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The Employment-Related Emotional Distress Morass: Confusing Signals From California's Courts and Legislature

I. INTRODUCTION

The torts of intentional and negligent infliction of emotional distress have been recognized by the California courts for many years.¹ In the last ten years, a large body of California case law has developed concerning the issue of whether an action in tort for emotional distress arising out of the plaintiff's employment may be brought, or whether such actions are barred by the workers' compensation provisions of the California Labor Code.² The controversy surrounding this issue has become more prominent in recent months due to certain 1989 California court decisions³ and legislative acts.⁴

This Comment will first give a general overview of California statutes and case law concerning the conflict between infliction of emotional distress by an employer and workers' compensation exclu-

1. See *infra* notes 62-69 and accompanying text (discussion of intentional infliction of emotional distress in California), notes 38-60 and accompanying text (discussion of negligent infliction of emotional distress in California).

2. See *infra* notes 79-188 and accompanying text (discussion of the conflict between emotional distress causes of action and the Labor Code). See generally, e.g., *Jenkins v. Family Health Program*, 214 Cal. App. 3d 440, 262 Cal. Rptr. 798 (1989); *Cole v. Fair Oaks Fire Protection Dist.*, 43 Cal. 3d 148, 729 P.2d 743, 233 Cal. Rptr. 308 (1987); *Renteria v. County of Orange*, 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (1978) (cases involving emotional distress arising from employment).

3. See *infra* notes 132-88 and accompanying text (discussion of 1989 California court decisions).

4. See *infra* notes 189-97, 220-28 and accompanying text (discussion of recent legislative action).

sivity.⁵ Next, this Comment will discuss the likely future ramifications of recent California cases and legislative enactments.⁶ Finally, this Comment will propose legislative and judicial action to ensure that injured employees are adequately compensated, while preserving the efficiency of the California workers' compensation system.⁷

II. LEGAL HISTORY

A. The Statutory Background of Workers' Compensation Law in California

The constitution of the state of California grants the legislature the power to create and regulate the workers' compensation system.⁸ In 1911, the legislature enacted the Workmen's Compensation Act, which was designed to compensate employees for work-related injury or death and to create and fund an industrial accident board.⁹ The legislature intended to provide injured employees with swift disposition of their claims.¹⁰

The workers' compensation provisions are contained in the California Labor Code (hereinafter Labor Code).¹¹ Labor Code section 3600 provides that, with very few exceptions, liability exists against any employer,¹² without regard to negligence, for any employee's¹³ injury¹⁴ or death caused by an incident arising out of the course of employment.¹⁵ The Labor Code contains extensive provisions regard-

5. See *infra* notes 8-30 (discussion of the statutory basis of workers' compensation), notes 38-68 (discussion of case law concerning the torts of intentional and negligent infliction of emotional distress), notes 71-188 (discussion of emotional distress in the area of employment).

6. See *infra* notes 198-214 and accompanying text.

7. See *infra* notes 217-52 and accompanying text.

8. See CAL. CONST. art XIV, § 4.

9. 1911 Cal. Stat. ch. 399, at 796.

10. *Johns-Manville Prods. Corp. v. Superior Court*, 27 Cal. 3d 465, 474, 612 P.2d 948, 953, 165 Cal. Rptr. 858, 863 (1980). See CAL. LAB. CODE § 3202 (West 1989) (workers' compensation provisions are to be liberally construed in the employee's favor).

11. See CAL. LAB. CODE §§ 3200-6149 (West 1989).

12. See *id.* § 3300 (definition of employer).

13. See *id.* § 3351 (definition of employee).

14. See *id.* § 3208 ("injury" is defined as "any injury or disease arising out of employment").

15. *Id.* § 3600(a). The provisions only apply when: (1) Both the employee and the employer are subject to the workers' compensation system; (2) the employee is acting within the scope of employment; (3) the injury is proximately caused by the employment; (4) the injury is not intentionally self-inflicted; (5) the injury is not a proximate result of the employee's intoxication; (6) the employee is not injured in the course of the commission of a felonious act; and (7) the injury does not arise out of an altercation initiated by the employee. *Id.*

ing computation of the proper amount of compensation for specific injuries.¹⁶ The legislature has explicitly stated that courts should construe the workers' compensation provisions liberally in favor of providing coverage for injured employees.¹⁷

Section 3602 of the Labor Code, commonly known as the "exclusive remedy provision," prohibits most injured employees from bringing tort claims against their employers by providing that the workers' compensation system is the exclusive remedy for most on-the-job injuries.¹⁸ The exclusive remedy provision applies to almost all injuries resulting from employment. The Labor Code includes exceptions to the exclusive remedy provision for injuries which are proximately caused by an employer's willful physical assault,¹⁹ or aggravated by the employer's fraudulent concealment of the nature of the injury.²⁰ Also excepted from the exclusive remedy provision are injuries proximately caused by a defective product manufactured by the employer and transferred for consideration to a third party for the employee's use,²¹ injuries caused by the manufacturer's failure to install mandatory safety guards on power equipment,²² and injuries for which the employer is uninsured, or otherwise fails to take action to secure payment of the injured employee's workers' compensation claim.²³

The legislature amended much of the workers' compensation system in 1982, adding the above exceptions to the exclusive remedy provision.²⁴ The reasoning behind the legislature's failure to make claims

16. See *id.* §§ 4550-855.

17. *Id.* § 3202 (explicit legislative mandate to liberally construe workers' compensation provisions).

18. *Id.* § 3602(a) (exclusive remedy provision).

19. *Id.* § 3602(b)(1) (exception for physical assaults by the employer).

20. *Id.* § 3602(b)(2) (exception for the employer's fraudulent concealment of the injury or its relationship to employment). In such cases, the employer has the burden of proof concerning apportionment of compensation between the original injury, which is exclusively compensable under workers' compensation, and the aggravation of the injury, which is compensable in tort. *Id.* See generally *Barth v. Firestone Tire & Rubber Co.*, 661 F. Supp. 193 (N.D. Cal. 1987) (case dealing with the employer's fraudulent concealment).

21. CAL. LAB. CODE § 3602(b)(3) (West 1989) (exception for certain defective products).

22. *Id.* § 4558 (exception for removal of safety guards). See generally *Swanson v. Matthews Prods., Inc.*, 175 Cal. App. 3d 901, 221 Cal. Rptr. 84 (1985) (case dealing with removal of safety guards).

23. CAL. LAB. CODE § 3706 (West 1989) (exception for the employer's failure to secure payment). See generally *Lee v. Cranford*, 107 Cal. App. 2d 677, 237 P.2d 986 (1951) (failure of the employer to insure against the employee's injury).

24. See 1982 Cal. Stat. ch. 922, sec. 4, at 3365 (amending CAL. LAB. CODE § 3600); *id.* sec. 5, at 3366 (amending CAL. LAB. CODE § 3601); *id.* sec. 6, at 3367 (amending CAL. LAB. CODE § 3602). See also *Review of Selected 1982 California Legislation*, 14 PAC. L.J. 763, 763 (1983) (discussion of Chapter 922). Prior to the 1982 amendments, many provisions of section 3602 were contained in Labor Code section 3601. 1971 Cal. Stat. ch. 1751, sec. 1, at 3780

for emotional distress one of the explicit exceptions to the exclusive remedy provision is not clear. It has been suggested that the lack of a specific exemption could be interpreted as foreclosing all civil claims against employers for infliction of emotional distress.²⁵ This view, however, has generally been rejected by the courts.²⁶ Some courts have held that a specific exemption is unnecessary, since prior case law has recognized an implied exemption.²⁷

The fact that an employer intentionally causes an injury to an employee does not remove the injury from the ambit of the exclusive remedy provision, unless the employer physically assaults the employee.²⁸ However, the Labor Code does provide some deterrence for intentional injuries.²⁹ Under the Labor Code, serious or willful misconduct by the employer allows the injured employee to collect one and one-half times the normal compensation, together with costs and expenses.³⁰

Although the statutory basis of workers' compensation seems straightforward, the workers' compensation provisions of the Labor Code have been the subject of staggering amounts of litigation in the California courts.³¹ Much of this litigation has centered on application of the exclusive remedy provision.³² Of particular interest and importance is the clash between the common law tort of inten-

(amending CAL. LAB. CODE § 3601). Consequently, earlier decisions may cite the "exclusive remedy" provision as section 3601.

25. See Comment, *Cole v. Fair Oaks Fire Protection District: Exploring the Parameters of the Normal Risks of Employment Test*, 19 PAC. L.J. 303, 323 (1988) (discussion of the possible interpretations of the legislature's actions).

26. See, e.g., *Hart v. National Mortgage & Land Co.*, 189 Cal. App. 3d 1420, 1431, 235 Cal. Rptr. 68, 75 (1987) (legislature could not have intended to eliminate tort actions for emotional distress, because to do so would leave employees who suffer emotional distress with no remedy at all). See also Comment, *supra* note 25, at 323-25 (discussion of cases considering whether the 1982 amendments eliminate tort claims against employers).

27. *Id.* See *infra* notes 84-101 (discussion of cases recognizing an implied exception).

28. See *Azevedo v. Abel*, 264 Cal. App. 2d 451, 458, 70 Cal. Rptr. 710, 714 (1968) (the fact that an injury is intentional does not, by itself, remove it from the exclusive remedy provision). See also CAL. LAB. CODE § 3602(b)(1) (West 1989) (exception from the exclusive remedy provision for willful physical assault by an employer).

29. See *Cole v. Fair Oaks Fire Protection Dist.*, 43 Cal. 3d 148, 156-57, 729 P.2d 743, 748, 233 Cal. Rptr. 308, 313 (1987) (the Labor Code provides a deterrence for employer's intentional tortious acts). But see *Renteria v. County of Orange*, 82 Cal. App. 3d 833, 841, 147 Cal. Rptr. 447, 451 (1978) (the Labor Code might not provide a sufficient deterrent to intentional torts).

30. CAL. LAB. CODE § 4553 (West 1989). Recoverable costs and expenses are limited to \$250. *Id.*

31. See generally Comment, *Workers' Compensation Exclusivity and Wrongful Termination Tort Damages: An Injurious Tug of War?*, 39 HASTINGS L.J. 1229 (1988) (discussion of the history of workers' compensation litigation in California).

32. *Id.*

tional infliction of emotional distress³³ and the exclusive remedy provision.³⁴

B. Case Law

1. Emotional Distress Generally

For more than ninety years, California has recognized a cause of action for the infliction of emotional distress.³⁵ Modern California law recognizes two types of emotional distress causes of action: negligent infliction of emotional distress, and intentional infliction of emotional distress.³⁶ Both causes of action are responsible for separate and distinct bodies of case law, with correspondingly distinct requirements and elements.³⁷

a. Negligent Infliction of Emotional Distress

Negligent infliction of emotional distress, (hereinafter NIED), is further subdivided into two types of causes of action: direct actions and bystander actions. The modern California view toward NIED directly inflicted upon the plaintiff is stated in *Molien v. Kaiser Foundation Hospitals*.³⁸ Overruling prior case law,³⁹ the California Supreme Court ruled in *Molien* that a plaintiff seeking recovery for

33. See *infra* notes 62-69 and accompanying text (general discussion of the tort of intentional infliction of emotional distress in California).

