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The Limited Viability of Negligent Supervision, Retention, Hiring, and Infliction of Emotional Distress Claims in Employment Discrimination Cases in Minnesota

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THE LIMITED VIABILITY OF NEGLIGENT SUPERVISION, RETENTION, HIRING, AND INFLICTION OF EMOTIONAL DISTRESS CLAIMS IN EMPLOYMENT DISCRIMINATION CASES IN MINNESOTA

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I. INTRODUCTION

At any given time, thousands of employment discrimination cases are proceeding through Minnesota state and federal courts. Courts and litigants usually focus their attention on the "primary" claims in these cases—those premised on violations of rights protected by state and federal discrimination laws.[1] Although the high-

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1. Employment discrimination claims can be brought under a variety of federal and state statutes. *See, e.g.*, Civil Rights Act of 1991, 42 U.S.C. § 1981 (1994);

profile battles often are waged elsewhere, it is now standard practice for plaintiffs to plead a number of Minnesota common-law claims along with their discrimination counts.

In *Wirig v. Kinney Shoe Corp.*,[2] the Minnesota Supreme Court indicated that such parallel common-law claims, if otherwise sustainable, are welcome in the employment discrimination context, although the court made clear that there is to be no double recovery for the same harm.[3] While duplicative recovery is not available, zealous advocates should not hesitate to raise such claims, where appropriate, in cases that arise from discriminatory conduct. Pendent common-law claims arising from the same facts as discrimination claims may be advantageous to plaintiffs in a number of ways. For example, common-law claims may not face the same procedural and administrative hurdles as state or federal discrimination claims,[4] they may entitle plaintiffs to amounts and types of damages that are unavailable under discrimination statutes,[5] and the substantive elements of these claims often will differ from the elements of the discrimination claims.

Thus, common-law claims may aid plaintiffs' counsel in finding a viable theory for fully redressing the wrongs done to their clients. To be effective, employment law practitioners—whether represent-

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Title VII, 42 U.S.C. §§ 2000e-1 to 2000e-17 (1994); 42 U.S.C. §§ 12101–12213 (1994); Minnesota Human Rights Act, MINN. STAT. §§ 363.01–.20 (1996).

2. 461 N.W.2d 374 (Minn. 1990).

3. *Id.* at 379. The plaintiff can recover damages under one theory only, and therefore ultimately must choose between them. *See id.*

4. In *Vaughn v. Northwest Airlines, Inc.*, 558 N.W.2d 736, 740 (Minn. 1997), for example, the Minnesota Supreme Court affirmed, on statute-of-limitations grounds, the dismissal of the plaintiff's disability discrimination claim based upon the Air Carriers Access Act, 49 U.S.C. § 41705 (1994). The court simultaneously upheld the viability of plaintiff's common-law negligence claim against the airline—premised in that case on the special duty of care common carriers owe disabled passengers—which is governed by a much longer statute of limitations. *See id.* at 743-745. Thus, for procedural reasons, plaintiff's common-law cause of action became her only means of establishing liability. Moreover, some common-law negligence claims may trigger an employer's insurance coverage and an insurer's duty to defend. While an insurer's involvement obviously will benefit a defendant, it also may benefit a plaintiff by providing an additional source of grounds for settlement.

5. For example, the Minnesota Human Rights Act ("MHRA"), MINN. STAT. § 363.071, subd. 2 (1996) limits punitive damages awards to $8,500, and the Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(3) (1994), limits recovery of compensatory and punitive damages to $50,000-$300,000 (depending on the size of the employer) for Americans with Disabilities Act ("ADA") claims and certain Title VII claims.

ing plaintiffs, defendants, or both—must understand the parameters, benefits, and limitations of these claims.

In recent years, four recognized theories of employer negligence—negligent supervision, negligent retention, negligent hiring, and negligent infliction of emotional distress—have emerged as popular supplemental or alternative claims in employment discrimination cases. Despite their frequent consideration of these claims in discrimination cases, or perhaps because of it, lower Minnesota courts and federal courts have not reached agreement on the parameters of such claims. Likewise, while the Minnesota Supreme Court has recognized each of these causes of action, it has not done so in the discrimination context and therefore has not resolved lingering questions that will have a significant impact on the viability of these torts.

The purpose of this Article is to clarify the role of negligence claims in addressing and remedying employment discrimination. The first section undertakes to explain each doctrine and in the case of negligent supervision, its three sub-doctrines ("section 317," "section 213(c)," and "respondeat superior"); the requisite elements of each and their probable limitations; and the utility of each in addressing employment discrimination. The second section discusses two commonly pleaded defenses to these claims, preemption under the Minnesota Human Rights Act[6] ("MHRA") and the Minnesota Workers' Compensation Act[7] ("WCA").[8]

The conclusion from this analysis is that these negligence theories are viable supplemental or alternative claims against an employer only in circumstances involving the severest forms of discriminatory harassment. This is primarily the result of each theory's substantive limitations—most importantly, the "physical injury or threat of physical injury" and "zone of danger" requirements—rather than the preclusive effect of MHRA or WCA preemption. Unless the alleged underlying conduct poses at least a threat of physical harm to a co-employee, employment discrimination plaintiffs will have to look elsewhere for alternative causes of action.

6. MINN. STAT. §§ 363.01–.20 (1996).

7. MINN. STAT. §§ 176.001–.861 (1996).

8. As discussed in Section III, *infra*, both the MHRA and WCA contain "exclusive remedy" provisions that preclude recovery under alternative theories in certain circumstances.

II. THE NEGLIGENCE THEORIES

Negligence is a theory of liability premised on one's breach of a duty of care to another.[9] As a general rule, one does not have a duty of care to prevent a third party from harming another unless some "special relationship" exists.[10] No Minnesota court has held that the employer-employee relationship is always such a "special relationship." Thus, Minnesota does not impose on employers a general duty of care to prevent its employees from harming third parties or other employees. Such a duty arises only in limited circumstances.

In Minnesota, four recognized theories of employer liability for harm arising from employee conduct are negligent supervision, negligent retention, negligent hiring, and negligent infliction of emotional distress. These four theories and a number of other, narrowly confined doctrines,[11] arguably are applicable in the employment discrimination context. Although plaintiffs have pleaded a variety of other negligence claims, these four are the only ones that have received more than sporadic recognition.[12] It is these four theories then, that deserve scrutiny to determine whether neg-

9. *See, e.g.*, Rasmussen v. Prudential Ins. Co., 277 Minn. 266, 268-69, 152 N.W.2d 359, 362 (1967) ("Actionable negligence is a failure to discharge a legal duty to the one injured. Lacking duty, there can be no negligence.").

10. *See, e.g.*, Leaon v. County of Washington, 397 N.W.2d 867, 873 (Minn. 1986) ("Ordinarily a person owes no duty to control the conduct of another unless some special relationship exists."). The "special relationship" can be between the actor and the third party who causes the harm, or between the actor and the party harmed. *See* RESTATEMENT (SECOND) OF TORTS § 315 (1965).

11. For example, in *Larson v. Independent School Dist. No. 314*, 289 N.W.2d 112, 116 (Minn. 1979), the court, relying principally on department of education manuals and guidelines, held that public school officials have a duty to exercise reasonable care in supervising teachers in the school and ensuring conditions are conducive to the safety and welfare of students during school hours.

12. For example, plaintiffs have pleaded claims for "negligence," "negligent training," and "negligent investigation," along with their discrimination counts. Such claims have never been recognized as independent theories of liability. *See, e.g.*, Thompson v. Olsten Kimberly Qualitycare, Inc., 980 F. Supp. 1035, 1037 n.2 (D. Minn. 1997) (indicating Minnesota has not recognized the independent tort of "negligent investigation"); Mandy v. Minnesota Mining & Mfg., 940 F. Supp. 1463, 1473 (D. Minn. 1996) (stating Minnesota does not recognize a cause of action for negligent training); Fletcher v. St. Paul Pioneer Press, No. C7-95-2, 1995 WL 379140, at *4 (Minn. Ct. App. June 27, 1995) (refusing to recognize negligent training as an independent claim); *see also* M.L. v. Magnuson, 531 N.W.2d 849, 856 (Minn. Ct. App. 1995) (stating Minnesota recognizes three causes of action—negligent supervision, retention, and hiring—against an employer for injuries caused by one of its employees).

ligence plays a significant role in employment discrimination cases.

A. *Negligent Supervision*

The case law establishing the standards for negligent supervision is far from clear. Although many courts and practitioners assume there is a single doctrine known as "negligent supervision," at least three independent theories of liability are grouped under this heading. One of these theories, "respondeat superior," is neither a negligence theory nor even a tort. The other two theories, which derive from section 317 of the Restatement (Second) of Torts ("section 317") and section 213(c) of the Restatement (Second) of Agency ("section 213(c)"), do precisely what many Minnesota courts have said they cannot do: they impose direct (rather than vicarious) liability on an employer based on the employer's negligence or reckless conduct.

A review of the prerequisites for respondeat superior liability reveals that this doctrine is of little use in the employment discrimination context. The other two theories, which are closely related, can be viable supplemental or alternative causes of action in employment discrimination cases, but only in limited circumstances.

1. *Respondeat Superior*

Many courts describe "negligent supervision" as a theory of recovery rooted in the principles of respondeat superior.[13] Interest-

13. *See, e.g.*, Rogers v. Regency Plymouth Ventures Ltd. Partnership, Civ. No. 3-96-445, memo. op. at 23 (D. Minn. April 14, 1997) (unpublished) (holding negligent supervision is a respondeat superior liability doctrine and rejecting arguments that it imposes direct liability on an employer); Oberstar v. County of Saint Louis, Civ. No. 5-96-153, memo. op. at 9 (D. Minn. October 3, 1997) (unpublished) (stating negligent supervision is a form of respondeat superior liability); Cook v. Greyhound Lines, Inc., 847 F. Supp. 725, 732 (D. Minn. 1994) (same); Bruchas v. Preventive Care, Inc., 553 N.W.2d 440, 443 (Minn. Ct. App. 1996) ("Liability for negligent supervision of an employee is imposed under a theory of respondeat superior."); Oslin v. State, 543 N.W.2d 408, 414 (Minn. Ct. App. 1996) ("Liability for negligent supervision of an employee is imposed under a theory of respondeat superior. The basis of liability is that the tortious act is committed in the scope of employment."); Huffman v. Pepsi-Cola Bottling Co., No. C7-94-2404, 1995 WL 434467, at *3 (Minn. Ct. App. July 25, 1995) ("Negligent supervision is derived from the doctrine of respondeat superior . . . .") (citing Yunker v. Honeywell, Inc., 496 N.W.2d 419, 422 (Minn. Ct. App. 1993)); L.R.M. v. Engstrom, No. C9-95-261, 1995 WL 321346, at *4 (Minn. Ct. App. May 30, 1995) (same); *Yunker*, 496 N.W.2d at 422 (stating negligent supervision derives from respondeat supe-

ingly, after stating that negligent supervision in effect equals respondeat superior, many courts then set forth and apply one of the other two, direct liability supervision doctrines.[14] For example, in *Oslin v. State*, the court introduced negligent supervision as follows:

> Liability for negligent supervision of an employee is imposed under the theory of *respondeat superior*. The basis of liability is that the tortious act is committed in the scope of employment; *whether the employer is at fault is immaterial*.[15]

Several paragraphs later, however, when the court actually applied the negligent supervision doctrine to the facts, it stated that "[t]o prevail on a claim of negligent supervision, a plaintiff must prove that the employee's conduct was foreseeable and that the employer *failed to exercise ordinary care* when supervising the employee."[16] Thus, after the court said it was going to apply a respondeat superior analysis, it did just the opposite.

Some of the confusion may stem from the fact that a commonly utilized negligent supervision theory—section 317—creates employer liability arising from the injurious (though not necessarily tortious) conduct of an employee or agent on the employer's

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rior). Courts commonly distinguish negligent supervision claims from negligent retention and hiring for this reason, holding negligent supervision is a form of respondeat superior liability while negligent hiring and retention are direct liability claims. *See, e.g., Huffman*, 1995 WL 434467, at *3 (drawing this contrast between negligent supervision and negligent retention claims); *L.R.M.*, 1995 WL 321346, at *3-*4 (same); *Yunker*, 496 N.W.2d at 422 (same).

14. *See, e.g., Cook v. Greyhound Lines, Inc.*, 847 F. Supp. at 732 (stating negligent supervision "requires an employer to exercise ordinary care in supervising the employment relationship so as to prevent the foreseeable misconduct of an employee from causing harm to other employees or third persons," and then stating negligent supervision derives from respondeat superior); *Bruchas*, 553 N.W.2d at 443 (indicating negligent supervision is a respondeat superior theory and then applying section 317 and section 213(c)); Orth v. College of Saint Catherine, No. C9-94-2260, 1995 WL 333875, at *5 (Minn. Ct. App. June 6, 1995) (same). Other courts seem to merge the two concepts, indicating negligent supervision is a respondeat superior doctrine, but then using the language and elements of section 317 of the *Restatement (Second) of Torts*. *See, e.g., Huffman*, 1995 WL 434467, at *3 ("Negligent supervision is derived from the doctrine of respondeat superior and requires the existence of a legal duty and a connection to the employer's premises or chattels.") (citing *Yunker*, 496 N.W.2d at 422); *L.R.M.*, 1995 WL 321346, at *4 (same).

15. 543 N.W.2d at 414 (citations omitted) (emphasis added); *see also Bruchas*, 553 N.W.2d at 443 (same).

16. 543 N.W.2d at 415 (emphasis added); *see also Bruchas*, 553 N.W.2d at 443 (stating negligent supervision is a theory of respondeat superior liability and then discussing section 317 and section 213(c)).

premises or with its chattels.[17] Hence, many courts and practitioners may view section 317 as a form of vicarious liability.[18] However, as discussed below, section 317 is not a vicarious liability doctrine because it is a theory of direct employer liability requiring an element of employer fault.

