{22}\) Instead, in order to recover they must show that their employers, by firing them, breached an employment contract, violated a statute, or committed a tort.\(^{23}\)

These three exceptions to employment at will are, however, unavailing for most employees. First, most fired employees do not have a viable claim based on breach of an employment contract because few employers contractually modify the at-will relationship.\(^{24}\) Second, statutory modifications of employment at will often cover only particular types of wrongful discharge claims. For example, a number of statutes at the federal,\(^{25}\) state,\(^{26}\) and local\(^{27}\) levels supplement

19. See, e.g., Payne v. W. & Atl. R.R., 81 Tenn. 507, 519–20 (1884) ("All may dismiss their employe[e]s at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong."); overruled on other grounds, Hooton v. Watters, 179 S.W. 134 (Tenn. 1915); see also Cynthia L. Estlund, Wrongful Discharge Protections in an At-Will World, 74 Tex. L. Rev. 1655, 1657–58 (1996) (discussing employers' "right to fire employees at will—for good reason, for bad reason, or for no reason at all").

20. Courts have recognized that employers and employees can modify the at-will presumption by contract. See, e.g., Place v. Conn. Coll., No. CV106003543, 2013 WL 3388744, at *11 (Conn. Super. Ct. June 11, 2013); see also RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.03 (Tentative Draft No. 2, 2009). Furthermore, as will be developed below, courts have recognized tort theories that are applicable to some terminations.


22. The law of France is an example. See supra note 5. The Employment Rights Act of the United Kingdom classifies dismissals as fair and unfair and requires a reason that relates to the capability and qualifications of the employee for performing work, the conduct of the employee, the redundancy of the employee, the continued employment violating another enactment, or other substantial reason. Employment Rights Act, 1996, c. 18, § 98 (U.K.), available at http://www.legislation.gov.uk/ukpga/1996/18/section/98.


24. See J. Hoult Verkerke, An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate, 1995 Wis. L. Rev. 837, 867 (noting that, in a survey of employers in five states, about fifty-two percent of employers explicitly contracted for employment at will, about one-third used documents that did not address discharge, and only about fifteen percent contracted for just-cause protection).

25. In addition to the federal employment discrimination statutes, see infra notes 29–31, there are numerous anti-retaliation provisions in federal law that prohibit termination for an employee’s asserting rights under, for example, the Family and Medical Leave Act, 29 U.S.C. § 2615(a)(2) (2011), or the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) (2011). There are other types of federal statutes that prohibit discharges or other adverse
employment at will, the most significant of which are employment discrimination statutes. These employment discrimination laws prohibit employers from firing or taking other adverse employment actions based on specified characteristics of employees, such as race, color, sex, religion, national origin, age, or disability. Although many fired employees attempt to fit their termination lawsuits under these laws, many do not fit unless the employment discrimination theories are stretched to some extent. Finally, while plaintiffs have sued using the tort theories of wrongful discharge in violation of public policy and intentional infliction of emotional distress, few have prevailed on these claims.

Employment at will is unlikely to be abandoned by another state in the foreseeable future. Although legislatures, law reform commissions, and academics have made numerous proposals for employment actions, such as the whistleblower provisions of the Sarbanes-Oxley Act, which prohibits taking adverse actions against employees who provide information regarding securities law violations by the employer, 18 U.S.C. § 1514A (2012).

Most states have employment discrimination laws that more or less track the federal laws. See, e.g., Louisiana Employment Discrimination Law, LA. REV. STAT. ANN. §§ 23:301–369 (2010). In addition to discrimination laws, various states have a variety of other statutes prohibiting firing employees for a variety of reasons. Most states prohibit retaliation for asserting rights under workers’ compensation laws. See, e.g., LA. REV. STAT. ANN. 23:1361 (2011). A few states have laws prohibiting firing or other adverse employment actions based on an employee’s engaging in lawful off-duty activities. See, e.g., COLO. REV. STAT. § 24-34-402.5(1) (2012).


30. See, e.g., Martha Chamallas, Discrimination and Outrage: The Migration from Civil Rights to Tort Law, 48 WM. & MARY L. REV. 2115, 2177 (2007) (stating that "litigators often attempt to shoehorn their claims into one of the protected categories").

31. See infra Part III.

replacing employment at will with some other termination principle, predictions of the imminent demise of employment at will have proven wrong. Fired employees turn to employment discrimination statutes because they rarely have other options; however, employment discrimination statutes were not intended to, and should not, provide a remedy for unfair terminations unless the reason is a characteristic protected by those statutes.

B. Employment Discrimination Laws as a Narrow Limitation on Employment at Will

Employment discrimination laws at all levels prohibit employers from taking adverse employment actions against an employee “because of” some specified characteristic, such as race, sex, or age. For example, Title VII states that it is an unlawful employment practice “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, sex, or national origin.” Thus, discharge is only one type of adverse employment action prohibited by employment discrimination laws. In the early years after the enactment of Title VII, most claims were based on refusal to hire, but over the years the majority of claims have become discharge claims.

As a result, this shift from claims based on refusal to hire to claims based on terminations has brought employment discrimination laws increasingly into tension with employment at will.


36. Consider for example, the following prediction from the year 2000: “The future of employment-at-will, then, is that it has no future.” Deborah A. Balam, Employment-at-Will: The Impending Death of a Doctrine, 37 AM. BUS. L.J. 653, 687 (2000); see also Cornelius J. Peck, Unjust Discharges From Employment: A Necessary Change in the Law, 40 OHIO ST. L.J. 1, 1–2 (1979) (predicting the demise of employment-at-will).

37. The special concurrence in Nelson reiterated several times that employment-at-will required that plaintiff lose because she had not proven sex discrimination. See Nelson v. James H. Knight DDS, P.C., 834 N.W.2d 64, 75 (Iowa 2013) (Cady, C.J., concurring specially).


Recognizing the tension between employment at will and employment discrimination law, the United States Supreme Court in several decisions has explained that although employment discrimination laws impinge upon employer prerogative to some extent, they do not empower courts to restructure employers’ business practices or second-guess most employer decisions. The courts have limited the incursion of employment discrimination laws on employment at will by focusing on the “because of” requirement. A termination does not violate employment discrimination laws unless there is a causal connection between the termination and the protected characteristic. For sex discrimination, Title VII also has a lower “motivating factor” causation standard, which was added by the Civil Rights Act of 1991. Consequently, a termination does not violate discrimination laws unless the discharge is caused by the sex of the plaintiff. As will be developed in discussion of the cases below, the causal connection can be elusive in many cases in which the termination seems related to the plaintiff’s appearance or sex. If the causal connection is not established, then employment at will prevails.

II. FIRING “IRRRESISTIBLE” PEOPLE AND OTHER TERMINATION LAWSUITS INVOLVING APPEARANCE OR SEX

Numerous cases exist in which women were fired and their termination seemed to be related to their appearance or some other aspect of sex, such as a sexual attraction. In these cases, the plaintiffs usually sue for sex discrimination and lose because courts do not find the requisite causal connection between the plaintiff’s sex and the firing. 

A. The Latest Outrage: Nelson v. James H. Knight DDS, P.C.

Melissa Nelson worked as a dental assistant for Dr. James Knight for over ten years before she was fired in January 2010, and Dr.

44. See infra Part II for discussion of the Nelson case and others.
Knight acknowledged that she was a good dental assistant. Both Nelson and Knight were married and had children. Knight was about twenty years older than Nelson. During the last year of her employment, Knight began treating Nelson differently, commenting on her clothes being too tight, and suggesting that her physical appearance was arousing him. Although Nelson said she regarded Knight as a "friend" and a "father figure," she alleged that he made some sexually suggestive comments to her in person and by text message. She asserted that she did not respond to those comments.

The situation escalated when Dr. Knight took his children on a Christmas vacation without his wife, and Nelson and Knight texted each other throughout that time. Because of this, Mrs. Knight confronted Dr. Knight and insisted that he fire Nelson. The Knights consulted the senior pastor of their church, who agreed that Nelson should be fired. Dr. Knight then called Nelson into his office and, accompanied by another pastor from his church, he read from a prepared statement, telling her that their relationship had become detrimental to his family and stating that it was in their best interests to discontinue working together. Dr. Knight eventually met with Nelson's husband after he called Knight. In that meeting, again attended by a minister from Knight's church, Knight explained to Nelson's husband that she had done nothing wrong or inappropriate, but Knight feared that he would try to have an affair with her if she continued to work for him.

When he terminated Nelson, Dr. Knight gave her one month’s severance pay. Nelson cried and said she loved her job—to no avail.

