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***Cole v. Fair Oaks Fire Protection
District: Exploring the Parameters of the
Normal Risks of Employment Test***

The workers' compensation system is designed to compensate an employee¹ for work-related industrial injuries.² Workers' compensation is a no-fault liability system.³ In return for the employer assuming liability without fault, an employee must accept workers' compen-

1. CAL. LAB. CODE § 3351 (West Supp. 1987) (defining employee as "every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed").

2. *Id.* at § 3600. *See generally* 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 5.20 (2d ed. 1985) (compensation legislation arose out of the coincidence of increasing industrial injuries and decreasing common-law remedies for the employee's injuries); 2 W. HANNA, CALIFORNIA LAW OF EMPLOYEE INJURIES AND WORKMEN'S COMPENSATION § 1.01[2] (2d ed. 1986).

3. CAL. LAB. CODE § 3600 (West Supp. 1987). *See also* 1 A. LARSON, *supra* note 2, § 5.10, at 35 (the American workers' compensation scheme imposed unilateral liability without fault upon the employer and made the employer bear the entire burden of insuring against such liability). The development of the no-fault workers' compensation system was influenced by the social principles of nineteenth-century Germany. Among the noted German philosophers, Fichte was responsible for espousing the idea that the misfortunes, disabilities and accidents of individuals are social and not individual in origin, and the state should be concerned with helping them. *Id.* at 33-34. *See also* Portillo v. G.T. Price Prod., Inc., 131 Cal. App. 3d 285, 287-88, 182 Cal. Rptr. 291, 293 (1982) (the Workers' Compensation Act is designed to afford workers quick determination of their claims for injury without regard to common-law questions of liability, negligence, or fault).

sation as the exclusive remedy for work-related injuries.⁴ Difficult issues arise, however, when an employee claims that the tort of intentional infliction of emotional distress is not governed by the exclusivity provision of the Workers' Compensation Act.⁵ In particular, the California Supreme Court case of *Cole v. Fair Oaks Fire Protection District*⁶ has raised questions concerning the proper application of the exclusivity provision to cases where an employee alleges intentional infliction of emotional distress.⁷

In *Cole*, the California Supreme Court decided that the exclusive remedy provision of the Workers' Compensation Act precludes a civil action for intentional infliction of emotional distress when an injury occurs that is within the normal risks of employment.⁸ In determining whether the injury was within the normal risks of employment, the *Cole* court focused on the conduct of the employer, rather than on the injury suffered by the employee.⁹ If the conduct of the employer is construed as a normal risk of employment,¹⁰ workers' compensation is the exclusive remedy, and a tort action for intentional infliction of emotional distress cannot be brought.¹¹

4. CAL. LAB. CODE §§ 3601a, 3602a (West Supp. 1987). See also 2A A. LARSON, *supra* note 2, at § 65.11 (part of the bargain and exchange in which the sacrifices and gains of an employee and an employer are put in balance so that, although the employer assumes liability without fault, he is relieved of the prospect of a large civil verdict).

5. CAL. LAB. CODE § 3200 (West Supp. 1987) ("workmen's compensation" shall be referred to as workers' compensation); *id.* §§ 3200-9061 (the Workers' Compensation Act); *id.* § 3602a (exclusive remedy provision of the Workers' Compensation Act). See *infra* text accompanying notes 41-46 (complete discussion of the exclusive remedy provision of the Workers' Compensation Act).

6. 43 Cal. 3d 148, 729 P.2d 743, 233 Cal. Rptr. 308 (1987).

7. See *infra* text accompanying notes 129-44.

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

9. *Id.* Prior to *Cole*, the California courts focused on the injury of the employee in determining whether workers' compensation provided the exclusive remedy for intentional infliction of emotional distress. *Id.* at 155-57, 729 P.2d at 747-48, 233 Cal. Rptr. at 212-13. If only emotional harm was alleged, an employee was entitled to bring a civil action. *Id.* See *Renteria v. County of Orange*, 82 Cal. App. 3d 833, 840, 147 Cal. Rptr. 447, 450-51 (1978). If, however, an employee alleged physical injuries accompanying the emotional distress, workers' compensation was deemed the exclusive remedy. *Id.* See *Hollywood Refrigeration Sales Co. v. Superior Court*, 163 Cal. App. 3d 754, 759, 210 Cal. Rptr. 619, 621 (1985); *Gates v. Trans Video Corp.*, 93 Cal. App. 3d 196, 206, 155 Cal. Rptr. 486, 492 (1979); *Ankeny v. Lockheed Missiles & Space Co.*, 88 Cal. App. 3d 531, 535, 151 Cal. Rptr. 828, 831 (1979). The different treatment of intentional infliction of emotional distress by *Renteria* on the one hand, and *Gates-Ankeny* on the other, will be designated throughout this comment as the "physical versus non-physical injury" distinction.

10. *Cole v. Fair Oaks Fire Protection Dist.*, 43 Cal. 3d 148, 160, 729 P.2d 743, 750, 233 Cal. Rptr. 308, 315 (1987) (the court listed demotions, promotions, criticism of work practices, and frictions in negotiations as to grievances as examples of risks normally occurring in the workplace).

11. *Id.* But see *infra* text accompanying notes 121-23 (the normal risk test may only apply to cases in which physical injury is present).

Subsequent to the decision in *Cole, Hart v. National Mortgage and Land Co.*¹² addressed the issue of what the available remedy should be when the conduct of the employer is outside the normal risks of employment. Like *Cole*, the *Hart* court focused on the conduct of the employer in determining whether workers' compensation provided the exclusive remedy for work-related injuries.¹³ Since the conduct of the employer was found to be outside the normal risks of employment, the *Hart* court held that the employee was entitled to bring a civil action for intentional infliction of emotional distress.¹⁴ Unlike *Hart*, the *Cole* court did not discuss what remedy should be available to the employee when the conduct of the employer is not a normal risk of employment.¹⁵

The purpose of this comment is to address the question of whether workers' compensation should be the exclusive remedy for intentional infliction of emotional distress when the conduct of the employer is within the normal risks of employment. This comment will explore the history of both the workers' compensation system and the tort of intentional infliction of emotional distress.¹⁶ The interaction between the workers' compensation system and the general principles of tort law will also be examined.¹⁷ *Cole v. Fair Oaks Fire Protection District* will then be analyzed to determine the scope of the normal risks of employment test.¹⁸ Furthermore, various aspects of the *Cole* opinion will be criticized.¹⁹ Next, the 1982 amendments to the California Workers' Compensation Act will be discussed to determine legislative intent with respect to the application of the exclusivity provision to intentional infliction of emotional distress.²⁰ Finally, *Hart v. National Mortgage and Land Co.* will be evaluated to determine whether *Hart* is consistent with the reasoning in *Cole*, and whether a civil action is permissible when the conduct of the employer is outside the normal risks of employment.²¹ This comment will

12. 189 Cal. App. 3d 1420, 235 Cal. Rptr. 68 (1987).

13. *Id.* at 1429, 235 Cal. Rptr. at 74 (1987) (the court held that the "physical versus non-physical injury" distinction employed by courts prior to *Cole*, should be discarded).

14. *Id.* at 1430, 235 Cal. Rptr. at 74.

15. *Cole v. Fair Oaks Fire Protection Dist.*, 43 Cal. 3d 148, 160, 233 Cal. Rptr. 308, 315, 729 P.2d 743, 750 (1987) (the court held only that when an employer's conduct is a normal risk of employment, then workers' compensation provides the exclusive remedy).

16. See *infra* text accompanying notes 24-72.

17. See *infra* text accompanying notes 73-91.

18. See *infra* text accompanying notes 92-128, 144-52.

19. See *infra* text accompanying notes 129-43.

20. See *infra* text accompanying notes 153-68.

21. See *infra* text accompanying notes 172-95.

propose that when a cause of action for intentional infliction of emotional distress is properly alleged, an employee should be allowed to pursue a civil action whenever conduct of the employer is deemed outrageous.²² Finally, this comment will also propose that in certain circumstances civil actions should be allowed whether or not physical harm accompanies the emotional distress.²³

WORKERS' COMPENSATION

A. Historical Background

The onset of the Industrial Revolution brought problems for both employees and society at large.²⁴ Employees encountered both a sharp increase in industrial accidents, and a decrease in common law remedies for their injuries.²⁵ The increasing incidence of industrial accidents coupled with the difficulty in proving employer liability, left many employees with insufficient remedies.²⁶ Workers' compensation legislation was a reaction to the proliferation of injuries in the industrial workplace.²⁷

The workers' compensation system is predicated on a policy of employer no-fault liability.²⁸ The general theory behind the system is that employers are in the best position to disperse the cost of accident losses.²⁹ This type of "cost-spreading" benefits society by helping to

22. See *infra* text accompanying notes 196-222.

23. See *infra* text accompanying notes 196-222.

24. 1 A. LARSON, *supra* note 2, §§ 4.0, 5.20. See generally 2 W. HANNA, *supra* note 2, § 1.05[1] (since the amelioration of social conditions is a state function and victims of industrial accidents were without adequate legal remedies, the state may conceive that its proper function is to take steps necessary to correct the situation).

25. 1 A. LARSON, *supra* note 2, §§ 4.30-4.50. This decrease was due in part to the common law defenses of contributory negligence, assumption of the risk, and the fellow servant doctrine. *Id.* at § 4.30. In addition since many of the injuries suffered by employees were caused by accidents other than by the negligence of the employer and acts of God, the injuries were deemed non-compensable. *Id.* Moreover, co-employees who were often the only witnesses to an industrial accident, were frequently reluctant to testify against their employers for fear of losing their jobs. *Id.*

26. 1 A. LARSON, *supra* note 2, § 4.50 (studies made prior to the enactment of the worker's compensation legislation indicated that the employer liability laws were a complete failure because many of the injuries were left uncompensated).

27. *Id.* at § 5.20.

28. 2A A. LARSON, *supra* note 2, § 65.0.

29. See, e.g., G. Calabresi, The Cost of Accidents 39-44 (1970) (loss spreading reduces secondary accident costs). See Comment, *Exceptions to the Exclusive Remedy Requirements of Workers' Compensation Statutes*, 96 HARV. L. REV. 1641, 1647 (1983) (employers can disperse the burden of accident losses within the industry, among consumers and among employees in general); 1 A. LARSON, *supra* note 2, § 1.0 (the cost of work-related injuries are ultimately placed on the consumer); 2 W. HANNA, *supra* note 2, § 1.05[2] (discussion of cost spreading).

prevent a disproportionate effect on a few individuals, and reducing total accident-related costs.³⁰ Since the employer assumes liability without fault, the exclusive remedy available to the injured employee is workers' compensation.³¹ The exclusive remedy provision is based upon reciprocal concessions.³² In exchange for a speedy and guaranteed recovery, the employee relinquishes the right to attempt to recover a greater award for damages in the tort system.³³ The employer, on the other hand, is deemed liable without regard to fault, but is protected from a potentially larger civil verdict.³⁴

The workers' compensation system serves various purposes. In theory, the system protects employees against economic insecurity by providing prompt, reasonable compensation while the employee is unable to work.³⁵ In addition, the system effectuates the rehabilitation and reentry of the employee into the labor market.³⁶ These goals, however, are not always realized. Generally, compensation under the system is limited to medical and rehabilitation costs,³⁷ and roughly two-thirds of the income loss resulting from each accident.³⁸ Injuries that do not affect employability, such as disfigurement or pain and suffering, are left uncompensated.³⁹ As a result of the inadequacies

30. G. CALABRESI, *supra* note 29, at 27.

31. 2A A. LARSON, *supra* note 2, § 65.11. See CAL. LAB. CODE § 3602 (West Supp. 1987).