Where a plaintiff intends to pursue a true respondeat superior claim against an employer, "negligent supervision" is a misnomer. Respondeat superior liability requires no negligence or other fault on the part of the employer.[19] In fact, respondeat superior is not a tort at all: it is a form of vicarious liability, premised on whether an agent or employee commits a tort within the scope of his or her agency or employment.[20] Whether the employer was somehow negligent is irrelevant.

The Minnesota Supreme Court clearly drew this distinction in *Porter v. Grennan Bakeries, Inc.*,[21] in discussing the difference between respondeat superior and the theories of negligent hiring and retention:

> Where the doctrine of respondeat superior is relied on as a basis for recovery by a third person, the tortious act of the servant committed in the scope of his employment, and not the master's fault or the absence of it in hiring or retaining the servant, is the basis of liability. The master is held liable for the servant's tort. Consequently, where a cause of action for a servant's assault is based upon the doctrine of respondeat superior, the fault of the master, if any, in retaining in his employment an employee known to be likely to commit assaults, is immaterial, since it does not affect the master's liability one way or the other.
>
> A master's liability for [negligently] retaining in his em-

17. *See infra* note 39 and accompanying text.

18. Likewise, as set forth *infra* note 69–71 and accompanying text, some courts have viewed (inappropriately) section 213(c)'s "activities" limitation as creating a scope of employment requirement for claims under this section. This also may have mislead courts into believing negligent supervision claims are premised on the doctrine of respondeat superior.

19. *See, e.g.*, Laurie v. Mueller, 248 Minn. 1, 4, 78 N.W.2d 434, 437 (1956) ("In the modern concept of respondeat superior the law holds the master liable for the torts of his servants even though no fault personally rests upon the master.").

20. *See, e.g.*, Oelschlager v. Magnuson, 528 N.W.2d 895, 899 (Minn. Ct. App. 1995) ("A party that is only vicariously liable for another's intentional tort has neither deliberately caused harm nor committed a tort . . . ."); Bellini v. University of St. Thomas, No. C6-94-367, 1994 WL 425166, at *8 (Minn. Ct. App. Aug. 16, 1994) ("[R]espondeat superior is not a tort, but rather, a theory of vicarious liability.").

21. 219 Minn. 14, 21, 16 N.W.2d 906, 910 (1944).

> ployment a servant likely to commit assaults upon others rests upon personal fault in exposing others to unreasonable risk of injury in violation of the master's duty to exercise due care for their protection.[22]

Because respondeat superior liability is not premised on an employer's breach of a duty of care, the key inquiry for determining if liability attaches is whether the employee committed the underlying tort while acting within the "scope of employment."[23] The "scope of employment" requirement has created much confusion in the courts.[24]

The Minnesota Supreme Court provided some guidance on the meaning of "scope of employment" in *Marston v. Minneapolis Clinic of Psychiatry and Neurology, Ltd.*[25] The court made clear that an employee's intentional act is within the scope of employment if (1) the act is within the work-related limits of time and place, and (2) it should fairly have been foreseen from the nature of the employment.[26] The Court summarized its holding in the following model jury instruction:

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22. *Id.* (citations omitted); *see also* Ponticas v. K.M.S. Investments, 331 N.W.2d 907, 911 n.5 (Minn. 1983) ("It should be noted that this [duty to exercise reasonable care in hiring] is a direct duty running from the employer to those members of the public whom the employer might reasonably anticipate would be placed in a position of risk of injury as a result of the hiring. Thus, it is distinguishable from liability imputed to an employer as a result of the doctrine of respondeat superior.").

23. *See, e.g.*, Leaon v. County of Washington, 397 N.W.2d 867, 874 (Minn. 1986) ("For respondeat superior to lie, there must be, first, an actor personally liable for the tort, and, second, the actor must be within the scope of the employment by the employer.").

24. It is important to note that the concept of "scope of employment" may vary depending on the area of law and employee acts at issue. For example, numerous courts have described the location and chattels limitations set forth in section 317 as "scope of employment" limitations, although, as set forth below, the latter use of the term is incorrect. *See, e.g.*, Yunker v. Honeywell, Inc., 496 N.W.2d 419, 422 (Minn. Ct. App. 1993) (stating negligent supervision is bounded by a scope of employment requirement because it relies "on [a] connection to the employer's premises or chattels."). In the WCA context, the related concept of "in the course of employment," simply means "within the time and space boundaries of employment." *See, e.g.*, Gibbard v. Control Data Corp., 424 N.W.2d 776, 780 (Minn. 1988). Also, as set forth in note 28, *infra*, Minnesota adheres to a different test for "scope of employment" when negligent acts of employees—rather than intentional acts—underlie a respondeat superior claim. These differing definitions of "scope of employment" demonstrate that one must be careful not to assume this term will be applied consistently in differing legal contexts.

25. 329 N.W.2d 306, 310-11 (Minn. 1982).

26. *See id.* n.3.

> An agent is acting within the scope of his employment when he is performing services for which he has been employed or while he is doing anything which is reasonably incidental to his employment. The conduct must occur within the work-related limits of time and place. The test is not necessarily whether the specific conduct was expressly authorized or forbidden by the principal but rather whether such conduct should fairly have been foreseen from the nature of the employment and the duties relating to it.[27]

This standard does not require that the employee be motivated by a desire to further his or her employer's interests when the intentional tort is committed.[28] Minnesota's definition of the "scope of employment" therefore is broader than the traditional definition set forth in the Restatement of Agency.[29]

Despite its potential breadth, this theory of liability likely is of little use in the employment discrimination context. Most fundamentally, an employer can be liable under a respondeat superior theory only where there is some underlying tort. In other words, in order for liability to be imposed on an employer "vicariously" under the common law, its employee(s) must have committed some individualized, actionable wrong.[30] Federal discrimination laws and

27. *Id.*; *see also* P.L. v. Aubert, 545 N.W.2d 666, 668 (Minn. 1996) (reaffirming the test set forth in *Marston.*).

28. Minnesota abandoned the then-majority "motivation" test in the context of employee intentional torts in *Lange v. National Biscuit Co.*, 297 Minn. 399, 403-04, 211 N.W.2d 783, 785-86 (1973). In *Lange*, the court rejected the motivation test as arbitrary, and held instead that "an employer is liable for an assault by his employee when the source of the attack is related to the duties of the employee and the assault occurs within [the] work-related limits of time and place." *Id.* In the context of negligent acts of employees, however, Minnesota still adheres to the "motivation test." *See, e.g.*, Edgewater Motels, Inc. v. Gatzke, 277 N.W.2d 11, 15 (Minn. 1979); *see also Marston*, 329 N.W.2d at 310. *Marston* clarified the *Lange* standard and reiterated that it applies where an employee has committed an intentional wrong. 329 N.W.2d at 310-11. Because discriminatory conduct is intentional, the *Marston* standard is applicable to the conduct at issue in employment discrimination cases.

29. *See, e.g.*, RESTATEMENT (SECOND) OF AGENCY § 228 (1958) ("Conduct of a servant is within the scope of employment if, but only if . . . it is actuated, at least in part, by a purpose to serve the master . . . ."); *id.* § 235 ("An act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed.").

30. *See, e.g.*, Leaon v. County of Washington, 397 N.W.2d 867, 874 (Minn. 1986) ("For respondeat superior to lie, there must be, first, an actor personally liable for the tort, and, second, the actor must be within the scope of the employment by the employer."); Porter v. Grennan Bakeries, Inc., 219 Minn. 14, 21, 16

the MHRA do not create independent, individualized torts: discrimination, harassment, and retaliation claims brought under these laws impose only *employer* liability.[31] For example, sexual, ra-

N.W.2d 906, 910 (1944) (same).

31. Courts in the Eighth Circuit and an ever-expanding consensus of other circuit courts make clear that claims under Title VII, the ADEA, and the ADA—which contain virtually identical definitions of "employer"—can only be brought against an employer, not against individual employees. *See, e.g.*, Bonomolo-Hagen v. Clay Central-Everly Comm. Sch. Dist., 121 F.3d 446, 447 (8th Cir. 1997) (Title VII) (citing Spencer v. Ripley County State Bank, 123 F.3d 690, 691-92 (8th Cir. 1997)); Wathen v. General Elec. Co., 115 F.3d 400, 405-06 (6th Cir. 1997) (holding individual employees are not liable under Title VII and indicating the same is true under the ADA and ADEA); Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1077-78 (3d Cir. 1996) (Title VII) (stating "Congress did not intend to hold individual employees liable"); Williams v. Banning, 72 F.3d 552, 554-55 (7th Cir. 1995) (discussing Title VII and the ADA); Greenlaw v. Garrett, 59 F.3d 994, 1001 (9th Cir. 1995) (Title VII) (stating "there is no personal liability for employees"); EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1279-82 (7th Cir. 1995) (holding individuals are not liable under the ADA and noting the ADA, ADEA, and Title VII have employer liability provisions); Lenhardt v. Basic Inst. of Tech., Inc., 55 F.3d 377, 381 (8th Cir. 1995) ("Every circuit that has considered the issue ultimately has concluded that an employee, even one possessing supervisory authority, is not an employer upon whom liability can be imposed under Title VII."); Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 510-11 (4th Cir. 1994) (ADEA) (holding "the ADEA limits civil liability to the employer"); Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587-88 (9th Cir. 1993) (Title VII and ADEA) (dismissing claims against the defendants in their individual capacities); Oberstar v. County of Saint Louis, Civ. No. 5-96-153, memo. op. at 9 (D. Minn. Oct. 3, 1997) (unpublished) (stating employers, not employees, are directly liable for breaching duties to maintain a non-hostile work environment); D.W. v. Radisson Plaza Hotel Rochester, 958 F. Supp. 1368, 1375 (D. Minn. 1997) (stating employees cannot be held personally liable under Title VII).

Also, this conclusion is not inconsistent with the Supreme Court's recent rulings in *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998), and *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998). In *Burlington Industries* and *Faragher*, the Court looked to agency principles as guidance for determining whether and how to hold employers liable under Title VII for harassing conduct by supervisory employees. For the limited purpose of construing the statute, the Court treated such harassing conduct as if it were a "tort." *See Burlington Indus.*, 118 S. Ct. at 2265-66; *Faragher*, 118 S. Ct. at 2285. However, the Court never recognized an independent cause of action under Title VII against individual supervisors.

Likewise, individual employees cannot be held liable under the MHRA's general employment discrimination provision. *See, e.g.*, MINN. STAT. §§ 363.03, subd. 1(2) & 363.01, subd. 17 (1996) (providing it is an unlawful employment practice for an "employer" to discriminate and defining an employer as one who has one or more employees); Waag v. Thomas Pontiac, Buick, GMC, Inc., 930 F. Supp. 393, 408 (D. Minn. 1996) ("[A] Defendant . . . cannot be held individually liable under Title VII and the MHRA.").

Under the MHRA, an individual employee can be liable for "aiding and abetting" its employer in discriminating against an employee. *See* MINN. STAT. 363.03, subd. 6. (1996) However, Minnesota courts have made clear that aiding

cial or other forms of harassment in the workplace are not actionable against the employee under state and federal discrimination laws; rather, the action is based on the employer's maintenance of a "hostile work environment" in which such harassment creates intolerable working conditions.[32] Thus, unless an employee's discriminatory or harassing conduct rises to level of an independent tort such as assault or battery, the employee's conduct cannot serve as the basis for a respondeat superior claim.[33]

In addition, those forms of harassment that do rise to the level of an independent tort usually cannot be viewed as foreseeable from the nature of the employment. There may be exceptions to

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and abetting claims are "derivative" in that the plaintiff must first establish an underlying violation of the MHRA before employee liability for aiding and abetting may lie. *See, e.g.*, TeBockhorst v. Bank United of Texas, No. C6-97-2061, 1997 WL 471320, at *5 (Minn. Ct. App.), *review denied*, (Minn. 1997). Thus, attempting to fit an aiding and abetting claim into a respondeat superior framework would be extremely awkward, and courts may reject such a theory because it first requires a finding of employer liability. Moreover, for the reasons set forth in note 32, *infra*, the MHRA would preempt any such respondeat superior claim because it would be premised on a breach of a duty set forth in the MHRA.

32. *See, e.g., Oberstar*, Civ. No. 5-96-153, memo. op. at 9. The *Oberstar* court expressly applied this type of analysis in rejecting respondeat superior liability in the context of sexual harassment:

> A claim of hostile work environment-sexual harassment arises under the MHRA when an employer breaches his or her statutory duty to provide a workplace free of discrimination. Discrimination, of course, includes harassment based on sex. An employer thus can be found *directly liable* for breaching the statutorily created duty to maintain a non-hostile work environment. A statutory duty to maintain a non-hostile work environment can certainly cover those instances in which employees commit torts, but the significance of these statutes was in their creation of a new duty—a duty for employers to ensure, in certain circumstances, that even *non-tortious* conduct of their employees does not create a hostile work environment. Sexual harassment by an employee is *not* a tort.

Id. (citation and footnote omitted).

33. The *Oberstar* court reached this conclusion, applying the analysis of a Tennessee federal district court:

> Sexual harassment has never been a common law tort; as a cause of action, it is a statutory creation. A negligent supervision claim cannot be based solely upon an underlying claim of sexual harassment per se, because the effect would be to impose liability on employers for failing to prevent a harm that is not a cognizable injury under the common law. Sexual harassment, however, may include misconduct by a co-employee that is independently actionable under the common law, such as battery or intentional infliction of emotional distress.