34. See *infra* notes 79-188 and accompanying text (discussion of the viability of emotional distress causes of action in the employment setting).

35. See, e.g., *Sloane v. Southern Cal. Ry.*, 111 Cal. 668, 680, 44 P. 320, 322 (1896). Although the court recognized that mental suffering "constitutes an aggravation of damages when it naturally ensues from the act complained of," the court held that emotional injury must be accompanied by some physical injury to be compensable. *Id.*

36. See generally W.P. KEETON, PROSSER & KEETON ON TORTS at 359-67 (5th ed. 1984 & Supp. 1988) (discussion of negligent infliction of emotional distress); *id.* at 54-66 (discussion of intentional infliction of emotional distress).

37. See *infra* notes 38-61 and accompanying text (discussion of negligent infliction of emotional distress), notes 62-69 and accompanying text (discussion of intentional infliction of emotional distress).

38. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

39. See, e.g., *Sloane*, 111 Cal. at 680, 44 P. at 322; *Vanoni v. Western Airlines*, 247 Cal. App. 2d 793, 795-97, 56 Cal. Rptr. 115, 116-17 (1967) (physical manifestations are required in order to state a cause of action). See also BAJI No. 12.80 (6th ed. 1977) ("There can be no recovery of damages for emotional distress unaccompanied by physical injury where such emotional distress arises only from negligent conduct.").

emotional distress need not prove the existence of a physical injury.⁴⁰ The court stated that the physical injury requirement was created to satisfy cynical views that the injury was not genuine.⁴¹ The court felt that the physical injury requirement was disadvantageous because the requirement prevented valid claims from reaching a jury, and because the requirement encouraged extravagant pleading and distorted testimony to allow claims to be filed.⁴² Under *Molien*, a plaintiff may state a cause of action for direct NIED by proving that the emotional distress was severe and foreseeable.⁴³ The court held that the severity and foreseeability requirements would assure the genuineness of the claim.⁴⁴ The court stated that an emotional injury is defined as severe when it is the type that a normally constituted person could not bear.⁴⁵

The *Molien* analysis is used only when the plaintiff alleges a "direct" injury; in other words, that the result of the defendant's negligence was directly inflicted on the plaintiff.⁴⁶ A different analysis is required when the plaintiff suffers "bystander" NIED. In bystander NIED, the plaintiff suffers emotional distress as a result of viewing an injury to a third person proximately caused by the defendant's negligence.⁴⁷ The elements of the bystander NIED cause of action have been radically altered by the courts over the last thirty years.⁴⁸

In the early 1960's, many states allowed a recovery for bystander NIED when the plaintiff was in the "zone of danger," or, in other words, was threatened with physical injury by the defendant's negligence.⁴⁹ These decisions held that recovery was proper because, by placing the plaintiff in danger of physical injury, the defendant had already breached the duty owed to the plaintiff.⁵⁰ The zone of danger

40. *Molien*, 27 Cal. 3d at 928, 616 P.2d at 820, 167 Cal. Rptr. at 838.

41. *Id.*

42. *Id.* at 928-29, 616 P.2d at 820, 167 Cal. Rptr. at 838.

43. *Id.* at 929-30, 616 P.2d at 821, 167 Cal. Rptr. at 838-39. For a more detailed discussion of *Molien*, see generally Note, *Negligent Infliction of Emotional Distress: New Horizons After Molien v. Kaiser Foundation Hospitals*, 13 Pac. L.J. 179 (1981).

44. *Molien*, 27 Cal. 3d at 929-30, 616 P.2d at 820-21, 167 Cal. Rptr. at 838-39.

45. *Id.* at 928, 616 P.2d at 819-20, 167 Cal. Rptr. at 837-38 (quoting *Rodriguez v. State*, 52 Haw. 156, 173, 472 P.2d 509, 519-20 (1970)).

46. *Id.* at 923, 616 P.2d at 817, 167 Cal. Rptr. at 835.

47. W.P. KEETON, *supra* note 36, at 365 (discussion of the bystander NIED cause of action).

48. See *infra* notes 49-61 and accompanying text (discussion of the history of bystander NIED in California).

49. See W.P. KEETON, *supra* note 36, at 365 (discussion of the zone of danger test).

50. W.P. KEETON, *supra* note 36, at 365.

test was adopted in California in the early sixties,⁵¹ and continues to be valid in some other jurisdictions.⁵²

In the landmark 1968 case of *Dillon v. Legg*,⁵³ the California Supreme Court discarded the zone of danger test.⁵⁴ Instead, the court held that three factors would be taken into account by courts to determine if the defendant owes the plaintiff a duty of care: (1) Whether the plaintiff was located near the scene of the accident, as opposed to a distance away; (2) whether the shock resulted from a sensory and contemporaneous observance of the accident, as opposed to learning of it later; and (3) whether the plaintiff and the victim were closely related.⁵⁵ The *Dillon* case attracted nationwide attention, and its rationale was adopted in numerous other jurisdictions.⁵⁶

In a recent California Supreme Court case, *Thing v. LaChusa*,⁵⁷ the court narrowed and modified the above "Dillon factors" and ruled that they are not merely factors, but necessary *elements* of the cause of action. In *Thing*, the court held that a plaintiff may recover *only* if three elements are satisfied: (1) The plaintiff is closely related to the injured victim;⁵⁸ (2) the plaintiff is present at the scene of the injury and realizes that the victim is being injured;⁵⁹ and (3) the plaintiff suffers serious emotional distress as a result.⁶⁰

51. See *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295, 302-03, 379 P.2d 513, 517, 29 Cal. Rptr. 33, 37 (1963) (adoption of the zone of danger test).

52. See W.P. KEETON, *supra* note 36, at 365 n.69; *id.* at 61 n.75 (1988 Supp.) (list of modern cases from Arizona, Minnesota, New York, Vermont, and Wisconsin applying the zone of danger test).

53. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

54. *Id.* at 739-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.

55. *Id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80-81.

56. See Nolan & Ursin, *Negligent Infliction of Emotional Distress: Coherence Emerging From Chaos*, 33 HASTINGS L.J. 583, 584-85 (1982); Comment, *Negligent Infliction of Mental Distress: Reaction to Dillon v. Legg in Other States*, 25 HASTINGS L.J. 1248, 1253-57 (1974) (discussions of the nationwide response to *Dillon*). For citation lists of out-of-state cases adopting the *Dillon* test, see Nolan & Ursin, *supra*, at 585 n.9, and W.P. KEETON, *supra* note 36, at 366 n.74.

57. 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989).

58. *Id.* at 667-68, 771 P.2d at 829, 257 Cal. Rptr. at 880. The court stated that, barring unusual circumstances, recovery should be allowed only for parents, siblings, or children of the victim, or relatives who reside in the victim's household. *Id.* at 668 n.10, 771 P.2d at 829 n.10, 257 Cal. Rptr. at 880 n.10.

59. *Id.* at 668, 771 P.2d at 829, 257 Cal. Rptr. at 880. The court maintained that allowing those not physically present at the scene of the injury to state a cause of action would create overly broad limitations on liability. *Id.* at 668 n.11, 771 P.2d at 829-30 n.11, 257 Cal. Rptr. at 880-81 n.11.

60. *Id.* at 668, 771 P.2d at 829-30, 257 Cal. Rptr. at 880-81. The court stated that serious emotional distress arises when a reasonable person who is "normally constituted would be unable to adequately cope with the mental distress engendered by the circumstances." *Id.* at 668, 771 P.2d at 830, 257 Cal. Rptr. at 881 n.12 (quoting *Rodriguez v. State*, 52 Haw. 156, 173, 472 P.2d 509, 519-20 (1970)).

Bystander actions are extremely rare in the context of the subject matter of this Comment. In one of those rare cases arising out of employment, a court of appeals ruled that a cause of action for emotional distress suffered by a plaintiff who witnessed the fatal work-related injury of her husband was barred by the exclusive remedy provision of the Labor Code.⁶¹

b. Intentional Infliction of Emotional Distress

A completely different analysis is required when the emotional distress is intentionally inflicted. For nearly forty years, California has recognized a cause of action for intentional infliction of emotional distress.⁶² Under present law, a plaintiff states a claim for intentional infliction of emotional distress by first proving that the defendant either acted with the intention of causing emotional distress,⁶³ or with reckless disregard of the risk of causing the plaintiff to suffer emotional distress.⁶⁴ Additionally, the plaintiff must prove that the defendant's conduct is extreme and outrageous,⁶⁵ that the emotional distress is severe,⁶⁶ and that the distress is proximately caused by the defendant's behavior.⁶⁷ The plaintiff need not allege a physical in-

61. *Williams v. Schwartz*, 61 Cal. App. 3d 628, 634, 131 Cal. Rptr. 200, 203 (1976). See CAL. LAB. CODE § 3602 (West 1989) (exclusive remedy provision).

62. See, e.g., *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 240 P.2d 282 (1952) (emotional distress as a result of coercive credit collection methods); *Alcorn v. Ambro Eng'g*, 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970) (employee suffered emotional distress after his supervisor used racial epithets in firing him).

63. *Alcorn v. Ambro Eng'g*, 2 Cal. 3d 493, 497-98, 468 P.2d 216, 218, 86 Cal. Rptr. 88, 90.

64. *Newby v. Alto Riviera Apartments*, 60 Cal. App. 3d 288, 296, 131 Cal. Rptr. 547, 552 (1976) (reckless disregard of the risk may satisfy the intent requirement). See RESTATEMENT (SECOND) OF TORTS § 46 (1965) (discussion of the broader intent requirement for intentional infliction of emotional distress as compared to other intentional torts).

65. *Alcorn*, 2 Cal. 3d at 498-99, 468 P.2d at 218-19, 86 Cal. Rptr. at 90-91. One court held that, in order to meet the outrageous conduct element, a plaintiff must allege that:

(1) The defendant abused a relation or position which gives him power to damage the plaintiff's interest, (2) the defendant knew that the plaintiff was susceptible to injury through mental distress, or (3) the defendant acted intentionally or unreasonably with the recognition that the acts were likely to result in illness through emotional distress.

Newby v. Alto Riviera Apartments, 60 Cal. App. 3d 288, 297, 131 Cal. Rptr. 547, 553 (1976).

66. *Newby*, 60 Cal. App. 3d at 296, 131 Cal. Rptr. at 553. Emotional distress is severe if it is the sort that a normally constituted person would not be able to bear. *Molien v. Kaiser Foundation Hospitals*, 27 Cal. 3d 916, 928, 616 P.2d 813, 819-20, 167 Cal. Rptr. 831, 837-38 (1980).