“You’re fired!” Entertaining?

46. Id. at 65.
47. Id. at 66.
49. Nelson, 834 N.W.2d at 65.
50. Id.
51. Id.
52. Id. at 66.
53. Id.
54. Id.
55. Id.
56. Id.
57. Id.
58. Id.
RESPONDING TO "YOU'RE FIRED!"  

Melissa Nelson filed a charge with the Iowa Civil Rights Commission, alleging sex discrimination in violation of state employment discrimination law. After receiving a right-to-sue letter, she filed a lawsuit in state court, asserting a sex discrimination claim. She did not include IIED as a theory of recovery, but as will be discussed below, the tort theory probably would have been unavailing anyway. The district court granted summary judgment in favor of Knight. Nelson appealed the district court's decision to the Iowa Supreme Court.

The Iowa Supreme Court framed the issue as follows: "Can a male employer terminate a long-time female employee because the employer's wife, due to no fault of the employee, is concerned about the relationship between the employer and the employee?" The court understood that its task, based on the state employment discrimination law, was to determine whether the employer fired Nelson "because of" sex, which, borrowing from federal discrimination law, means that sex was a motivating factor in the employer's decision.

The Iowa Supreme Court looked to case law under Title VII for guidance. The court first considered Tenge v. Phillips Modern Ag Co., in which a business owner fired a female employee at his wife's

59. Id. at 67.
61. See id.
62. Iowa law on IIED in the employment context is consistent with the law of most other states. It is hard to recover for IIED in employment, and terminations particularly are not considered outrageous because of employment-at-will. See Butts v. Univ. of Osteopathic Med. & Health Sci., 561 N.W.2d 838, 842 (Iowa 1997), overruled on other grounds by Teachout v. Forest City Cnty. Sch. Dist., 584 N.W.2d 296 (Iowa 1998); Cheek v. ABC Beverage Mfrs., Inc., No. 6-630, 2006 WL 2560890, at *4 (Iowa Ct. App. 2006) (unpublished table decision). For discussion of courts' reluctance to permit recovery for IIED based on terminations, see infra Parts III.B-C and accompanying text.
63. Nelson, 834 N.W.2d at 67.
64. Id. at 65.
65. Id. at 67.
66. Most states look to federal employment discrimination case law as a guide to interpreting their state employment discrimination laws because the dispositive terms of the state statutes often replicate the language of the federal statutes. See Alex B. Long, "If the Train Should Jump the Track . . .: Divergent Interpretations of State and Federal Employment Discrimination Statutes," 40 GA. L. REV. 469, 477 (2006) (explaining that "[s]everal factors help explain the general rule of this lockstep approach to the interpretation of parallel state and federal employment discrimination statutes").
67. 446 F.3d 903 (8th Cir. 2006).
insistence. In Tenge, the Eighth Circuit first looked to cases in which sexual favoritism in employment did not amount to illegal sex discrimination, but rather discrimination based on sexual conduct, which is not covered by Title VII. The Eighth Circuit considered the sexual favoritism cases roughly analogous to the case before it, reasoning that if treating an employee favorably due to sexual conduct does not constitute prohibited sex discrimination, neither does treating an employee unfavorably. However, realizing that the case before it was distinguishable because the plaintiff was fired, the Tenge court next considered Platner v. Cash & Thomas Contractors, Inc., in which an employee was treated less favorably (she was fired) for being perceived as a threat to the marriage of the owner’s son. Finally, the Tenge court considered three cases supporting the proposition that firing an employee for engaging in consensual sexual conduct with no allegations of sexual harassment does not violate Title VII. Based on all of the precedent it reviewed, the Eighth Circuit concluded in Tenge that the employee’s termination did not violate Title VII; the plaintiff was fired not “because of” her sex but because of the owner’s desire to assuage his wife’s concern over the plaintiff’s admitted conduct with him.

Nelson argued that Tenge was not analogous to her case because, unlike the plaintiff in Tenge, Nelson did nothing to get herself fired other than “exist as a female.” Thus, the court posed the issue as whether an employee who has not engaged in flirtatious conduct can be legally fired because the boss views her as “an irresistible attraction.” The court observed that it was unusual to ask that

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68. The Iowa court noted that, unlike the case before it, Tenge involved a fired female employee who admitted that she had written and left accessible notes of a sexual or intimate nature that could have led the owner’s wife to believe that she and the owner were having an affair. See Nelson, 834 N.W.2d at 68.

69. Tenge, 446 F.3d at 909-10.

70. 908 F.2d 902 (11th Cir. 1990).


72. Id. at 910.


74. See Nelson v. James H. Knight DDS, P.C., No. 11-1857, 2012 WL 6652747, at *5 (Iowa Dec. 21, 2012), withdrawn and superseded by Nelson, 834 N.W.2d 64. The “irresistible attraction” language does not appear in the opinion on rehearing. As will be discussed below, after issuing the original opinion in December 2012, the court granted rehearing, withdrew its original opinion, and issued a new and superseding opinion in July 2013. There were few changes in the principal opinion between the December 2012 version, which was withdrawn, and the July 2013 opinion. However, one change is that the phrase “irresistible attraction” does not appear in the new opinion; instead, it is replaced by
question in a case of employment discrimination, in which the usual focus is on the employer's motivation, not "whether the discharge in a broader sense is fair."{75}

Plaintiff Nelson raised three arguments that the court considered. First, she argued that, contrary to Tenge, any termination based on a superior's sexual attraction to a subordinate employee is by its very nature discrimination "because of" sex.{76} The Iowa court rejected that argument, explaining that such decisions are based on feelings regarding a particular individual, rather than feelings toward a gender. {77} Moreover, the court felt if Nelson's argument were accepted, any termination related to a consensual relationship would be "because of" sex.{78}

Second, Nelson argued that holding that sexual attraction discrimination does not constitute sex discrimination enforces gender-based stereotypes and permits pretexts for sex discrimination.{79} The court recognized gender stereotyping as a viable theory of sex discrimination, but explained that Nelson was not fired for nonconformance with any particular stereotype.{80}

Third, Nelson argued that if her employer could be held liable for sexual harassment, he should not be able to avoid such liability by firing her out of fear that he was going to harass her.{81} The court responded to this argument by explaining that a single decision to terminate does not constitute harassment.{82}

The court rejected Nelson's arguments, holding that the issue before it was not whether Knight treated Nelson badly, but whether he discriminated based on sex when he fired her at his wife's request.{83}

{75} Nelson, 834 N.W.2d at 69. The original opinion stated it as follows: "whether the discharge in a broader sense is fair because the employee did something to 'deserve it.' " See Nelson, 2012 WL 6652747, at *5.

{76} See id. at 70.

{77} Id.

{78} Id.

{79} Id. at 71.

{80} Id. at 70.

{81} Id. at 72.

{82} Id. at 73.
Based on this framing of the issue, the Iowa Supreme Court ruled against Nelson.84

The Nelson case captured the public's attention, as it went viral on the internet,85 generated op-eds,86 and provoked television interviews.87 The general public thought that Dr. Knight should not have been able to terminate Ms. Nelson without incurring some legal liability. Despite this widespread public outrage,88 the Iowa Supreme Court denied recovery under the theory of sex discrimination—not once, but twice.89

The Iowa Supreme Court's treatment of the case is bizarre. The court rendered its initial decision against Nelson in December 2012.90 After the firestorm of publicity, much of it criticizing the court's decision,91 the court withdrew its original opinion, reheard the case

84. Id.


91. See supra notes 85–87 and accompanying text.
and (without additional briefing or arguments) rendered a new opinion on July 12, 2013. The holding was the same, and other than an added special concurrence by three justices, little changed in the principal opinion. A comparison of the original and revised opinions, which arrived at the same conclusion without relying on additional briefing or argument, suggests that the court simply wished to further explain the result in response to the public criticism. Indeed, the new special concurrence said as much: “These challenges to defining sex discrimination in the workplace have, at times, created controversy and divisiveness, especially when decisions by courts are not fully explained or when court decisions are not fairly read and interpreted or accepted.

In the reissued opinion, the special concurrence written by Chief Justice Cady and joined by two justices makes two major points in addition to responding to the negative reaction after the December decision. The first is that the employment discrimination laws only go so far in impinging on the predominant legal principle of employment at will. The concurrence states:

[T]he law does not escape some blame for the difficult nature of the issue in light of the countervailing employment-at-will doctrine, which permits employers to terminate employees for reasons personal to them, so long as the will of the employer is not discriminatory or otherwise against public policy. This law is our Iowa law.