Oberstar, Civ. No. 5-96-153, memo. op. at 10 (quoting Hays v. Patton-Tully Transp. Co., 844 F. Supp. 1221, 1223 (W.D. Tenn. 1993)).

this principle,[34] but generally, unsanctioned conduct of this kind—such as gender or race-based assaults and batteries—has nothing to do with, and is in no way tied to, particular types of employment or particular employment duties and cannot fairly be characterized as foreseeable from the nature of the employment.[35] These acts rarely will fall within the scope of employment, as that term is defined for

34. In *Marston v. Minneapolis Clinic of Psychiatry & Neurology*, for example, the Court found that sexual assaults are potentially foreseeable in the context of the therapist/patient relationship. 329 N.W.2d 306, 311 (Minn. 1982). The court focused on the fact that expert testimony had established that "sexual relations between a psychologist and a patient is a well-known hazard and thus, to a degree, foreseeable and a risk of employment." *Id.* The court also found, in these relatively unique circumstances that such acts were related to and connected with acts otherwise within the scope of employment. *See id.*

35. *See, e.g.*, P.L. v. Aubert, 545 N.W.2d 666, 668 (Minn. 1996) (holding in a case involving sexual contact between a high school teacher and a student that "the employer is not liable for the intentional torts of its employee even though the acts occurred within the work related limits of time and place where such acts were unforeseeable, and were unrelated to the duties of the employee."); Rogers v. Regency Plymouth Ventures Ltd. Partnership, Civ. No. 3-96-445, memo. op. at 16-17 (D. Minn. April 14, 1997) (unpublished) (rejecting respondeat superior liability for an employees' acts of sexual harassment and battery because the tortious conduct was neither related to the employees' duties nor connected with acts within the scope of employment).

Some courts mistakenly have viewed "foreseeability" in the respondeat superior context in its broader sense, suggesting any type of employee misconduct the employer "should have foreseen" is foreseeable from the nature of employment. For example, in *Oslin v. State*, 543 N.W.2d 408, 413 (Minn. Ct. App. 1996), the court indicated that sexual harassment of an employee by a supervisor can be foreseeable where complaints of supervisor harassment had been filed previously. The *Oslin* court, relying on the subsequently overturned lower court decision in *P.L.*, *supra*, appears to have approached the foreseeability issue like it would in a negligence case. *See id.* However, in *P.L.*, *supra*, the court indicated that the issue of foreseeability in the respondeat superior context is narrower; it only addresses the types of risks inherently associated with the relationship between the perpetrating employee and the victim. *See P.L.*, 545 N.W.2d at 668 ("Here we find no evidence that such [employment] relationships between teacher and student are a 'well-known hazard'; thus foreseeability is absent."); *see also Marston*, 329 N.W.2d at 311 n.3 (focusing on whether the "conduct should fairly have been foreseen from the nature of the employment and the duties relating to it"). Thus, severe forms of harassment rarely will be "foreseeable."

In theory, other forms of discrimination, such as animus-based adverse employment actions (termination, failure to hire, failure to promote) arguably could be foreseeable from the nature of employment. For example, because it is foreseeable that a supervisor will hire, promote, and fire, workers below him or her, it may also be foreseeable that that supervisor will use illegitimate criteria for making those decisions. However, this example is merely academic because these acts do *not* constitute independent torts or actionable wrongs, and therefore cannot support respondeat superior liability.

purposes of respondeat superior liability.[36]

Thus, discriminatory, harassing, or retaliatory acts almost always fail to support a common-law respondeat superior claim because such acts either do not constitute an underlying tort or fall outside the scope of employment. Accordingly, this doctrine almost never will be viable in the discrimination context.

2. *Section 317 Negligent Supervision*

In a number of cases in which Minnesota state or federal courts have discussed a claim for negligent supervision, they have explicitly or implicitly applied the doctrine set forth in section 317 of the *Restatement (Second) of Torts*.[37] Although the Minnesota Supreme Court has not had the opportunity to adopt this doctrine, its detailed discussion of this section in *Semrad v. Edina Realty, Inc.*,[38] strongly suggests it would adopt the tort in the appropriate circumstance.[39] Section 317 provides as follows:

A master is under a duty to exercise reasonable care so to

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36. It is worth noting that the Supreme Court recently rejected the notion that sexual harassment by a supervisor is conduct within the scope of employment. See *Burlington Indus.*, 118 S. Ct. at 2267 ("The general rule is that sexual harassment by a supervisor is not conduct within the scope of employment."); *Faragher*, 118 S. Ct. at 2289 (stating it makes sense to classify sexual harassment "as beyond the scope of employment"). The Court therefore refused to rely on the doctrine of respondeat superior set forth in section 219(1) of the *Restatement (Second) of Agency* as a basis for concluding that employers are liable for unknown and unsanctioned acts of sexual harassment by supervisory employees.

After rejecting that theory, the Court sought guidance from another section of the *Restatement* to support its conclusion that an employer otherwise can be "vicariously" liable under Title VII. *See, e.g., Burlington Indus.*, 118 S. Ct. at 2267. The Court relied on section 219(2)(d) of the *Restatement*, which is premised on the existence of the agency relationship aiding the employee in accomplishing the wrongful act. *See id.* This section contains a separate theory of vicarious liability wholly unrelated to the doctrine of respondeat superior under Minnesota law.

37. *See, e.g.*, Mandy v. Minnesota Mining & Mfg., 940 F. Supp. 1463, 1471 (D. Minn. 1996); Leidig v. Honeywell, Inc., 850 F. Supp. 796, 808 (D. Minn. 1994); Semrad v. Edina Realty, Inc., 493 N.W.2d 528, 534 (Minn. 1992); *see also* Piper Jaffray Cos., Inc. v. National Union Fire Ins. Co., 967 F. Supp. 1148, 1157 (D. Minn. 1997) (recognizing both section 317 and section 213(c)); Bruchas v. Preventive Care, Inc., 553 N.W.2d 440, 443 (Minn. Ct. App. 1996) (same).

38. 493 N.W.2d at 534.

39. *Id.; see also Bruchas*, 553 N.W.2d. at 443 (applying section 317 based on the court's discussion in *Semrad*). The Minnesota Supreme Court also briefly discussed section 317 in *Meany v. Newell*, 367 N.W.2d 472, 475-76 (Minn. 1985), but rejected its applicability in the circumstances presented because the offending employee was neither on the employer's premises nor using the employer's chattels.

> control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if
>
> (a) the servant
>
> (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or
>
> (ii) is using a chattel of the master, and
>
> (b) the master
>
> (i) knows or has reason to know that he has the ability to control his servant, and
>
> (ii) knows or should know of the necessity and opportunity for exercising such control.[40]

As is apparent, this doctrine is distinguishable from respondeat superior liability in a number of ways. Unlike respondeat superior liability, where the employer's fault is irrelevant, liability under section 317 is premised on the employer's breach of the aforementioned duty of care. Section 317 negligent supervision is therefore a *direct* liability theory,[41] and those courts that have stated otherwise

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40. RESTATEMENT (SECOND) OF TORTS § 317 (1965). In certain narrow circumstances, the court has recognized context-specific negligent supervision causes of action. For example, as set forth in note 11, *supra*, the court recognized a cause of action for negligent supervision against public school officials. *See* Larson v. I.S.D. No. 314, Braham, 289 N.W.2d 112, 116 (Minn. 1979).

41. *See, e.g.*, Ponticas v. K.M.S. Inv., 331 N.W.2d 907, 911 n.5 (Minn. 1983) (noting that where a duty is imposed upon an employer to those members of the public whom the employer might reasonably anticipate would be placed in a position of risk, this is a *direct* duty which is distinguishable from liability imputed to an employer as a result of the doctrine of respondeat superior); *see also* Sutherland v. Barton, 570 N.W.2d 1, 5 (Minn. 1997) ("Direct liability is the imposition of liability when one party has breached a personal duty to another party through his own acts of negligence."). In *M.L v. Magnuson.*, 531 N.W.2d 849, 856 n.3 (Minn. Ct. App. 1995), the court drew this distinction between negligent supervision (and retention and hiring) and the doctrine of respondeat superior:

> These negligent employment theories [including negligent supervision] are distinct from the doctrine of respondeat superior. Respondeat superior imposes vicarious liability on an employer for all acts of its employees that occur within the scope of their employment, regardless of the employer's fault. Negligent employment imposes direct liability on the employer only where the claimant's injuries are the result of the employer's failure to take reasonable precautions to protect the claimant from the misconduct of its employees.

Interestingly, later in its analysis, the *M.L.* court mistakenly states that because neg-

are simply incorrect.

Another doctrinal distinction between section 317 and respondeat superior liability is that a claim under the former, at least in theory, need not be premised on an employee's committing a tort. The *Semrad* Court and some lower courts have suggested—without explicitly holding—that a negligent supervision claim also must be based on an underlying tort.[42] However, although the language of section 317 mandates that the employee's conduct at minimum create an unreasonable risk of harm, it does not expressly state the employee's action rise to the level of an independent tort. In addition, comment d to this section expressly rejects such a requirement.[43] A negligent supervision theory under section 317 therefore does not depend on whether the employer's employee(s) or agents committed an independently actionable tort. This distinction leaves open the possibility that this tort may be more useful in the discrimination context than a respondeat supe-

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ligent supervision derives from respondeat superior, claims must be premised on employee acts within the "scope of employment." *Id.* at 858. As suggested in *Ponticas*, 331 N.W.2d at 911 n.5, and as suggested by the *M.L.* court's earlier statement, negligent supervision is a doctrine of direct liability wholly independent of the doctrine of respondeat superior.

42. *See Semrad*, 493 N.W.2d at 534 (stating, in describing the duty imposed by this section, that the employer must act to "prevent intentional or negligent infliction of personal injury"); *see also* Oberstar v. County of Saint Louis, Civ. No. 5-96-153, memo. op. at 13 (D. Minn. Oct. 3, 1997) (unpublished) (holding a negligent supervision claim is not actionable without an underlying tort); Oslin v. State, 543 N.W.2d 408, 415 (Minn. Ct. App. 1996).

The *Semrad* court's use of the terms "intentional or negligent" appears to be merely descriptive of the types of employee conduct section 317 tends to encompass. *See* 493 N.W.2d at 534. The court's analysis and holding focused on whether economic damages (rather than damages for personal injuries) are available under section 317. *See id.* The court never addressed whether an independent, employee tort must be present to create liability under section 317. Also, the *Oberstar* court's determination is easily explainable, because there, the court assumed negligent supervision is a respondeat superior theory. *See Oberstar*, Civ. No. 5-96-153, memo. op. at 9-13.

43. Comment d provides as follows:

> *Cases in which servant not liable.* In order that the master may be subject to liability under the rule stated in this Section, it is not necessary that the act of the servant which he has failed to control is one which is negligent on the part of the servant and, therefore, subjects the servant to liability. The master may know of circumstances of which the servant is excusably ignorant which should cause the master to realize that the servant's actions involve an unreasonable risk of harm to others of which the servant neither is nor should be aware.

RESTATEMENT (SECOND) OF TORTS § 317 cmt. d (1965).

rior theory.[44]

A further difference is that liability under this section of the Restatement is not confined to employee acts within the "scope of employment."[45] The relevant "scope" of covered activity is much broader: liability may arise when the employee or servant is upon the premises of the employer or is using the employers' chattels.[46] That a number of Minnesota court decisions have indicated that negligent supervision claims can only arise within the scope of employment does not alter this conclusion. Some of these courts have used (perhaps inappropriately) the term "scope of employment" to describe the "premises and chattels" limitations set forth in section 317, rather than the definition contained in *Marston*.[47] Other courts incorrectly have indicated they were applying a respondeat superior analysis,[48] and others simply were mistaken. Any other conclusion is ruled out by the express language section 317, which provides for liability when the servant is acting "outside the scope of employment."[49]

Given the language of section 317, the real issue appears to be whether liability is precluded for employee acts *within* the scope of employment. Comment a to this section suggests as much, indicating this rule "is applicable only when the servant is acting outside the scope of his employment," and "[i]f the servant is acting within the scope of his employment, the master may be vicariously liable

44. This difference is the only reason—at least in terms of establishing liability—why a negligent supervision claim may be preferable to a respondeat superior claim when an employee is acting within the scope of employment. In theory, one could state a viable section 317 claim based on discriminatory conduct of an employee which does not rise to the level of an independent tort, even though such conduct cannot form the basis of a respondeat superior claim.

45. *See* RESTATEMENT (SECOND) OF TORTS § 317 (1965); *see also* Leidig v. Honeywell, Inc., 850 F. Supp. 796, 808 (D. Minn. 1994).

46. *See* RESTATEMENT (SECOND) OF TORTS § 317 (1965).

47. *See, e.g.*, Yunker v. Honeywell, Inc., 496 N.W.2d 419, 422 (Minn. Ct. App. 1993) (stating negligent supervision is bounded by a scope of employment requirement because it relies "on a connection to the employer's premises or chattels.").

48. *See, e.g.*, Cook v. Greyhound Lines, Inc., 847 F. Supp. 725, 732 (D. Minn. 1994) (stating "negligent supervision derives from the respondent superior doctrine. . . . Accordingly, under the rubric of negligent supervision, in order to successfully state a claim against an employer, the claimant must establish that the employee who caused an injury did so within the scope of his or her employment."); Bruchas v. Preventive Care, Inc., 553 N.W.2d 440, 443 (Minn. Ct. App. 1996); Oslin v. State, 543 N.W.2d 408, 415 (Minn. Ct. App. 1996).