67. *Newby*, 60 Cal. App. 3d at 296, 131 Cal. Rptr. at 553. See RESTATEMENT (SECOND) OF TORTS § 46 (1965) (paralleling the California standard).

jury.⁶⁸ As with other intentional injuries, the defendant may be liable for exemplary damages in proper cases.⁶⁹

2. Emotional Distress Claims Arising Out of Employment

a. Types of Injuries Which May Give Rise to a Tort Claim

The common law regarding emotional distress is well established in California.⁷⁰ Predictably, when emotional distress has arisen in the employment context, conflicts between the common law and the exclusive remedy provision of workers' compensation have arisen.⁷¹ A substantial body of case law attempting to resolve the issue exists in California.⁷² Plaintiffs who suffer employment related emotional distress can only receive compensation if they are allowed to pursue a tort claim, since the California courts traditionally view emotional distress as a noncompensable injury under the workers' compensation system.⁷³

In *Alcorn v. Anbro Engineering*,⁷⁴ the plaintiff brought an action against his employer for intentional infliction of emotional distress.⁷⁵ The plaintiff, who was black, alleged that he suffered emotional distress, resulting in physical injuries, as a result of his supervisor's racial slurs.⁷⁶ In reversing the trial court's decision to sustain the

68. *Alcorn*, 2 Cal. 3d at 498, 468 P.2d at 218, 86 Cal. Rptr. at 90.

69. *Alcorn*, 2 Cal. 3d at 497 n.1, 468 P.2d at 218 n.1, 86 Cal. Rptr. at 90 n.1. See CAL. CIV. CODE § 3294 (West Supp. 1989) (standards for exemplary damages).

70. See *supra* notes 38-69 and accompanying text (discussion of emotional distress actions in California).

71. See *infra* notes 78-188 and accompanying text.

72. See, e.g., *Cole v. Fair Oaks Fire Protection Dist.*, 43 Cal. 3d 148, 729 P.2d 743, 233 Cal. Rptr. 308 (1987); *Jenkins v. Family Health Program*, 214 Cal. App. 3d 440, 262 Cal. Rptr. 798 (1989); *Panopulos v. Westinghouse Elect. Corp.*, 216 Cal. App. 3d 660, 264 Cal. Rptr. 810 (1989); *Renteria v. County of Orange*, 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (1978) (cases dealing with the conflict between the exclusive remedy provision and intentional infliction of emotional distress).

73. See, e.g., *Renteria v. County of Orange*, 82 Cal. App. 3d 833, 839-40, 147 Cal. Rptr. 447, 450-51 (1978) (emotional distress is not compensable under workers' compensation). But see 1989 Cal. Legis. Serv. ch. 892, sec. 25, at 2683 (West) (enacting CAL. LAB. CODE § 3208.3) (psychiatric injuries causing a mental disorder are compensable) (discussed *infra* notes 186-94 and accompanying text).

74. 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970).

75. *Id.* at 496-97, 468 P.2d at 217, 86 Cal. Rptr. at 89.

76. *Id.* The supervisor allegedly stated, "You goddam 'niggers' are not going to tell me about the rules. I don't want any 'niggers' working for me. I am getting rid of all the 'niggers'." *Id.*

defendant's demurrer, the California Supreme Court held that the plaintiff stated a cause of action for intentional infliction of emotional distress, because all of the common law elements of the intentional infliction of emotional distress cause of action had been satisfied.⁷⁷ The issue of the exclusivity of workers' compensation was not raised by the parties.⁷⁸

In subsequent employment emotional distress cases, defendants have raised the issue of workers' compensation exclusivity.⁷⁹ Since physical injuries are covered under the workers' compensation system, California courts have treated tort actions brought against employers for purely emotional injuries differently than actions brought against employers for the infliction of emotional distress combined with an employment-related physical injury.⁸⁰ For cases of purely emotional harm, the California courts have generally allowed the employee to bring a tort action.⁸¹ In cases against employers involving emotional distress combined with physical illness or injury, most courts have held that the existence of a physical injury triggers the exclusive remedy provision, effectively barring any tort claim.⁸²

In many complaints alleging employment related emotional distress filed after the *Anbro* case, the emotional distress was not accompanied by physical injury.⁸³ In the seminal case on the issue, *Renteria*

77. *Id.* at 498-99, 468 P.2d at 218-19, 86 Cal. Rptr. at 90-91. See *supra* notes 63-67 and accompanying text (discussion of the common law elements of intentional infliction of emotional distress).

78. At least two later appellate decisions permitted plaintiffs to state a cause of action for intentional infliction of emotional distress against their employers, without raising the issue of the exclusivity of workers' compensation. See *Agarwal v. Johnson*, 81 Cal. App. 3d 513, 146 Cal. Rptr. 521 (1978) (emotional distress caused by the employer's verbal abuse); *Toney v. State*, 54 Cal. App. 3d 779, 126 Cal. Rptr. 869 (1976) (emotional distress caused by the employer's threats and verbal abuse). For a discussion of the state of the law at the time of these cases, see *Larson, Nonphysical Torts and Workmen's Compensation*, 12 CAL. W.L. REV. 1, 9-21 (1975).

79. See, e.g., *Cole v. Fair Oaks Fire Protection Dist.*, 43 Cal. 3d 148, 729 P.2d 743, 233 Cal. Rptr. 308 (1987); *Jenkins v. Family Health Program*, 214 Cal. App. 3d 440, 262 Cal. Rptr. 798 (1989); *Panopoulos v. Westinghouse Elect. Corp.*, 216 Cal. App. 3d 660, 264 Cal. Rptr. 810 (1989); *Renteria v. County of Orange*, 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (1978) (cases dealing with the conflict between the exclusive remedy provision and intentional infliction of emotional distress).

80. Compare *Ankeny v. Lockheed Missiles & Space Co.*, 88 Cal. App. 3d 531, 151 Cal. Rptr. 828 (1979) (tort action for emotional distress accompanied by physical illness and disability was barred by the exclusive remedy provision) with *Renteria v. County of Orange*, 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (1978) (tort action for a purely emotional injury may be brought).

81. See *infra* notes 83-101 and accompanying text.

82. See *infra* notes 102-11 and accompanying text.

83. See, e.g., *Young v. Libby-Owens Ford Co.*, 168 Cal. App. 3d 1037, 214 Cal. Rptr. 400 (1985) (distress due to the employer's failure to discipline the plaintiff's co-worker for an

v. County of Orange,⁸⁴ the plaintiff alleged that his employer subjected him to surveillance and interrogations, treated him in a rude and degrading manner, and discriminated against him because of his Mexican descent, all for the purpose of causing him emotional distress.⁸⁵ In the lower court, the defendant successfully demurred on the ground that the plaintiff's emotional injuries were within the workers' compensation exclusive remedy provision.⁸⁶ The trial court determined that since the alleged injuries arose out of the course of employment, the exclusive remedy provisions of Labor Code section 3602 applied, and thus a tort action was improper.⁸⁷

The appellate court in *Renteria* held that emotional distress, unaccompanied by physical injury, is not a compensable injury under the workers' compensation system.⁸⁸ Although the employer in *Renteria* cited cases which, according to the employer, implied that emotional distress was a compensable injury under the workers' compensation system, the court maintained that those cases involved other, nonemotional injuries, and thus were not controlling.⁸⁹ The court recognized that classifying an injury as not compensable under the workers' compensation system does not, by itself, abrogate the exclusive remedy provision.⁹⁰ The court noted that it may be necessary to bar recovery for certain types of negligently or accidentally inflicted injuries in order to further the policy of the continued efficient operation of the workers' compensation system.⁹¹

While acknowledging that courts in some other states have held that the workers' compensation system provided the exclusive remedy

assault on the plaintiff); *Iverson v. Atlas Pac. Eng'g*, 143 Cal. App. 3d 219, 191 Cal. Rptr. 696 (1983) (distress due to false imprisonment); *McGee v. McNally*, 119 Cal. App. 3d 891, 174 Cal. Rptr. 253 (1981) (distress due to harassment); *Lagies v. Copely*, 110 Cal. App. 3d 958, 168 Cal. Rptr. 368 (1980) (distress due to defamation by employer); *Renteria v. County of Orange*, 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (1978) (distress due to verbal assaults, interrogation, and ethnic discrimination).

84. 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (1978).

85. *Id.* at 835, 147 Cal. Rptr. at 447.

86. *Id.* at 835, 147 Cal. Rptr. at 447-48.

87. *Id.*

88. *Id.* at 839-40, 147 Cal. Rptr. 450-51. The court stated that it was "aware of no decisional or statutory authority for the proposition that mental suffering, *as such*, is a compensable injury." *Id.* at 839, 147 Cal. Rptr. at 450 (emphasis in original).

89. *Id.* at 839-40, 147 Cal. Rptr. at 450 (citing *Baker v. Workmen's Comp. Appeals Bd.*, 18 Cal. App. 3d 852, 96 Cal. Rptr. 279 (1971)) (heart condition brought about by mental strain of employment); *Burnight v. Industrial Accident Commission*, 181 Cal. App. 2d 816, 5 Cal. Rptr. 786 (1960) (mental illness caused by job pressure).

90. *Renteria*, 82 Cal. App. 3d at 840, 147 Cal. Rptr. at 451. See *Williams v. State Compensation Ins. Fund*, 50 Cal. App. 3d 116, 122-23, 123 Cal. Rptr. 812, 815 (1975) (the absence of a compensable injury does not abrogate the exclusive remedy provision).