The opinion closes by noting that “[w]ithout proof of sex discrimination, the employment-at-will doctrine ... guides the outcome.” The second major point the concurrence emphasized is how the plaintiff’s consensual close personal relationship with Knight resulted in her termination.

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93. Nelson, 834 N.W.2d 64.

94. Indeed, Professor Todd Pettys said, “It appears to me what they really wanted to do was take another shot at explaining why they were reaching the conclusion that they did, understanding that they had come under some criticism for that conclusion.” See Kay Henderson, Firing “Attractive” Assistant Is Legal—Iowa Court Reaffirms, REUTERS (July 12, 2013, 6:02 PM), http://www.reuters.com/article/2013/07/12/us-usa-dentist-sex-idUSBRE96B0X2A20130712?feedType=RSS.

95. See Nelson, 834 N.W.2d at 74 (Cady, C.J., concurring specially).

96. Id. at 75 (Cady, C.J., concurring specially) (citing Fitzgerald v. Salsbury Chem., Inc., 613 N.W.2d 275, 280–82 (Iowa 2000)).

97. Id. at 81.

98. Id. at 80.
It will be interesting to see the public and media reaction to the new opinion. The new special concurrence attempts to deflect criticism by shifting attention or blame to at least three targets: media and public misdepictions of the court’s opinion, the employment-at-will doctrine, and the conduct of plaintiff. The concurrence also suggests that the court did its best with statutory language that “could not be more general.”

Was the Iowa court’s decision correct? The court considered the most analogous precedent and most of the relevant issues. Although those issues could have been resolved in the plaintiff’s favor, the court’s decision was consistent with precedent, and its analysis was thorough and careful. Although other courts may have found sex discrimination, the Iowa court competently explained the problems with Nelson’s sex discrimination theory. Thus, the Nelson case is the latest high-profile example of terminations permissible under employment at will because they are not quite covered by employment discrimination law. Given the sense of public outrage provoked by this case, perhaps another theory would permit recovery in such cases.

B. Other Termination Lawsuits Related to Appearance or Aspects of Sex

The Nelson case is one of several recent cases in which the plaintiff alleged that she was fired because of her appearance. In some such cases, the plaintiffs attempted to recover for sex discrimination but faced some of the same impediments to recovery that Nelson did. In 2010, banker Deborahlee Lorenzana sued her employer for sex discrimination, claiming she was told her fitted suits were too provocative and distracting. Her story initially went viral as well but eventually provoked something of a backlash when less-than sympathetic stories emerged depicting Ms. Lorenzana as trying to

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99. Id. at 74.
100. See supra notes 76–84 and accompanying text.
101. The reissued Nelson decision made clear that plaintiff did not assert a claim for sexual harassment and the court did not decide how such a claim would have been resolved. Nelson, 834 N.W.2d at 67, 72.
capitalize on her appearance.\textsuperscript{104} Based on a mandatory arbitration clause, Lorenzana’s case was referred to arbitration,\textsuperscript{105} and according to reports, the case was concluded and she recovered nothing.\textsuperscript{106}

At the other extreme on the irresistibility spectrum from the Nelson and Lorenzana cases, a woman sued her former employer for sex discrimination for rescinding an offer of employment, alleging that the chief executive did not like her “body shape” and did not consider her the kind of woman that he would like to sexually harass or with whom he would want to have a sexual relationship.\textsuperscript{107} Although her claims for breach of contract and tortious interference with contract were dismissed, her sex discrimination claim under Title VII survived.\textsuperscript{106}

In Shomo v. Junior Corp.,\textsuperscript{109} a slightly different case that still involved aspects of appearance and sex, the plaintiff, a waitress, alleged that she had a sexual relationship with the restaurant’s owner.\textsuperscript{110} When she told the owner that she was pregnant, he allegedly told her that restaurant patrons preferred slender waitresses to pregnant ones and offered to pay for an abortion.\textsuperscript{111} When the plaintiff refused to terminate the pregnancy, she was fired.\textsuperscript{112} She sued for her termination under theories of sex and pregnancy discrimination and the tort of wrongful discharge in violation of public policy.\textsuperscript{113} While her Title VII discrimination claims survived a motion to dismiss, her wrongful discharge tort claim did not. In its opinion, the court acknowledged that Virginia recognizes a tort exception to employment at will, but explained that it is a narrow exception and not every public policy evidenced in the statutes can give rise to a claim for wrongful


\textsuperscript{106} See Bess Levin, Citi Would Like To Make It Clear It Did Not Pay Debrahlee Lorenzana a Dime, DEALBREAKER (May 22, 2012, 3:34 PM), http://dealbreaker.com/2012/05/citi-would-like-to-make-it-clear-it-did-not-pay-debrahlee-lorenzana-a-dime/#more-76999.


\textsuperscript{108} See id. at *5 (the motion to dismiss was granted only as to the torts).


\textsuperscript{110} Id.

\textsuperscript{111} Id.

\textsuperscript{112} Id. at *1, 2.

\textsuperscript{113} Id.
discharge in violation of public policy. At the same time, the court declared that “[t]erminating an employee simply because she refuses to have an abortion offends the conscience of the Court.”

In a pending case “gone viral,” the fired employee has alleged a type of appearance discrimination that might permit recovery under the Americans with Disabilities Act. The case illustrates that some aspects of appearance may constitute disabilities, although that would not be so for general attractiveness or unattractiveness. Sandra Lupo, a former hostess at a Hooters restaurant, alleges she was fired after she had brain surgery, requiring her to have a “buzz” cut. Lupo alleges that Hooters required her to wear a wig, but she stopped wearing it because she found that the wig impeded healing of her scar and made it prone to infections. When she explained to her manager why she could not wear a wig, he allegedly reduced her hours until she was forced to quit. She filed a lawsuit alleging disability discrimination in federal district court in Missouri. Although Hooters denied the allegations, if they are proven, Lupo has a viable disability discrimination claim.

Finally, sexual favoritism or paramour cases present similar issues and also generally fall outside employment discrimination recovery.

114. Id. at *5.
115. Id. at *7, 13.
117. See supra note 116.
119. See WTSP.COM, supra note 116.
121. EEOC, N-915.048, POLICY GUIDANCE ON EMPLOYER LIABILITY UNDER TITLE VII FOR SEXUAL FAVORITISM (Jan. 12, 1990), available at http://www.eeoc.gov/policy/docs/sexualfavor.html (*Not all types of sexual favoritism violate Title VII. It is the Commission’s position that Title
As discussed above, the Eighth Circuit used these types of cases by analogy in *Tenge v. Phillips Modern Ag Co.* For example, in *Kelly v. Howard I. Shapiro & Associates Consulting Engineers,* the plaintiff, who had worked for the employer for twenty-eight years, quit because she alleged the workplace had become permeated with sexual favoritism. Specifically, the plaintiff alleged that one of the company vice presidents, who was her brother, engaged in a sexual affair with a subordinate employee. The plaintiff tried to dissuade the vice president from pursuing the relationship because of its effect on the workplace. The plaintiff alleged that, in response, her duties and authority were downgraded in favor of the vice president’s paramour, who also was accorded workplace privileges and not required to submit to the plaintiff’s authority. The plaintiff quit and sued for hostile environment sexual harassment and retaliation under Title VII and state employment discrimination law. The Second Circuit affirmed dismissal of the plaintiff’s hostile environment claim because a preference for a paramour is not discrimination “because of” sex. Additionally, the court affirmed dismissal of the retaliation claim because the plaintiff could not have possessed a good faith belief that the alleged conduct violated employment discrimination laws, and her employer could not have understood that to be her complaint.

The *Nelson* case and others exemplify cases in which women allege they were fired for their appearance or some related aspect of sex. Many of these suits claim sex, disability, or age discrimination, and sometimes the tort of wrongful discharge in violation of public policy. Sex discrimination claims sometimes succeed, but more often they do not, as in the *Nelson* case. If the statutorily based sex discrimination theory is inadequate to accommodate these cases, perhaps a tort theory could fill the gap. 

Professor Chamallas has argued persuasively that **IIED should be viewed as more than a mere gap filler and should be used to augment the law of sexual harassment.** See Chamallas, supra note 32. While I agree with that position, my argument here is that the gap-filler function is very important for tort law. Nimble tort theory should fill gaps in areas...
seems most suited to this purpose, but proves to be inadequate to the task.