32. 2A A. LARSON, *supra* note 2, § 65.11.

33. *Id.*

34. *Id.* See also CAL. LAB. CODE § 3600(a) (West Supp. 1987) (liability for compensation shall, without regard to negligence, exist against an employer).

35. 2 W. HANNA, *supra* note 2, § 1.05[3]. See also *Moyer v. W.C.A.B.*, 10 Cal. 3d 222, 233, 514 P.2d 1224, 1231, 110 Cal. Rptr. 144, 151 (1973) (the primary purpose of industrial compensation is to ensure injured employees an adequate means of subsistence while they are unable to work); *Santiago v. Employee Benefit Serv.*, 168 Cal. App. 3d 898, 901, 214 Cal. Rptr. 679, 681 (1985) (the underlying purpose of the Workers' Compensation Act is to provide a quick, simple, and readily accessible method of claiming and receiving compensation); *Portillo v. G.T. Price Prod., Inc.*, 131 Cal. App. 3d 285, 287-88, 182 Cal. Rptr. 291, 293 (1982) (the Workers' Compensation Act is designed to afford workers quick determination of their claims for injury).

36. *Id.* The California Constitution states that the purpose of a workers' compensation system is to "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character." CAL. CONST. art. XX, § 21.

37. See generally 2 W. HANNA, *supra* note 2, § 1.05[5]; 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW § 250, at 820 (9th ed. 1987) (discussing injuries compensable under workers' compensation).

38. See, e.g., CAL. LAB. CODE § 4453 (West Supp. 1987); 1 S. HERLICK, CALIFORNIA WORKERS' COMPENSATION LAW §§ 5.17-5.23 (3d ed. 1987).

39. See 2 B. WITKIN, *supra* note 37, § 250 (for a work-related injury the employer is liable for medical costs, rehabilitation benefits, death and burial expenses, and indemnity for disability). See also *Williams v. State Compensation Ins. Fund*, 50 Cal. App. 3d 116, 123 Cal. Rptr. 812 (1975). In *Williams*, an employee suffered an injury resulting in loss of sexual performance. *Id.* at 121-22, 123 Cal. Rptr. at 815. The court held that a work-related injury could not be divided into separate elements of damage even though some injuries were unrelated to earning

of the workers' compensation system, both the California legislature and judiciary have created exceptions to the exclusivity provision which allow employees to bring a civil action.⁴⁰

B. Workers' Compensation Act

Certain statutory conditions must be met before the workers' compensation system will be triggered.⁴¹ Workers' compensation is available only when an employee suffers an injury arising out of and within the course of employment.⁴² There are limitations, however, on the right of an employee to seek redress in the workers' compensation system, even when the injury is work-related.⁴³

Although workers' compensation generally provides the exclusive remedy for work-related injuries, statutory exceptions to the exclusivity provision allow an injured employee to bring an alternative action.⁴⁴ The question remains, however, whether there are additional

capacity and noncompensable in a workers' compensation proceeding. *Id.* at 122, 123 Cal. Rptr. at 815. Consequently, in *Williams*, since the loss of sexual performance did not cause an employment disability, the injury was noncompensable in workers' compensation. *Id.*

40. See *infra* text accompanying notes 216-17 (the 1982 amendments to the Workers' Compensation Act codified several judicially-created exceptions to the exclusivity provision allowing an action at law).

41. CAL. LAB. CODE § 3600(a) (West Supp. 1987).

42. *Id.* Broadly interpreted, an injury is said to arise out of and in the course of employment when the injury takes place within the period of the employment, at a place where the employee reasonably should be, and while the employee is fulfilling duties or engaged in doing something incidental thereto. See, e.g., *J.T. Thorp, Inc. v. W.C.A.B.*, 153 Cal. App. 3d 327, 200 Cal. Rptr. 219 (1984) (compensation may be awarded under the Workers' Compensation Act for any injury or disease arising out of or in the course of employment); *Maher v. W.C.A.B.*, 33 Cal. 3d 729, 661 P.2d 1058, 190 Cal. Rptr. 729 (1983) (an injury arises out of and in the course of employment when the employee performs a duty imposed by the employer); *Truck Ins. Exch. v. Industrial Accident Comm'n*, 77 Cal. App. 2d 461, 175 P.2d 884 (1947) (an injury arises out of employment when there is a causal connection between the conditions under which the work is to be performed and the resulting injury).

43. CAL. LAB. CODE § 3600(a)(4)-(9) (West Supp. 1987). Workers' compensation is not triggered where the injury is caused by the intoxication of the injured employee, where the employee's injury is intentionally self-inflicted, where the employee willfully and deliberately caused his own death, where the injury arises out of an altercation in which the injured employee was the initial physical aggressor, and where the injury of the employee is caused by the employee's own felonious act. *Id.*

44. *Id.* § 3602. California Labor Code Section 3602 states that workers' compensation is the exclusive remedy except in the following instances:

1. Where the employee's injury is proximately caused by a willful physical assault by the employer.
2. Where the employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the employment, in which case the employer's liability shall be limited to those damages proximately caused by the aggravation. The burden of proof respecting apportionment of damages between the injury and any subsequent aggravation thereof is upon the employer.
3. Where the employee's injury or death is proximately caused by a defective

exceptions to the exclusivity provision which have not been codified.⁴⁵ Much debate has centered around whether a civil action for intentional infliction of emotional distress should be allowed or whether the tort is barred by the exclusivity provision of workers' compensation.⁴⁶

INTENTIONAL INFLECTION OF EMOTIONAL DISTRESS

A. Development of the Tort

Prior to the 1930's, American courts did not recognize a separate and distinct tort of intentional infliction of emotional distress.⁴⁷ Recovery of damages for emotional distress was allowed only when another tort was committed.⁴⁸ During the 1930's, the tort of intentional infliction of emotional distress was first recognized.⁴⁹ At that time courts required however, that physical injuries accompany the emotional distress to sustain an action.⁵⁰

In *State Rubbish Collectors Associations v. Siliznoff*,⁵¹ the California Supreme Court held that consequential physical injuries are not necessary to sustain a tort action for intentional infliction of emotional distress.⁵² The court reasoned that when mental suffering constitutes a major element of damages, an anomaly exists when a tort recovery is denied because the intentional conduct of the defend-

product manufactured by the employer and sold, leased, or otherwise transferred for valuable consideration to an independent third person, and that product is thereafter provided for the employee's use by a third person.

Id.

45. See *infra* text accompanying notes 153-74.

46. See *infra* text accompanying notes 73-222.

47. W. PROSSER, W. KEETON, D. DOBBS, R. KEETON & D. OWENS, PROSSER & KEETON ON THE LAW OF TORTS § 12, at 60 (5th ed. 1984) [hereinafter W. PROSSER & W. KEETON].

48. See, e.g., *American Sec. Co. v. Cook*, 49 Ga. App. 723, 176 S.E. 798 (1934) (emotional distress damages recoverable in a trespass to land action); *Atlanta Hub Co. v. Jones*, 47 Ga. App. 778, 171 S.E. 470 (1933) (emotional distress damages allowed in an assault case); *Salisbury v. Paulson*, 51 Utah 552, 172 P. 315 (1918) (emotional distress damages allowed in a false imprisonment action); *DeMay v. Roberts*, 46 Mich. 160, 9 N.W. 146 (1881) (emotional distress damages recoverable in a battery suit).

49. W. PROSSER & W. KEETON, *supra* note 47, at 60-61. A minority of courts still refuse to recognize intentional infliction of emotional distress as a separate tort. See, e.g., *Jeffersonville Silgas, Inc. v. Wilson*, 154 Ind. App. 398, 290 N.E.2d 113 (1972); *Harned v. E-Z Finance Co.*, 151 Tex. 641, 254 S.W.2d 81 (1953). Cases are collected in Annot. 38 A.L.R. 4th 998, 1030-32, 1034-35 (1985).

50. Prior cases had required physical injury or some other nonmental damage to protect against fraudulent claims. See, e.g., *Harned v. E-Z Finance Co.*, 151 Tex. 641, 254 S.W.2d 81 (1953); *Kirby v. Jules Chain Stores Corp.*, 210 N.C. 808, 188 S.E. 625 (1936).

51. 38 Cal. 2d 330, 240 P.2d 282 (1952).

52. *Id.* at 338, 240 P.2d at 286.

ant falls short of producing physical injury.⁵³ The *Siliznoff* court concluded that when the conduct of the defendant is outrageous, there is a sufficient guarantee that the emotional distress suffered by the plaintiff is genuine.⁵⁴

In order to sustain an action for intentional infliction of emotional distress, the plaintiff must show that the defendant harbored the requisite mental state.⁵⁵ The defendant must intend to cause mental suffering in the plaintiff, possess the knowledge that mental suffering is substantially certain to result, or act with reckless disregard of the high probability that the plaintiff will suffer emotional distress.⁵⁶ In addition, California cases clearly establish that in order for an intentional infliction of emotional distress action to lie, the defendant must have been aware or substantially certain that the plaintiff will perceive the outrageous conduct.⁵⁷ If the defendant knows of the presence of the plaintiff, it is more certain that the defendant reasonably anticipated to cause emotional distress to the plaintiff.⁵⁸ The refusal of the California courts to apply the doctrine of transferred intent⁵⁹ to intentional infliction of emotional distress cases constitutes a major limitation on the tort.⁶⁰

A reasonable person standard is applied to determine whether the conduct of the defendant was outrageous.⁶¹ If the conduct of the defendant is not objectively outrageous, the plaintiff cannot recover even if the plaintiff is especially sensitive to such conduct.⁶² However,

53. *Id.*

54. *Id.*

55. W. PROSSER & W. KEETON, *supra* note 47, § 12, at 64-65.

56. *Id.* RESTATEMENT (SECOND) TORTS § 46 (1965); *Agarwal v. Johnson*, 25 Cal. 3d 932, 946, 603 P.2d 58, 67, 160 Cal. Rptr. 141, 149-50 (1979); *Alcorn v. Anbro Eng'g, Inc.*, 2 Cal. 3d 493, 498, 468 P.2d 216, 218, 86 Cal. Rptr. 88, 90 (1970); *Newby v. Alto Riviera Apartments*, 60 Cal. App. 3d 288, 296-97, 131 Cal. Rptr. 547, 552-53 (1976).