91. *Renteria*, 82 Cal. App. 3d at 840-41, 147 Cal. Rptr. at 451-52.

for work-related injuries, even if they were noncompensable under the workers' compensation system,⁹² the appellate court in *Renteria* found no support for such a proposition under California law.⁹³ The court reasoned that to adopt such a proposition would bar recovery for numerous civil wrongs that are outside the ambit of the workers' compensation system, including many intentionally caused injuries.⁹⁴ The court then reasoned that the legislature could not have intended for employees to lose their right to compensation for an entire class of intentional civil wrongs, namely intentional infliction of emotional distress.⁹⁵

Although the Labor Code provides for a penalty of fifty percent of benefits for serious and willful misconduct by the employer,⁹⁶ the court observed that the penalty provision does not provide a deterrent for the intentional infliction of noncompensable injuries, since "50 percent of nothing is still nothing."⁹⁷ Consequently, the court held that an employee's claim for intentional infliction of emotional distress, unaccompanied by physical injuries, constituted an implied exception to the exclusive remedy provision.⁹⁸ Under *Renteria*, a plaintiff may bring a tort action for intentional infliction of emotional distress against his employer so long as the essence of the tort is nonphysical.⁹⁹ By recognizing a tort cause of action for purely emotional injuries, the *Renteria* decision created an exception to a later line of cases which held that emotional distress arising out of

92. *Id.* at 840, 147 Cal. Rptr. at 451. *See, e.g.,* Grice v. Suwanee Lumber Mfg. Co., 113 So. 2d 742 (Fla. Dist. Ct. App., 1959) (loss of a testicle); Moushon v. National Garages, 9 Ill. 2d 407, 137 N.E.2d 842 (1956) (loss of both testicles); Hyett v. Northwestern Hosp. For Women & Children, 147 Minn. 413, 180 N.W. 552 (1920) (noncompensable neurological injury). *See generally* 2 LARSON, LARSON'S WORKMEN'S COMPENSATION § 65.20 (Desk ed. 1989) (discussion of out-of-state cases barring tort recovery for noncompensable injuries). The *Renteria* court observed that the theory underlying these decisions is that the workers' compensation system imposes reciprocal concessions upon the employer and the employee: While the employee enjoys speedy disposition of most claims, he or she gives up the right to relief for certain injuries. These decisions hold that "a failure of the compensation law to include some element of damage recoverable at common law is a legislative and not a judicial problem." *Renteria*, 82 Cal. App. 3d at 840-41, 147 Cal. Rptr. at 451 (quoting Williams v. State Compensation Ins. Fund, 50 Cal. App. 3d 116, 122, 123 Cal. Rptr. 812, 815 (1975)).

93. *Renteria*, 82 Cal. App. 3d at 840-41, 147 Cal. Rptr. at 451.

94. *Id.* at 841, 147 Cal. Rptr. at 451.

95. *Id.* at 841, 147 Cal. Rptr. at 451-52.

96. *See* CAL. LAB. CODE § 4553 (West 1989) (increase of benefits by 50% for serious and willful misconduct by the employer or the employer's agents resulting in injury to the employee). *See also supra* notes 29-30 and accompanying text (discussion of the Labor Code penalty provision).

97. *Renteria*, 82 Cal. App. 3d at 841, 147 Cal. Rptr. at 451-52.

98. *Id.* at 842, 147 Cal. Rptr. at 452.

99. *Id.*

employment was compensable only through workers' compensation.¹⁰⁰ The *Renteria* holding was followed in numerous subsequent cases.¹⁰¹

Later cases raised the exclusive remedy issue in actions for emotional distress combined with physical injuries.¹⁰² Consideration of the exclusive remedy provision in these cases provided a different result than in *Renteria*. For example, in *Ankeny v. Lockheed Missiles and Space Co.*,¹⁰³ an employee alleged that, as a result of managerial harassment, he had suffered emotional distress leading to physical illness and permanent disability.¹⁰⁴ In the trial court, the defendant successfully demurred on the grounds that a tort cause of action for intentional infliction of emotional distress was barred by the exclusive remedy provision.¹⁰⁵

On appeal, the employee contended that *Renteria* was controlling, and that he was entitled to bring a tort claim.¹⁰⁶ The court distinguished *Renteria* on the basis of the existence of a compensable physical injury.¹⁰⁷ The court stated that unlike the situation in *Renteria*, the workers' compensation system offered the *Ankeny* plaintiff a remedy.¹⁰⁸ The court then ruled that a tort action for emotional distress accompanied by physical injury was barred by the exclusive remedy provision.¹⁰⁹ As a result, since emotional distress has traditionally been viewed as a noncompensable injury under California workers' compensation law, and the plaintiff was barred from bringing a tort action, the *Ankeny* decision meant that plaintiffs who suffer emotional distress combined with physical injury must go uncompensated for their emotional injuries.¹¹⁰ Notwithstanding this

100. See *infra* notes 102-11 and accompanying text (cases determining that emotional distress claims are within the exclusive remedy provision).

101. See *supra* note 83 (cases following *Renteria*).

102. See, e.g., *Ankeny v. Lockheed Missiles & Space Co.*, 88 Cal. App. 3d 531, 151 Cal. Rptr. 828 (1979) (emotional distress and physical disability); *Gates v. Trans Video Corp.*, 93 Cal. App. 3d 196, 155 Cal. Rptr. 486 (1979) (emotional distress and neurological damage); *Cole v. Fair Oaks Fire Protection Dist.*, 43 Cal. 3d 148, 729 P.2d 743, 233 Cal. Rptr. 308 (1987) (emotional distress and stroke).

103. 88 Cal. App. 3d 531, 151 Cal. Rptr. 828 (1979).

104. *Id.* at 534, 151 Cal. Rptr. at 830.

105. *Id.*

106. *Id.* at 535, 151 Cal. Rptr. at 830-31.

107. *Id.* at 535, 151 Cal. Rptr. at 831.

108. *Id.* at 536, 151 Cal. Rptr. at 831.

109. *Id.* at 535-36, 151 Cal. Rptr. at 830-31.

110. See, e.g., *Renteria v. County of Orange*, 82 Cal. App. 3d 833, 839-40, 147 Cal. Rptr. 447, 450-51 (1978) (emotional distress is a noncompensable injury under workers' compensation). But see *Panopoulos v. Westinghouse Elec. Corp.*, 216 Cal. App. 3d 660, 667, 264 Cal. Rptr. 810, 814 (1989) (workers' compensation awarded for an emotional injury, when the employee suffered emotional distress and physical injury resulting in total disability).

fact, subsequent California cases dealing with combined emotional injuries and compensable physical injuries arising from employment have, with very few exceptions, followed the *Ankeny* holding.¹¹¹

Very few courts have allowed a plaintiff who suffered a combination of physical and emotional injuries to maintain a tort action. The few cases in which the courts have allowed employees to maintain a tort action for emotional distress accompanied by physical injury involved physical injuries which, like emotional distress, were not compensable under the workers' compensation system.¹¹² Only a bare handful of cases have suggested, albeit in dicta, that a tort claim for an emotional injury combined with a physical injury is allowable when the gravamen of the complaint or the essence of the wrong is emotional distress, and the physical injury is relatively minor compared to the emotional distress.¹¹³ In one case in which the plaintiff alleged emotional distress and physical injury, the court found the allegation of physical injury to be superfluous makeweight, and allowed the plaintiff to amend his complaint to excise the allegation of physical injury.¹¹⁴

b. Determining Whether the Injury Arises Out of the Course of Employment

The *Renteria* and *Ankeny* decisions purported to resolve the issue of when an employment related tort claim for emotional distress can be pursued. Until recently, however, a major question in the field remained unresolved: Courts had not precisely defined the parameters of what conduct arose "out of and in the course of" employment for workers' compensation purposes. A recent California Supreme

111. See, e.g., *Cole v. Fair Oaks Fire Protection Dist.*, 43 Cal. 3d 148, 156, 729 P.2d 743, 747, 233 Cal. Rptr. 308, 312-13 (1987); *Gates v. Trans Video Corp.*, 93 Cal. App. 3d, 196, 204, 155 Cal. Rptr. 486, 491 (1979).

112. See, e.g., *Iverson v. Atlas Pac. Eng'g*, 143 Cal. App. 3d 219, 191 Cal. Rptr. 696 (1983) (noncompensable loss of hearing combined with intentional infliction of emotional distress); *Lagies v. Copely*, 110 Cal. App. 3d 958, 168 Cal. Rptr. 368 (1980) (plaintiff alleged that physical injury occurred from conduct by employer outside the scope of employment).

113. *Cole v. Fair Oaks Fire Protection Dist.*, 43 Cal. 3d 148, 160, 729 P.2d 743, 750, 233 Cal. Rptr. 308, 315 (1987); *Iverson v. Atlas Pac. Eng'g*, 143 Cal. App. 3d 219, 230, 191 Cal. Rptr. 696, 703 (1983).

114. *McGee v. McNally*, 119 Cal. App. 3d 891, 895-98, 174 Cal. Rptr. 253, 255-57 (1981). But see *Shoemaker v. Myers*, 192 Cal. App. 3d 788, 792-93, 237 Cal. Rptr. 686, 689 (1987) (plaintiff could not amend his complaint to eliminate the allegations of physical injuries when the elimination of the allegations was not properly explained), *rev. granted*, 740 P.2d 404, 239 Cal. Rptr. 292 (1987).

Court case, *Cole v. Fair Oaks Fire Protection Dist.*,¹¹⁵ addressed this and other issues. In *Cole*, the plaintiff, a firefighter employed by the defendant, alleged that the defendant's agents had harassed him and wrongfully demoted him.¹¹⁶ As a result of the demotion and harassment, the plaintiff suffered emotional distress and hypertension, resulting in a severe stroke which left him totally disabled.¹¹⁷ In accord with prior case law,¹¹⁸ the trial court sustained the defendant's demurrer, ruling that emotional injury combined with physical injuries were within the ambit of the exclusive remedy provision of workers' compensation, and the court of appeals affirmed.¹¹⁹

On appeal to the California Supreme Court, the plaintiff argued, inter alia, that an exception to the exclusive remedy provision should exist for an employer's intentional acts which aggravate an employment related injury.¹²⁰ The supreme court first emphasized the physical versus non-physical injury distinction, and distinguished the case from the *Renteria* line of cases on the basis of *Cole*'s physical injuries.¹²¹ The court restated the rule from *Ankeny* and its progeny that a tort claim for emotional distress could not be pursued when the employee's emotional distress is accompanied by physical injury.¹²² The court reasoned that the justification for allowing tort recovery in the case of emotional distress unaccompanied by physical injury is that such cases are not compensable under workers' compensation, and failure to allow a tort action would mean that there was no deterrent to intentional tortious conduct by employers.¹²³ The court ruled that Labor Code section 4553 provided a deterrent for the employer's acts that resulted in compensable injuries, by providing for an increase in workers' compensation benefits for an employer's "serious and willful misconduct."¹²⁴

The court next considered whether demotion decisions causing emotional injury arise "out of and in the course of" employment

115. 43 Cal. 3d 148, 729 P.2d 743, 233 Cal. Rptr. 308 (1987).

116. *Id.* at 152-53, 729 P.2d at 744-45, 233 Cal. Rptr. at 309-10.

117. *Id.* The plaintiff could no longer move or communicate, except by blinking. *Id.* at 153, 729 P.2d at 745, 233 Cal. Rptr. at 310.

118. See *supra* notes 102-11 and accompanying text.

119. *Cole*, 43 Cal. 3d at 151, 729 P.2d at 744, 233 Cal. Rptr. at 309.

120. *Id.* at 159, 729 P.2d at 749, 233 Cal. Rptr. at 314.

121. *Id.* at 155-56, 729 P.2d at 746-48, 233 Cal. Rptr. at 312-13.

122. *Id.*

123. *Id.* at 156-57, 729 P.2d at 748, 233 Cal. Rptr. at 313.