III. LOOKING FOR A TORT TO FILL THE GAP: THE HISTORIC INADEQUACY OF Torte THEORIES IN EMPLOYMENT TERMINATION CASES

Terminations that elicit societal outrage are not new. Many other very bad reasons for discharge, beyond sex or appearance, offend ordinary sensibilities. As certainly as American law has embraced employment at will as the foundational and default rule for employment terminations, it is clear that some terminations are so unfair that our society cannot countenance them without providing legal recourse.131 This fact is indicated by both the numerous legal exceptions to employment at will132 and the outraged reactions to terminations like Nelson's. Termination is the "capital punishment" of employment in that it is the most severe adverse employment action that an employer can impose on an employee.133

Employment discrimination law does not provide an adequate limitation on employment at will because its particular purposes are deterring and eradicating invidious discrimination in employment,134 rather than serving as a general wrongful discharge law. Forcing employment discrimination law to protect against wrongful discharges would distort and discredit it, and jeopardize its principal objectives.135

where more ossified bodies of law, such as employment discrimination, do not provide reliable redress.

131. See, e.g., Donald C. Carroll, At-Will Employment: The Arc of Justice Bends Towards the Doctrine's Rejection, 46 U.S.F. L. Rev. 655, 672 (2012) ("The sum total of all these exceptions to the at-will rule reflect a deep-seated dissatisfaction with the at-will rule and with the economic free play of the liberty of contract. The dissatisfaction is moral in nature, implicating a piecemeal evolution of a moral consensus that the at-will rule does not serve our deepest values as a people.").

132. There are statutory exceptions and common law exceptions, both contract- and tort-based. See supra notes 23–33 and accompanying text.


135. See Cynthia L. Estlund, The Workplace in a Racially Diverse Society: Preliminary Thoughts on the Role of Labor and Employment Law, 1 U. PA. J. LAB. & EMP. L. 49, 81 (1998) (positing that some who regard themselves as non-protected employees may believe that protected employees are getting preferential treatment because employers must review adverse decisions carefully when dealing with what they believe to be protected classes); Cynthia L. Estlund, Wrongful Discharge Protections in an At-Will World, 74 TEX. L. REV. 1655, 1679 (1996) (explaining that the combination of antidiscrimination laws and at-will employment practice may add to the tension between what are regarded as protected groups and other employees because the latter normally have no recourse against unfair
In addition, employment discrimination law would not provide a reliable source of redress because of its byzantine proof structures and focus on proof of an unlawful discriminatory motive. Substantial empirical research and commentary address the relative lack of success of employment discrimination plaintiffs compared with plaintiffs asserting other types of claims. In light of these problems with employment discrimination law, tort law may provide a better remedy for egregious discharges on the fringes of employment discrimination. After all, tort law is a "mirror" for reflecting changes in society. To the extent that society cannot tolerate some terminations, tort law should be counted on to provide a reliable restriction and remedy.

This Section considers two tort theories: WDVPP and IIED. Although WDVPP was tailor-made for providing redress for employment terminations, it has been of very limited utility in providing a tort limitation on employment at will. Instead, IIED holds more promise for filling the legal gap and providing a tort bulwark against employment at will. However, for IIED to fill that role, courts must adjust their concept of the tort in the context of employment.

Cf. Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 Tex. L. Rev. 1539, 1564 (1997) (expressing a preference for new torts over "a vigorous display of group-based activism"); Chamallas, supra note 32, at 2178 (considering IIED as a basis for recovering for sexual harassment and observing that "[g]iven the limitations of Title VII, not surprisingly there has been a turn to tort law, in which plaintiffs are not required to pinpoint the motivation behind their harassment or mistreatment in order to recover").

136. See, e.g., Chamallas, supra note 32, at 2176-77 (stating that "[a]s Title VII has matured, it has become increasingly complex and rigid"); Sandra F. Sperino, *Rethinking Discrimination Law*, 110 Mich. L. Rev. 69, 71 (2011) (positing that the rigid proof structures that control employment discrimination law have "led to doctrinal, procedural, and theoretical confusion within employment discrimination law and ... mired the field in endless questions about frameworks rather than in addressing the field's core issues").

137. See, e.g., Chamallas, supra note 32, at 2178.

138. See supra note 16 and accompanying text.

139. *Cf.* Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 Tex. L. Rev. 1539, 1564 (1997) (expressing a preference for new torts over "a vigorous display of group-based activism"); Chamallas, supra note 32, at 2178 (considering IIED as a basis for recovering for sexual harassment and observing that "[g]iven the limitations of Title VII, not surprisingly there has been a turn to tort law, in which plaintiffs are not required to pinpoint the motivation behind their harassment or mistreatment in order to recover").

A. Wrongful Discharge in Violation of Public Policy: A Feckless Tort With No Potential to Remedy Outrageous Terminations

Wrongful discharge in violation of public policy could have been the tort of choice for abusive discharges, but instead it has developed as a narrow and unreliable restriction on employment at will. Notwithstanding the power and pervasiveness of employment at will, many people in the United States do not think that employers should or can fire workers without a good reason or for bad reasons. While it is hardly uncommon to hear workers and lawyers say that an employee was “wrongfully” or “unfairly” discharged, one must wonder, in the land of employment at will, what they mean by that. WDVPP could have been the tort theory that provided relief in unfair termination cases. Nevertheless, substantial problems have arisen in plaintiffs’ use of WDVPP to challenge wrongful terminations. First, courts have struggled with the tort’s link between termination and jeopardy to public policy. Second, although states recognize different versions of WDVPP, most only recognize fairly limited factual scenarios in which the tort may apply. Ultimately, courts probably find ways to deny recovery for WDVPP claims because they are solicitous of preserving a powerful, overarching employment at will principle, which permits only narrow and rare exceptions. In addition to these specific weaknesses, the mere existence of this vapid tort with its deceptively promising name may persuade many that no tort theory is needed for bad terminations because one already exists.

The tort of WDVPP was created to address some terminations that even a society governed by employment at will was unwilling to permit. The tort first appeared in the late 1950s in California, gained momentum with the publication of Professor Lawrence Blades’s article in 1967, and eventually was adopted by all but about five or six states. Blades’s article was influential in the movement to recognize

141. See Ballam, supra note 36, at 656 (describing WDVPP as “[t]he most significant limitation on the employment-at-will doctrine [that] has arisen from tort law”).
143. See supra Part I.A.
146. There is some uncertainty because in some states there are few reported decisions addressing the viability of such a claim. One treatise states that “[a]s of 2003, the courts of 45 states and the District of Columbia had recognized the public policy exception to the at-
tort limitations on employment at will. However, because the WDVPP tort recognized by states required a link between a termination and the jeopardizing of public policy, this resulted in a much narrower tort than the one proposed by Blades.\textsuperscript{147} Although the general recognition of some version of WDVPP by most states may lead some to call it a successful tort,\textsuperscript{148} it has been an abject failure in providing a reliable theory for overcoming employment at will in cases of abusive discharge.\textsuperscript{149}

The requisite connection between a termination and jeopardy to public policy is, as one court explained, "the Achilles heel of the [tort]."\textsuperscript{150} Courts struggle with finding the source of public policy, determining whether the termination at issue poses a threat to the public policy, and balancing the public policy with employment at will. In many cases, a plaintiff identifies what seems to be one or more viable public policies in state constitutional provisions or statutes, only to have the court declare that the legislature did not contemplate a remedy for employment terminations linked to that public policy.\textsuperscript{151}

will rule in one or more factual settings." Paul H. Tobias, Litigating Wrongful Discharge Claims pt. 1, § 5.3 (June 2013) (listing cases for each state that had recognized the tort). However, the qualifier "in one or more factual settings" is important because some states, such as Louisiana, do not recognize the tort, but have enacted a statute that covers some branches of WDVPP.\textsuperscript{id} The following states appear not to recognize the common law tort of WDVPP: Alabama, Florida, Georgia, Louisiana, Maine, New York, and Rhode Island. One could take issue with some of these.\textsuperscript{id} For example, Tobias's treatise cites at least one New York case that recognizes the tort: Wieder v. Skala, 609 N.E.2d 105 (N.Y. 1992). Although the Wieder case permitted a discharged employee to recover, it appears to have been on an implied covenant rationale, not WDVPP.\textsuperscript{id} at 109.

147. Specifically, Blades proposed adopting a tort modeled on the abuse of process tort, in which the tortfeasor exercises a right, but acts with bad motives or without justification. See Kenneth A. Sprang, Beware the Toothless Tiger: A Critique of the Model Employment Termination Act, 43 A.M. U. L. Rev. 849, 868 n.100 (1994) ("Blades persuasively argued . . . for adoption of the tort of 'abusive discharge,' which would reach beyond the limits of wrongful discharge in violation of public policy."). Blades's proposal, however, gave impetus to the recognition of a more limited tort—wrongful discharge in violation of public policy. See Ballam, supra note 36, at 664 (stating that, as of the 1990s, "courts were far from adopting Blades's recommendation").