57. W. PROSSER & W. KEETON, *supra* note 47, § 12, at 64-65. *See, e.g.*, *Taylor v. Vallelunga*, 171 Cal. App. 2d 107, 109, 339 P.2d 910, 911 (1959) (action at law for intentional infliction of emotional distress was denied because plaintiff failed to allege that defendants knew that plaintiff was present and witnessed the beating of her father).

58. W. PROSSER & W. KEETON, *supra* note 47, § 12, at 64-65; *Taylor*, 171 Cal. App. 2d at 109, 339 P.2d at 911.

59. W. PROSSER & W. KEETON, *supra* note 47, § 12, at 65. As an example, if a person intentionally directs an act towards Abel, but wrongfully hits Baker, the intent is said to have transferred from Abel to Baker and the person is liable to Baker even though he did not intend to hit Baker. *Id.*

60. The refusal to apply the doctrine to the tort has a limiting effect because plaintiffs cannot recover unless the conduct of the defendant is directed at them. *Id.* at 64-65.

61. *Scott v. McDonnell Douglas Corp.*, 37 Cal. App. 3d 277, 291, 112 Cal. Rptr. 609, 619 (1974); RESTATEMENT (SECOND) OF TORTS § 46 comment j (1965); W. PROSSER & W. KEETON, *supra* note 47, § 12, at 63-64.

62. W. PROSSER & W. KEETON, *supra* note 47, § 12, at 63-64.

when the defendant indulges in acts designed to prey upon a special sensitivity of the plaintiff, liability may attach.⁶³

B. Application of the Tort in the Workplace

The leading case dealing with intentional infliction of emotional distress in the workplace was *Alcorn v. Anbro Engineering, Inc.*⁶⁴ In *Alcorn*, the plaintiff was a black truck driver and a member of the Teamster's Union.⁶⁵ When the field superintendent learned that the plaintiff had advised another employee not to drive a truck because the employee was not a union member, the field superintendent allegedly shouted at the plaintiff in a rude and violent manner.⁶⁶ The field superintendent then allegedly shouted racial epithets at the plaintiff and fired him.⁶⁷ The plaintiff suffered humiliation, and emotional and physical distress.⁶⁸ The plaintiff argued that he should be allowed to pursue a civil action for intentional infliction of emotional distress against his employer.⁶⁹ Although the exclusivity provision of workers' compensation was not an issue in *Alcorn*, the court reasoned that the invasion of mental and emotional tranquility alone is a sufficient basis for a tort action.⁷⁰ Moreover, the court indicated that abuse of the employment relationship can constitute outrageous conduct because of the inherent power of the employer over the interest of the employee.⁷¹

After *Alcorn* was decided, employers began raising the exclusivity provision of workers' compensation as a defense in civil actions for intentional infliction of emotional distress cases.⁷² Thereafter, the issue of whether the workers' compensation system provides the exclusive remedy for the tort of intentional infliction of emotional

63. See *Alcorn v. Anbro Eng'g, Inc.*, 2 Cal. 3d 493, 498, 468 P.2d 216, 218-19, 86 Cal. Rptr. 88, 90-91 (1970) (use of racial epithet in face of plaintiff's peculiar susceptibility held sufficient to support an action for intentional infliction of emotional distress when defendant knew or should have known of plaintiff's susceptibility); *Wallis v. Superior Court*, 106 Cal. App. 3d 1113, 1120, 207 Cal. Rptr. 123, 130 (1984) (employer who knew of plaintiff's special susceptibility to financial injury held liable for inflicting such injury).

64. 2 Cal. 3d 493, 86 Cal. Rptr. 88 (1970).

65. *Id.* at 496, 86 Cal. Rptr. at 89.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 497, 86 Cal. Rptr. at 90.

70. *Id.* at 498-99, 86 Cal. Rptr. at 90-91.

71. *Id.*

72. See *infra* text accompanying notes 73-128, 178-93 (discussing application of the exclusive remedy provision to intentional infliction of emotional distress).

distress in the workplace has been the subject of much controversy among courts and commentators.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AND WORKERS'
COMPENSATION

A. Prior to Cole v. Fair Oaks Fire Protection District

Prior to 1978, the issue of whether workers' compensation provided the exclusive remedy for intentional infliction of emotional distress remained undecided. In *Renteria v. County of Orange*,⁷³ the court held that the employee should be allowed to pursue a civil remedy because the employee did not suffer any physical disability compensable in the workers' compensation system as a result of intentionally inflicted emotional distress.⁷⁴ The *Renteria* court reasoned that limiting the employee to only workers' compensation could effectively shield the employer from all liability.⁷⁵

The *Renteria* court noted that the mere existence of an injury not recoverable under workers' compensation did not necessarily entitle a court to imply an exception to the exclusive remedy provision.⁷⁶ According to the *Renteria* court, the Legislature did not intend that the employee surrender all rights to compensation for mental suffering caused by extreme and outrageous conduct.⁷⁷ In addition, the *Renteria* court noted that the tort involves intentional wrongdoing for which the "no-fault" workers' compensation system fails to provide a sufficient deterrent.⁷⁸ Therefore, intentional infliction of emotional distress was outside the contemplation of the workers' compensation system.⁷⁹ Accordingly, the *Renteria* court created an implied exception to the exclusivity provision of workers' compensation in order to ensure some compensation for the injured employees.⁸⁰ Thus, the employee was able to bring a civil action for intentional infliction of emotional distress.

73. 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (1978).

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

75. *Id.*

76. *Id.* at 840, 147 Cal. Rptr. at 451.

77. *Id.* at 841, 147 Cal. Rptr. at 452.

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

79. *Id.* (intentional infliction of emotional distress comprises an entire class of civil wrongs outside the contemplation of the workers' compensation system).

80. *Id.*

After *Renteria*, some courts refused to extend the implied exception to the exclusivity requirement to actions where physical injuries accompanied the emotional distress. In *Gates v. Trans Video Corp.*⁸¹ the plaintiff allegedly suffered a back injury on the job.⁸² When the plaintiff went to discuss sick pay benefits with the manager, an argument ensued.⁸³ The plaintiff was subsequently fired.⁸⁴ As a result of the termination, the plaintiff allegedly suffered emotional distress.⁸⁵ In *Ankeny v. Lockheed Missles and Space Co.*,⁸⁶ the defendant allegedly harassed the plaintiff by assigning him to tasks not appropriate to his skills, transferring him from one job to another, passing him over for promotion twice and terminating him.⁸⁷ The plaintiff allegedly suffered both physical and emotional harm as a result of the harassment.⁸⁸ Both the *Gates* and *Ankeny* courts reasoned that the *Renteria* court allowed a tort action only because the emotional distress injuries were not compensable within the workers' compensation system.⁸⁹ According to the *Gates* and *Ankeny* courts, the exclusivity provision applies whenever the employee has suffered physical injuries compensable within the workers' compensation system.⁹⁰ In contrast, the exclusivity provision does not apply when emotional distress is the only injury suffered.⁹¹

81. 93 Cal. App. 3d 196, 155 Cal. Rptr. 486 (1979).

82. *Id.* at 199, 155 Cal. Rptr. at 488.

83. *Id.*

84. *Id.* at 200, 155 Cal. Rptr. at 488.

85. *Id.* at 201, 155 Cal. Rptr. at 489.

86. 88 Cal. App. 3d 531, 151 Cal. Rptr. 828 (1979).

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

88. *Id.*

89. *Gates v. Trans Video Corp.*, 93 Cal. App. 3d 196, 205, 155 Cal. Rptr. 486, 492; *Ankeny*, 88 Cal. App. 3d at 535, 151 Cal. Rptr. at 831.

90. *Gates*, 93 Cal. App. 3d at 205, 155 Cal. Rptr. at 492; *Ankeny*, 88 Cal. App. 3d at 535, 151 Cal. Rptr. at 831.

91. *Gates*, 93 Cal. App. 3d at 205, 155 Cal. Rptr. at 492; *Ankeny*, 88 Cal. App. 3d at 535, 151 Cal. Rptr. at 831. Cases decided after *Renteria* have been inconsistent in applying the "physical versus non-physical injury" distinction when determining whether a tort action for intentional infliction of emotional distress could be brought. For example in *McGee v. McNally*, 119 Cal. App. 3d 891, 174 Cal. Rptr. 253 (1981), the plaintiff alleged that while he was a foreman at Stanford University Hospital, he was the victim of a campaign instigated by the plaintiff's supervisors to harass and oust him from his job. *Id.* at 893, 174 Cal. Rptr. at 254. The California Court of Appeal for the First District took a minority stance, allowing the employee to bring a civil action for intentional infliction of emotional distress even though physical injuries were alleged. *Id.* at 895, 174 Cal. Rptr. at 255. The *McGee* court held that under appropriate circumstances, compensation outside the workers' compensation system should be allowed. *Id.* The court reasoned that if the injuries suffered by the employee were non-physical and the basis of the claim is also non-physical, then the employee should not be barred from suing at law even if physical injuries are alleged. *Id.* at 894-95, 174 Cal. Rptr. at 255-56. Similarly, in *Iverson v. Atlas Pacific Engineering*, 143 Cal. App. 3d 219, 191 Cal.

B. *Cole v. Fair Oaks Fire Protection District*

In *Cole v. Fair Oaks Fire Protection District*,⁹² the California Supreme Court examined the interaction between workers' compensation and intentional infliction of emotional distress. The challenge before the *Cole* court was to delineate the circumstances under which workers' compensation provides the exclusive remedy for intentional infliction of emotional distress. The *Cole* court focused on the conduct of the employer in determining whether workers' compensation provides the exclusive remedy for intentional infliction of emotional distress.⁹³

1. *The Facts*

Cole was a firefighter in Fair Oaks and a union representative.⁹⁴ Cole alleged that the assistant fire chief engaged in harassing and punishing Cole for his activities as union representative.⁹⁵ The assistant chief's activities culminated in a disciplinary hearing based on false charges.⁹⁶ Subsequent to the hearing, Cole was demoted, assigned to perform not only humiliating duties, but also to work as a dispatcher.⁹⁷ Although the District Board of Directors reversed Cole's demotion and reinstated him as captain, the assistant fire chief persisted in harassing Cole by filing an application with the State Personnel Employees Retirement System to force Cole to re-

Rptr. 696 (1983), the plaintiff alleged that the defendant's agent set up a steel horseshoe target directly above the plaintiff's place of work, forced plaintiff to remain in confined quarters against his will, and repeatedly pounded the sledgehammer against the target to cause loud crashing noises upon plaintiff. *Id.* at 222, 191 Cal. Rptr. at 697. The California Court of Appeal for the First District held that an employee could sue in a civil action for intentional infliction of emotional distress notwithstanding allegations of physical injuries. *Id.* at 230, 191 Cal. Rptr. at 703. The appellate court allowed a civil action because the gravamen of the complaint was emotional harm not physical disability. *Id.* The *Iverson* court concluded that it would be contrary to the policy behind the Workers' Compensation Act, which was designed to benefit employees, if the employer were shielded from liability for intentional and outrageous conduct. *Id.* at 230, 191 Cal. Rptr. at 704. On the other hand, some courts have read *Renteria* as creating a blanket exception to the exclusivity provision for intentional infliction of emotional distress. See *Russell v. Massachusetts Mut. Life Ins. Co.*, 722 F.2d 482 (9th Cir. 1983)(applying California law). Under this view, a plaintiff may proceed in a civil action regardless of whether there is physical injury. *Id.* at 493-95.