49. The Minnesota Supreme Court quoted this language in *Semrad v. Edina Realty, Inc.*, 493 N.W.2d 528, 534 (Minn. 1992).

under the principles of the law of Agency."[50] However, no Minnesota court has addressed expressly this issue.[51]

Minnesota courts may decline to impose such a limitation for a number of reasons. First, as set forth above, the *Marston* court defined "scope of employment" (in the context of intentional torts) more broadly than this term is defined in the Restatement of Agency. Minnesota courts may be hesitant to rule out application of section 317 to such a wide range of employee conduct. Also, the *Semrad* court's statement that an employer's duty under section 317 applies "even when the employee is acting outside the scope of the employment," suggests the court views the "outside the scope" language as descriptive rather than restrictive.[52] Finally, the Minnesota Supreme Court made clear in another context that one may recover damages from an employer for the intentional torts of an employee under either a theory of respondeat superior or negligence, suggesting acts inside the scope of employment are not out of the reach of negligence claims.[53]

In any event, even if section 317's language limits claims to those arising "outside the scope of employment," such a requirement rarely will affect the analysis in discrimination cases. Section 317 contains another substantive limitation that rules out its application in most discrimination cases and limits the reach of this section to those types of harassing conduct that almost always will be outside scope of employment.

This key limitation is the "physical injury or threat of physical injury requirement." Section 317 on its face confines an employer's duty of care to preventing its agents from intentionally harming others or creating an unreasonable risk of bodily harm to them. In *Semrad,* the Minnesota Supreme Court appears to have interpreted this provision as applicable only where the plaintiff, at minimum, has been exposed to some unreasonable risk of physical injury as a

50. RESTATEMENT (SECOND) OF TORTS § 317 cmt. a (1965).

51. One federal district court mentioned that the plaintiff failed to allege the employee's acts occurred outside the scope of employment, but it did not hold expressly that section 317 imposes such a requirement. *See* Leidig v. Honeywell, 850 F. Supp. 796, 808 (D. Minn. 1994).

52. *See* 493 N.W.2d at 534. Perhaps the court viewed the "outside the scope" language as descriptive because, if the elements of respondeat superior are otherwise present, that theory often will be preferable because the plaintiff need not prove a breach of duty by the employer.

53. *See* Lange v. National Biscuit Co., 297 Minn. 399, 405, 211 N.W.2d 783, 786 (1973) ("Plaintiff may recover damages under either the theory of respondeat superior or negligence.").

result of the employee's conduct:

> The placement of section 317 in the Restatement and the language of sections 315 and 317 unambiguously limit the scope of 317 to a duty to prevent an employee from inflicting personal injury upon a third person on the master's premises or to prevent the infliction of bodily harm by use or misuse of the employer's chattels. In short, the entire thrust of section 317 is directed at an employer's duty to control his or her employee's physical conduct while on the employer's premises or while using the employer's chattels, even when the employee is acting outside the scope of the employment, in order to prevent intentional or negligent infliction of personal injury. Nothing in section 317 calls for its application in a case involving economic loss only.[54]

Thus, a plaintiff cannot recover on a section 317 claim unless he or she establishes, at minimum, that the employee's conduct exposed him or her to an unreasonable risk or threat of physical injury.[55]

In ruling out claims for economic damages under this provision, the *Semrad* court suggests that some actual physical injury may be necessary to sustain a section 317 claim. The court's lack of directness on this issue and the language of section 317, however, leave open the possibility that an unreasonable exposure to a risk or threat of physical injury is enough to sustain a claim. Recent lower Minnesota court and federal court decisions have required some physical injury or threat of physical injury in negligent supervision cases (whether expressly premised on section 317, section 213(c), or neither), but these opinions appear split over whether a mere threat of physical injury is sufficient.[56]

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54. 493 N.W.2d at 534.

55. *See id.*

56. *Compare* Hayes/Gueltzow v. Northwest Airlines, Inc., Civ. No. 3-95-858, memo. op. at 7 (D. Minn. Nov. 21, 1997) (unpublished) (indicating there must have been physical harm to bring a section 213(c) claim); Olson v. City of Lakeville, No. C3-97-390, 1997 WL 561254, at *1 (Minn. Ct. App. Sept. 9, 1997) ("Employer liability for negligent supervision may lie if an employee's act causes some form of physical injury."); *and* Bergstrom-Ek v. Best Oil Co., Civ. No. 5-96-167, memo. op. at 34 (D. Minn. June 20, 1997) (unpublished) (requiring actual physical injury), *with* Thompson v. Olsten Kimberly Qualitycare, Inc., 980 F. Supp. 1035, 1041 (D. Minn. 1997) ("[A] viable claim for negligent supervision requires the infliction of some sort of physical injury, or threat of physical injury."); Oberstar v. County of Saint Louis, Civ. No. 5-96-153, memo. op. at 13 (D. Minn. Oct. 3, 1997) (unpublished) (holding negligent supervision claims must be premised on a threat of physical injury); Piper Jaffray Cos., Inc. v. National Union Fire Ins. Co.,

If there is no actual physical impact, but an employee suffers emotional distress because he or she is in the "zone of danger" of physical impact, the employee may be able to bring a claim for negligent infliction of emotional distress. As discussed below, the main function of the negligent infliction of emotional distress doctrine is to provide a remedy for emotional distress from negligently caused, imminent threats of physical harm.[57] In light of the fact that economic injuries are not compensable under section 317, and because a claim for emotional distress resulting from threatened harm is separately maintainable, common sense suggests that courts should limit negligent supervision claims to situations where negligent acts cause actual physical injuries.[58]

Nevertheless, if plaintiffs are allowed to bring claims for mental anguish for threats of physical injury under the rubric of "negligent supervision," the Minnesota Supreme Court's consistent refusal to allow recovery for negligently caused mental anguish unless the "zone of danger" requirement is met,[59] strongly suggests it would also adopt such a requirement in this context, regardless of how the claim was pleaded.[60] Thus, at minimum, some imminent threat of physical injury should be mandatory.

The physical injury or threat of physical injury requirement sharply limits the utility of section 317 claims in discrimination cases. Rarely will discriminatory conduct go beyond an infringement of rights and actually create an unreasonable, imminent risk

967 F. Supp. 1148, 1157 (D. Minn. 1997) (stating the doctrine of negligent supervision is "unambiguously limited to situations involving the threat of personal injury"); *Leidig*, 850 F. Supp. at 808; TeBockhorst v. Bank United of Texas, No. C6-97-2061, 1997 WL 471320, at *7 (Minn. Ct. App.), *review denied*, (Minn. Oct. 21, 1997) (stating "plaintiff must present some evidence of a threat of or actual physical injury caused by defendant's actions"). In *Bruchas v. Preventive Care, Inc.*, the Court interpreted *Semrad* as requiring actual physical injury to sustain a section 317 claim, but found a "threat of physical injury" is sufficient to support a section 213(c) claim. *See* 553 N.W.2d 440, 443 (Minn. Ct. App. 1996)

57. *See* discussion, *infra* Part II.C.

58. *See, e.g., Bruchas*, 553 N.W.2d at 443 (interpreting *Semrad* to require actual physical injury).

59. *See infra* notes 118-19 and accompanying text; *see also* Leaon v. County of Washington, 397 N.W.2d 867, 875 (Minn. 1986) ("Where defendant's negligence causes emotional distress to plaintiff without any accompanying physical impact, plaintiff may still recover for emotional disorders if plaintiff was within the scope of danger of the negligent act and if plaintiff exhibits physical manifestations of the emotional distress.").

60. The court is also likely to require that plaintiffs establish other elements of negligent infliction of emotional distress, such as "resulting physical manifestations." *See infra* note 116 and accompanying text.

of physical injury to an employee.

Sexual, racial, and other forms of harassment are the most likely contexts in which discriminatory conduct could expose an employee to a risk of physical danger. Indeed, a number of Minnesota courts have suggested that negligence claims against an employer can be premised on acts of sexual harassment.[61] As more recent opinions have indicated, however, sexual harassment alone is insufficient.[62] *Semrad*'s language dictates that the harassing conduct at minimum must place the victimized employee in danger of physical harm.[63] Generally speaking, unless the alleged harassment rises to the level of an assault or battery, the victim will not be able to recover under a section 317 theory.

In conclusion, section 317 negligent supervision claims, unlike those brought under the doctrine of respondeat superior, can be viable supplementary or alternative claims in employment discrimination cases. However, because of the physical injury or threat of physical injury requirement, such claims will be confined to very limited circumstances.

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61. *See, e.g.*, Thompson v. Campbell, 845 F. Supp. 665, 676 (D. Minn. 1994) ("[A] claim for negligent retention may lie where an employee subjects another employee to sexual harassment."); DeRochemont v. D & M Printing of Minneapolis, Inc., No. C2-94-169, 1994 WL 510153, at *1 (Minn. Ct. App. Sept. 20, 1994) ("The tort of negligent supervision or retention is not limited to negligence that results in physical injuries; it also applies to negligent retention or supervision of a sexual harasser."); *see also* Kresko v. Rulli, 432 N.W.2d 764, 769-70 (Minn. Ct. App. 1988) (suggesting that sexual harassment may be the type of negative employee activity that could underlie a claim for negligent retention). No Minnesota cases reveal such a statement made with regard to other forms of harassment.

62. *See, e.g.*, Olson v. City of Lakeville, No. C3-97-390, 1997 WL 561254, at *1 (Minn. Ct. App. Sept. 9, 1997). In *Bruchas v. Preventive Care, Inc.*, the court stated as follows: "A claim for negligent retention may lie where an employee is subjected to sexual harassment. Even in those cases, however, there must be some evidence of a threat of physical injury or actual physical injury." 553 N.W.2d at 442-43 (citations omitted). The court went on to hold that plaintiff could not recover under section 317 or section 213(c) for the same reason. *Id.* at 443. In *Olson*, the court declined to expand the (negligent supervision) duty of care to include "liability for sexual harassment perpetrated by employees absent physical injury or threat of physical injury." 1997 WL 561254, at *1; *see also* D.W. v. Radisson Plaza Hotel Rochester, 958 F. Supp. 1368, 1378 (D. Minn. 1997) (finding in a negligent retention case that general harassment is insufficient to state a claim, rather, the conduct must rise to the level of an intentional tort to be actionable).

63. *See* 493 N.W.2d 528, 534 (Minn. Ct. App. 1992); *see supra* notes 54-56 and accompanying text.

3. Section 213(c) Negligent Supervision

A third, less frequently discussed and often misunderstood negligent supervision theory is based on section 213(c) of the *Restatement (Second) of the Law of Agency.* The applicable portion of this section provides as follows:

> A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:
>
> * * *
>
> (c) in the supervision of the activity[.][64]

Whether section 213(c) is a viable negligent supervision theory under Minnesota law remains an open question. Although some lower courts have recognized this doctrine,[65] the Minnesota Supreme Court has not. As discussed below, in *Ponticas v. K.M.S. Investments,* the court expressly relied on another subsection of section 213 relating to the negligent hiring of dangerous employees.[66] The court did not address whether it would recognize the negligent

64. Comment g to this section provides in relevant part: "A master is negligent if he fails to use care to provide such regulations as are reasonably necessary to prevent undue risk of harm to third persons *or to other servants* from the conduct of those working under him." RESTATEMENT (SECOND) OF AGENCY § 213(c) cmt. g (1958) (emphasis added).

It is worth noting that subsection (a) of this section of the *Restatement* could also be viewed as a negligent supervision theory. That subsection focuses on the "giving improper or ambiguous orders or in failing to make proper regulations." *Id.* § 213(a). There is no indication that these two subsections were intended to be mutually exclusive. On the contrary, they appear to address substantially overlapping conduct. This article focuses on subsection (c) because it has been discussed by the Minnesota courts.

65. *See, e.g.,* Piper Jaffray Cos., Inc. v. National Union Fire Ins. Co., 967 F. Supp. 1148, 1157 (D. Minn. 1997); Hayes/Gueltzow v. Northwest Airlines, Inc., Civ. No. 3-95-858, memo. op. at 6-7 (D. Minn. Nov. 21, 1997) (unpublished); Leidig v. Honeywell, Inc., 850 F. Supp. 796, 808 (D. Minn. 1994); *Bruchas,* 553 N.W.2d at 443; Semrad v. Edina Realty, Inc., 470 N.W.2d 135, 146 (Minn. Ct. App.) (*Semrad I*), *aff'd in part and rev'd in part on other grounds,* 493 N.W.2d 528 (Minn. 1992). Other courts have articulated a standard of care similar to that set forth in section 213(c). *See, e.g.,* Cook v. Greyhound Lines, Inc., 847 F. Supp. 725, 732 (D. Minn. 1994) (stating negligent supervision requires "an employer to exercise ordinary care in supervising the employment relationship, so as to prevent the foreseeable misconduct . . . from causing harm to other employees or third persons."); Fletcher v. St. Paul Pioneer Press, No. C7-95-2, 1995 WL 379140, at *4 (Minn. Ct. App. June 27, 1995) (stating the standard as "the failure of the employer to exercise ordinary care in supervising the employment relationship so as to prevent the foreseeable misconduct of an employee causing harm to others").

66. 331 N.W.2d 907, 911 (Minn. 1983).

supervision subsection.[67] Also, although the *Semrad* court noted that the Court of Appeals had addressed section 213(c), it did not state whether it would adopt this theory.[68]

Minnesota courts' analyses of section 213(c) have been confusing and misguided. Courts often conflate this section with the doctrine of respondeat superior rather than recognize it as an independent theory of direct liability similar to the doctrine contained in section 317.[69]

For example, the Minnesota Court of Appeals' opinion in *Semrad I* expressly equated section 213(c) with the doctrine of respondeat superior set forth in *Marston*.[70] After finding section 213(c) is premised on a special agency relationship and therefore is applicable only to employee acts within the scope of employment, the Court stated "we believe that section 213 liability has effectively become part of respondeat superior liability in Minnesota."[71]

The *Semrad I* court's reading of section 213 is incorrect for a number of reasons. First, the language of section 213 does not require that an agent's harmful acts occur within the scope of employment.[72] Contrary to the view of the *Semrad I* court, the harmful conduct of the employee is not limited to the employer's activities. Rather, the plain language of section 213(c) makes clear that the term "activities" defines the extent of the *employer*'s duty. Thus, even if the employer's "activities" establishes the scope of employment, the harmful conduct of the employee need not be in furtherance or part of these activities. All that is required is that the employer's failure to supervise properly its activities allowed the harmful conduct to occur.