148. See, e.g., Bernstein, supra note 139, at 1541.

149. See, e.g., Bammer v. Don's Super Valu, Inc., 2002 WI 85, ¶ 25–27, 254 Wis. 2d 347, 646 N.W.2d 365 (recognizing tension between WDVPP and employment at will, and denying recovery).


151. See, e.g., Green v. Bryant, 887 F. Supp. 798, 801 (E.D. Pa. 1995) (referring to the Pennsylvania statutes on domestic abuse and crime victim compensation cited by plaintiff, the court stated that "while these statutes provide certain procedures and protections, they do not thereby create a protected employment class . . . [and the abuse statute] does not . . . say that a complainant is entitled to any kind of employment rights or benefits").
In one case, *Wagenseller v. Scottsdale Memorial Hospital*, the Arizona Supreme Court permitted a plaintiff to recover under WDVPP for allegedly being fired for refusing to "moon" the audience during a performance of the song "Moon River." The court found the public policy implicated was a criminal law prohibiting indecent exposure. The Arizona legislature bristled at the court's declaration of the state's public policy and quickly responded by enacting the Arizona Employment Protection Act, in which the legislature statutorily recognized the tort but limited the judiciary's power to determine public policy.

An additional problem with the public policy requirement is that when a plaintiff attempts to invoke a public policy under a statute, such as employment discrimination statutes, some courts disallow the claims either because the legislature provided an adequate and exclusive remedy in the statute or because that federal or state law preempts state tort law recovery.

Courts' inconsistent approaches to identifying public policy and linking public policies to terminations have led some to question whether the tort really has anything to do with public policy. Professor Peck characterized the search for public policy as a disguise for what the courts actually have been doing—"revising and rejecting the employment-at-will doctrine because they sensed that it was no longer acceptable in contemporary society," and "providing needed job protection for employees who have none." On the other hand, Dean Schwab argues that what courts actually are doing is permitting

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153. Id. at 1029.
154. Id. at 1035–36.
156. Id.
160. Id.
recovery when the termination produces deleterious third-party effects.\footnote{Stewart J. Schwab, \textit{Wrongful Discharge and the Search for Third-Party Effects}, 74 \textit{Tex. L. Rev.} 1943, 1945 (1996).} Regardless of one’s evaluation and synthesis of the cases on WDVPP, it is true that there are a number of approaches to public policy, the results are often unpredictable, and many courts have interpreted the public policy requirement as imposing a significant restriction on the tort’s coverage of abusive discharge cases.

A second problem with the tort of WDVPP is that there are four general factual scenarios in which the tort is recognized, and not all states recognize all four.\footnote{See, e.g., Johnston \textit{v. Del Mar Distrib. Co.}, 776 S.W.2d 768, 770 (Tex. Ct. App. 1989) (explaining that Texas only recognizes the tort of WDVPP relating to a refusal to participate in unlawful conduct); (2) exercising a statutory right; (3) fulfilling a public obligation; and (4) whistleblowing.\footnote{See, e.g., Gardner \textit{v. Loomis Armored Inc.}, 913 P.2d 377, 379 (Wash. 1996).} A handful of states have gone beyond the four types and recognized WDVPP if four elements are satisfied: clear public policy, jeopardy, causation, and no overriding justification.\footnote{Ohio and perhaps Iowa recognize the four-elements approach. \textit{See Dohme v. Eurand Am., Inc.}, 130 Ohio St. 3d 168, 2011-Ohio-4609, 956 N.E.2d 825, at ¶ 12–16; \textit{Newell v. JDS Holdings, L.L.C.}, 834 N.W.2d 463, 468 (Iowa Ct. App. 2013).} A handful of states have gone beyond the four types and recognized WDVPP if four elements are satisfied: clear public policy, jeopardy, causation, and no overriding justification.\footnote{\textit{See} Dohme \textit{v. Eurand Am., Inc.}, 130 Ohio St. 3d 168, 2011-Ohio-4609, 956 N.E.2d 825, at ¶ 12–16; \textit{Newell v. JDS Holdings, L.L.C.}, 834 N.W.2d 463, 468 (Iowa Ct. App. 2013).}

WDVPP could have been the tort theory that would have provided a significant tort restriction on employment at will, and it could have permitted recovery for terminations like that of Melissa Nelson and other appearance-based and sex-tainted discharges.\footnote{\textit{Cf} Ballam, \textit{supra} note 36, at 664–65 (recognizing that courts adopting WDVPP were adopting a version far less expansive than Professor Blades’s recommendation and questioning whether WDVPP could evolve to significantly erode employment-at-will).} However, there are problems with the tort of WDVPP that make it an unpredictable and unreliable theory of recovery for employment terminations that are viewed as reprehensible by society. Fundamentally, the problem is indicated by the name of the tort: what connection is required between a wrongful termination and a public policy that is allegedly jeopardized by the termination? Many courts are reluctant boldly to declare public policy.

Beyond the problems with the elements of the tort, there is a more significant limitation on the tort. The biggest impediment to a viable
tort is the judiciary’s unwillingness to allow WDVPP to encroach on the employment-at-will doctrine. It is common for courts to reject modest expansions of WDVPP and explain that they are doing so to preserve employment at will. For example, in Bammert v. Don’s Super Valu, Inc., the Wisconsin Supreme Court considered the WDVPP claim of a store cashier who claimed she was fired because her policeman husband assisted in arresting the store owner’s wife for drunk driving. The court affirmed the dismissal of the plaintiff’s claim, explaining that, although the plaintiff did identify relevant public policies, she could not recover because she was not the one who participated in the conduct in support of the public policies. The court stated its reluctance to broaden the narrow WDVPP theory of recovery it had recognized because employment at will is a “stable fixture” of the common law of the state and is “central to the free market economy.” Further, the court stated that “[t]he employment-at-will doctrine thus inhibits judicial ‘second-guessing’ of discharge decisions—even those that are unfair, unfortunate, or harsh.” Accordingly, the court affirmed dismissal of the plaintiff’s claim. Thus, courts’ insistence on keeping WDVPP narrow can be seen as a strong impulse to preserve the strength, vitality, and scope of employment at will.

B. The Current Weakness of Intentional Infliction of Emotional Distress

In contrast to WDVPP, IIED is not a tort that was designed for employment law or terminations. Instead, the tort emerged from efforts to unleash parasitic damages for emotional distress from other torts. Before the recognition of the freestanding tort of IIED,

167. See, e.g., Bammert v. Don’s Super Valu, Inc., 2002 WI 85, ¶ 10, 254 Wis. 2d 347, 646 N.W.2d 365 (recognizing tension between WDVPP and employment-at-will and denying recovery).
168. 2002 WI 85, ¶ 10, 254 Wis. 2d 347, 646 N.W.2d 365.
169. See id. at 367.
170. See id. at 370–71.
171. Id. at 369.
172. Id. at 370.
173. The dissent argued that, despite reluctance to impinge upon employment-at-will, a narrow expansion of WDVPP was appropriate under the facts of the case and posed no great threat to employment-at-will. See id. at 374–75 (Bablitch, J., dissenting).
174. See, e.g., Briggs v. Nova Servs., 213 P.3d 910, 914 (Wash. 2009) (stating that “the tort of wrongful discharge in violation of public policy is a narrow exception to this employment at-will doctrine [and] [t]he exception should be applied cautiously so as to not swallow the rule”) (citation omitted); White v. Sears, Roebuck & Co., 163 Ohio App. 3d 416, 2005-Ohio-5086, 837 N.E.2d 1275, at ¶ 10–11 (recognizing narrow exception to employment-at-will).
emotional distress damages could be recovered only if some other physical contact and damage could be established under an existing tort theory.\textsuperscript{176} The first cases to recognize a cause of action for freestanding emotional distress involved special duties imposed on common carriers and innkeepers to exercise civility toward their customers.\textsuperscript{177} Then, courts began “stretching” to find a physical impact so that they could award emotional distress damages.\textsuperscript{178} From those mounting exceptions to the rule that emotional distress damages were recoverable only if an existing tort could be established, the work of academics, including Professors William Prosser and Calvin Magruder,\textsuperscript{179} and the enshrinement of IIED in the 1948 supplement to the first Restatement of Torts,\textsuperscript{180} prompted courts to recognize IIED, or the tort of outrage.\textsuperscript{181} IIED is now officially recognized in all but two states, and the highest courts of those states seem receptive to recognizing the tort under appropriate facts.\textsuperscript{182} IIED is perhaps the most amorphous of all intentional torts,\textsuperscript{183} requiring severe emotional distress caused by outrageous conduct that
exceeds the bounds that ought to be tolerated by civilized society.184 Reviewing many cases of successful IIED claims, commentators have identified several characteristics, one or more of which characterize most of those claims: (1) abusing a position of power; (2) taking advantage of a vulnerable or susceptible person; (3) repeating acts that would not be considered intolerable but for the repetition; and (4) committing acts of physical violence or threatening serious economic harm to person or property in which the plaintiff is known to have a special interest.185 Nonetheless, it has been a largely unavailing theory for plaintiffs generally,186 and for terminated employees specifically.187 Due to lingering concerns with recovery for just emotional distress, courts often grant summary judgment on IIED claims, holding as a matter of law that the conduct at issue is not outrageous and/or that the defendant did not intend to cause severe emotional distress.188 Indeed, the Restatement (Second), while giving its imprimatur to the tort, bestowed the initial weakness that it still bears: “Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it.”189 Thus, IIED is potentially both one of the most broadly applicable torts and a tort theory that courts have been most reluctant to apply broadly.190