124. *Id.* See CAL. LAB. CODE. § 4553 (West 1989) (150% of normal benefits for serious and willful misconduct by the employer).

for workers' compensation purposes.¹²⁵ The court held that supervisory acts such as demotions, promotions, employment negotiations, and criticism of job performance were all a normal part of the employment relationship, meaning that injuries arising from such supervisory acts are within the ambit of the workers' compensation system, and therefore within the exclusive remedy provision.¹²⁶ The court reasoned that, in order to properly manage the business, most employers must periodically criticize, demote, and discipline their employees.¹²⁷ The court held that when an employee suffers emotional distress leading to compensable disability, the employee is barred from bringing a tort claim so long as the employer's misconduct arises from a normal part of the employment relationship.¹²⁸

The court did not state whether injuries resulting from the termination of employment arise out of the course of employment.¹²⁹ Had the *Cole* court intended to bar all tort claims arising out of termination, it probably would have done so explicitly, given the tremendous impact such a holding would have on the huge body of California case law concerning wrongful termination.¹³⁰ As discussed in the next section of this Comment, some California appellate courts attempted to resolve the issue in 1989.¹³¹

III. 1989 DEVELOPMENTS

A. Case Law

In 1989, the California Second District Court of Appeal appeared to drastically alter the common law regarding employment related emotional distress in *Giorgi v. Verdugo Hills Hospital*.¹³² The *Giorgi* decision appeared to be a distinct departure from the *Renteria* line

125. *Cole*, 43 Cal. 3d at 160-61, 729 P.2d at 751-52, 233 Cal. Rptr. at 315-16. See CAL. LAB. CODE § 3600(a) (West 1989) (workers' compensation only applies when the injury arises "out of and in the course of the employment").

126. *Cole*, 43 Cal. 3d at 160, 729 P.2d at 750, 233 Cal. Rptr. at 315.

127. *Id.*

128. *Id.*

129. *Id.*

130. See Comment, *supra* note 25, at 321-22 (such an interpretation of *Cole* would eviscerate the law of wrongful termination).

131. See *infra* notes 132-88 and accompanying text (discussion of 1989 cases).

132. 210 Cal. App. 3d 252, 258 Cal. Rptr. 426 (2d Dist. 1989) (decertified pursuant to California Rules of Court Rules 976 and 976.5 on November 6, 1989).

of cases.¹³³ The impact of the case, at least as far as the case's precedential value is concerned, was radically altered when the California Supreme Court ordered the *Giorgi* opinion not published, on November 2, 1989.¹³⁴ As such, *Giorgi* may not be cited in California courts.¹³⁵ However, the *Giorgi* case provides valuable insight as to the direction in which California courts are headed, and is thus meritorious of detailed discussion. Prior to its depublishation, *Giorgi* was followed by other California cases which have not been overruled or depublished.¹³⁶

In *Giorgi*, the plaintiff, Amparo Giorgi, was hired by the defendant hospital as the night housekeeping supervisor in June of 1980.¹³⁷ The plaintiff received a benefit package which included health insurance.¹³⁸ In November 1981, the plaintiff requested and was granted a leave of absence to care for her daughter, who had undergone brain cancer surgery.¹³⁹ After her return to work the following January, the plaintiff's attitude changed, and she had several confrontations with co-workers.¹⁴⁰ Soon after the plaintiff's return, the defendant gave the plaintiff a written disciplinary notice which stated that her conduct was unsatisfactory.¹⁴¹ The situation did not significantly improve thereafter, and the defendant fired the plaintiff on June 30, 1982.¹⁴² The termination was in apparent violation of the defendant's stated termination policy, which provided for two written warnings prior to termination.¹⁴³

The plaintiff filed a complaint naming the hospital as defendant.¹⁴⁴ The complaint was amended several times in response to a series of successful demurrers.¹⁴⁵ Ultimately, the complaint alleged three causes of action arising out of her termination: (1) Breach of an implied

133. Compare *supra* notes 83-101 and accompanying text (discussion of *Renteria* and its progeny) with *infra* notes 137-78 (discussion of the *Giorgi* holding).

134. *Giorgi v. Verdugo Hills Hosp.*, 1989 W.L. 48727 (November 6, 1989) (depublishation order). See CA. R. Cr. 976(c)(2) (West 1989) (the California Supreme Court may order an opinion certified for publication not to be published).

135. See CA. R. Cr. 977(a) (West 1989) (an opinion not ordered published may not be cited or relied on).

136. See *infra* notes 179-88 and accompanying text (discussion of cases citing *Giorgi* with approval).

137. *Giorgi*, 210 Cal. App. 3d at 260, 258 Cal. Rptr. at 428.

138. *Id.*

139. *Id.*

140. *Id.* at 260-61, 258 Cal. Rptr. at 428.

141. *Id.* at 260, 258 Cal. Rptr. at 428.

142. *Id.* at 261, 258 Cal. Rptr. at 428.

143. *Id.* at 261, 258 Cal. Rptr. at 428-29.

144. *Id.* at 261, 258 Cal. Rptr. at 429.

145. *Id.*

contract of permanent employment; (2) intentional infliction of emotional distress; and (3) breach of the implied covenant of good faith and fair dealing.¹⁴⁶

Giorgi alleged that she had suffered emotional distress as a result of her wrongful termination and the loss of her insurance benefits.¹⁴⁷ In the superior court, in 1986, the defendant moved for summary adjudication of the emotional distress cause of action.¹⁴⁸ The defendant argued that *Cole* should be interpreted as standing for the proposition that an emotional injury resulting from termination is exclusively compensable under workers' compensation.¹⁴⁹ Additionally, the defendant claimed that the Employment Retirement Income Security Act¹⁵⁰ (ERISA) precluded any claim for emotional distress arising from a denial of health benefits.¹⁵¹ The plaintiff conceded that ERISA preempted a state court claim for denial of benefits.¹⁵² The court granted summary adjudication of the emotional distress issue.¹⁵³ The plaintiff appealed to the Second District Court of Appeal.¹⁵⁴

The court of appeal first observed that the recent judicial trend has been to narrow the range of exceptions to the exclusive remedy provision.¹⁵⁵ The court stated that narrowing the exceptions was beneficial to both employers and employees, since doing so helped to keep the workers' compensation system effective and cost-efficient.¹⁵⁶ The court did admit, however, that the exclusive remedy provision bars only tort claims, and that, in a case in which a plaintiff alleges facts sufficient to satisfy the elements of breach of contract, the plaintiff may bring an action for breach of contract.¹⁵⁷ The court cited *Cole* to address the question of whether injuries

146. *Id.*

147. *Id.*

148. *Id.* See CAL. CIV. PROC. CODE § 437c(f) (West Supp. 1989) (standards for motions for summary adjudication).

149. *Giorgi*, 210 Cal. App. 3d at 261, 258 Cal. Rptr. at 429. See *supra* notes 125-29 (discussion of *Cole* holding regarding normal risks of employment).

150. See 29 U.S.C. §§ 1001-1461 (1982) (ERISA provisions).

151. *Giorgi*, 210 Cal. App. 3d at 261-62, 258 Cal. Rptr. at 429.

152. *Id.* at 262, 258 Cal. Rptr. at 429. ERISA provides extensive federal regulation of termination of employment benefits. See 29 U.S.C. §§ 1341-1348 (1982) (ERISA provisions concerning termination of benefits).

153. *Giorgi*, 210 Cal. App. 3d at 262, 258 Cal. Rptr. at 429.

154. *Id.*

155. *Id.* at 264, 258 Cal. Rptr. at 431.

156. *Id.* (citing *Continental Casualty Co. v. Superior Court*, 190 Cal. App. 3d 156, 235 Cal. Rptr. 260 (1987)) (purpose of narrowing exceptions to the exclusive remedy provision).

157. *Id.* at 265, 258 Cal. Rptr. at 431.

arising out of termination of employment arise "out of and in the course of the employment" for workers' compensation purposes.¹⁵⁸ Although the *Cole* court did not specifically state that termination was a necessary and inevitable part of employment,¹⁵⁹ the *Giorgi* court concluded such a view was implicit in the *Cole* holding.¹⁶⁰ The court reasoned that like hiring, demotion, and employee discipline, termination is a day-to-day employment decision.¹⁶¹ The court believed that it was illogical to contend that at the time of the employee's discharge, the employee was not "employed" for workers' compensation purposes.¹⁶² Injuries resulting from termination, the court stated, are an inherent risk of employment, and therefore injuries arising from termination arise out of employment.¹⁶³

The court then restated the *Cole* court's observation that there is no general exception to the exclusive remedy rule for injuries that are intentionally caused.¹⁶⁴ However, in an apparent contradiction of *Cole*,¹⁶⁵ the court then extended the rule to cover all actions for intentional infliction of emotional distress, regardless of whether the emotional injury is accompanied by physical injury.¹⁶⁶ The court noted that the result left plaintiffs such as *Giorgi* with no remedy, but rationalized the result as a necessary trade-off to the right conferred by the workers' compensation system to obtain swift disposition of most injury claims without proving liability.¹⁶⁷ The court implied that *Giorgi*'s injury was too insignificant to be covered under the workers' compensation system.¹⁶⁸

The *Giorgi* court held that the distinction between emotional distress injuries with and without physical injury was no longer valid,¹⁶⁹ and thus all emotional injuries were within the exclusive

158. *Id.* at 265-68, 258 Cal. Rptr. at 431-34. See CAL. LAB. CODE § 3600 (West 1989) (conditions of compensation).

159. See *supra* notes 127-29 and accompanying text.

160. *Giorgi*, 210 Cal. App. 3d at 266, 258 Cal. Rptr. at 432.

161. *Id.*

162. *Id.* at 267, 258 Cal. Rptr. at 433. The court believed that a contrary interpretation would contravene the legislature's intent that workers' compensation statutes be liberally construed in favor of compensation. *Id.* See CAL. LAB. CODE § 3202 (West 1989).

163. *Giorgi*, 210 Cal. App. 3d at 265, 258 Cal. Rptr. at 432.

164. *Id.* at 271, 258 Cal. Rptr. at 436. See *supra* notes 115-28 and accompanying text (discussion of *Cole*).

165. See *Cole v. Fair Oaks Fire Protection Dist.*, 43 Cal. 3d 148, 155-57, 729 P.2d 743, 747-48, 233 Cal. Rptr. 308, 312-13 (1987) (the *Renteria* rationale is valid).

166. *Giorgi*, 210 Cal. App. 3d at 272, 258 Cal. Rptr. at 436.

167. *Id.* at 270, 258 Cal. Rptr. at 435.