92. 43 Cal. 3d 148, 729 P.2d 743, 233 Cal. Rptr. 308 (1987).

93. *Id.* at 160, 729 P.2d at 750, 233 Cal. Rptr. at 315.

94. *Id.* at 152, 729 P.2d at 744, 233 Cal. Rptr. at 309.

95. *Id.*

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

97. *Id.* at 153, 729 P.2d at 745, 233 Cal. Rptr. at 310. Cole had worked as a dispatcher, a job unsuited to his senior status, 11 years earlier. *Id.*

tire.⁹⁸ Cole further alleged that this continuous harassment by the assistant fire chief elevated his blood pressure.⁹⁹ Cole ultimately suffered a severe stroke which left him totally disabled.¹⁰⁰ The plaintiff filed a civil action for intentional infliction of emotional distress against his employer.¹⁰¹ The trial court sustained the defendant's demurrer on the ground that the claim was governed exclusively by the workers' compensation system.¹⁰² The plaintiff appealed and the Supreme Court of California affirmed the judgment of the trial court and the court of appeal.¹⁰³

2. *The Opinion*

The *Cole* court began with an analysis of the "physical versus non-physical injury" distinction. The *Cole* court emphasized that the basis for the *Renteria* decision in allowing a civil action when no physical injuries were alleged, was the perceived absence of any other deterrent to intentionally tortious conduct.¹⁰⁴ If deterrents in the workers' compensation system were available, the *Cole* court stated, a civil action would be superfluous.¹⁰⁵ The *Cole* majority perceived California Labor Code Section 4553 as deterring intentionally tortious conduct by providing for an increase in compensation benefits for the "serious and willful misconduct" of the employer.¹⁰⁶ Another potential deterrent discussed in the *Cole* opinion was the prospect of a workers' compensation award itself.¹⁰⁷ The *Cole* court determined that the presence of statutorily provided deterrents undermines the theoretical underpinning of the *Renteria* decision.¹⁰⁸

98. *Id.*

99. *Id.*

100. *Id.* (Cole cannot move, care for himself, or communicate other than by blinking).

101. *Id.* at 151, 729 P.2d at 744, 233 Cal. Rptr. at 309.

102. *Id.*

103. *Id.*

104. *Id.* at 155-56, 729 P.2d at 747-48, 233 Cal. Rptr. at 312-13.

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

106. *Id.* See CAL. LAB. CODE § 4553 (West Supp. 1987) ("The amount of compensation otherwise recoverable shall be increased one-half . . . where the employee is injured by reason of the serious and willful misconduct of . . . [the employer or enumerated representatives thereof]"). See also CAL. INS. CODE § 11661 (West 1972) (an insurer shall not insure against the liability of the employer for the additional compensation recoverable for serious and willful misconduct of the employer).

107. *Cole*, 43 Cal. 3d 157, 729 P.2d at 748, 233 Cal. Rptr. at 313 (paying out workers' compensation claims costs the employer's money). See also CAL. LAB. CODE § 3700 (West Supp. 1987) (every employer must carry workers' compensation insurance).

108. *Cole*, 43 Cal. 3d at 157, 729 P.2d at 748, 233 Cal. Rptr. at 313.

The plaintiff in *Cole* also relied on *Johns-Manville v. Superior Court*.¹⁰⁹ In *Johns-Manville*, the employer intended to injure the plaintiff by fraudulently concealing the presence of a hazardous condition in the workplace and inducing the employee to continue working.¹¹⁰ The California Supreme Court held that an employee was not precluded from bringing a civil action for intentional misconduct on the part of the employer.¹¹¹ The *Cole* court distinguished the holding in *Johns-Manville*, however, on the basis of intent.¹¹² In *Cole* the plaintiff did not allege that the employer specifically intended to injure.¹¹³ Rather, the employer displayed a reckless disregard for the high probability of causing emotional distress.¹¹⁴ The *Cole* court concluded that an employer who acts with reckless disregard lacks the higher intent, required under *Johns-Manville*, to warrant exemption from the exclusive remedy provision of workers' compensation.¹¹⁵ The *Cole* court stated that even when the employer harbors specific intent to injure, workers' compensation would be the exclusive remedy if the conduct of the employer is a normal risk of employment.¹¹⁶

The defendant in *Cole* argued that the *Gates* and *Ankeny* line of cases were decisive in determining whether workers' compensation provides the exclusive remedy.¹¹⁷ Because *Cole* suffered physical injuries compensable within the workers' compensation system, the defendant maintained that a civil action was unnecessary.¹¹⁸ Since the *Gates* and *Ankeny* courts were concerned only with determining whether the employee suffered physical injuries, the *Cole* court noted

109. 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980).

110. *Id.* at 469-70, 612 P.2d at 950-51, 165 Cal. Rptr. at 860-61.

111. *Id.*

112. *Cole*, 43 Cal. 3d at 159, 729 P.2d at 749-50, 233 Cal. Rptr. at 314-15.

113. *Id.*

114. *Id.*

115. *Id.* See also *Johns-Manville v. Superior Court*, 27 Cal. 3d 465, 477-78, 612 P.2d 948, 955-56, 165 Cal. Rptr. 858, 865-66 (1980) (only specific intent to injure warrants allowing a civil action for damages thereby upsetting the balance between the employer and employee).

116. *Cole*, 43 Cal. 3d at 160, 729 P.2d at 750, 233 Cal. Rptr. at 315. The court indicated that:

[i]f characterization of conduct normally occurring in the workplace as unfair or outrageous were sufficient to avoid the exclusive remedy provision of the Labor Code, the exception would permit the employee to allege a cause of action in every case where he suffered mental disability merely by alleging an ulterior purpose of causing injury. Such an exception would be contrary to the compensation bargain and unfair to the employer.

Id.

117. *Id.* at 157, 729 P.2d at 748, 233 Cal. Rptr. at 313 (in *Gates* and *Ankeny* the employee alleged physical injuries accompanying the emotional distress).

118. *Id.* See also *supra* note 9 and accompanying text (discussing the "physical versus non-physical injury" distinction).

that alternative grounds for permitting a civil action were not considered.¹¹⁹ Thus, the *Cole* court did not find the *Gates* and *Ankeny* cases persuasive.¹²⁰

Although not explicit, language from the *Cole* opinion suggests that the normal risk test may be limited to intentional infliction of emotional distress cases where physical injury is present.¹²¹ While *Gates*, *Ankeny*, and *Renteria* are discussed, none of these cases are expressly rejected or accepted by the *Cole* majority.¹²² The failure of the court to reject these cases allows the inference that the "physical verses non-physical injury" approach remains viable and should be applied in conjunction with the normal risk test.¹²³

In *Cole*, the California Supreme Court in *Cole* shifted the focus of inquiry from the injury of the employee to the conduct of the employer in determining when a civil action can be brought for intentional infliction of emotional distress.¹²⁴ The conduct of the employer is analyzed to determine whether the conduct of the employer can be fairly characterized as a normal risk of the employment relationship.¹²⁵ Demotions, promotions, criticism of work practices, and frictions in negotiations as to grievances are all examples of conduct falling within the normal risks of employment.¹²⁶ The *Cole* court distinguished previous cases which had allowed recovery in a civil action for intentional infliction of emotional distress on the ground that those cases involved conduct of a "questionable" relationship to employment.¹²⁷ Since the conduct of the employer in *Cole*

119. *Cole*, 43 Cal. 3d at 157, 729 P.2d at 748, 233 Cal. Rptr. at 313. Other than the normal risk test, the court in *Cole* did not elaborate as to what alternative grounds should have been considered by the courts in *Gates* and *Ankeny*. *Id.*

120. *Id.*

121. *Id.* at 159-60, 729 P.2d at 750, 233 Cal. Rptr. at 315. The court stated: "Nevertheless, the question remains whether the exclusive remedy provisions exclude liability in a limited class of cases of intentional infliction of emotional distress *causing disability* . . ." *Id.* (emphasis added).

122. *Id.* at 156-57, 729 P.2d 746-47, 233 Cal. Rptr. at 311-12. According to the court, *Renteria*, and the cases following, did not offer support for the plaintiff's position. *Id.* After discussion of the *Gates* and *Ankeny* cases, the court in *Cole* stated that, "We proceed to consider alternative bases for an exception to the exclusive remedy provisions of the Labor Code." *Id.* at 157, 729 P.2d at 747, 233 Cal. Rptr. at 312.

123. See 2 B. WITKIN, *supra* note 37, §§ 52-53, at 608-13 (suggesting that the normal risk test is applicable only in cases where physical injury is present).

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

125. *Id.*

126. *Id.*

127. *Id.* at 161, 729 P.2d at 751, 233 Cal. Rptr. at 316 (citing *Johns-Manville Prod. Corp. v. Superior Court*, 27 Cal. 3d 465, 477, 612 P.2d 948, 950-51, 165 Cal. Rptr. 858, 860 (1980) (employer fraudulently concealed the cause of employee's work-related injury); *Magliulo v.*

reflected matters which occur frequently in the workplace, the *Cole* court held that a civil action was barred and workers' compensation was deemed the exclusive remedy.¹²⁸

3. Criticisms of *Cole*

The majority opinion in *Cole* can be criticized on several grounds. First, the additional forms of behavior that will be viewed as conduct within the normal risks of employment is unclear. The lower courts must evaluate the conduct of the employer on a case-by-case basis in order to determine when the conduct is or is not within the normal risks of employment. The *Cole* court should have presented a more concrete analytical framework in order to promote consistency and prevent needless litigation.

Secondly, the majority in *Cole* noted that prior California cases permitting recovery in tort for intentional misconduct are based on the conduct of an employer having a "questionable" relationship to employment.¹²⁹ Even though the majority in *Cole* did not analogize to the questionable relationship cases, the deliberate harassment, humiliation, and psychological assault alleged by the plaintiff appears questionably related to employment.¹³⁰ Consequently, *Cole* should also have been allowed to bring a tort action for intentional infliction of emotional distress.

The decision in *Cole* can also be criticized for the treatment by the court of extreme and outrageous conduct.¹³¹ Under *Cole*, if the conduct of an employer is within the normal risks of employment, a civil action is barred even if the conduct was extreme and outrageous. However, since the very definition of extreme and outrageous

Superior Court, 47 Cal. App. 3d 760, 779, 121 Cal. Rptr. 621, 623 (1975) (employer willfully physically assaulted employee); *Unruh v. Truck Ins. Exch.*, 7 Cal. 3d 616, 630, 498 P.2d 1063, 1066, 102 Cal. Rptr. 815, 818 (1972) (employer perpetrated fraud on employee); *Ramey v. General Petroleum Corp.*, 173 Cal. App. 2d 386, 402, 343 P.2d 787, 790-99 (1959) (employer conspired with a third party tortfeasor to fraudulently conceal the employer's liability for the employee's injury)).