As difficult as it has been for plaintiffs generally to recover for IIED, plaintiffs in employment cases, particularly those involving terminations, have found courts particularly reluctant to permit

what employers fear about IIED is the unknown and describing IIED as one of the formless torts); Alex B. Long, Lawyers Intentionally Inflicting Emotional Distress, 42 SETON HALL L. REV. 55, 60 (2012) (stating that it is “it is difficult, if not impossible, to state with precision what actions qualify as extreme and outrageous”).
185. DOBBS, supra note 175, at 827.
186. See Fraker, supra note 176, at 984, 996 (describing it as a disfavored cause of action and “The Tort of Last Resort”); Long, supra note 183, at 56 (quipping that IIED is “predictable in the sense that most plaintiffs lose”).
187. See, e.g., Gergen, supra note 179, at 1706 (explaining that IIED was not vexing until cases presented the question “whether liability might exist for conduct that is privileged or immunized under another body of law”).
188. See, e.g., Chamallas, supra note 32, at 2117 (describing “a considerable reluctance on the part of courts to intrude upon other areas of law or to interfere with what is perceived to be an exercise of the defendant’s legal rights”); Gergen, supra note 179, at 1706 (explaining that IIED was not vexing until cases presented the question “whether liability might exist for conduct that is privileged or immunized under another body of law”).
189. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965).
190. See Chamallas, supra note 32, at 2117 (noting that IIED represents both “expansive protection” of tort law and courts’ “considerable reluctance … to intrude upon other areas of law”).
recovery. As with WDVPP, courts fear permitting a substantial tort incursion on employment at will.191 Some courts adopting this a restrictive approach to IIED have cited a comment in the Restatement (Second) of Torts: “The actor is never liable . . . where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress.”192 Believing that employment at will is a sacrosanct principle of law, some courts fear that permitting recovery for one termination case under IIED will open the floodgates and jeopardize employment at will.193

The Texas courts are representative of the restrictive approach to IIED applied to workplace claims and terminations, and plaintiffs asserting IIED claims for workplace incidents have lost most of these cases.194 The Texas Supreme Court explained this approach in GTE Southwest, Inc. v. Bruce195: “to properly manage its business, an employer must be able to supervise, review, criticize, demote, transfer, and discipline employees. Although many of these acts are necessarily unpleasant for the employee, an employer must have latitude to exercise these rights in a permissible way, even though emotional distress results.”196 The court in GTE Southwest cited numerous Texas cases following this restrictive approach.197 Nevertheless, the Texas Supreme Court affirmed a judgment for the plaintiffs on an IIED claim, given the supervisor’s “repeated or ongoing severe harassment” of his subordinate employees.198 GTE Southwest was not a termination case, but it did slightly liberalize the standard for outrageous conduct in

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191. In 1994, Professor Duffy declared that “the overwhelming majority of jurisdictions either do not recognize the tort in the employment-at-will context, or place severe restrictions on liability in that context.” Duffy, supra note 179, at 391; see also Cavico, supra note 183, at 157–61 (describing reluctance of courts to permit IIED to be used as a backdoor wrongful discharge claim); Gergen, supra note 179, at 1702 (observing that “[d]espite the apparent openness of the tort, infliction claims by employees rarely succeed”). Although there has been some expansion of application of IIED to terminations in some states since Duffy’s statement, there is still considerable reticence on the part of courts.

192. RESTATEMENT (SECOND) OF TORTS § 46 cmt. g (1965); see, e.g., GTE Sw., Inc. v. Bruce, 998 S.W.2d 605, 611–12 (Tex. 1999).

193. See, e.g., Diamond Shamrock Ref. & Mktg. Co. v. Mendez, 844 S.W.2d 198, 202 (Tex. 1992) (stating “there would be little left of the employment-at-will doctrine” if it permitted recovery under IIED).

194. See, e.g., Cavico, supra note 183, at 120–22; Duffy, supra note 179, at 404–11; Gergen, supra note 179, at 1728–30.

195. 998 S.W.2d 605 (Tex. 1999).

196. Id. at 612.

197. See id.

198. Id. at 616.
Texas in the workplace setting. Yet, the principle that courts should rarely permit a successful IIED claim for employment termination remains vibrant in Texas case law after GTE Southwest.\textsuperscript{199}

Notwithstanding the limited success of plaintiffs in some states, it is very difficult for plaintiffs to win on IIED claims, and this is even more pronounced in employment cases, and even more so in cases involving terminations. Nonetheless, IIED is the tort theory that possesses the most potential for a tort limitation on employment at will. To realize that promise, however, courts must adjust their conception of IIED.

C. An Exemplar: WDVPP and IIED Applied to An Egregious Termination

One case of a particularly egregious termination of a female employee is Green v. Bryant,\textsuperscript{200} in which Ms. Bryant worked at a doctor's office.\textsuperscript{201} While not at work, she was attacked by her estranged husband, who beat her with a pipe and raped her at gunpoint.\textsuperscript{202} When she reported for work, she was fired, apparently because the employer feared that her violent spouse might come to her workplace and injure people.\textsuperscript{203} Bryant sued for wrongful termination based on legal theories of wrongful discharge in violation of public policy, negligent infliction of emotional distress, and intentional infliction of emotional distress.\textsuperscript{204} The court denied recovery on all theories, granting a motion to dismiss for failure to state a claim.\textsuperscript{205} The court's decision provides an prime example of why tort theories have not been filling the gap on abusive discharges.

The court rejected Bryant's claim under the theory of WDVPP. Bryant identified two public policies: protecting an employee's right to privacy and protecting victims of crime or spousal abuse.\textsuperscript{206} The court found with respect to privacy that the employer did not violate

\textsuperscript{199} See, e.g., City of Midland v. O'Bryant, 18 S.W.3d 209, 217 (Tex. 2000); Sw. Bell Mobile Sys., Inc. v. Franco, 971 S.W.2d 52, 54 (Tex. 1998), abrogated on other grounds by Intercontinental Grp. P'ship v. KB Home Lone Star L.P., 295 S.W.3d 650 (Tex. 2009); Gergen, supra note 179, at 1703 (stating, before GTE Southwest was decided, that "conduct which normally or naturally occurs in a termination cannot be considered morally outrageous as a matter of law").


\textsuperscript{201} Id.

\textsuperscript{202} See id. at 800.

\textsuperscript{203} See id. at 800 n.2.

\textsuperscript{204} See id. at 800.

\textsuperscript{205} See id. at 801.

\textsuperscript{206} See id.
Bryant’s privacy by terminating her. She disclosed the attack by her estranged spouse, and the employer did not pry into her privacy. With respect to the second public policy, the court explained that although the statutes cited by plaintiff did create certain procedures and protections for victims of crime and domestic abuse, they did not “create a protected employment class” and did not provide a person with employment rights or benefits. Finally, the court noted that the claim did not fit any of the categories of WVDPP recognized in Pennsylvania. Therefore, the court concluded that the plaintiff could not recover under the Pennsylvania tort of WDVPP.