168. *Id.* The court stated that the legislature had viewed certain injuries as too insignificant to trigger the workers' compensation provisions. *Id.*

169. *Id.* at 272-73, 258 Cal. Rptr. at 436-37.

remedy provision.¹⁷⁰ The court explicitly based its decision on *Cole*, interpreting *Cole* as barring all employment related emotional distress actions.¹⁷¹ Although the *Cole* opinion explicitly recognized the validity of *Renteria*, the *Giorgi* court stated that, on the basis of *Cole*, *Renteria* and its progeny were no longer valid.¹⁷² The court also held that the plaintiff's claim for punitive damages was similarly barred by the exclusive remedy provision, stating that all tort claims are barred, "no matter what the labels of the causes of action seeking them."¹⁷³

The dissenting opinion, authored by Justice Johnson, strongly disagreed with the majority's reasoning, pointing out that since purely emotional injuries are not compensable under workers' compensation, such plaintiffs will have no recourse whatsoever against employers' intentional acts.¹⁷⁴ The dissenting justice noted the majority's inconsistency with the *Cole* court's approval of *Renteria* and its progeny.¹⁷⁵ Justice Johnson felt that the *Cole* court had emphatically limited its opinion to cases where the plaintiff had suffered a physical injury or disability compensable under workers' compensation.¹⁷⁶ Correspondingly, the fact that *Giorgi*'s injury was not compensable under the workers' compensation system mandated the allowance of her tort claim.¹⁷⁷ Justice Johnson, citing *Renteria*, viewed the "trade-off" rationale asserted by the majority as inappropriate, in that an employer can completely escape liability for his or her intentional misconduct.¹⁷⁸

Prior to the Supreme Court's order to depublish the case in November of 1989, at least two California court of appeal cases cited *Giorgi* with approval.¹⁷⁹ In the first case, *Pichon v. Pacific Gas*

170. *Id.*

171. *Id.*

172. *Compare id.* ("plaintiff's reliance on [cases following *Renteria*] is misplaced in light of *Cole* . . . after *Cole*, there is really nothing left of the physical/emotional injury dichotomy") with *Cole*, 43 Cal. 3d at 156-57, 729 P.2d at 747-48, 233 Cal. Rptr. at 312-13 (recognition of the *Renteria* exception to workers' compensation exclusivity).

173. *Giorgi*, 210 Cal. App. 3d at 273, 258 Cal. Rptr. at 437.

174. *Id.* at 286, 258 Cal. Rptr. at 446 (Johnson, J., concurring and dissenting).

175. *Id.* at 288, 258 Cal. Rptr. at 447 (Johnson, J., concurring and dissenting).

176. *Id.* at 286, 258 Cal. Rptr. at 446 (Johnson, J., concurring and dissenting). See *Cole*, 43 Cal. 3d at 156, 729 P.2d at 747, 233 Cal. Rptr. at 312-13 (the exclusive remedy provision is only applicable when the plaintiff has no substantial remedy under workers' compensation). The *Cole* court appears to have limited its holding to cases in which the employee suffers compensable disability. *Id.* at 159-60, 729 P.2d at 750, 233 Cal. Rptr. at 315.

177. *Giorgi*, 210 Cal. App. 3d at 286, 258 Cal. Rptr. at 446 (Johnson, J., concurring and dissenting).

178. *Id.* at 286-87, 258 Cal. Rptr. at 446 (Johnson, J., concurring and dissenting).

179. See *Pichon v. Pacific Gas & Elect. Co.*, 212 Cal. App. 3d 488, 497, 260 Cal. Rptr.

& *Elect. Co.*,¹⁸⁰ the First District Court of Appeal stated that the issue of whether the exclusive remedy provision only applied when emotional distress was accompanied by a compensable physical injury was left unanswered by *Cole*.¹⁸¹ The court viewed *Giorgi* as answering the question in the negative.¹⁸² The *Pichon* court found it unnecessary to resolve the question, however, because the plaintiff had suffered a compensable physical injury.¹⁸³

In another case, *Jenkins v. Family Health Program*,¹⁸⁴ the plaintiff alleged intentional infliction of emotional distress based on the employer's wrongful termination of the plaintiff's employment.¹⁸⁵ The complaint did not allege a physical injury.¹⁸⁶ Nonetheless, the Second District Court of Appeal affirmed the trial court's decision to sustain the defendant's demurrer.¹⁸⁷ The court completely ignored *Renteria* and its progeny, and instead interpreted *Cole* and *Giorgi* as standing for the proposition that all injuries actually arising out of employment are barred by the exclusive remedy provision, regardless of whether there is an injury compensable under workers' compensation.¹⁸⁸ As of this writing (April, 1990), the *Jenkins* case has not been overruled or republished.

B. Legislative Changes in Workers' Compensation Law

In the 1989 session, the California legislature passed numerous bills amending the workers' compensation provisions of the Labor Code and adding new workers' compensation provisions.¹⁸⁹ The most

677, 683 (1989); *Jenkins v. Family Health Program*, 214 Cal. App. 3d 440, 450, 262 Cal. Rptr. 798, 803 (1989).

180. 212 Cal. App. 3d 488, 260 Cal. Rptr. 677 (1989).

181. *Id.* at 495, 260 Cal. Rptr. at 681.

182. *Id.* at 488, 497, 260 Cal. Rptr. at 683.

183. *Id.* at 495, 260 Cal. Rptr. at 681-82.

184. 214 Cal. App. 3d 440, 262 Cal. Rptr. 798 (1989).

185. *Id.* at 443, 262 Cal. Rptr. at 799.

186. *Id.* at 443-44, 262 Cal. Rptr. at 799.

187. *Id.* at 450, 262 Cal. Rptr. at 803.

188. *Id.* at 449-50, 262 Cal. Rptr. at 803.

189. See, e.g., 1989 Cal. Stat. chs. 461 (enacting Senate Bill 715), 507 (enacting Assembly Bill 2380), 594 (enacting Senate Bill 1578), 827 (enacting Assembly Bill 323), 892 (enacting Assembly Bill 276), 893 (enacting Senate Bill 47), 1165 (enacting Senate Bill 353), 1171 (enacting Senate Bill 89), 1280 (enacting Senate Bill 804), 1369 (enacting Senate Bill 198). See generally Note, *Tackling Workers' Compensation In California: The Margolin-Bill Greene Workers' Compensation Reform Act of 1989*, 21 PAC. L.J. 853 (1990); *Review of Selected 1989 California Legislation*, 21 PAC. L.J. 569, 571 (1990) (discussions of the 1989 amendments to the workers' compensation system).

sweeping of these enactments was Assembly Bill 276, which was enacted as 1989 California Statutes Chapter 892 (hereinafter Chapter 892).¹⁹⁰ While much of Chapter 892 concerns changes in the dollar amounts of benefits, creation of rate boards, and the like, a few provisions of the statute may have some effect on employment-related emotional distress actions, although it will more likely be applied to job-related stress, not the infliction of emotional distress.¹⁹¹

Chapter 892 expresses the legislature's intent to "establish a new and higher threshold of compensability for psychiatric injury."¹⁹² After the enactment of Chapter 892, a "psychiatric injury," for which events of employment are at least ten percent responsible and which causes disability or the need for medical treatment, is compensable, so long as the injury is a "mental disorder."¹⁹³ The statute does not refer to "emotional distress," only to "mental disorders." Chapter 892 requires that the diagnosis of a mental disorder be expressed using the terminology of the third edition of the *American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders* (hereinafter *DSM-III*).¹⁹⁴ The *DSM-III* is a nearly 500-page volume describing a variety of organic, schizophrenic, paranoid, and similar disorders.¹⁹⁵

The *DSM-III* states that a mental disorder is "conceptualized as a clinically significant behavioral or psychologic syndrome or pattern," combined with "an inference that there is a behavioral, psychologic, or biologic dysfunction, and that the disturbance is not only in the relationship between the individual and society."¹⁹⁶ This type of injury, then, seems to be something more than ordinary emotional distress, which the Restatement of Torts defines as "all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea."¹⁹⁷

190. See 1989 Cal. Stat. ch. 892 (enacting Assembly Bill 276).

191. See *infra* notes 192-97 and accompanying text (discussion of effects of Chapter 892 on emotional distress actions).

192. 1989 Cal. Legis. Serv. ch. 892, sec. 25, at 2683 (West) (enacting CAL. LAB. CODE § 3208.3(c)).

193. *Id.* (enacting CAL. LAB. CODE § 3208.3(a)-(b)).

194. *Id.* sec. 23, at 2681 (enacting CAL. LAB. CODE § 139.2(i)(4)).

195. See AMERICAN PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (3d ed. 1980) [hereinafter *DSM-III*].

196. *Id.* at 363. "When the disturbance is limited to a conflict between an individual and society, this . . . is not by itself a mental disorder." *Id.*

197. RESTATEMENT (SECOND) OF TORTS § 46 comment j (1965).

IV. THE FUTURE OF EMOTIONAL DISTRESS ARISING FROM EMPLOYMENT IN CALIFORNIA

While the explicit language of Chapter 892 expresses the legislature's intent to alter the compensability of psychological injuries,¹⁹⁸ it seems unlikely that the new provisions will provide coverage under workers' compensation for the vast majority of those who suffer emotional distress. First, the distress is required to rise to the level of a mental disorder, the definition of which suggests a higher standard than that of common-law emotional distress.¹⁹⁹ Second, the *DSM-III* warns physicians that a high suspicion of "malingerin," rather than a mental disorder, should be aroused when the patient visits the physician in the context of a potential legal claim, particularly when the patient is referred to the physician by an attorney.²⁰⁰ In sum, it seems unlikely that Chapter 892 is applicable to employees who suffer emotional distress, except for those who suffer emotional distress so severe that it leads to a mental disorder categorized in the *DSM-III*. Chapter 892 will more likely apply to those employees who suffer stress due to the pressures of their jobs.²⁰¹

As discussed above, case law in the area of employment related emotional distress is far from clear. A fair inference, judging from cases such as *Ankeny*, *Cole*, *Giorgi*, and *Jenkins*, is that the trend over the past ten years has been to restrict the availability of tort remedies to employees suffering from emotional distress.²⁰² How far this trend will be carried is difficult to predict.

Prior to the depublication order, the *Giorgi* opinion was binding on the courts of the Second Appellate District, and was persuasive authority for all other California appellate courts. An opinion which has been ordered not published, however, may not be cited as

198. 1989 Cal. Legis. Serv. ch. 892, sec. 25, at 2683 (West) (enacting CAL. LAB. CODE § 3208.3(a)).

199. Compare *DSM-III*, *supra* note 195, at 363 (definition of mental disorder) with RESTATEMENT (SECOND) OF TORTS § 46 comment j (1965) (definition of emotional distress).

200. *DSM-III*, *supra* note 195, at 331.

201. See, e.g., *Albertson's, Inc. v. Workers' Compensation Appeals Bd.*, 131 Cal. App. 3d 308, 316-17, 182 Cal. Rptr. 304, 309 (1982) (stress is a compensable injury under workers' compensation so long as employment was influential in creating or aggravating the injury). See generally Duckworth, *Workers' Compensation: Expanding Areas*, 23 TORT & INS. L.J. 478 (1988) (courts are beginning to recognize workers' compensation claims for job-related stress).