In addition, although section 213(c) is contained in the Restatement (Second) of Agency, comment a to this section states that it is not premised on the scope of the principal-agent relationship:

> The rule stated in this Section is not based upon any rule of law of principal and agent or of master and servant. It

67. *See generally id.* In *Bruchas*, however, the court of appeals interpreted *Ponticas* as adopting all of section 213, and thus, recognizing the tort of negligent supervision in section 213(c). *See* 553 N.W.2d at 443.

68. 493 N.W.2d at 533-34.

69. *See, e.g., Leidig*, 850 F. Supp. at 808; *Semrad I*, 470 N.W.2d at 146.

70. *Semrad I*, 470 N.W.2d at 146 (citing Marston v. Minneapolis Clinic of Psychiatry & Neurology, Ltd, 329 N.W.2d 306, 310-11 (Minn. 1982)).

71. *Semrad I*, 470 N.W.2d at 146.

72. *See* RESTATEMENT (SECOND) OF AGENCY § 213(c)

> is a special application of the general rules stated in the Restatement of Torts and is not intended to exhaust the ways in which a master or other principal may be negligent in the conduct of his business.[73]

Moreover, and most importantly, section 213(c), by its own terms, sets forth a theory of *direct* employer liability resulting from the employer's negligence or recklessness. On this point the Minnesota Supreme Court's *Ponticas* decision is clear: negligent hiring claims premised on subsection (b) of section 213 are breaches of a *direct* duty running to the employer, and thus, are "distinguishable from liability imputed to an employer as a result of the doctrine of respondeat superior."[74]

Thus, if section 213(c) is a viable negligent supervision theory under Minnesota law, it is, like the section 317 theory, a direct liability doctrine. Section 213(c) and section 317 are, in fact, closely related. This relationship is made apparent in one of the comments to section 213, which cross-references section 317.[75] Also, like section 317, section 213(c) imposes no requirement that the harm result from acts either within or outside the scope of employment,[76] and does not rely on an employee's committing an independent

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73. *Id.* cmt. a.

74. 331 N.W.2d at 911 n.5 ("It should be noted that this [duty to exercise reasonable care in hiring] is a direct duty running from the employer to those members of the public whom the employer might reasonably anticipate would be placed in a position of risk of injury as a result of the hiring. Thus, it is distinguishable from liability imputed to an employer as a result of the doctrine of respondeat superior.").

75. *See* RESTATEMENT (SECOND) OF AGENCY § 213 cmt. g (1958).

76. *See id.* This is of course contrary to the view in *Semrad I*, 470 N.W.2d at 146, and other court opinions which erroneously equate section 213(c) liability with the doctrine of respondeat superior. As set forth above, the language of section 213(c) merely requires the harm occur through an employer's negligence or recklessness in "supervising its activities." *See id.* § 213(c). In addition, limiting liability to circumstances in which the employee acted within his or her scope of employment would limit severely the utility of this claim. If an employee tortiously harms another while acting within the scope of employment, the employer will be liable under the doctrine of respondeat superior whether or not it was negligent in supervising the employee. Thus, imposition of such a requirement would limit the utility of this doctrine to the circumstance where an employee acting within the scope of employment harms someone without committing an individual tort.

Likewise, section 213(c) imposes no "outside the scope of employment" requirement. Comment h to this section suggests that, in a given case, an employer may be liable for negligent acts "within the scope of employment." *See id.* § 213(c) cmt. h. This comment therefore indicates there is no "outside the scope of employment" requirement.

tort.[77] Furthermore, section 213(c) at a minimum requires a threat of physical injury.[78]

More likely, however, this section requires actual physical injury.[79] First, section 213(c) (unlike section 317) not only sets forth a duty to avoid the risk of harm, but also expressly requires *resulting harm.*[80] Second, Minnesota courts are likely to interpret "harm" to mean "physical injury."[81] Such an interpretation is consistent with the *Semrad*'s view of the term "harm" in section 317.[82] Also, all of the illustrations set forth in section 213's comments involve physical injuries.[83] Likewise, although the *Ponticas* court did not have to reach the issue of whether an actual physical impact is necessary, it used the terms "harm" and "injury" interchangeably.[84]

Thus, because this section is triggered only where there is resulting "harm," and because harm equals physical injury, Minnesota courts likely will find actual physical injury is a requisite element of this claim. Since section 213(c) requires resulting "harm" and section 317 does not, it is possible that Minnesota courts would require actual physical injury under section 213(c) and only a threat of such injury under section 317. However, no Minnesota

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

78. *See supra* note 56 and accompanying text (setting forth recent lower court and federal court decisions requiring physical injury, or at minimum, a threat of physical injury in the negligent supervision context).

79. *See, e.g.*, Piper Jaffray Cos. Inc. v. National Union Fire Ins. Co., 967 F. Supp. 1143, 1157 (D. Minn. 1997) (holding a section 213(c) claim is only sustainable if there is a threat of physical injury); Hayes/Gueltzow v. Northwest Airlines, Inc., Civ. No. 3-95-858, memo. op. at 7 (D. Minn. Nov. 21, 1997) (unpublished) (same); Bruchas v. Preventive Care, Inc., 553 N.W.2d 440, 443 (Minn. Ct. App. 1996) (same); *see also supra* note 56 and accompanying text.

80. *See* RESTATEMENT (SECOND) OF AGENCY § 213 (1958) ("A person conducting an activity through servants or other agents is subject to liability *for harm resulting* from his conduct if he is negligent or reckless . . . .").

81. Those courts that have recognized that section 213(c) claims require at least a threat of physical injury, already have recognized some relationship between the concepts of "harm" and "injury." *See supra* note 56.

82. *See* 493 N.W.2d 528, 534 (Minn. 1992). One potential difference is that section 317 uses the term "bodily harm" once, instead of just "harm." However, nothing in section 317 or section 213 suggests this distinction is decisive.

83. *See* RESTATEMENT (SECOND) OF AGENCY § 213 cmts. a–j (1958).

84. 331 N.W.2d 907, 911 (Minn. 1983) (quoting section 213 which uses the term harm and then consistently utilizing the term "injury"). In *Bruchas*, the court indicated that the *Ponticas* court equated harm with a threat of physical injury. 553 N.W.2d at 443. The *Bruchas* court is correct to equate harm and physical injury. Because section 213's language requires actual resulting harm, however, *Bruchas*'s suggestion that the mere threat of physical harm is sufficient conflicts with this provision and hence, probably is incorrect.

court has drawn such a fine distinction between these closely related theories. Even if the mere threat of physical harm is sufficient under section 213(c), Minnesota courts likely will limit recovery to circumstances in which the plaintiff is exposed to the "zone of danger" of physical injury, for the reasons set forth in the previous section.[85]

The only other possible difference between section 213(c) and section 317 is the scope of conduct they cover. As discussed previously, section 317 only governs employee conduct on an employer's premises or while using the employer's chattel.[86] Section 213 contains no such limitation, requiring only that the employer be negligent or reckless in the supervision of its activities being conducted through its employees.[87] Thus, at least in theory, section 213(c) may have a broader reach than section 317, encompassing employee conduct that occurs off the employer's premises and without the employer's chattels, as long as the conduct is so related to the employer's activities that the employer can be charged with the duty to supervise the employee. Whether the Minnesota Supreme Court will be willing to recognize section 213(c) as a separate and/or more expansive doctrine of negligent supervision remains to be seen.

In the employment discrimination context, however, which usually involves conduct between co-employees on the employer's premises, section 213(c) and section 317 are virtually indistinguishable doctrines. Only in the rare circumstance where an employee's discriminatory or harassing conduct physically injures the plaintiff or places the employee in imminent danger of physical injury will supplemental or alternative liability under section 213(c) be possible.

B. Negligent Retention and Hiring

Two additional negligence theories that are popular in em-

85. *See supra* notes 57-63 and accompanying text.

86. *See* RESTATEMENT (SECOND) OF TORTS § 317(a) (1965).

87. Note that subsection (d) of section 213 imposes liability for negligently or recklessly "permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control." RESTATEMENT (SECOND) OF AGENCY § 213(d) (1958). The significant overlap between the "premises and instrumentalities" language in this subsection and the "premises and chattels" limitations under section 317 suggests that subsection (c), at least to some extent, was intended to encompass different conduct.

ployment discrimination cases are negligent retention and negligent hiring. The doctrines of negligent retention and hiring are closely related in Minnesota law. Under both theories:

> Liability is predicted on the negligence of an employer in placing a person with known propensities, or propensities which should have been discovered by reasonable investigation, in an employment position in which, because of the circumstances of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others.[88]

The only difference between these torts is one of timing: "negligent hiring" is predicated on an employer's duty to exercise reasonable care in the initial hiring of an employee, while "negligent retention" involves the duty to exercise this care in retaining an employee once employed.[89]

Minnesota first recognized the doctrine of negligent retention in *Dean v. St. Paul Union Depot Co.*[90] The *Dean* court made clear that negligent retention is a theory of direct employer liability, thus avoiding the type of confusion that has surrounded the tort of negligent supervision.[91] In *Ponticas*, the Minnesota Supreme Court expressly recognized the doctrine of negligent hiring for the first time, finding no reason to refuse to extend the negligent retention doctrine to the hiring context.[92] In so doing, the court relied upon a subsection of section 213 of the Restatement (Second) of Agency.[93]

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88. *Ponticas*, 331 N.W.2d at 911. Courts often group these two claims together, articulating the same standard of care for both. *See, e.g.*, L.R.M. v. Engstrom, No. C9-95-261, 1995 WL 321346, at *3 (Minn. Ct. App. May 30, 1995) ("Liability attaches when the facts establish that an employer 'knew or should have known that the employee was violent or aggressive and might engage in injurious conduct.'") (quoting Yunker v. Honeywell, Inc., 496 N.W.2d 419, 422 (Minn. Ct. App. 1993)).

89. *See, e.g.*, *Yunker*, 496 N.W.2d at 423 ("The difference between negligent hiring and negligent retention focuses on when the employer was on notice that an employee posed a threat and failed to take steps to insure the safety of third parties.").

90. 41 Minn. 360, 363, 43 N.W. 54, 55 (1889) (reasoning an employer "has no more right . . . to knowingly and advisedly employ or allow to be employed . . . a dangerous and vicious man, than it would have to keep and harbor a dangerous and savage dog . . .").

91. *See id.* As set forth above, the *Ponticas* court clearly indicated that negligent hiring is a theory of direct liability distinguishable from the doctrine of respondeat superior. 331 N.W.2d at 911 n.5.

92. 331 N.W.2d at 911.

93. *Id.* *Ponticas* relied on section 213(b), which is related to section 213(c),

The *Ponticas* court held that the employer's duty under the negligent retention/hiring doctrine is owed to "the public."[94] The court made clear, however, that this doctrine originally arose out of fellow-servant law, "which imposed a duty on employers to select employees who would not endanger fellow employees by their presence on the job."[95] Thus, the torts of negligent retention and hiring are theories employees may utilize for establishing employer liability for harm caused by other employees.[96]

It is worth noting however, that these torts do not impose on an employer a duty to discover and avoid any and all risks a employee poses to co-employees or third parties.[97] Rather, in the discrimination context, an employer only can be held liable if it reasonably should have foreseen, or "knew or should have known," that an employee would discriminate against or harass another employee.[98] Under this standard, if the employer does not have ac-

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but sets forth a distinct duty. Section 213(b) provides as follows:

> A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:
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> * * *
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> (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others.

RESTATEMENT (SECOND) OF AGENCY § 213(b) (1958).

It is worth noting that language of this section suggests it was intended to apply to circumstances in which the type of employment poses a risk of harm to others. Minnesota courts have not so limited the torts of negligent retention and hiring. Instead, Minnesota has adopted a "sliding scale" approach, in which the duty to investigate is less rigorous where the employment is less dangerous. *See Ponticas*, 331 N.W.2d at 912-13.; *see also infra* notes 97-102.

94. *Ponticas*, 331 N.W.2d at 911.

95. *Id.* at 910.

96. *See id.*; *see also* Bruchas v. Preventive Care, Inc., 553 N.W.2d 440, 442 (Minn. Ct. App. 1996); RESTATEMENT (SECOND) OF AGENCY § 213 cmt. f (1958) ("A master is negligent if he fails to use care to provide such regulations as are reasonably necessary to prevent under risk of harm to third persons *or to other servants* from the conduct of those working under him."). Also, comment b to section 213 makes clear that this duty, as with the duty under 213(c), is likewise owed to co-employees:

> The rule stated in this section applies to the liability of the master to his servants, the master being subject to liability to them for his own negligence, even though the act immediately causing the harm is that of a fellow servant for whose negligence to them the master is not liable.

Id. cmt. b.

97. *See, e.g.*, M.L. v. Magnuson, 531 N.W.2d 849, 857-58 (Minn. Ct. App. 1995) (rejecting the suggestion that a church must undertake an extraordinary investigation or take extreme measures to ensure sexual abuse by its pastors does not occur).