128. *Cole*, 43 Cal. 3d at 161, 729 P.2d at 750, 233 Cal. Rptr. at 315.

129. See *supra* note 127 and accompanying text (describing conduct having a questionable relationship to employment).

130. *Cole*, 43 Cal. 3d at 161, 729 P.2d at 750, 233 Cal. Rptr. at 315.

131. *Id.* at 160, 729 P.2d at 750, 233 Cal. Rptr. at 315. According to the court: "[w]hen the misconduct attributed to the employer is actions which are a normal part of the employment relationship . . . an employee . . . may not avoid the exclusive remedy provisions of the Labor Code by characterizing the employer's decisions as manifestly unfair, outrageous, harassment or intended to cause emotional disturbance . . ." *Id.*

conduct is that behavior which civilized society will not tolerate,¹³² attempting to characterize such conduct as a normal risk of employment is problematic. It seems contradictory to state that conduct not tolerated in a civilized society can still be considered a normal risk of employment.

Another ambiguity in the *Cole* opinion is that the majority indicated, in dicta, that the normal risk test is to be applied regardless of whether specific intent to injure is alleged.¹³³ The plaintiff in *Cole*, however, alleged only that the defendant acted with reckless disregard of the high probability that emotional distress would result.¹³⁴ The *Cole* case, therefore, may not stand for the proposition that specific intent to cause emotional distress is a normal risk of employment.¹³⁵

Another criticism of the *Cole* opinion concerns the analysis of the deterrent effect of California Labor Code Section 4553. Section 4553 provides that the amount of compensation otherwise recoverable under workers' compensation may be increased by one-half when the employee is injured by the serious and willful misconduct of an employer.¹³⁶ The majority in *Cole* argued that Labor Code Section 4553 created a "substantial deterrent" to intentional employer misconduct because an employer cannot insure against such liability.¹³⁷ Given the generally low benefits payable under the workers' com-

132. See *Davidson v. City of Westminster*, 32 Cal. 3d 197, 219, 649 P.2d 894, 901, 185 Cal. Rptr. 252, 259 (1982); *Malko v. Holy Spirit Ass'n*, 179 Cal. App. 3d 450, 464, 224 Cal. Rptr. 817, 831 (1986); *Nelson v. GAB Business Serv.*, 179 Cal. App. 3d 610, 617, 224 Cal. Rptr. 595, 603 (1986) (intentional infliction of emotional distress is defined as conduct so outrageous as to exceed all bounds usually tolerated in a civilized community). Abuse of the employment relationship can also constitute extreme and outrageous conduct. *Alcorn v. Anbro Eng'g, Inc.*, 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970).

133. See *supra* text accompanying note 116 (civil action may be barred despite allegations of specific intent to injure).

134. *Cole*, 43 Cal. 3d at 159, 729 P.2d at 749, 233 Cal. Rptr. at 314.

135. *Id.* (reckless disregard of the probability of causing emotional injury should not warrant exemption from the exclusive remedy provision of the California Labor Code). The plaintiff urged that the reasoning of *Johns-Manville* permitted an action at law for intentional infliction of emotional distress. *Id.* at 159, 729 P.2d at 749-50, 233 Cal. Rptr. at 314-15. The majority in *Cole*, however, distinguished the tort of intentional infliction of emotional distress from the conduct in *Johns-Manville*, stating that to permit liability where the employer did not specifically intend to cause emotional distress, but reflected only a reckless disregard of the probability of causing injury would be contrary to the reasoning in *Johns-Manville*. *Id.* The problem is that the court in *Cole* ignored the fact that most intentional infliction of emotional distress cases are based on a specific intent to injure. See W. PROSSER & W. KEETON, *supra* note 47, § 12, at 64 (reckless disregard standard for intentional infliction of emotional distress liability is a minority view).

136. See *supra* note 106 and accompanying text (workers' compensation benefits may be increased by one-half if the employer has committed serious and willful misconduct).

137. *Cole*, 43 Cal. 3d at 161, 729 P.2d at 751, 233 Cal. Rptr. at 316.

pensation system,¹³⁸ however, an additional payment of one-half of such an amount is unlikely to suffice to deter employer misconduct.¹³⁹ Additionally, Section 4553 fails to provide additional compensation for emotional distress in cases where the employee suffers no physical harm, since only employment disabilities are compensable under the workers' compensation system.¹⁴⁰ Employers are unlikely to be deterred when a damage award of zero is increased by one-half.

The majority in *Cole* was also concerned that if intentional infliction of emotional distress claims arising out of employment are allowed to proceed in a civil action, the tort system will be burdened with claims already compensable in the workers' compensation system.¹⁴¹ The reasoning of the majority is flawed because cases which result solely in emotional injury are not compensable in workers' compensation.¹⁴² Furthermore, even if emotional distress cases include a claim for physical injuries, damages for mental suffering remain unavailable.¹⁴³

138. See CAL. LAB. CODE §§ 4453-4458. California is considered one of the lowest paying states for workers' compensation claims. See S.B. 323, 1987-88, 1st Reg. Sess., sec.1 (Cal. 1987) (introduced Feb. 5, 1987) (pending legislation designed to increase workers' compensation benefits in California). Currently, California's Workers' Compensation Act authorizes benefits of up to \$224 per week. See SENATE RULES COMMITTEE, *Analysis of S.B. 323*, 2 (copy on file at *Pacific Law Journal*). The pending legislation would increase the maximum compensation to \$362 per week in 1988 and \$435 per week by 1990. *Id.*

139. CAL. LAB. CODE § 4553 (increasing workers' compensation awards by one-half in the event of serious and willful misconduct on the part of the employer). The 50-percent increase in the award authorized by section 4553 is additional compensation and does not represent exemplary damages. *State Dept. of Corrections v. Workmen's Comp. App. Bd.*, 5 Cal. 3d 885, 891, 489 P.2d 818, 822, 97 Cal. Rptr. 786, 790 (1971); *E. Clemens Horst Co. v. Industrial Accident Comm'n.*, 184 Cal. 180, 193, 193 P. 105, 110 (1920). Punitive damages, on the other hand, are designed to deter extreme and outrageous conduct. CAL. CIV. CODE § 3294 (West Supp. 1987). Since the primary purpose of punitive damages is to punish and make an example of the defendant, the wealthier the defendant the larger the punitive assessment must be in order to achieve deterrence. See *Merlo v. Standard Life & Accident Ins. Co.*, 59 Cal. App. 3d 5, 130 Cal. Rptr. 416 (1976); *Wetherbee v. United Ins. Co. of America*, 18 Cal. App. 3d 266, 95 Cal. Rptr. 678 (1971). See also W. PROSSER & W. KEETON, *supra* note 47, § 2 (discussion of the policies behind punitive damages).

140. See *Renteria v. County of Orange*, 82 Cal. App. 3d 833, 841, 147 Cal. Rptr. 447, 455 (1978) ("Where there is no compensable injury, 50 percent of nothing is still nothing, and Labor Code Section 4553 cannot function as a deterrent").

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

142. See *Hart v. Nat'l Mortg. & Land Co.*, 189 Cal. App. 3d 1420, 1431, 235 Cal. Rptr. 68, 75 (1987). See also *Renteria*, 82 Cal. App. 3d at 841, 147 Cal. Rptr. at 455 (1978) (emotional distress is not compensable in workers' compensation).

143. Mental suffering not constituting an employment disability is not compensable within workers' compensation. See *Fruehauf Corp. v. W.C.A.B.*, 68 Cal. 2d 569, 574, 440 P.2d 236, 239, 68 Cal. Rptr. 164, 168 (1968) (for an injury to be compensable within the workers' compensation system the injury must be disabling); *Chavez v. W.C.A.B.*, 31 Cal. App. 3d 5, 8, 106 Cal. Rptr. 853, 856 (1973) ("injury" within the workers' compensation system includes any event which causes a disability). See generally Note, *Azevedo v. Abel: Denial of Employee's Right to Sue His Employer For An Intentional Tort*, 21 HASTINGS L.J. 683, 695-96 (1969).

REMAINING QUESTIONS AFTER *Cole*

Three major questions remain unanswered after *Cole v. Fair Oaks Fire Protection District*. The first question is how a court should determine whether the conduct of the employer constitutes a normal risk of employment. The second question is whether the 1982 amendments to the Workers' Compensation Act allow a civil action for intentional infliction of emotional distress. The final question is whether the "physical versus non-physical injury" distinction still applies in cases where the conduct of the employer falls outside of the normal risks of employment.

A. *What Constitutes a Normal Risk of Employment?*

A major question left open by the *Cole* decision is whether and under what circumstances tortious employment termination is a normal risk of employment.¹⁴⁴ The California Supreme Court will have to decide whether wrongful termination cases will be forced into the workers' compensation system.¹⁴⁵ *Cole* could stand for the proposition

144. See Schwartz, *Cole v. Fair Oaks Fire Protection District: Does the Workers' Compensation Exclusive Remedy Rule Bar Damages for Emotional Distress in Wrongful Termination Cases?*, 17 CAL. TRIAL LAW. A.F. 251, 251-53 (1987) (discussion of the application of *Cole* to wrongful termination). See also Valenzuela v. California, 194 Cal. App. 3d 916, 240 Cal. Rptr. 45 (1987) (damages for intentional infliction of emotional distress was barred by the exclusivity provision in a wrongful termination case because the claim was allegedly based on conduct normally occurring in the workplace); Green v. City of Oceanside, 194 Cal. App. 3d 212, 239 Cal. Rptr. 470 (1987); Shoemaker v. Myers, 192 Cal. App. 3d 788, 237 Cal. Rptr. 686 (1987), rev. granted ___Cal. 3d ___, 740 P.2d 404, 239 Cal. Rptr. 292 (1987) (court held that terminations were a normal risk of employment).

145. See *Shoemaker*, 192 Cal. App. 3d 788, 237 Cal. Rptr. 686 (1987). A cause of action for intentional infliction of emotional distress was barred by the exclusivity provision of workers' compensation in a wrongful discharge case. *Id.* at 794-95, 237 Cal. Rptr. at 690-91. The plaintiff was subjected to direct threats, intimidation and harassment by defendant's for his investigation of possible illegal practices of certain health care centers receiving state funds. *Id.* at 791-92, 237 Cal. Rptr. at 688. The plaintiff was informed by defendants to refrain from further investigating the centers. *Id.* The defendant Shuttleworth threatened to fire anyone responsible for the "leak" of information to the press concerning the funding of the center. *Id.* at 792, 237 Cal. Rptr. at 688. On November 4, 1981, Shuttleworth received a complaint in an unrelated matter to the centers and plaintiff was mistakenly identified as the person accused. *Id.* Shuttleworth ordered to have plaintiff interrogated but plaintiff invoked his right of representation. *Id.* Plaintiff was fired for insubordination. *Id.* Compare *id.* with *Cole v. Fair Oaks Fire Protection Dist.*, 43 Cal. 3d 148, 160, 729 P.2d 743, 750-51, 233 Cal. Rptr. 308, 315-16 where the court stated:

If characterization of conduct *normally occurring* in the workplace as unfair or outrageous were sufficient to avoid the exclusive remedy provisions of the Labor Code, the exception would permit the employee to allege a cause of action in *every case* where he suffered mental disability merely by alleging an ulterior purpose of causing injury. Such an exception would be contrary to the compensation bargain and unfair to the employer.