Turning to IIED, the court first explained that it is rare that conduct in the employment context will reach the level of outrageousness, which is an essential element of IIED. The court stated that although it could “contemplate circumstances” in which a termination would satisfy the requirement of outrageousness, this was not the case: “[Plaintiff] alleges only that she was fired because she was the victim of a violent crime. Although any involuntary discharge from employment is unpleasant, defendant’s conduct was not so outrageous in character or extreme in degree as to exceed all bounds of decency.” The court rejected Bryant’s IIED theory quite simply because it concluded as a matter of law that firing an employee because she was a victim of crime and domestic abuse is not outrageous conduct. While it may seem surprising that a court would declare as a matter of law that such conduct is not extreme or outrageous, the message and theme are more employment-specific. As the court explained, terminations from employment, while unpleasant, ordinarily do not satisfy outrageousness. Indeed, in an employment-at-will state, that general principle must be true or else employers would be held liable for doing what the law says they are entitled to do.

The court’s analysis and conclusions regarding each tort may be criticized and debated. The court did expose the problems and
shortcomings with the tort of WDVPP; however, although the court also demonstrated the weakness of the tort of IIED as currently conceived in the context of abusive discharges, as explained below, IIED has greater flexibility and potential than WDVPP.

IV. RECONCEPTUALIZING IIED TO PROVIDE AN EFFECTIVE REMEDY FOR OUTRAGEOUS TERMINATIONS

In spite of IIED's current feebleness when pitted against employment at will, IIED can be refashioned to navigate a middle ground between categorically denying recovery and liberally permitting recovery. While IIED, as currently conceived, does not provide a reliable theory for recovery in termination cases implicating appearance and/or sex, it is tort law's most promising theory, and it can be reconceived to fill this role. Furthermore, given the role that IIED has played in sexual harassment cases, reconceptualizing it to provide relief in appearance- and sex-tainted terminations should be a logical evolution.

A. Incipient Promise of IIED to Provide a Remedy for Egregious Firings

What is promising about IIED as a wrongful discharge theory for some cases on the edge of employment discrimination? To begin with, the core element of outrage is a formless concept, and any type of conduct, including employment termination, could satisfy it. 215 Furthermore, there has been some movement in the law that suggests IIED could become a viable wrongful discharge theory for some terminations carried out for bad reasons. The first such development is the emergence of the concept of “discharge with dignity” and the successful assertion of IIED claims in cases involving discharges carried out in ways that humiliated the employee. 216 The second development is the interaction between sexual harassment law and IIED and the successful assertion of IIED claims in cases involving sexual harassment.

In some cases, various courts have permitted IIED claims in the termination context by reasoning, explicitly or implicitly, that although

215. One commentator suggests that the antiquated word “outrage” is part of the problem with the tort. See Fraker, supra note 176, at 1022 (arguing that “‘outrage’ is a remarkably deficient description, not only in being antiquated and vague, but because it focuses attention on the response of a hypothetical third party”).

216. See, e.g., Chamallas, supra note 32, at 2181 (citing the Restatement (Third) of Torts for the proposition that “the new Restatement does authorize a claim in cases where an employer ‘goes so far beyond what is necessary to exercise the right [to fire an at-will employee]’ and ‘unnecessarily humiliates a fired employee’ ”).
employers have the right to discharge employees for any reason, that right does not entitle them to execute the termination in a humiliating or demeaning way. 217 The comments to the Restatement (Third) of Torts indicate a shift from the Restatement (Second) toward recognizing the “discharge with dignity” cases:

An actor can intentionally or recklessly cause severe emotional harm while exercising a legal right. ... [A]n employer who terminates an at-will employee might be substantially certain that the conduct will cause severe emotional harm, but neither is liable for that conduct. Otherwise, the tort of intentional infliction of emotional harm would undermine well-established principles of marital law and employment law.

Although an actor exercising legal rights is not liable under this Section merely for exercising those rights, the actor is not immunized from liability if the conduct goes so far beyond what is necessary to exercise the right that it is extreme and outrageous. ... [A]n employer who unnecessarily humiliates a fired employee goes further than is necessary to exercise the legal right and may be subject to liability if the conduct is found to be extreme and outrageous. 218

At this time, however, the cases denying recovery for IIED in the context of termination far outnumber the successful discharge-with-dignity claims. 219

The second development that bodes well for the more expansive successful use of IIED in the employment termination context is the successful assertion of IIED along with sexual harassment claims. Although there has been some resistance to permitting IIED recovery in conjunction with sexual harassment, 220 such cases have been one of

217. See, e.g., Bristow v. Drake St., Inc., 41 F.3d 345, 349 (7th Cir. 1994) (reasoning that “no one should have to put up with such abuse”); Agis v. Howard Johnson Co., 355 N.E.2d 315, 318–19 (Mass. 1976) (explicitly applying IIED in the employment context). Cf. GTE Sw., Inc. v. Bruce, 998 S.W.2d 605, 611–13 (Tex. 1999) (although not a termination case, the court permits an IIED recovery because of the supervisor’s humiliating supervisory methods).


219. See, e.g., Porter, supra note 35, at 71–75 (discussing egregious termination cases that plaintiffs lost, including Bryant v. Green).

220. See Cavico, supra note 183, at 156 (stating that “courts typically hold that sexual harassment... does not necessarily equate to a finding of [IIED]”); Chamallas, supra note 32, at 2127–29 (stating that proving sexual harassment is not sufficient to guarantee tort recovery).
the most successful types of IIED cases. Professor Chamallas notes that there are various defenses and arguments used to prevent the overlap of employment discrimination/harassment law and torts, including preemption and states’ workers’ compensation laws providing the exclusive remedy for workplace injuries. Still, the relative success of IIED claims combined with sexual harassment claims suggests a liberalization of IIED and potential for further expansion.

B. Why a More Expansive Application of IIED to Terminations is Appropriate

Arguments regarding the appropriate role of the tort of outrage in employment law are not new. It has been argued that courts’ receptiveness to IIED has “tortified” labor and employment law, and this trend is not a good development. It has been argued, at the other extreme, that IIED should be expanded to provide a remedy for pervasive supervisor abuse of employees. Between these positions is the argument that IIED (and other “collateral torts”) are doing what they should do—essentially patrolling the outer perimeter of employment law and providing recovery in only the most egregious cases. Professor Chamallas provides a more nuanced position, arguing that courts should abandon the approach that torts apply to workplace claims only as a default if no other theory fits. Rather, she argues that courts should allow a migration of principles from employment discrimination/civil rights law to tort law, rather than viewing tort law as distinct from, and a gap filler for, civil rights law. Specifically, she argues for sexual harassment law to migrate to and inform IIED.

This Article proposes a similarly expansive use of IIED in the employment context, but the rationale is somewhat different from others. It has been argued before that tort law should play the role of

221. See, e.g., Bustamento v. Tucker, 607 So. 2d 532, 538–39 (La. 1992); Gergen, supra note 179, at 1702 (stating that a “majority of successful infliction claims by employees involve persistent sexual demands or lewd behavior”).
222. See Chamallas, supra note 32, at 2135–36.
223. See id. at 2137–39.
224. Duffy, supra note 179, passim.
226. See Gergen, supra note 179.
227. See Chamallas, supra note 32, at 2180–82.
228. See id. at 2183–87.
filling gaps in employment law. Specifically, broader interpretations of IIED and invasion of privacy could provide remedies for workplace bullying and workplace intrusions on privacy, respectively. That theme is perpetuated in arguing that IIED should be applied to permit recovery for wrongful discharge in some cases of termination that do not fit comfortably within employment discrimination theories, such as the sex- and appearance-tinged terminations discussed above. This modest expansion of IIED is the appropriate response to a significant gap in the law—termination cases that do not fit squarely within employment discrimination law but where society rankles at leaving the plaintiff without a legal remedy.

This argument is built on the idea that the two great pillars of employment law in the United States are employment at will and employment discrimination laws. Between them there are cases for which the law should provide a remedy. There are three possible ways to address this problem and permit recovery: (1) abrogating employment at will; (2) expanding employment discrimination law; or (3) filling the gap with something, thus effectively contracting employment at will. As for abrogating employment at will, despite numerous proposals over the years, only one state has passed legislation to modify employment at will, and no others are likely to do so in the foreseeable future.

Regarding expanding or stretching employment discrimination law to cover the cases, there are a number of reasons for rejecting that solution. First, many courts simply are unwilling to stretch discrimination law to cover such cases. Consider, for example, Nelson, in which the court held that terminating an employee because her employer found her irresistible was not sex discrimination. Like other courts, the Iowa Supreme Court implicitly followed the tenet that the employment discrimination laws modify employment at will only slightly. Although one may argue that the Nelson case was decided

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230. See id. at 153–56.