98. *See, e.g.*, L.R.M. v. Engstrom, No. C9-95-261, 1995 WL 321346, at *3

tual knowledge of a history of discriminatory conduct by an employee, the employer is only liable if it failed to conduct an investigation (or maintain oversight) which is reasonable under the circumstances.[99] What constitutes a "reasonable investigation" is obviously case specific, but the *Ponticas* court's reasoning suggests the duty to investigate for past discriminatory conduct in hiring someone will not require a rigorous search in most circumstances.[100]

(Minn. Ct. App. May 30, 1995) ("Liability attaches when the facts establish that an employer 'knew or should have known that the employee was violent or aggressive and might engage in injurious conduct.'") (quoting Yunker v. Honeywell, Inc., 496 N.W.2d 419, 422 (Minn. Ct. App. 1993)); Kresko v. Rulli, 432 N.W.2d 764, 769-70 (Minn. Ct. App. 1988) (affirming the dismissal of a negligent retention claim because there were no complaints of sexual harassment prior to the lawsuit, and thus, the employer could not foresee the problem). For a brief discussion of precautions employers can take to minimize their exposure to liability for negligent supervision, retention, and hiring, *see* Ellen G. Sampson & Daniel Oberdorfer, *Negligent Hiring, Retention, and Supervision: An Update*, HENNEPIN LAWYER, March-April 1994, at 4, 6.

99. *See, e.g.*, *L.R.M.*, 1995 WL 321346, at *3 ("An employer cannot breach this duty if a reasonable investigation would not have revealed the employee's inherent propensity for dangerous conduct.").

100. *See* 331 N.W.2d at 912-913. The genesis of the doctrines of negligent retention and hiring was in the context of work that, by its nature, involved the risk of harm to others. *See, e.g.*, RESTATEMENT (SECOND) OF AGENCY § 213(b) (1958). The *Ponticas* court and lower Minnesota courts recognize that these doctrines now extend to types of work that do not involve inherent risks of harm, but the scope of the employer's duty to investigate becomes narrower as the risk of harm decreases. *See* 331 N.W.2d at 912-13; *Bruchas*, 553 N.W.2d at 442. The *Ponticas* court described this "sliding scale" as follows:

> [T]he issue is whether the employer did make a reasonable investigation. The scope of the investigation is directly related to the severity of risk third parties are subjected to by an incompetent employee. Although only slight care might suffice in the hiring of a yardman, a worker on a production line, or other types of employment where the employee would not constitute a high risk of injury to third persons, "a very different series of steps are justified if an employee is to be sent, after hours, to work for protracted periods in the apartment of a young woman tenant. . . ."

331 N.W.2d at 912-13 (footnotes and citation omitted); *see also Yunker*, 496 N.W.2d at 422 (noting that numbers of jurisdictions have defined the scope of the employer's duty of care in hiring as dependent on the types of duties associated with the job and whether those duties impose risks).

There are few work environments in which the risk of discriminatory conduct is inherently greater than others. Thus, in most circumstances, an employer need not undertake thorough and searching investigations of its employees for past discriminatory conduct. "Slight" or reasonable care will suffice. *Cf. M.L.*, 531 N.W.2d at 857 (suggesting that the inquiry is whether the investigatory steps in determining whether to hire are "reasonably seen as part of the hiring process" for that particular type of job or organization).

Likewise, once an employee is hired, an employer does not have a duty to continue investigating the employee; it must simply remain reasonably aware of its employees' conduct.[101] The employer must take remedial action if it becomes aware that the employee poses a threat to others.[102] Provided the employer has no other reason to believe an employee is a risk for discriminating against or harassing co-employees, the employer acts with sufficient care if it follows ordinary hiring procedures (such as checking references, etc.) and maintains reasonable oversight of its activities.

Although premised on different duties, the parameters of the negligent retention and hiring doctrines are otherwise similar to those framing the section 317 and section 213(c) negligent supervision theories. For example, negligent retention and hiring claims apply to employee acts committed inside or outside the scope of employment.[103] Also, although the employee conduct giving rise to

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101. *See Yunker*, 496 N.W.2d at 423 ("Negligent retention . . . occurs when . . . the employer becomes aware or should have become aware of problems with an employee that indicated his unfitness, and the employer fails to take further action such as investigating, discharge, or reassignment."); Orth v. College of Saint Catherine, No. C9-94-2260, 1995 WL 333875, at *5 (Minn. Ct. App. June 6, 1995) (same).

102. *See* Benson v. Northwest Airlines, Inc., 561 N.W.2d 530, 540 (Minn. Ct. App. 1997) ("A separate claim for negligent retention may arise when an employer becomes aware or should have become aware that an employee poses a threat and fails to take remedial measures to ensure the safety of others."); *see also* Thompson v. Campbell, 845 F. Supp. 665, 676-77 (D. Minn. 1994) (dismissing a negligent retention claim because the employer promptly took corrective actions once it knew of the alleged harassment).

103. *See, e.g., Bruchas*, 553 N.W.2d at 442 ("Negligent retention claims do not involve a scope of employment limitation . . . ."); *M.L.*, 531 N.W.2d at 857 n.4 (rejecting any requirement that the employee misconduct occur outside the scope of employment). Although a few lower courts have indicated these doctrines apply only to acts outside the scope of employment, a majority either reject this restriction or simply suggest these acts *may be* outside the scope of employment. *Compare* Leidig v. Honeywell, Inc., 850 F. Supp. 796, 807 (D. Minn. 1994) (dismissing a negligent retention claim because underlying acts occurred within the scope of employment); *and* Cook v. Greyhound Lines, Inc., 847 F. Supp. 725, 732-33 (D. Minn. 1994) (holding negligent retention requires that an employee's conduct occur outside the scope of employment), *with* D.W. v. Radisson Plaza Hotel Rochester, 958 F. Supp. 1358, 1379 (D. Minn. 1997) (stating the tort is premised on exposing third parties to danger, not whether acts are inside or outside the scope of employment); *Bruchas*, 553 N.W.2d at 442 (simply noting employee acts underlying such claims almost invariably occur outside the scope of employment); *M.L.*, 531 N.W.2d at 857 n.4 (rejecting the suggestion in *Cook* that the employee misconduct underlying negligent retention and hiring claims must be outside the scope of employment); Huffman v. Pepsi-Cola Bottling Co., No. C7-94-2404, 1995 WL 434467, at *3 (Minn. Ct. App. July 25, 1995) (stating the wrongful conduct is "usually committed by an employee outside the scope of employment"); Oslin v.

employer liability under these theories will often rise to the level of an independent tort, these doctrines do not depend on the presence of an underlying, employee tort.[104]

Finally, and most importantly, these doctrines are almost certainly applicable only in circumstances in which the victim is physically injured or exposed to an imminent threat of physical injury. Numerous, recent lower court and federal court opinions have imposed such a requirement.[105] The *Ponticas* court did not need to

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State, 543 N.W.2d 408, 415 (Minn. Ct. App. 1996) (noting covered acts almost always occur outside the scope of employment); *and Orth*, 1995 WL 333875, at *9 n.2 (rejecting *Cook's* requirement that the underlying act occur outside the scope of employment). For the reasons set forth in the previous section, it is doubtful that Minnesota would preclude application of these torts in the rare circumstance that such harmful acts occurred inside the scope of employment. *See supra* note 76; *see also* Lange v. National Biscuit Co., 297 Minn. 399, 405, 211 N.W.2d 783, 786 (1944) (stating the plaintiff in that case "may recover damages under either the theory of respondeat superior or negligence," when an employee's assault of a third party was in the scope of employment); RESTATEMENT (SECOND) OF AGENCY § 213, cmt. h (1958) (suggesting this section applies to acts within the scope of employment as well by indicating that in such a case, the employer may be liable both for negligence and under agency principles).

104. The language in a number of decisions suggests that the employee must have committed an intentional tort for there to be liability for negligent retention or hiring. *See, e.g., D.W.*, 958 F. Supp. at 1378; *Bruchas*, 553 N.W.2d at 442; *Oslin*, 543 N.W.2d at 415 (indicating negligent retention imposes liability for an employee's intentional tort); *Huffman*, 1995 WL 434467, at *3 (stating negligent retention arises in the context of an employee committing an intentional tort). These courts appear to use "intentional torts" descriptively—for example, to describe employee conduct that typically rises to the level of an assault or battery—and do not hold expressly that a plaintiff must establish the presence of an independently actionable tort to support a claim for negligent retention or hiring. In addition, nothing in *Ponticas*, section 213 or its comments, or other Minnesota Supreme Court cases imposes such a requirement. On the contrary, their language suggests otherwise, indicating employee negligence, incompetence, carelessness, lack of skill or other conduct or qualities that creates a risk of harm to others is sufficient. *See, e.g., Ponticas*, 331 N.W.2d at 913 (using the term "incompetent employee"); RESTATEMENT (SECOND) OF AGENCY § 213 (1958); *id.* cmts. d & h. These negligence doctrines impose a duty of care to prevent harm by employees with known or foreseeable propensities for endangering others, not just a duty of care to prevent foreseeable "intentional torts."

105. *See, e.g.*, Thompson v. Olsten Kimberly Qualitycare, Inc., 980 F. Supp. 1035, 1040 (D. Minn. 1997) ("As with the tort of negligent supervision, an actionable claim for negligent retention requires the existence of a threat, or reasonable apprehension of actual physical injury."); *Leidig*, 850 F. Supp. at 807 (stating that negligent retention claim can fail for failing to show threat of physical injury); TeBockhorst v. Bank United of Texas, No. C6-97-206, 1997 WL 471320, at *7 (Minn. Ct. App.), *review denied*, (Minn. 1997) ("To establish a claim for negligent hiring, retention, or supervision, a plaintiff must present some evidence of a threat of or actual physical injury . . . ."); Olson v. City of Lakeville, No. C3-97-390, 1997 WL 561254, at *1 (Minn. Ct. App. 1997) ("In Minnesota, an employer may be liable

reach this issue because such an injury clearly was present in that case.[106] However, the Court framed the duty as one of reasonable care in selecting or retaining employees who would not "endanger" or pose "a threat of injury" to others.[107] Because the duty itself is imposed to compel employers to prevent dangerous employees from causing physical harm to third parties or co-workers, the duty is breached only when the employee indeed threatens someone with physical harm. Thus, at minimum, some physical impact or threat of physical injury is required.

Whether these doctrines require an actual physical impact, or merely an imminent threat of such an impact remains an open question. A majority of lower courts suggest a threat or reasonable apprehension of physical injury is sufficient.[108] However, the *Ponticas* court's reliance on section 213—which, as set forth above, plainly requires resulting "harm"—suggests some physical injury or impact is necessary.[109] As with the negligent supervision theories, if a threat of physical injury is sufficient to sustain negligent retention and hiring claims, Minnesota courts likely will impose a "zone of danger" requirement."[110]

In any event, because of the physical injury or threat of physical injury requirement, negligent retention and hiring causes of action—like negligent supervision claims—will have limited application in the discrimination context.[111] Presuming all other elements can be established, only where an employee's discriminatory or harassing conduct, at a minimum, threatens physical harm to another employee, will negligent retention and hiring claims be possible. Again, the most likely scenario in which these claims will be

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for negligent retention when its employee's acts cause physical injury or a threat of physical injury."); *Benson*, 561 N.W.2d at 540 (affirming dismissal of negligent hiring and retention claims for lack of evidence of physical injury or threat of physical injury); *Bruchas*, 553 N.W.2d at 443 (requiring some evidence of physical injury or threat of physical injury). In other cases, although the courts have not stated expressly that a physical impact or threat of physical injury is required, they strongly suggest it in how they articulate the standard of care. *See, e.g., Huffman*, 1995 WL 434467, at *3 (stating negligent retention exists when "the employer knew or should have known that the employee was violent or aggressive and might engage in injurious conduct.") (quoting *Yunker*, 496 N.W.2d at 422).

106. In *Ponticas*, the plaintiff brought a negligent hiring claim against defendant, her landlord, after she had been sexually assaulted. *See* 331 N.W.2d at 908.

107. *See id.* at 910-11.

108. *See supra* note 105 (providing cases and descriptive parentheticals).

109. *See* 331 N.W.2d at 911; *see also supra* notes 79-85 and accompanying text.

110. *See supra* note 85.

111. *See supra* notes 58-60 and 79-87 and accompanying text.

viable in the discrimination context is when some type of harassment rises to the level of an assault or battery. Where an employee "merely" violates another's right to be free from discrimination in employment, negligent retention and hiring cannot be brought as supplemental or alternative claims.

C. *Negligent Infliction of Emotional Distress*

A final negligence theory that appears often in employment discrimination cases is negligent infliction of emotional distress. Unlike the previous three doctrines, each of which is predicated on a particular standard of care, negligent infliction of emotional distress—as its name suggests—is premised on the result (emotional distress) of the negligent conduct. Thus, in theory, liability under this doctrine can result from any breach of a recognized duty to act with reasonable care.[112] Like the previous three doctrines, however, negligent infliction of emotional distress claims under Minnesota law are of limited utility in the employment discrimination context.

To establish a claim for negligent infliction of emotional distress against an employer, the employee must demonstrate the employer acted negligently (breached some duty of care), causing the employee to be within a zone of danger of physical impact, in which the employee reasonably feared for his or her own safety, and thereby suffered severe emotional distress with attendant physical manifestations.[113] Although plaintiffs must establish all four elements, the "zone of danger" requirement dominates the analysis of most courts. This is not only because overcoming the zone of danger requirement is often a plaintiff's toughest challenge, but also because this requirement distinguishes negligent infliction of emotional distress from other negligence claims. The Minnesota Supreme Court has made clear that emotional distress damages are available under *any* negligence theory, provided the plaintiff actually suffers physical injury.[114] However, where there is no actual

112. The most common types of breaches of duty in this context are the three discussed above. Although these doctrines may require some physical impact, the duties of care they impose are to prevent the unreasonable exposure to a risk of physical injury or to dangerous individuals. *See supra* notes 40, 63-65, 88 and accompanying text. If these duties are breached and there is resultant emotional distress, the breach can support a claim for negligent infliction of emotional distress even if there is no actual physical impact. *See supra* notes 56-57 and accompanying text.