Id. (emphasis added).

that wrongfully terminated employees suffering physical injury may only seek redress in the workers' compensation system.¹⁴⁶ Although this proposition would eviscerate the law of wrongful termination, perhaps *Cole* will ultimately dictate that all wrongful termination cases be governed by the exclusivity provision reasoning that termination is a normal risk of employment, regardless of motive or intent.¹⁴⁷

By articulating the normal risk test, the *Cole* court created the possibility that termination cases could be forced into workers' compensation.¹⁴⁸ In determining whether the conduct of the employer is a normal risk of employment, however, the *Cole* court should not have focused on categories of conduct. The focus, instead, should be upon the motives of the employer.¹⁴⁹ The *Cole* court held that the demotion by the employer was a normal risk of employment.¹⁵⁰ To believe that the campaign of deliberate harassment, which culminated in the demotion, could ever be considered a normal risk of employment under any standard is difficult. The problem therefore, is determining whether the demotion was done with specific intent to injure. If a demotion or termination is made with proper motives then it should be considered a normal risk of employment.¹⁵¹ To avoid this problem, the courts should scrutinize the facts closely to determine whether or not the actions taken by the employer were prompted by malicious intent. Otherwise, the courts could simply characterize the conduct as falling within the categories announced in *Cole*, and the intentional misconduct by the employer would be deemed a normal risk of employment.¹⁵²

B. Effect of 1982 Amendments to the California Workers' Compensation Act on Intentional Infliction of Emotional Distress

The question remains whether the Legislature intended to abrogate the *Renteria* exception allowing a civil action for intentional infliction of emotional distress by failing to codify the exception in the 1982

146. See Schwartz, *supra* note 144 at 251 (discussing potential application of the normal risk test to all emotional distress damages).

147. *Id.*

148. *Id.*

149. See *infra* notes 210-212 and accompanying text (discussing the inapplicability of the workers' compensation system to intentionally tortious conduct).

150. *Cole v. Fair Oaks Fire Protection Dist.*, 43 Cal. 3d 148, 160, 729 P.2d 743, 750, 233 Cal. Rptr. 308, 315 (1987).

151. *Id.*

152. *Id.* at 164, 729 P.2d at 755, 233 Cal. Rptr. at 320 (Bird, C.J., dissenting).

amendments.¹⁵³ If so, then *Renteria* is no longer an exception to the exclusivity provision of workers' compensation. If the legislature did not intend, then the *Renteria* exception is still viable notwithstanding the 1982 amendments and the decision in *Cole*.

Prior to the 1982 amendments to the Workers' Compensation Act, California Labor Code Section 3600 provided that workers' compensation was the exclusive remedy for work-related injuries.¹⁵⁴ The 1982 amendments changed the language in section 3600 to read as follows: "liability for the compensation provided by this division, . . . except as *otherwise specifically* provided in sections 3602, 3706, and 4558"¹⁵⁵ The insertion of the "otherwise specifically" language can be interpreted as requiring all exceptions to the exclusivity provision to be expressly provided for by statute. Logically, if certain judicially-created exceptions which existed prior to the 1982 amendments were not included in the statutory exceptions, the legislature intended to nullify them. If this reasoning is accepted, then the only exceptions to the exclusivity provision are those which are codified and the courts cannot create implied exceptions. Accordingly, since intentional infliction of emotional distress was not codified as an exception, workers' compensation provides the exclusive remedy.¹⁵⁶

In contrast, intentional infliction of emotional distress may still be a viable exception to the exclusivity provision. A cursory reading of the 1982 amendments suggests that those civil actions not codified as exceptions to Labor Code Section 3600 should be governed by the exclusivity provision. Subsequent to the 1982 amendments, however, the court in *Howland v. Balma*¹⁵⁷ held that an employee could bring

153. CAL. LAB. CODE § 3602 (West Supp. 1987). This section states in pertinent part that workers' compensation provides the exclusive remedy except where the employee's injury is caused by a willful physical assault by an employer, where the employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury and where the employee's injury is caused by a defective product manufactured by the employer and that product is provided for the employee's use by a third person. *Id.*

154. CAL. LAB. CODE § 3600 (West 1971).

155. CAL. LAB. CODE § 3600 (West Supp. 1987).

156. The basis for this viewpoint has been rejected in two recent California cases. See *Hart v. Nat'l Mortgage & Land Co.*, 189 Cal. App. 3d 1420, 1424, 235 Cal. Rptr. 68, 75 (1987) (allowing a civil action for intentional infliction of emotional distress despite the 1982 amendments); *Howland v. Balma*, 143 Cal. App. 3d 899, 904-05, 192 Cal. Rptr. 286, 290 (1983) (allowing a civil action for defamation despite the 1982 amendments).

157. 143 Cal. App. 3d 899, 192 Cal. Rptr. 286 (1983). The *Howland* court pointed out that the Workers' Compensation Act relates to medical and/or occupational injuries, i.e., those risks to which the fact of employment in the industry exposes the employee. *Id.* at 904, 192 Cal. Rptr. at 289. The gist of an action for slander, on the other hand, is damage to reputation. *Id.* An injury to reputation affects a proprietary interest and is not a personal injury. *Id.* Moreover, defamation and slander were exceptions to the exclusivity provision prior

a civil action against an employer for slander despite the exclusivity provision.¹⁵⁸ The court found that slander was simply not considered by the legislature when amending the Labor Code.¹⁵⁹ Therefore, the plaintiff was allowed to recover for the non-physical damages available in a slander action.¹⁶⁰ Intentional infliction of emotional distress, like slander, was arguably not considered when the legislature amended the Labor Code in 1982, and therefore, a civil action should be allowed.¹⁶¹

Similarly, in *Hodges v. Sweetwater Union High School District*,¹⁶² the court specifically considered whether the 1982 amendments affected the judicially-created exception for intentional infliction of emotional distress.¹⁶³ Upon close examination of the 1982 amendments, the *Hodges* court found that the statutory language referred only to actions involving injuries of a physical nature.¹⁶⁴ According to the *Hodges* court, since the Labor Code defines injury in terms of a physical disability, a non-physical injury, such as emotional distress, is not included within the statutory framework.¹⁶⁵ The court indicated that if workers' compensation was the sole remedy, an employer could inflict outrageous behavior upon an employee while remaining shielded from liability by the statutes.¹⁶⁶ Accordingly, the *Hodges* court stated that the legislature did not intend an employee's cause of action for intentional infliction of emotional distress to be viewed as an injury for purposes of workers' compensation.¹⁶⁷ The

to the 1982 amendments. See *Cole v. Fair Oaks Fire Protection Dist.*, 43 Cal. 3d 148, 151, 729 P.2d 743, 744, 233 Cal. Rptr. 308, 309 (1987) (California Supreme Court did not overrule the California Court of Appeal for the Third District's holding that the causes of action for defamation and privacy are not barred by the exclusive remedy provision of the California Labor Code). *Cole* was not decided under the 1982 amendments as the cause of action occurred prior to the effective date of the amendments, and there is no retroactive application. *Id.* at 153, 729 P.2d at 745, 233 Cal. Rptr. at 310.

158. *Howland*, 143 Cal. App. 3d at 904, 192 Cal. Rptr. at 289 (1983).

159. *Id.* at 905, 192 Cal. Rptr. at 289.

160. *Id.*

161. *Id.* See generally Review of Selected 1982 California Legislation, 14 PAC. L.J. 357, 763-68 (1983) (discussion of the 1982 amendments). It is clear that at the time the workers' compensation laws were enacted, the common law did not recognize an action for intentional infliction of emotional distress, and therefore such an action was not within the contemplation of the legislature. *Id.*

162. 228 Cal. Rptr. 464 (1986) (discussion of this case is for purposes of illustration only). Pursuant to California Rules of Court sections 976(b) and 976.1, the California Supreme Court has ordered the *Hodges* opinion depublished. CAL. R. CT. 976(b), 976.1 (West Supp. 1987). As a result, the case cannot be cited as authority in the California courts. *Id.*

163. 228 Cal. Rptr. at 469.

164. *Id.* at 468.

165. *Id.* at 467-68.

166. *Id.* at 469-70.

167. *Id.* at 470.

court held that an employee could bring a civil action for intentional infliction of emotional distress regardless of the new exclusivity provision.¹⁶⁸

*Hart v. National Mortgage and Land Co.*¹⁶⁹ also considered whether the 1982 amendments affected the exception for intentional infliction of emotional distress.¹⁷⁰ The court stated that intentional infliction of emotional distress is one wrong for which the workers' compensation system provides no remedy.¹⁷¹ The court concluded that the exception must be viable if employees are to have redress for wrongful acts committed by their employers, and therefore, the exception did not die with the 1982 amendments.¹⁷²

In summary, for several reasons the 1982 amendments to the California Workers' Compensation Act should be construed to permit an implied exception for intentional infliction of emotional distress. First, since emotional harm is non-compensable within workers' compensation, an employee will be left without a remedy.¹⁷³ The workers' compensation system is designed to compensate workers for injuries suffered as a result of employment, irrespective of fault, but not intentionally tortious conduct.¹⁷⁴ Therefore, intentionally tortious conduct should be exempted from the workers' compensation system, either explicitly through the statutes or implicitly through judicial decisions.

C. Is The "Physical Versus Non-Physical Injury" Distinction Still Viable After Cole?

The *Cole* court held only that workers' compensation provides the exclusive remedy when the conduct of the employer is within the normal risks of employment.¹⁷⁵ In *Hart v. National Mortgage and Land Co.*,¹⁷⁶ the court held that a civil action should be allowed when the conduct of the employer does not constitute a normal risk

168. *Id.*

169. 189 Cal. App. 3d 1420, 235 Cal. Rptr. 68 (1987).

170. *Id.* at 1425, 235 Cal. Rptr. at 75.

171. *Id.*

172. *Id.*

173. See *supra* note 142 and accompanying text (emotional distress is a non-compensable injury in the workers' compensation system).

174. See *infra* notes 210-12 and accompanying text (workers' compensation was not designed to deter or encourage intentionally tortious conduct). See also *supra* text accompanying notes 1-4, 35-40 (purposes of workers' compensation).

175. *Cole v. Fair Oaks Fire Protection Dist.*, 43 Cal. 3d 148, 160, 729 P.2d 743, 750, 233 Cal. Rptr. 308, 315 (1987).

176. 189 Cal. App. 3d 1420, 1430, 235 Cal. Rptr. 68, 74 (1987).

of employment.¹⁷⁷ In examining the *Hart* opinion, the “physical versus non-physical injury” distinction is still viable when the conduct of the employer is outside the normal risks of employment.