202. See *supra* notes 115-88 and accompanying text (discussion of recent cases narrowing employee tort causes of action).

precedent in any California court.²⁰³ The reasoning used in *Giorgi* and *Jenkins* suggests that all tort claims for intentional infliction of emotional distress arising out of employment situations, including those arising from wrongful termination, should be barred.²⁰⁴ If the California courts accept the doctrines of such cases, future cases may spell an end to the tort cause of action for employment related infliction of emotional distress in California.

The language of *Giorgi*, however, is more far-reaching. The *Giorgi* opinion states that *all* tort claims arising out of employment are subject to the exclusive remedy provision.²⁰⁵ Dictum in a more recent court of appeal opinion, *Panopulos v. Westinghouse Electric Corporation*,²⁰⁶ seems to be in accord.²⁰⁷ In the past, California decisions have indicated that plaintiffs may successfully pursue other tort causes of action against employers, such as defamation.²⁰⁸ By extension, future decisions similar to *Giorgi* could preempt such causes of action through the exclusive remedy provision. Members of the legislature reacted to opinions such as *Giorgi* and *Jenkins* with a bill which would specifically create an exception to the exclusive remedy provision for intentionally inflicted injuries.²⁰⁹ This bill, however, died in committee.²¹⁰

The California Supreme Court has granted review of another case, *Shoemaker v. Myers*,²¹¹ in which the lower court ruled that an emotional injury with physical manifestations was ruled to be barred by the exclusive remedy provision.²¹² In *Shoemaker*, the plaintiff originally alleged physical injuries, and the defendant successfully

203. See CAL. R. CT. 977(a) (West 1989) (depublication prohibits an opinion from being cited in court). In a civil action, unpublished opinions may only be cited or relied on "when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel." *Id.* 977(b).

204. See *supra* notes 165-71, 180-88 and accompanying text (discussion of the possible elimination of tort causes of action for employer-inflicted emotional distress).

205. *Giorgi*, 210 Cal. App. 3d at 273-74, 258 Cal. Rptr. at 437.

206. 216 Cal. App. 3d 660, 264 Cal. Rptr. 810 (1989).

207. *Id.* at 668, 264 Cal. Rptr. at 815. The court stated that "any damages based on plaintiff's injuries while he remained on the job are . . . barred," *Id.*

208. See *Howland v. Balma*, 143 Cal. App. 3d 899, 903, 192 Cal. Rptr. 286, 288 (1983) (recognition of a defamation cause of action arising from wrongful termination). See also Comment, *supra* note 31, at 1247-48 (discussion of defamation causes of action for wrongful termination).

209. See Assembly Bill 208 (Floyd, 1989) (amending CAL. LAB. CODE § 3602).

210. 1989-90 REGULAR SESSION ASSEMBLY RECESS HISTORY, at 161 (October 3, 1989).

211. 192 Cal. App. 3d 788, 237 Cal. Rptr. 686 (1987), rev. granted, 740 P.2d 404, 239 Cal. Rptr. 292 (1987).

212. *Id.* at 792, 237 Cal. Rptr. at 689.

demurred on the basis of the exclusive remedy provision.²¹³ The plaintiff then attempted to amend his complaint to eliminate the allegation of physical injuries, but the trial court found that the plaintiff did not adequately explain the deletions, and therefore treated the complaint as if the physical injury allegations had not been deleted.²¹⁴ The *Shoemaker* case, then, is not precisely on point with the *Giorgi* and *Jenkins* opinions. However, the case may provide the California Supreme Court with an opportunity to set down rules for the lower courts concerning many of the confusing issues discussed in Parts II and III of this Comment. Without a doubt, the last word on the issue has not been spoken. The issue will likely remain cloudy until either the legislature or the California Supreme Court addresses it in the future.

V. PROPOSED SOLUTIONS TO THE CONTROVERSY

If holdings such as those in *Giorgi* and *Jenkins* become universally accepted in California, injured employees will be absolutely barred from any recovery for intentionally caused emotional injuries arising from employment.²¹⁵ Additionally, such holdings provide no deterrent to intentional infliction of emotional distress by employers.

Even under the well-established *Ankeny* reasoning, a curious anomaly exists: Employees who suffer only emotional injury, which does not lead to physical harm, may maintain an action in tort, while plaintiffs who suffer emotional distress so severe that debilitating physical manifestations result are limited to workers' compensation coverage for the physical harm, with no compensation for the emotional harm, unless the conduct results in a mental disorder.²¹⁶ This situation will often allow employers who commit the most egregious acts to escape with only limited liability, and seems inconsistent with the well-established public policy goal of discouraging intentional torts.²¹⁷

213. *Id.*

214. *Id.* at 792-93, 237 Cal. Rptr. at 689.

215. Of course, if the injuries are the result of a willful physical assault, they are outside the ambit of the exclusive remedy provision. CAL. LAB. CODE § 3602(b)(1) (West 1989).

216. See, e.g., *Cole v. Fair Oaks Fire Protection Dist.*, 43 Cal 3d 148, 153, 729 P.2d 743, 745, 233 Cal. Rptr. 308, 310 (1987) (emotional distress led to plaintiff's total paralysis, leaving the plaintiff incapable of communication except through blinking, yet plaintiff's tort claim was barred by the exclusive remedy provision).

217. See generally W.P. Keeton, *supra* note 36, at 25-26 (discussion of the public policy goal of discouragement of the commission of torts).

A. Proposal: Creation of an Explicit Exception to the Exclusive Remedy Provision for Injuries Intentionally Caused by the Employer

In *Williams v. State Compensation Insurance Fund*,²¹⁸ a California court of appeal stated that any failure of the workers' compensation system to provide benefits for a class of injuries is a legislative and not a judicial problem.²¹⁹ In light of *Williams* and the conflicting decisions of the California courts, the confusion over employment related emotional distress claims is best resolved by legislative enactment. During the 1989 session of the legislature, Assembly Bill 208 (hereinafter A.B. 208) was proposed to amend the exclusive remedy provision of the Labor Code. Under A.B. 208, the exclusive remedy provision would not have applied "[w]here the employee's injury is proximately caused or aggravated by the employer's conduct that exceeds all bounds usually tolerated by a decent society and where the employer acted deliberately for the purpose of injuring the employee."²²⁰ Although the bill died in committee, it was a two-year bill and was thus eligible for reconsideration by the 1990 legislature.²²¹ The 1990 legislature failed to pass the bill.²²²

Such a proposal, while certainly a step in the right direction as far as injured employees are concerned, is no panacea for the problem of adequately compensating victims of emotional distress inflicted by employers. This legislation would likely allow a tort remedy for the most reprehensible instances of conduct by employers, those which exceed all bounds of decency. In such a case, a defendant would likely be liable for punitive damages.²²³ The likelihood of having to pay out both compensatory and punitive damages would possibly deter some intentionally harmful behavior on the part of employers.²²⁴

218. 50 Cal. App. 3d 116, 123 Cal. Rptr. 812 (1975).

219. *Id.* at 122, 123 Cal. Rptr. at 815.

220. 1990 Assembly Bill 208, sec. 1 (Floyd) (as introduced) (amending CAL. LAB. CODE § 3602).

221. 1989-90 REGULAR SESSION ASSEMBLY RECESS HISTORY at 161 (October 3, 1989).

222. 1990 ASSEMBLY WEEKLY HISTORY, MARCH 1, 1990, at 90. The bill died in committee. *Id.*

223. See CAL. CIV. CODE § 3294 (West 1989) (defendants are liable for exemplary damages for willful, despicable conduct).

224. See generally DOBBS, HANDBOOK ON THE LAW OF REMEDIES 205-11 (1973) (punitive damages are generally viewed as not compensatory, but to punish the defendant and to deter repetition of the behavior).

However, a statute such as the one proposed by A.B. 208 would still permit courts to bar certain emotional distress actions which would be actionable in tort if not employment related. Through narrow judicial interpretation of the demanding requirements of the language of A.B. 208, courts might bar otherwise actionable claims.

A.B. 208 allows an employee to avoid the exclusive remedy provision only if the employer acts "deliberately."²²⁵ As discussed in Part II of this Comment,²²⁶ under the generally recognized California law of intentional infliction of emotional distress, a defendant may be liable when he or she acts without actual intent to injure the plaintiff, but with reckless disregard of the risk that the plaintiff will suffer emotional distress.²²⁷ The disparity in the intent requirements between A.B. 208 and the common law would certainly mean that some plaintiffs who would be able to bring a tort action for intentional infliction of emotional distress under common law, but for the fact that the distress was inflicted in the course of employment, will ultimately remain uncompensated. Furthermore, the narrow intent requirement of A.B. 208 would also exclude a tort cause of action for employment related negligent infliction of emotional distress.²²⁸

A possible solution to the controversy surrounding the intentional infliction of emotional distress arising out of employment is for the legislature to amend the Labor Code to exempt all intentional torts from the exclusive remedy provision. California would not be the first state to amend its laws to exempt intentional acts from the exclusive remedy provision. Prior to 1987, Michigan's exclusive remedy provision contained language nearly identical to the language of California's exclusive remedy provision: "The right to recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer."²²⁹ The Michigan courts found that workers' compensation provided a remedy for both physical and

225. 1990 Assembly Bill 208, sec. 1 (Floyd) (as introduced) (amending CAL. LAB. CODE § 3602).

226. See *supra* note 64 and accompanying text.

227. *Newby v. Alto Riviera Apartments*, 60 Cal. App. 3d 288, 131 Cal. Rptr. 547, 552 (1976) (broader intent requirement for intentional infliction of emotional distress).

228. See *supra* notes 38-61 and accompanying text (discussion of common law tort of negligent infliction of emotional distress).

229. MICH. COMP. LAWS ANN. § 418.131 (West 1985) (amended by 1987 Mich. Pub. Acts 28, § 1). Compare *id.* with CAL. LAB. CODE § 3602(a) (West 1989) ("Where the conditions of compensation . . . concur, the right to recover such compensation is . . . the sole and exclusive remedy of the employee and his or her dependents against the employer").

emotional injuries, so long as the injury was "disabling."²³⁰ As such, some emotional distress cases were viewed as within the exclusive remedy provision.²³¹ For cases of emotional distress not compensable under workers' compensation, however, Michigan allowed a tort action to be maintained.²³²

In 1987, the Michigan legislature amended the Michigan exclusive remedy provision to read:

The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease. The only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of the deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. The issue of whether an act was an intentional tort shall be a question of law for the court.