113. *See* K.A.C. v. Benson, 527 N.W.2d 553, 557 (Minn. 1995).

114. *See, e.g.*, Lickteig v. Alderson, Ondov, Leonard & Sween, 556 N.W.2d 557,

physical injury, the only negligence theory providing emotional distress damages is negligent infliction of emotional distress.[115] Thus, in essence, the central function of the negligent infliction of emotional distress doctrine under Minnesota law is to provide a theory of recovery for negligently caused emotional distress where there is no actual, resulting physical injury or impact.

Both the "zone of danger" and "attendant physical manifestations" prongs derive from the courts' desire to impose liability for negligently caused emotional distress (without actual physical injury), tempered by their concern that without objective limits, application of such a theory could become unreasonable, arbitrary, and impossible to administer.[116] Originally, courts did not employ a zone of danger "exception"; they required actual physical impact before one could recover damages for emotional distress arising out of negligent conduct. In *Purcell v. St. Paul City Railway Co.*,[117] the Minnesota Supreme Court first recognized the zone of danger exception to the physical impact requirement for danger so imminent it caused a reasonable fear of immediate death or great bodily harm. The court recently reiterated the parameters of the zone of danger requirement in *K.A.C.*:

> This court has limited the zone of danger analysis to en-

560 (Minn. 1996); Langeland v. Farmers State Bank of Trimont, 319 N.W.2d 26, 31 (Minn. 1982).

115. The Minnesota Supreme Court's language in *Leaon v. County of Washington* suggests negligent infliction of emotional distress is the only alternative in this circumstance: "Where defendant's negligence causes emotional distress to plaintiff without any accompanying physical impact, plaintiff may still recover for emotional disorders if plaintiff was within the scope of danger of the negligent act and if plaintiff exhibits physical manifestations of the emotional distress." 397 N.W.2d 867, 875 (Minn. 1986).

116. *See, e.g.*, *K.A.C.*, 527 N.W.2d at 559 ("Concerns about unintended and unreasonable results prompted this court to limit negligent infliction of emotional distress claims to persons who experienced personal physical danger as a result of defendant's negligence. We determined the 'zone-of-danger rule' would lead to reasonable and consistent results because courts and juries can objectively determine whether plaintiffs were within the zone of danger."); Leaon v. County of Washington, 397 N.W.2d 867, 875 (Minn. 1986) (stating the physical manifestations test is designed "to assure the genuineness of the alleged emotional distress); Hubbard v. United Press Int'l, Inc., 330 N.W.2d 428, 440 n.9 (Minn. 1983) (stating objective evidence of physical manifestations of emotional distress protects against the possibility of "trumped-up claims"); Stadler v. Cross, 295 N.W.2d 552, 554 (Minn. 1980) (stating, in upholding the zone of danger requirement, that the "limits . . . must be as workable, reasonable, logical, and just as possible" and "[i]f the limits cannot be consistently and meaningfully applied by courts and juries, then the imposition of liability will become arbitrary and capricious.").

117. 48 Minn. 134, 50 N.W. 1034, 1034 (1892).

> compass plaintiffs who have been in some actual personal physical danger caused by defendant's negligence.
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> Thus, cases permitting recovery for negligent infliction of emotional distress are characterized by a reasonable anxiety arising in the plaintiff, with attendant physical manifestation, from being in a situation where it was abundantly clear that plaintiff was in grave personal peril for some specifically defined period of time. Fortune smiled and the imminent calamity did not occur.
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> This court has long recognized that a person within the zone of danger of physical impact who reasonably fears for his or her own safety during the time of exposure, and who consequently suffers severe emotional distress with resultant physical injury, may recover emotional distress damages whether or not physical impact results. However, a remote possibility of personal peril is insufficient to place plaintiff within a zone of danger for purposes of a claim of negligent infliction of emotional distress.[118]

The *K.A.C.* court therefore continued a long tradition refusing to soften the zone of danger rule.[119]

The zone of danger requirement, although slightly more lenient than the actual physical injury requirement that may be applicable under the other three negligence theories, greatly limits the circumstances in which discriminatory conduct can form the basis of a claim for negligent infliction of emotional distress. Only the most severe forms of harassment will place a plaintiff within the zone of danger of physical impact, during which time the person will reasonably fear for his or her own safety.[120] Thus, if Minnesota continues to adhere strictly to the zone of danger rule, negligent infliction of emotional distress rarely will be a viable supplementary or alternative claim in the employment discrimination context.

There is, however, a line of Minnesota Court of Appeals decisions (and some federal cases) that recognize an exception to the zone of danger requirement which could have a significant impact

118. 527 N.W.2d at 555, 559.

119. *See id.* at 557-59.

120. The "physical manifestations" prong is also rigorous, but its limiting effect may be far less pervasive because, in theory, various types of discriminatory conduct can cause emotional distress with physical symptoms.

on whether negligent infliction of emotional distress can play a substantial role in employment discrimination litigation. In *Bohdan v. Alltool Manufacturing Co.*,[121] a panel of the court of appeals recognized for the first time an exception to the zone of danger requirement, holding "a plaintiff may recover damages for mental anguish or suffering for a direct invasion of his rights, such as defamation, malicious prosecution, or other willful, wanton, or malicious conduct."[122] In articulating this principle, the *Bohdan* court relied on the Minnesota Supreme Court's opinion in *State Farm Mutual Automobile Insurance Co. v. Village of Isle*, in which the high court stated as follows:

> It is well established that damages for mental anguish or suffering cannot be sustained where there has been no accompanying physical injury[,]. . . unless there has been some conduct on the part of defendant constituting a direct invasion of the plaintiff's rights such as that constituting slander, libel, malicious prosecution, seduction, or other like willful, wanton, or malicious misconduct.[123]

Numerous court of appeals panels and federal courts have followed *Bohdan*, stating that a plaintiff need not be in the zone of danger if he or she can show some type of malicious or willful violation of rights.[124] At least one federal court — in an older published opinion — refused to follow *Bohdan*, concluding that the Minnesota Supreme Court is not likely to allow such an exception to the zone of danger rule.[125]

In theory, the principle articulated in *Bohdan* and its progeny opens the door for liability for negligent infliction of emotional distress in any discrimination case in which plaintiff can demonstrate that the defendant (or defendant's employees) willfully, wantonly, or maliciously invaded his or her right to be free from discrimina-

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121. 411 N.W.2d 902 (Minn. Ct. App. 1987)

122. *Id.* at 907.

123. 265 Minn. 360, 367-68, 122 N.W.2d 36, 41 (1963) (citations omitted).

124. *See, e.g.*, Bergstrom-Ek v. Best Oil Co., Civ. No. 5-96-167, memo. op. at 45 (D. Minn. June 20, 1997) (unpublished); Rogers v. Regency Plymouth Ventures Ltd. Partnership, Civ. No. 3-96-445, memo. op. at 25 (D. Minn. April 14, 1997) (unpublished); TeBockhorst v. Bank United of Texas, No. C6-97-206, 1997 WL 471320, at *6 (Minn. Ct. App.), *review denied*, (Minn. 1997); Oslin v. State, 543 N.W.2d 408, 417 (Minn. Ct. App. 1996); Orth v. College of Saint Catherine, No. C9-94-2260, 1995 WL 333875, at *4 (Minn. Ct. App. June 6, 1995).

125. Meyer v. Tenvoorde Motor Co., 714 F. Supp. 991, 995 (D. Minn. 1989) (refusing to recognize this exception, finding it is directly at odds with Minnesota Supreme Court precedent).

tion, whether or not the plaintiff was ever in a zone of danger.[126] Indeed, it is now standard pleading practice in Minnesota for plaintiffs in discrimination cases to include in their complaint a claim for negligent infliction of emotional distress premised on willful, wanton, or malicious discriminatory conduct or other factually related violations of rights, such as defamation.

However, despite the popularity of this alleged exception, the Minnesota Supreme Court is not likely to adopt it. This exception is based on a misinterpretation of *State Farm*, is contrary to the Supreme Court's reasoning in a more recent opinion, and defies stated policy and common sense.

Bohdan's reliance on *State Farm* is misplaced. In *State Farm*, the court merely determined that the plaintiff was not entitled to emotional distress damages because she had no accompanying physical injury.[127] In so holding, the court noted that emotional distress or mental anguish damages are recoverable without physical injury where there have been willful violations of a plaintiff's rights. The court did not hold that such willful violations of rights somehow alters the substantive requirements for imposing *liability* under the theory of negligent infliction of emotional distress.[128] In fact, nowhere in the *State Farm* opinion does the court discuss negligent infliction of emotional distress or the prerequisites for imposing liability under such a theory.[129]

The Supreme Court further clarified the damages/liability distinction in *Lickteig v. Alderson, Ondov, Leonard & Sween*.[130] In *Lickteig*, the court pointed out that there are four circumstances in which emotional distress may be an element of *damages*: (1) where a plaintiff suffers a physical injury as a result of another's negligent conduct and has accompanying mental anguish; (2) where the plaintiff establishes the elements of negligent infliction of emotional distress, including being within the zone of danger; (3) where, as stated in *State Farm*, there has been direct invasion of plaintiff's rights through willful, wanton, or malicious conduct ("willful conduct"); and (4) where the plaintiff establishes a claim for intentional infliction of emotional distress.[131] Thereafter, the

126. 411 N.W.2d 902, 907 (Minn. Ct. App. 1987).
127. 265 Minn. 360, 367-69, 122 N.W.2d 36, 41-42 (1963).
128. *See id.*
129. *See generally id.*
130. 556 N.W.2d 557, 560 (Minn. 1996).
131. *See id.* In discussing negligent infliction of emotional distress, the court stated that "a plaintiff may recover . . . when physical symptoms arise after and be-

court made clear—in contrasting the willful conduct category with the tort of intentional infliction of emotional distress—that the willful conduct category cannot support a finding of *liability*:

> This independent tort [intentional infliction of emotional distress] differs from the "willful conduct" category above in that it can stand alone as a separate action, whereas in the "willful conduct" category, emotional distress *is only an element of damages* arising from an intentional tort that constitutes a direct violation of the plaintiff's rights, such as defamation.[132]

In an accompanying footnote, the court further clarified that the "willful conduct" category merely describes a type or theory of *damages*:

> This latter category [willful conduct] is often referred to as "parasitic damages" in that the emotional distress damages are "insufficient in themselves to make the slander actionable, but once the cause of action is made out without them, they be tacked on as 'parasitic' to it."[133]

Thus, the willful conduct doctrine merely allows the award of emotional distress *damages* where a plaintiff has otherwise established liability for a direct violation of his or her rights. For example, once a plaintiff establishes that the defendant is liable for defamation, the plaintiff can recover emotional distress damages for the mental anguish caused by defendant's willful conduct.[134] This doctrine therefore has nothing to do with the requirements for establishing *liability* for negligent infliction of emotional distress.

Finally, this "exception," if applied in the employment discrimination context or elsewhere, would be contrary to logic. As an initial matter, carving out such a gaping hole in the zone of danger requirement directly contradicts the Minnesota Supreme Court's tradition of narrowly limiting the tort of negligent infliction of

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cause of emotional distress, if the plaintiff was actually exposed to physical harm as a result of the negligence of another (the 'zone of danger' rule)." *Id.* (citations omitted). The court gave no hint that it would recognize an exception to the zone of danger requirement.

132. *Id.* (emphasis added).

133. *Id.* at 560 n.4 (quoting Richie v. Paramount Pictures Corp., 544 N.W.2d 21, 27 (Minn. 1996) (quoting W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 112, at 794-95 (5th ed. 1984))).

134. *See, e.g., Richie*, 544 N.W.2d at 27 ("It is generally the case that once a defamation claim is established, damages for wounded feelings and humiliation are recoverable as 'parasitic' damages.").

emotional distress.[135] Moreover, if a plaintiff can establish that an employer directly violated his or her rights, he or she is entitled to emotional distress damages for the common-law or statutory claim associated with that violation, unless such damages are otherwise prohibited. In other words, there is a much more direct route to recovery.[136] Where the direct route is unavailable—for example, where only the employee acts intentionally—no court has offered a viable explanation for why a "willful conduct" doctrine should turn on its head a well-established requirement for imposing liability on an employer for *negligently* causing emotional distress.[137]

In conclusion, contrary to the views of a number of lower state and federal courts, the Minnesota Supreme Court is unlikely to recognize the "willful conduct" exception to the "zone of danger" requirement. Employment discrimination plaintiffs will have to establish they were placed negligently in the "zone of danger" before they can recover under this theory. Negligent infliction of emotional distress therefore rarely will be a viable supplementary or alternative claim in the employment discrimination context.

III. THE PREEMPTION DEFENSES

By outlining the key elements plaintiffs must establish in bringing the various respondeat superior and negligence theories, the previous section has also illuminated the principal "defenses" that greatly limit the utility of these theories in discrimination cases.

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135. *See, e.g., K.A.C.*, 527 N.W.2d at 557-59; *see supra* notes 116-120 and accompanying text.

136. If a plaintiff seeks to hold an employer liable for the direct violation of his or her rights by another employee, the plaintiff still must establish the employer breached some duty of care to state a claim for negligence. As is clear from the analysis in the previous sections of this Article, Minnesota courts probably will not find the employer breached of a duty of care unless the plaintiff demonstrates, at minimum, the employee's conduct exposed plaintiff to a threat of physical harm. Thus, the "willful conduct" of an employee cannot, in and of itself, suffice to establish a compensable breach of care by the employer.