Hart v. National Mortgage and Land Co.

A. The Facts

The plaintiff, Hart, along with Campbell and Adams were all supervisors in the defendant’s company.¹⁷⁸ During the time Hart and Campbell worked together, Campbell allegedly made unwelcomed sexual advances and crude remarks towards Hart.¹⁷⁹ Hart complained to his superiors about Campbell’s behavior, but no action was taken to alleviate the problem.¹⁸⁰ After approximately eighteen months, Hart resigned because of a nervous condition allegedly caused by Campbell’s behavior.¹⁸¹

B. The Opinion

The *Hart* court determined that the plaintiff was entitled to bring a civil action for intentional infliction of emotional distress.¹⁸² In reaching this decision, the court first applied the normal risk test enunciated in *Cole*.¹⁸³ Noting that Hart’s employer was not engaged in conduct consisting of promotions, demotions, criticism of job performance or friction in negotiations, the *Hart* court concluded that the conduct was not within the normal risks of employment.¹⁸⁴ Moreover, the *Hart* court drew an analogy between the conduct of the defendant and those cases in which the conduct of the employer bore a questionable relationship to employment.¹⁸⁵ According to the

177. *Id.* at 1430, 235 Cal. Rptr. at 74.

178. *Id.* at 1424, 235 Cal. Rptr. at 70.

179. *Id.* (on several occasions Campbell would, “grab Hart’s genitals, grab Hart around the waist and try to mount him and make sexually suggestive gestures, accompanied by crude remarks.”).

180. *Id.*

181. *Id.* Hart told one of his supervisors, “[Campbell] has really done it to me . . . with his . . . horsing around . . .” *Id.*

182. *Id.* at 1429-30, 235 Cal. Rptr. at 74.

183. *Id.* In *Cole*, the court held that when the conduct of the employer is within the normal risks of employment, workers’ compensation provides the exclusive remedy. *Cole v. Fair Oaks Fire Protection Dist.*, 43 Cal. 3d 148, 160, 729 P.2d 743, 750, 233 Cal. Rptr. 308, 315 (1987).

184. *Hart*, 189 Cal. App. 3d at 1429-30, 235 Cal. Rptr. at 74.

185. *Id.* See also *supra* note 127 and accompanying text (description of conduct found to have a questionable relationship to employment).

court in *Hart*, there was little doubt that Campbell's conduct bore a questionable relationship to employment.¹⁸⁶

Since the plaintiff had alleged substantial physical injuries, the *Hart* court was confronted with the "physical versus non-physical injury" distinction. Application of the *Gates* and *Ankeny* approach would have forced the plaintiff into the workers' compensation system.¹⁸⁷ However, the court chose to abandon the "physical versus non-physical injury" distinction, thus abrogating later interpretations of *Renteria* and allowing the plaintiff to bring a civil action for intentional infliction of emotional distress.¹⁸⁸ The *Hart* court concluded that whenever the conduct of the employer is outside the normal risks of employment, it is irrelevant whether the plaintiff suffers physical injuries.¹⁸⁹ The court reasoned that conduct constituting intentional infliction of emotional distress leading to both physical and emotional injury is often more reprehensible than conduct leading only to mental suffering.¹⁹⁰ According to the *Hart* court, an anomaly would arise if a plaintiff with no physical injuries is allowed to bring a civil action, while the victim of possibly more egregious conduct resulting in physical injuries is limited to a workers' compensation claim.¹⁹¹

C. Analysis of *Hart v. National Mortgage and Land Co.*

By eliminating the "physical versus non-physical injury" distinction, *Hart* may conflict with other appellate courts.¹⁹² An unanswered question is whether the *Cole* court impliedly holds that a civil action is allowed whenever the conduct of the employer is deemed outside the normal risks of employment, whether or not physical injuries are

186. *Id.*

187. See *Gates v. Trans Video Corp.*, 93 Cal. App. 3d 196, 155 Cal. Rptr. 486 (1979); *Ankeny v. Lockheed Missles & Space Co.*, 88 Cal. App. 3d 531, 151 Cal. Rptr. 828 (1979) (cases barring an action at law for intentional infliction of emotional distress when physical injuries are alleged, reasoning that an action at law is unnecessary when the injury is compensable within workers' compensation). But *c.f.* *Renteria v. County of Orange*, 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (1978) (action at law allowed for intentional infliction of emotional distress when only emotional harm is alleged, reasoning that emotional harm is noncompensable within workers' compensation).

188. *Hart*, 189 Cal. App. 3d at 1430, 235 Cal. Rptr. at 74.

189. *Id.* at 1429, 235 Cal. Rptr. at 73-74.

190. *Id.*

191. *Id.* The *Hart* court also cited *Cole* for this proposition. *Id.*

192. *Id.* at 1428-29, 235 Cal. Rptr. at 73-74 (refusing to follow *Gates* and *Ankeny*). Compare *id.* with *Gates v. Trans Video Corp.*, 93 Cal. App. 3d 196, 204-05, 155 Cal. Rptr. 486, 491-92 (1979); *Ankeny v. Lockheed Missles & Space Co.*, 88 Cal. App. 3d 533, 533, 151 Cal. Rptr. 828, 829 (1979) ("physical injury versus non-physical injury" distinction).

alleged. Since the *Cole* court merely applied the exclusivity provision when an employer's conduct is a normal risk, the courts can determine whether or not to bar civil actions when the conduct of the employer is not a normal risk.

If a civil action is allowed whenever the conduct of the employer is not a normal risk, and irrespective of whether physical injuries are alleged, then the courts would be adopting the approach set forth in *Hart*.¹⁹³ If, on the other hand, the courts apply the "physical versus non-physical injury" distinction, a civil action would be allowed if only emotional harm is alleged, even if the conduct of the employer is outside the normal risks of employment.¹⁹⁴ When physical injuries are alleged, workers' compensation remains the exclusive remedy for intentional infliction of emotional distress cases arising out of the employment relationship.¹⁹⁵

POSSIBLE APPROACHES TO VARIOUS FACTUAL SITUATIONS AFTER *Cole* and *Hart*

There are three variables to consider when analyzing the potential factual situations that may confront the courts. The first variable is whether the employee has suffered any physical injury. The second is whether the conduct of the employer is within the normal risks of employment. The third is whether the employee can establish the elements necessary to sustain a tort action for intentional infliction of emotional distress.

A. If Physical and Emotional Injuries Are Alleged

The normal risk test of *Cole* is clearly applicable to cases where physical injuries, causing disability, are alleged.¹⁹⁶ If an employee sues for intentional infliction of emotional distress alleging both physical and emotional injuries, and the conduct of the employer is within the normal risks of employment, workers' compensation is the ex-

193. *Hart*, 189 Cal. App. 3d at 1430, 235 Cal. Rptr. at 74 (holding that when the conduct of the employer is not a normal risk of employment an action at law for intentional infliction of emotional distress may be maintained).

194. See *Gates*, 93 Cal. App. 3d at 206, 155 Cal. Rptr. at 492 (citing *Ankeny*, 88 Cal. App. 3d at 533, 151 Cal. Rptr. at 829) (action at law unnecessary because physical injuries are compensable in workers' compensation).

195. See *supra* note 194 and accompanying text (action at law unnecessary because physical injuries are compensable in workers' compensation).

196. See *Cole v. Fair Oaks Fire Protection Dist.*, 43 Cal. 3d 148, 155-57, 729 P.2d 743, 747-49, 233 Cal. Rptr. 308, 312-13 (1987) (discussing but not overruling *Renteria*).

clusive remedy.¹⁹⁷ The employee's recovery, however, will be limited to damages for physical injury since emotional distress is non-compensable in the workers' compensation system.¹⁹⁸ If, on the other hand, the employee sues for intentional infliction of emotional distress alleging both physical and emotional injury, and the conduct of the employer is outside the normal risks of employment, then the *Hart* approach permits a civil action.¹⁹⁹ Some courts, however, may choose to apply the "physical versus non-physical injury" distinction and force the case into the workers' compensation system.²⁰⁰ Courts choosing to follow the *Gates* and *Ankeny* "physical versus non-physical injury" distinction would reason that since the employee has suffered a work-related physical injury compensable under workers' compensation, a civil action is unnecessary regardless of whether the conduct of the employer is outside the normal risks of employment.²⁰¹

B. If Only Emotional Injury Is Alleged

Cole may stand for the proposition that the normal risk test should not be applied to cases where an employee has not suffered physical injury.²⁰² The *Renteria* approach, allowing a civil action when only emotional injuries are present, may therefore, still be viable.²⁰³ If so, the courts would not be required to analyze whether the conduct of the employer is within the normal risks of employment.

In contrast, the normal risk test may be applied to all intentional infliction of emotional distress cases arising out of employment.²⁰⁴ If the courts adopt this approach, an employee who does not allege physical injuries may have a civil action depending on whether the conduct of the employer is or is not within the normal risks of employment. If the conduct of the employer is within the normal

197. *Id.* at 160, 729 P.2d at 750, 233 Cal. Rptr. at 315.

198. See *Renteria v. County of Orange*, 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (1978).

199. See *Hart v. Nat'l Mort. & Land Co.*, 189 Cal. App. 3d 1420, 1430, 235 Cal. Rptr. 68, 74 (1987) (action at law for intentional infliction of emotional distress available when employer's conduct is outside the normal risks of employment).

200. See *supra* note 9 and accompanying text (discussion of the *Renteria*, *Gates*, and *Ankeny* approaches).

201. *Id.*

202. See *supra* note 121 and accompanying text (suggesting that the normal risk test is applicable only in cases where physical injury is present).

203. See *supra* note 123 and accompanying text (suggesting that the *Renteria* exception may still be viable).

204. See A. Schwartz, *supra* note 144, at 251 (defense counsel are currently arguing that the normal risk test is applicable to "all emotional distress damages with and without physical manifestations").

risks of employment, the employee may, in theory, have only a workers' compensation remedy.²⁰⁵ Because emotional distress not causing disability is not compensable within the workers' compensation system, however, the employee will be without a remedy.²⁰⁶ If, instead, the conduct of the employer is outside the normal risks of employment, the employee will be entitled to bring a civil action.²⁰⁷

C. *If the Elements of the Tort Cannot Be Established*

If the employee is unable to establish the elements of intentional infliction of emotional distress, the only possible remedy is workers' compensation.²⁰⁸ The problem, therefore, is whether a workers' compensation claim is still possible when the conduct of the employer is outside the normal risks of employment. If the conduct of the employer is outside the normal risks of employment, some courts may apply the *Gates* and *Ankeny* distinction, if physical injury is present, allowing a workers' compensation claim reasoning that a compensable injury exists.²⁰⁹ Other courts, however, may apply the *Hart* interpretation of *Cole* and reason that since the conduct of the

205. *Cole v. Fair Oaks Fire Protection Dist.*, 43 Cal. 3d 148, 160, 729 P.2d 743, 750, 233 Cal. Rptr. 308, 315 (1987).

