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The Texas Supreme Court discusses the viability of intentional infliction of emotional distress claims in cases involving sexual harassment. The court finds that Intentional Infliction of Emotional Distress claims should only be used as a "gap filler" to remedy situations not specifically addressed by other laws.

## Texas Edition

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### Texas Supreme Court Limits Emotional Distress Claims

*By Allan King*

On August 27, 2004, the Texas Supreme Court issued its long-awaited decision in *Hoffmann-LaRoche Inc. v. Zeltwanger*. This decision has resulted in a significant change in Texas law on intentional infliction of emotional distress claims — a change that is favorable to employers. The case had garnered substantial publicity as a result of the eight-figure judgment against the employer (Roche). The original judgment was based on Joan Zeltwanger's claims that she was subjected to sexual harassment and intentional infliction of emotional stress by her supervisor. Roche appealed the judgment to the court of appeals, which affirmed the district court, and then to the Texas Supreme Court, which reversed the appellate court in an 8-0 decision.

Zeltwanger was employed by Roche as a pharmaceutical sales representative. Her job required her to call on physicians in her assigned territory, and on occasion she was accompanied by her supervisor. Zeltwanger alleged that while they were driving to these appointments, her supervisor routinely sought to impress her with tales of his sexual exploits, which she interpreted as an invitation to engage in a sexual relationship with him. However, she never acquiesced and her supervisor never made any explicit sexual advance. Although she informed another Roche manager of this harassment, her complaint was never relayed to the employer's human resources department. Zeltwanger testified that because she did not acquiesce her supervisor retaliated by downgrading her performance evaluations. As a consequence, when Roche selected employees for layoff based upon their job performance, she claims she was unfairly included in the layoff.

Zeltwanger sued for sexual harassment under the Texas Commission on Human Rights Act and for the common-law tort of intentional infliction of emotional distress ("IIED"). The jury agreed that Zeltwanger suffered sexual harassment which resulted in a tangible employment action. However, the jury found against her on her claim of retaliation. The jury also found in favor of Zeltwanger on the tort of IIED, and awarded compensatory and punitive damages in amounts equal to the awards it rendered for sexual harassment.

The critical issue on appeal was whether the harassing acts of Zeltwanger's supervisor could support the jury's finding that Roche was also liable for common law IIED. This question is important for several reasons. First, under both Texas law and federal law, the size of a plaintiff's potential recovery for sexual harassment is limited by statute. Depending upon the size of the employer, a plaintiff may receive a maximum of \$300,000 in compensatory and punitive damages. In contrast, an IIED claim has fewer limits and permits a much larger potential recovery. As a result, plaintiffs usually pursue both claims at the same time in an effort to gain the largest possible recovery. Many of the state's largest employment law verdicts in the last ten years have been predominantly awarded for IIED claims that were added on to some other statutory employment claim.

Second, a claim for sexual harassment lies only against the employer, not the harasser. Therefore, if this is the only claim asserted, employers who are incorporated or have their principal place of business outside of Texas can often remove a case that is originally filed in Texas state court to federal court (usually a preferable forum). However, if the harasser is a Texas citizen, and is sued personally for IIED, the case ordinarily must remain in Texas

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state court. Thus, underlying this case are two issues of both economic and strategic importance — the amount of damages an employee can recover and the likelihood that a federal, rather than state, court will hear the case.

Roche argued that an IIED claim should only be used as a “gap filler” tort. In other words, it is only supposed to be used to remedy wrongs that are not specifically addressed by other laws. This description did not fit Zeltwanger’s claim because she primarily alleged that her emotional distress was the result of sexual harassment — something that is already prohibited by both federal and state statutes. In addition, Roche contended that although Zeltwanger’s evidence might establish a claim of sexual harassment, it was legally insufficient to meet the high threshold of “outrageous” conduct that is required to prove an IIED claim. The Texas Supreme Court accepted both of these arguments and reversed the court of appeals on both grounds, with the result that the judgment on the IIED claim was reversed and the claim defeated.

The end result is that employers have a new defense to IIED claims. Although this decision should provide employers a measure of comfort, the *Zeltwanger* opinion leaves some significant questions unanswered. For example, it remains an open question whether other common law torts would be judged similarly incompatible with a sexual harassment claim. Thus, if Zeltwanger’s harasser had touched her in an unwelcome and offensive way, it is unclear whether the Texas Supreme Court would permit a common law claim of battery to be added to a sexual harassment claim based on the same facts. In addition, because a supervisor is not personally liable for sexual harassment under Texas law, it is an open question whether IIED would be considered a needed “gap filler” in a suit against the supervisor. Further, a question remains whether the Texas Supreme Court would have limited Zeltwanger to statutory damages had the harassment she suffered been more severe. Accordingly, while it seems safe to say that the *Zeltwanger* decision is a step forward for employers, it remains to be seen whether this is a baby step or a giant step.

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Allan G. King is a shareholder in Littler Mendelson’s Dallas, Texas office; If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Rose at agking@littler.com and at 214.880.8100.