This subsection shall not enlarge or reduce rights under law.²³³

The state of Arizona has adopted a similar standard in the Arizona exclusive remedy provision.²³⁴

The new Michigan statute, if adopted in California, would allow most employees injured by their employers' intentional infliction of emotional distress to maintain a tort action, particularly if the California legislature altered the intent requirement of the Michigan statute to incorporate the broader intent requirement of the California common law regarding emotional distress.²³⁵ This could be accom-

230. *Kissinger v. Mannor*, 92 Mich. App. 572, 285 N.W.2d 214, 216-17 (citing *Diezel v. Difco Laboratories, Inc.*, 403 Mich. 1, 268 N.W.2d 1 (1978) and *Milton v. Oakland County*, 50 Mich. App. 279, 213 N.W.2d 250 (1973)) (only disabling injuries are compensable under workers' compensation).

231. 285 N.W.2d at 216.

232. *Id.* at 217. In *Kissinger*, the court also strained to find the employer's behavior as outside the scope of employment, thus removing it from the ambit of the exclusive remedy provision. In that case, the plaintiff, a General Motors employee, requested that his supervisor temporarily replace him on the assembly line so that he could use the men's room. *Id.* at 215. The supervisor failed to do so, and the employee had a bowel movement in his clothing. *Id.* After the employee received permission to go home and change his clothing, his supervisor informed approximately 40 co-workers that the plaintiff had "crapped his pants" at work. *Id.* The plaintiff alleged that this disclosure subjected him to ridicule and caused emotional distress. *Id.* The court found that the supervisor's act was outside the scope of employment. *Id.* at 217.

233. MICH. COMP. LAWS, ANN. § 418.131(1) (West Supp. 1989).

234. See ARIZ. REV. STAT. ANN. § 23-1022 (Supp. 1989) (exception to the exclusive remedy provision for acts done purposefully with the direct intent of injuring the employee).

235. See *supra* note 64 and accompanying text (discussion of the broader intent requirement for intentional infliction of emotional distress encompassing reckless behavior).

plished by adopting language similar to that in Louisiana's exclusive remedy provision: "Nothing in [the exclusive remedy provision] shall affect . . . the [employer's] liability, civil or criminal, resulting from an intentional act."²³⁶ Fears of the courts being clogged by nonmeritorious emotional distress claims should be allayed by the Michigan statute's provision that the determination of whether the employer's act is intentional is a question of law for the judge. This provision should allow frivolous claims to be disposed of by demurrer.²³⁷ Adoption of a statute similar to those passed in Michigan, Arizona, or Louisiana would in all likelihood have the additional benefit of deterring intentional and outrageous conduct by employers resulting in the infliction of emotional distress upon employees. Unlike the present law in California, employers would not be able to completely escape liability for the infliction of emotional distress merely because the employee suffers a compensable physical injury.

California courts could accomplish the same objective by interpreting the legislature's intent in creating the workers' compensation system as preserving a tort action for employees injured by their employers' acts. Although the exclusive remedy provisions of Connecticut²³⁸ and Illinois²³⁹ do not explicitly exempt employers' intentional acts, courts in those states have, through judicial interpretation, created exceptions to the exclusive remedy provisions for intentional acts.²⁴⁰ In the past, California courts have not interpreted the workers' compensation provisions in this way, and it seems unlikely they will do so in the future.²⁴¹ Since the exclusive remedy provision explicitly creates an exception for willful assaults by an employer, but not other willful acts, it could certainly be argued

236. LA. REV. STAT. ANN. § 23:1032 (West 1985) (exclusive remedy provision). See generally Comment, *The Intentional Act Exception To The Exclusivity of Workers' Compensation*, 44 LA. L. REV. 1507 (1984) (discussion of the Louisiana legislature's amendment of the exclusive remedy provision to exempt intentional torts and its effect on Louisiana case law).

237. See CAL. CIV. PROC. CODE §§ 430.10-.30 (West 1973 & Supp. 1990) (provisions for demurrer).

238. See CONN. GEN. STAT. ANN. § 31-284 (West 1987) (exclusive remedy provision).

239. See ILL. ANN. STAT. ch. 48, para. 138.5(a) (Smith-Hurd 1986) (exclusive remedy provision).

240. See *Mingachos v. CBS, Inc.*, 196 Conn. 91, 491 A.2d 368, 375 (1985) (the exclusive remedy provision may be bypassed by showing that the employer's act was intentional); *McDaniel v. Johns-Manville Sales Corp.*, 487 F. Supp. 714, 716 (S.D. Ill. 1978) (intentional torts are risks of employment not contemplated by the workers' compensation system).

241. See, e.g., *Azevedo v. Abel*, 264 Cal. App. 2d 451, 458, 70 Cal. Rptr. 710, 714 (1968) (the fact that an employer's acts are intentional does not create an exception to the exclusive remedy provision).

that, through negative implication, the legislature did not intend to exempt *all* intentional acts.²⁴²

B. Alternative Proposal: Explicit Inclusion of Emotional Distress in Those Injuries Compensable Under Workers' Compensation

An additional alternative is to either legislatively or judicially provide workers' compensation benefits for emotional distress arising from employment. This solution would allow some compensation to plaintiffs. Although, in all likelihood, the average plaintiff would receive a lesser settlement under workers' compensation than through a tort claim,²⁴³ allowing plaintiffs to collect for emotional distress under workers' compensation would further the legislative goal that the workers' compensation system provide swift disposition of an injured employee's claims without forcing the employee to prove fault.²⁴⁴

Under the present California Labor Code, the workers' compensation system covers any injury sustained by an employee arising out of the course of employment.²⁴⁵ The Labor Code does not exclude emotional injuries from the definition of the term "injury;" in fact, the term is defined rather broadly as any injury or disease arising out of employment.²⁴⁶ Despite the fact that emotional distress is not explicitly excluded from the definition of the term "injury" for workers' compensation purposes, California courts have universally held that emotional distress is a noncompensable injury under workers' compensation.²⁴⁷

Other states have interpreted their statutes differently. As discussed above, the Michigan courts have interpreted statutes similar to California's as allowing a claim for emotional distress under workers'

242. See CAL. LAB. CODE § 3602(b)(1) (West 1989) (exclusion from the exclusive remedy provision for intentional physical assaults by employers).

243. For example, although the amount of potential punitive damages are unlimited for tort claims, they are limited to 50% of compensation benefits for workers' compensation. Compare CAL. CIV. CODE § 3294 (West Supp. 1989) (assessment of punitive damages in tort cases) with CAL. LAB. CODE § 4553 (West 1989) (assessment of punitive damages in workers' compensation cases).

244. See *Johns-Manville Prods. Corp. v. Superior Court*, 27 Cal. 3d 465, 474, 612 P.2d 948, 953, 165 Cal. Rptr. 858, 863 (1980) (discussion of the statutory intent of the workers' compensation provisions).

245. CAL. LAB. CODE § 3600(a) (West 1989).

246. *Id.* § 3208.

247. See *supra* note 73 and accompanying text.

compensation, in some situations.²⁴⁸ In Wyoming, an “injury” for workers’ compensation purposes is defined as “any harmful change in the human organism other than natural aging.”²⁴⁹ The Wyoming Supreme Court ruled that emotional injuries are compensable injuries under that statute, so long as the plaintiff proves that such injury was caused by stress greater than that arising from normal working conditions.²⁵⁰ Wisconsin has recognized a similar rule.²⁵¹

The California courts could ensure that plaintiffs receive some compensation by interpreting the workers’ compensation provisions, as other states have, as providing coverage for all emotional injuries arising out of the scope of employment. The failure of the courts to do so up to this point reflects an outmoded manner of thinking: that emotional injuries are not valid injuries.²⁵² For purposes other than workers’ compensation, of course, emotional distress has long been recognized as a valid injury.²⁵³

In reality, there is little or no likelihood that the California Supreme Court will be inclined to overrule the substantial body of case law holding that emotional distress is not compensable under the California Labor Code. Additionally, in light of the legislature’s recent passage of Chapter 892, the court may feel that the legislature has, by failing to include the term “emotional distress” in Chapter 892, declared that emotional distress should not be compensable under workers’ compensation. For these reasons, the California legislature should clarify this area of the law. The legislature should amend the definition of a compensable injury under the workers’ compensation provisions to explicitly include emotional distress. Perhaps this is what the legislature was attempting to do in enacting Chapter 892 in 1989, but it is highly unlikely that most emotional distress will fall within the definition of a mental disorder as provided by Chapter 892. Including all emotional distress claims within the workers’ compensation system would have three distinct benefits: (1) Employees would be compensated for the on-the-job emotional distress they

248. See *supra* notes 229-31 and accompanying text.

249. WYO. STAT. § 27-14-102(a)(xii) (1987).

250. *Graves v. Utah Power & Light*, 713 P.2d 187, 193 (Wyo. 1987) (each situation must be analyzed on a case-by-case basis).

251. See *Swiss Colony, Inc. v. Dept. of Indust., Labor, & Health Relations*, 72 Wis. 2d 46, 240 N.W.2d 128, 130 (1976) (the mail order business during the Christmas season determined to be particularly stressful).

252. See W.P. KEETON, *supra* note 36, at 360-61 (discussion of the reluctance of early twentieth century courts to recognize emotional distress as a compensable injury).

253. See *supra* notes 38-69 and accompanying text.

suffer, without the employer and the employee being forced to endure lengthy and costly litigation; (2) employers would be deterred from intentionally inflicting emotional distress on their employees; and (3) the burden on the court system would be lessened slightly by diverting cases from the courts to the workers' compensation board.

CONCLUSION

The current state of the law concerning employer-inflicted emotional distress is far from ideal. Currently, employees whose emotional distress leads to physical injury are barred from bringing tort claims against their employers, regardless of how reprehensible the employers' conduct may be. This artificial result encourages bizarre pleadings and even more bizarre results. Recent cases suggest that even an employee who suffers a purely emotional injury may not bring a claim of any kind and will receive absolutely no compensation, while the employer who sets out to emotionally cripple the employee incurs absolutely no liability. Even courts which have helped shape this area of the law have conceded that such a result seems completely inconsistent with the legislature's intent in creating the workers' compensation system.²⁵⁴

The basic goal of tort law is to ensure that injured parties are adequately compensated for their injuries.²⁵⁵ The current law plainly does not accomplish this goal. Remedial measures should be taken with this purpose of tort law in mind. This goal could most efficiently be accomplished by the courts or the legislature explicitly allowing a tort action for work related intentionally inflicted emotional distress claims regardless of whether the emotional injury is accompanied by physical injury. The goal could also be accomplished, but, due to the lower rate of compensation, less completely, by explicitly including emotional distress within the class of injuries contemplated by the workers' compensation system.

Until this issue is resolved, little will be certain in this area of the law. Until the courts or the legislature speak, however, a few predictions seem safe to make: Many injured plaintiffs will remain uncompensated; many employers will completely escape liability for

254. See, e.g., *Renteria v. County of Orange*, 82 Cal. App. 3d 833, 841, 147 Cal. Rptr. 447, 451 (1978).

255. See W.P. KEETON, *supra* note 36, at 5-6 (description of the basic function of tort law).

their intentionally injurious acts; and nobody will be able to say for sure what the law is.

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