206. See *supra* notes 142, 173 and accompanying text (emotional distress non-compensable in workers' compensation).

207. See *Hart v. Nat'l Mort. & Land Co.*, 189 Cal. App. 3d 1420, 1430, 235 Cal. Rptr. 68, 74 (1987) (civil action for intentional infliction of emotional distress available when the conduct of the employer is outside the normal risks of employment).

208. See *Gates v. Trans Video Corp.* 93 Cal. App. 3d 96, 206, 155 Cal. Rptr. 486, 492 (1979) and *Ankeny v. Lockheed Missiles & Space Co.*, 88 Cal. App. 3d 531, 533, 151 Cal. Rptr. 828, 829 (1979) (regardless of the culpability of the employer, workers' compensation is available when physical injuries arising out of employment occur). For example, assume the following facts. Abel and Baker are employed by Ernie. Both Abel and Baker have an irrational fear of snakes. One day Ernie, knowing of Abel's susceptibility to snakes, but not of Baker's, decides to scare Abel by exhibiting a snake. Ernie approaches Abel and Baker, exhibits the snake and both suffer a heart attack. Abel could establish the elements of intentional infliction of emotional distress since Ernie knowingly preyed upon a known special susceptibility of Abel. *Alcorn v. Anbro Eng'g Inc.*, 2 Cal. 3d 493, 498, 468 P.2d 216, 218-19, 86 Cal. Rptr. 88, 90-91 (1970). Abel would also be able to avoid application of the exclusivity rule, assuming that Ernie's behavior is outside the normal risks of behavior. *Hart*, 189 Cal. App. 3d 1420, 1424, 235 Cal. Rptr. 68, 75. Baker, on the other hand, would be unable to establish intentional infliction of emotional distress, even though Ernie's conduct was beyond the normal risks of employment, since Ernie was unaware of Baker's unreasonable susceptibility to snakes. *Scott v. McDonnell Douglas Corp.*, 37 Cal. App. 3d 277, 291, 112 Cal. Rptr. 609, 619 (1974). In such a case, workers' compensation is the only possible remedy. The courts may allow recovery under workers' compensation on the theory that the injury arose out of and in the course of employment, even though the conduct causing injury was not a normal risk of employment.

209. See CAL. LAB. CODE § 3600 (West Supp. 1987) (work-related physical injury compensable regardless of fault). See also *Gates*, 93 Cal. App. 3d at 204-05, 155 Cal. Rptr. at 491-92 (work-related physical injury compensable regardless of fault); *Ankeny*, 88 Cal. App. 3d at 533, 151 Cal. Rptr. at 829 (same).

employer is not a normal risk of employment, the employee is barred from the Workers' Compensation system.²¹⁰ This approach is predicated on a reading of *Hart* which mandates legal remedies to the exclusion of workers' compensation when the conduct of the employer is outside the normal risks. It seems more likely, however, that *Hart* simply permits a legal remedy under certain circumstances, while allowing a workers' compensation remedy in all other work-related situations.²¹¹

PROPOSAL

The courts should limit the effect of the normal risk test set forth in *Cole v. Fair Oaks Fire Protection District*. Outrageous conduct should never be considered a normal risk of employment.²¹² Furthermore, the courts should adopt the approach in *Hart* and permit a civil action whenever the conduct of the employer is not a normal risk of employment.²¹³ The effect of this will be to allow an employee to bring a civil action anytime a cause of action for intentional infliction of emotional distress is properly alleged. However, if the courts are unwilling to limit *Cole*, then the legislature should amend the Workers' Compensation Act to include intentional infliction of emotional distress as an exception to the exclusivity provision.

210. See *Hart v. Nat'l Mortgage & Land Co.*, 189 Cal. App. 3d 1420, 1430, 235 Cal. Rptr. 68, 74 (1987) (action at law available for intentional infliction of emotional distress when the conduct of the employer is outside the normal risks of employment).

211. *Id.*

212. The *Cole* case should be limited because it unfairly forces severely injured people into the workers' compensation system. The *Cole* majority implicitly recognizes the unfairness of forcing severely distressed plaintiffs into the workers' compensation system. See *Cole*, 43 Cal. 3d at 156, 729 P.2d at 753, 233 Cal Rptr. at 313. It is universally recognized that the workers' compensation system yields significantly smaller recoveries than the civil system. *Id.* When discussing the "physical versus non-physical injury" distinction, the court noted:

We recognize that the distinction drawn by the [physical versus non-physical injury] cases presents an anomaly. Intentional infliction of emotional distress which results in physical injury and disability is ordinarily more reprehensible than intentional infliction of emotional distress which does not result in disability, but civil action is allowed only in the latter situation.

Id. The anomaly referred to by the court is that extreme and outrageous conduct, leading to dire physical injury, is not deterred by the prospect of a low workers' compensation assessment while less egregious conduct may lead to a massive award in the civil system. *Id.* The *Cole* court solved this problem, not by allowing the tort system to serve its deterrent function, but by continuing to shield employers from the deterrent effect of tort judgments. See *supra* note 121 and accompanying text (the normal risk test may apply only to cases of physical injury, thereby allowing a civil action when only emotional injury is alleged and deterring conduct that is less egregious than that which leads to physical injury).

213. 189 Cal. App. 3d 1429, 1430, 235 Cal. Rptr. 68, 74 (1987).

The decision by the *Cole* court to include intentional infliction of emotional distress claims within the workers' compensation system is arguably inconsistent with the policies underlying both workers' compensation and tort systems.²¹⁴ Although workers' compensation is a bargain and exchange system, the bargain seems fair only when the conduct of the employer is not morally culpable.²¹⁵ When workers' compensation was originally enacted, as a no-fault liability system, the legislature meant conduct not intending to cause injury.²¹⁶ Since the workers' compensation system only compensates for employment disabilities and not for emotional distress as such, workers' compensation may not deter intentionally tortious conduct.²¹⁷ If a civil action is not allowed when the employer specifically intends to inflict emotional distress, the employee may be uncompensated and the employer may not be deterred from certain egregious conduct. The deterrent effect of tort law, through large damage awards, is therefore not realized.²¹⁸ Because conduct intended to cause injury is blameworthy and should be deterred, the exclusivity provision should not be invoked in intentional infliction of emotional distress cases.

In addition, several factors indicate that conduct specifically designed to injure employees is not subject to workers' compensation. For example, the California legislature has amended the exclusive remedy provision to allow a civil action for certain intentional employer misconduct.²¹⁹ California Labor Code Section 3602 allows an action at law where an employer willfully physically assaults an

214. See *supra* notes 1-4, 26, 36-41 and accompanying text. The workers' compensation system was designed to compensate employees for industrial accidents who were left remediless because of the three common law defenses of assumption of the risk, contributory negligence, and the fellow servant doctrine. See *supra* note 26. See also, W. PROSSER & W. KEETON, *supra* note 47, § 2 (the purpose of the law of torts is to deter egregious conduct and to compensate for injuries sustained by one person as the result of the conduct of another).

215. *Cole v. Fair Oaks Fire Protection Dist.*, 43 Cal. 3d 148, 167, 729 P.2d 743, 757, 233 Cal. Rptr. 308, 320 (1987) (Bird, C.J., dissenting).

216. See *id.* The court stated that the "[workers' compensation] bargain appears fair where the employer's conduct is negligent or even reckless, [but] it is difficult to justify shielding the employer from "the full brunt of liability where, as here, the employer has acted intentionally and with the purpose of injuring the employee" (citing Comment, *Johns-Manville Product Corp. v. Superior Court: The Not-So Exclusive Remedy Rule*, 33 HASTINGS L.J. 263, 270 (1981); Tomita, *The Exclusive Remedy of Workers' Compensation for Intentional Torts of the Employer: Johns-Manville Products v. Superior Court*, 18 CAL. W.L. REV. 27, 45 (1982)). *Id.*

217. See *Renteria v. County of Orange*, 82 Cal. App. 3d 833, 841, 147 Cal. Rptr. 447, 454 (1978) (intentional wrongdoing by the employer in the employment setting has presented many troubling issues).

218. W. PROSSER & W. KEETON, *supra* note 47, § 2.

219. CAL. LAB. CODE § 3602 (West Supp. 1987).

employee²²⁰ or where an employer fraudulently conceals the existence of an injury in connection with the employment.²²¹ Furthermore, workers' compensation has been held not to be the exclusive remedy for other intentional torts such as defamation²²² and invasion of privacy.²²³ Therefore, since intentional infliction of emotional distress is analogous to willful physical assaults and defamations, the legislature should amend California Labor Code Section 3602 to codify an exception for intentional infliction of emotional distress.²²⁴

CONCLUSION

The state of the law with regard to intentional infliction of emotional distress and workers' compensation is characterized by confusion. Although *Cole* formulated a new approach to determine those circumstances under which an employee may bring a civil action, this method is problematic. The approach precludes a civil action when the conduct of an employer is within the normal risks of the employment relationship.²²⁵ No explicit test, however, was set forth to determine when the conduct of an employer is within the normal risks. Furthermore, the *Cole* court failed to enunciate the available remedies when the conduct of an employer is construed as being outside the normal risks of employment.²²⁶

This comment proposes that *Cole v. Fair Oaks Protection District* should be limited so that outrageous conduct should never be considered a normal risk of employment. The reasoning in *Hart v. National Mortgage and Land Co.* should be adopted to allow a civil action whenever the conduct of an employer is outside the normal

220. *Id.* at § 3602(b)(1) (codifying *Magliulo v. Superior Court*, 57 Cal. App. 3d 160, 121 Cal. Rptr. 621 (1975)).

221. *Id.* at § 3602(a)(2) (codifying *Johns-Manville v. Superior Court*, 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980)).

222. *Howland v. Balma*, 143 Cal. App. 3d 899, 192 Cal. Rptr. 286 (1983). *See also* 2 B. WITKIN, *supra* note 37, § 51, at 608 (defamation is an exception to the exclusive remedy provision).

223. *See Cole v. Fair Oaks Fire Protection Dist.*, 43 Cal. 3d 148, 151, 729 P.2d 743, 745, 233 Cal. Rptr. 308, 310 (1987) (upholding right of plaintiff to proceed in a civil action for invasion of privacy and defamation).

224. In *Williams v. State Compensation Ins. Fund*, 50 Cal. App. 3d 116, 123 Cal. Rptr. 812 (1975), the court held that a failure of workers' compensation law to include some element of damage recoverable at common law is a legislative, and not a judicial problem. *Id.* at 120, 122 Cal. Rptr. at 817.

225. *Cole v. Fair Oaks Fire Protection Dist.*, 43 Cal. 3d 148, 160, 729 P.2d 743, 750, 233 Cal. Rptr. 308, 315 (1987).

226. *Id.*

risks of employment. In the absence of either of the foregoing, this comment recommends that the legislature should amend the Workers' Compensation Act to include intentional infliction of emotional distress as an exception to the exclusivity provision. A response by the courts and legislature is required to effectuate the respective policies of the tort and workers' compensation systems.

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