231. See supra Part I.

232. See supra notes 34–36 and accompanying text (discussing unsuccessful proposals).

233. See supra note 10 (discussing the Montana Wrongful Discharge From Employment Act).

234. See supra Part II.A.

235. See, e.g., Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1233 n.20 (3d Cir. 1994) cert. granted and judgment vacated in part, 514 U.S. 1034 (1995) (stating that “the employment-at-will doctrine has been abridged only to the extent necessary to enforce the federal employment discrimination laws”).
wrongly and that Ms. Nelson and other plaintiffs in similar cases should be afforded a remedy under the employment discrimination laws, there are reasons to look to tort law instead. The most significant reason is that plaintiffs rarely prevail under the employment discrimination laws now, so simply bringing more termination cases under them would not change employees' chances. Employment discrimination law has become rigid, not amenable to reaching cases that do not fit the formal proof structures or the requirement of a discriminatory motive. Consequently, it is difficult for courts to stretch the analysis to cover peripheral cases. Moreover, stretching employment discrimination law to cover wrongful discharge cases at the periphery of discrimination could weaken the laws in their core objectives of deterring and eradicating invidious discrimination; they should not come to be viewed as backdoor wrongful termination claims.

Rejecting abrogation of employment at will and expansion of employment discrimination law, I propose fashioning a new concept of IIED so that it fills the gap and effectively contracts employment at will slightly. Although IIED as it is currently understood does not provide a reliable theory of recovery in abusive termination cases, the seeds of reform have been planted. I call for IIED to be strengthened so that it can serve as an effective gap filler in employment law. Drawing on Professor Chamallas's arguments, I contend that principles of employment discrimination law, specifically hostile environment sexual harassment theory, have migrated to and informed IIED as indicated in part by the successful claims for IIED involving sexual harassment allegations. Although courts do not necessarily equate the severe or pervasive requirement of hostile environment with outrage, there has been movement in that direction.

Both IIED specifically and tort law generally are well suited to addressing appearance- and sex-based terminations. IIED's outrage element is amorphous and thus adaptable. Applying it to terminations is reasonable in light of the importance most people attach to their

236. See supra note 16.
237. See, e.g., Chamallas, supra note 32, at 2177.
238. See supra notes 136–37 and accompanying text.
239. See supra Part III.A.
240. See supra Part IV.A.
241. Chamallas, supra note 32, at 2172 (positing that tort law can borrow from hostile environment law to give meaning to outrageous conduct); Duffy, supra note 179, at 420 (noting that, as applied in the employment context, IIED is “analogous to hostile environment sexual harassment claims”).
242. See supra notes 220–23 and accompanying text.
jobs, often defining themselves in significant part by their jobs. Furthermore, the tort of outrage has been steeped in issues of gender, sexuality, and morality since its inception. Women, who seem disproportionately to be the victims of these appearance- and sex-based terminations, have been favored under IIED, with Prosser remarking early in the life of the tort that "[n]early all of the plaintiffs have been women ...."

Tort law, with many of its flexible doctrines, also may provide a more calibrated incursion into employment at will than the rigid structures of employment discrimination law. Consider, for example, the court’s discussion in the original opinion in the Nelson case of the plaintiff being without fault in encouraging the overtures of her employer: “whether an employee who has not engaged in flirtatious conduct may be lawfully terminated simply because the boss views her as an irresistible attraction.” The court noted the difference between that situation and the facts presented in Tenge v. Phillips Modern Ag Co., in which the plaintiff was fired because of her admitted flirtatious conduct with her employer. In the substitute opinion, the special concurrence stressed that Nelson was fired because of her consensual participation in a close personal relationship with Knight. However, the Iowa court noted that in employment discrimination law such a distinction usually is meaningless because the focus is on the discriminatory and unlawful motivation of the employer rather than on the fairness of the decision in the broader sense. While employment discrimination law is not well-suited to address such issues, tort law is.

Beyond simply deciding whether the conduct is actionable or not, tort law has comparative fault principles that may be applied so that fault can be allocated to both employer and employee in appropriate cases. This is a broad generalization about comparative fault. The specifics of comparative fault depend on the particular state’s law. A few states adhere to contributory negligence rather than comparative fault. Furthermore, it must be determined whether a particular state’s tort law permits application of comparative fault in the context of intentional torts and between intentional torts and negligence. See generally RESTATEMENT (THIRD) OF TORTS:
than one cause of the employee's discharge, and the employee may be partly at fault. While one of the major issues of employment discrimination law has been wrestling with various standards of causation borrowed from tort law, employment discrimination law has not benefited from a tort tool like comparative fault, which can relieve the all-or-nothing issue.

What adjustments of IIED would be needed for it to perform this gap filling role? In short, courts must be more receptive to the argument that firing employees under some circumstances is outrageous. In addition, those outrageous circumstances should not be limited to the manner of firing—i.e., “discharge with dignity”—but should also extend to some bad reasons for termination. For example, certain bad reasons for termination that previously were immunized under employment at will would be considered bad enough to satisfy outrageous conduct. This liberalization of IIED could be effected in part by a substantive change: courts articulating that the standard for outrageous conduct can include employers terminating employees for some bad reasons, such as reasons related to appearance and sex. It also could be facilitated by procedural changes. First, courts routinely grant summary judgment in employment cases, dismissing plaintiffs' IIED claims by concluding as a matter of law that the conduct is not outrageous. If courts would deny summary judgment in some abusive discharge cases and leave the case to juries, then the doctrine may gain traction, as juries tend to favor plaintiffs in IIED claims and termination cases. Second, appellate courts often reverse IIED judgments based on jury verdicts. Under the approach I describe, appellate courts should be less inclined to reverse such judgments.

One objection often posed to application of IIED in the context of employment is that employers fear the uncertainty and unpredictability of what conduct may be found to be outrageous.

Apportionment of Liability § 1 cmt. b (2012) (surveying the approaches). While most jurisdictions do not compare the fault of an intentional tortfeasor defendant and a plaintiff, id., it might be an appropriate adaptation of tort principles in the context of employment discrimination law.


251. Consider, for example, some of the bad reasons for termination in the cases discussed in this article: attractiveness, unattractiveness, domestic abuse, and refusal to have an abortion.

252. See, e.g., Gergen, supra note 179, at 1694-95.

253. See id.

254. See id.

255. See, e.g., Duffy, supra note 179, at 410 (arguing that "an employer would be left in a quandary as to the circumstances under which a demotion or other change in the terms or
Thus, expanded application of IIED to termination cases could act as a substantial retrenchment on employment at will. However, the expansion that I advocate is for cases that are on the periphery of discrimination and harassment law, such as the cases discussed earlier in which appearance or sex is at least a factor in the termination. Under current law, plaintiffs often sue for sex or other discrimination in these cases, and courts struggle to determine whether the claims come within the principles of discrimination law. Employers should not have difficulty identifying the type of conduct that could result in liability under IIED, as such conduct now often prompts discrimination lawsuits.256

What are the advantages of this proposal for expanding the scope of IIED? Would Nelson or any of the other women fired for reasons of sex or appearance win their cases? With a malleable tort standard like outrage, I do not wish to propose an answer for any specific case. I only wish to persuade that some terminations that do not fit neatly under employment discrimination law are likely to be considered outrageous by society. Instead, under this approach, fact finders would decide more of these cases at trial. I suspect that under this liberalized standard, more cases would settle. Furthermore, instead of fretting over whether employment discrimination law covers such a case, we can turn to a tort theory that permits society to express outrage at employment terminations, even in a body of law dominated by employment at will.

CONCLUSION

The firing of Melissa Nelson because her employer found her irresistible triggered a sense of moral outrage. It was an unfair firing for reasons of sex and appearance. Applied to a real person, “You’re fired!” was not so entertaining. That case and many other terminations involving aspects of appearance or sex lie on the border of employment discrimination law, and fired female workers suing for sex and other types of discrimination often lose. Such cases are not uncommon in the land of employment at will. The reaction of society is appropriate—we should be outraged that workers can be fired for such reasons and the legal system currently provides no remedy. The

conditions of at will employment would subject it to damages for intentional infliction of emotional distress); Gergen, supra note 179, at 1695.

256. See, e.g., Lynn, Jackson, Shultz, Lebrun, P.C., Fired for Being Too Tempting, S.D. EMP. L. LETTER, Feb. 2013 (stating that “Knight found himself standing too close to the line” because he would not stop his questionable conduct, and stating “[w]e don’t recommend Knight’s actions as a model for yours”).
appropriate answer, however, is not to expand employment discrimination law, which is overtaxed with termination claims already and has a low success rate for plaintiffs. Society’s outrage should be assuaged by an expanded conception of the tort of outrage, a theory of recovery that has underperformed to date, but that has remarkable potential to address such cases. Employment law needs a good tort for wrongful discharge, and IIED could rise to the occasion.