137. The *Lickteig* court suggests as much in holding that a negligent breach of an attorney's duty to the client cannot support emotional distress damages. *See* Lickteig v. Anderson, Ondov, Leonard & Sween, 556 N.W.2d 557, 561-62 (Minn. 1996). Where a defendant's actions are merely negligent, rather than willful, it will not be liable for emotional distress damages for violations of rights or duties. *See id.* at 562. Also, as the court made clear in *Stadler v. Cross*, 295 N.W.2d 552, 555 (Minn. 1980), its steadfast opposition to opening the floodgates by loosening the zone of danger requirement: "No arguments have been presented that persuade us that the problems we see in limiting liability once it is extended beyond the zone of danger of physical impact can be justly overcome." *Id.*

These include the "independent tort" and "scope of employment" defenses that virtually preclude respondeat superior from being a viable theory of liability in the employment discrimination context. In addition, the "physical injury or threatened physical injury" defense to negligent supervision, retention, and hiring claims, and the related "zone of danger" defense to negligent infliction of emotional distress claims, greatly narrow the range of viable negligence claims in discrimination cases.

Defendants commonly raise two additional substantive defenses to negligence claims in discrimination cases. Both are premised on the preemptive scope of remedial Minnesota statutes: the Minnesota Human Rights Act ("MHRA") and the Workers' Compensation Act ("WCA"). Although these preemption defenses have generated an enormous amount of litigation and controversy, their preclusive effect should have little overall impact on these four types of negligence claims. This is partially due to the significant substantive limitations of these negligence theories. Any additional impact of MHRA and WCA preemption on the viability of these claims in the employment discrimination context may seem comparably insignificant. It is also due, however, to the fact that most of the negligence claims that would otherwise survive in the discrimination cases will fall outside of the preclusive scope of the MHRA and WCA. Thus, these defenses are not worth the mountains of pages of briefs defendants continue to devote to them.

A. MHRA Preemption

The MHRA prohibits numerous forms of discrimination and retaliation for reporting discriminatory conduct. The MHRA declares that it is an unlawful employment practice:

> (2) For an employer, because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, membership or activity in a local commission, disability, or age,
>
> (a) to refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or
>
> (b) to discharge an employee; or
>
> (c) to discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading,

conditions, facilities, or privileges of employment.[138]

The MHRA also prohibits retaliation:

It is an unfair discriminatory practice for any employer . . . to intentionally engage in any reprisal against any person because that person:

(1) Opposed a practice forbidden under this chapter or has filed a charge, testified, assisted, or participated in any manner in an investigation proceeding or hearing under this chapter[.][139]

(2) Associated with a person or group of persons who are disabled or who are of different race, color, creed, religion, sexual orientation or national origin.

In addition to providing these various protections to employees, the MHRA contains the following exclusivity provision:

The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this chapter shall be deemed to repeal any of the provisions of the civil rights law or of any other law of this state relating to discrimination because of race, creed, color, religion, sex, age, disability, marital status, status with regard to public assistance, national origin, sexual orientation, or familial status; but, as to acts declared unfair by section 363.03, the procedure herein shall, while pending, be exclusive.[140]

The MHRA therefore "preempts" state-law claims addressing "acts declared unfair" by the MHRA.[141]

The Minnesota Supreme Court has discussed the preclusive effect of the MHRA three times. In *Wirig v. Kinney Shoe Corp.*, the court first reached this issue, addressing whether an employee can maintain against her employer both a sexual harassment claim under the MHRA and a common-law battery claim.[142] The court noted at the outset that it would follow the presumption that statu-

138. MINN. STAT. § 363.03, subd. 1(2) (1996).

139. *Id.*, subd. 7.

140. MINN. STAT. § 363.11 (1996).

141. Even if no claim is brought under the MHRA, other state-law claims falling within its preemptive scope are barred. *See, e.g.*, Oberstar v. County of Saint Louis, Civ. No. 5-96-153, memo. op. at 8 n.2 (D. Minn. Oct. 3, 1997) (unpublished).

142. 461 N.W.2d 374, 377-79 (Minn. 1990).

tory law is consistent with the common law.[143] It then proceeded to discuss the remedial purposes of the MHRA. In holding that the MHRA does not preempt a common-law battery claim, the court stated as follows:

> Elimination of employment discrimination and establishment of equal employment opportunities and conditions for both sexes is not effectuated by declaring common law battery preempted by an MHRA sexual harassment action. Battery does not address discrimination. It does not propose to redress injuries occasioned by society's discriminatory tendencies. It did not develop to change society's biases or prejudices. Although under certain circumstances sexually motivated battery might fit the definition of sexual harassment, the purpose of the MHRA does not suggest that sexually motivated battery should be impliedly abrogated as an act declared unfair by the statute. The legislature did not design the MHRA to redress intentional offensive physical contact already addressed by a tort battery action. Therefore, we hold that a sexual harassment action brought pursuant to the MHRA does not bar a parallel action for common law battery.[144]

Thereafter, the court made clear that although the plaintiff could maintain such parallel actions, she could not seek double recovery for the same harm.[145]

In *Williams v. St. Paul Ramsey Medical Center, Inc.*,[146] the court addressed the preclusive effect of the MHRA on a factually parallel claim brought pursuant to the Minnesota "Whistleblower Act." The court concluded that a complaint of retaliation for reporting discriminatory conduct under the Whistleblower Act is preempted by the MHRA.[147] In so holding, the court focused on the intent of the Minnesota legislature in enacting the Whistleblower Act:

> While the Whistleblower Act was enacted in 1987, long after the [MHRA], we cannot identify any clear legislative

143. *See id.* at 377.

144. *Id.* at 378-79 (footnote omitted).

145. *Id.* at 379. The court further held, in denying double recovery, that plaintiffs are not free to pick and choose from the various types of damages available under the different counts. *See id.* For example, the court held that the plaintiff could not recover two punitive damages awards unless she could show, by clear and convincing evidence, that the misconduct on which the awards are based was different under each count. *See id.*

146. 551 N.W.2d 483, 484-86 (Minn. 1996).

147. *See id.* at 485-86.

> intention that such a general remedial provision should, as the court of appeals held, "take precedence" over the exclusivity of remedies provision of the [MHRA]. Certainly, the legislature could not have contemplated that employees seeking redress for allegedly discriminatory employment action could simultaneously maintain an action relating to the same allegedly discriminatory practice and predicated on identical factual statements and alleging the same injury or damages. The language of the [Whistleblower] Act does not support such an interpretation and we decline to judicially fashion such relief.[148]

The court's analysis therefore was limited to determining the meaning of the Whistleblower Act, rather than deciding, as a general matter, the scope of the MHRA's exclusivity provision.

Nevertheless, perhaps to avoid misinterpretation, the court expressly distinguished *Wirig*:

> While in [*Wirig*] , the plaintiff was authorized to maintain a sexual harassment action under the [MHRA] and a parallel action for common law battery arising from the same facts, we so held because these separate causes of action require different elements of proof and address different injuries. We conclude that that analysis is not appropriate here and that the exclusivity provision of the [MHRA] operates as a bar to the separate maintenance of this claim under the Whistleblower Act.[149]

Thus, *Williams* did nothing to limit or alter *Wirig*, it merely interpreted the Whistleblower Act as not authorizing retaliation claims parallel to those already contemplated under the MHRA.

Following some intervening confusion in the Minnesota Court of Appeals, the Supreme Court held in *Vaughn v. Northwest Airlines* that the MHRA does not preempt a common-law negligence claim that was factually parallel to plaintiff's disability discrimination claim.[150] The court first noted the plaintiff had indicated that her negligence claim was independent of her disability discrimination claim because the defendant's employee had breached a separate duty to her by failing to assist her.[151] Thereafter, the court again

148. *Id.* (citation omitted).
149. *Id.* at 486 (citation omitted).
150. 558 N.W.2d 736, 745 (Minn. 1997). The negligence theory in *Vaughn* was premised on the special duty common carriers owe disabled passengers to ensure safe conditions. *See id.* at 740.
151. *See id.* at 744.

emphasized its hesitation to recognize preemption of common-law claims.[152] In summary fashion, the court ultimately found no preemption, relying on *Wirig* and rejecting the notion that factually parallel causes of action are mutually exclusive.[153]

On the most general level it is worth noting that *Vaughn* involved a negligence claim and *Wirig* involved violent (or physically injurious) conduct.[154] Thus, the tortious conduct at issue in each case is somewhat analogous to the negligence theories discussed above. Moreover, neither *Wirig* or *Vaughn* suggest their reasoning is limited to the specific common-law claims addressed therein.

More importantly, however, two principles—one obvious and one more subtle—emerge from the analyses in all three supreme court cases that are applicable to other common-law torts such as the negligence theories discussed above. First, the court's reasoning makes clear that simply because a common-law claim and an MHRA claim derive from the same underlying facts, the latter does not abrogate the former.[155] Second, the court's focus on the independence of the common-law claims and their distinct elements of proof suggests the MHRA will preempt a common-law cause of action only if, to establish liability, the plaintiff must address a violation of a right originating in MHRA.[156] Perhaps this test can be articulated in the following manner: a common-law claim is preempted if, but for the violation of rights guaranteed by the MHRA, that elements of that claim cannot be established.[157]

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152. *See id.* at 744-45.

153. *See id.*

154. *See Vaughn*, 558 N.W.2d at 745; Wirig v. Kinney Shoe Corp., 461 N.W.2d 374, 378-79 (Minn. 1990).

155. *See Vaughn*, 558 N.W.2d at 745 (rejecting notion that factually parallel causes of action are mutually exclusive); *Wirig*, 461 N.W.2d at 378-79 (same); *see also* Huffman v. Pepsi-Cola Bottling Co., No. C7-94-2404, 1995 WL 434467, at *5 (Minn. Ct. App. July 25, 1995). (interpreting *Wirig* as allowing parallel actions based on the same facts as MHRA claims to proceed).

156. *See* Williams v. St. Paul Ramsey Med. Ctr., Inc., 551 N.W.2 483, 486 (Minn. 1996) (noting that the court in *Wirig* had allowed a parallel action for battery because this claim and the MHRA claim "require different elements of proof"); *Wirig*, 461 N.W.2d at 378 (reasoning that battery does not address or redress discrimination); *see also* Moss v. Advance Circuits, Inc., 981 F. Supp. 1239, 1252 (D. Minn. 1997) (interpreting *Vaughn* as requiring negligence claims to be founded on a duty of care independent from the duties owed under the MHRA). Rights originating in the MHRA include the right to be free from discrimination (based on race, sex, disability, age, etc.), discriminatory harassment, and retaliation for reporting acts of discrimination. *See supra* text accompanying notes 138-141.

157. Some courts have interpreted the court's reasoning in *Wirig*, *Williams*, and *Vaughn* differently. In *Bergstrom-Ek v. Best Oil Co.*, Civ. No. 5-96-167, memo. op. at

Applying these principles to the negligent supervision, retention, and hiring claims discussed above, it is clear that all survive preemption. First, these claims will not be preempted merely because they derive from the same underlying facts as adjoining discrimination claims.[158] Second, each of these negligence claims is an independent common-law theory that does not depend on a violation of a right guaranteed under MHRA.[159] Negligent supervision, retention, and hiring claims are premised on an employer's breach of an independent duty of care that causes some physical injury or threat of physical injury.[160] Again, these claims cannot be premised merely on discriminatory conduct and are not dependent upon the rights protected by the MHRA.[161]

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25 (D. Minn. June 20, 1997) (unpublished), for example, a federal district court judge interpreted this trilogy to stand for the proposition that an express abrogation would be necessary to preempt a common-law claim, while statutory interpretation would be used to resolve conflicts between the MHRA and other statutes. The *Bergstrom-Ek* court is correct that the Minnesota Supreme Court clearly announced its reluctance to abrogate the common law and could adopt such a strict standard. Nevertheless, the supreme court's focus on elements of proof and whether the claim redresses discrimination suggests it would find abrogation, if the particular common-law claim somehow depended on a finding of discrimination, as that term is defined in the MHRA. *See Williams*, 551 N.W.2 at 486; *Wirig*, 461 N.W.2d at 378.

158. *See, e.g., Huffman*, 1995 WL 434467, at *5 (holding negligent retention and supervision claims based on the same facts as a sexual harassment claim are not preempted under the MHRA).

159. *See, e.g.*, Olson v. City of Lakeville, No. C3-97-390, 1997 WL 561254, at *1 (Minn. Ct. App. Sept. 9, 1997) (stating that "the claims of negligence must be founded on a duty of care independent of obligations arising out of the MHRA."); *Huffman*, 1995 WL 434467, at *5 (finding negligent retention and supervision claims are not preempted because they were "completely separate" from plaintiff's sexual harassment claim under the MHRA). Also, although respondeat superior claims depend upon an employee's committing an independent tort, as set forth above, violations of discrimination laws cannot serve as these employee torts. Thus, the MHRA will not preempt respondeat superior claims because such claims cannot be premised on the statute's protections.

The only theoretical exception to this conclusion is if a plaintiff attempted to bring a common-law respondeat superior claim premised on an underlying "aiding and abetting" violation of the MHRA by an employee. Assuming such a claim otherwise would be actionable, which is doubtful, it would be preempted by the MHRA because it is relies on a violation of rights guaranteed by the MHRA. In other words, but for the violation of rights guaranteed by the MHRA, the elements of such a respondeat superior claim—the underlying, actionable wrong—cannot be established.

160. *See* discussion, *supra* Part II.A.

161. *See e.g.*, Oberstar v. County of Saint Louis, Civ. No. 5-96-153, memo. op. at 13 (D. Minn. Oct. 3, 1997) (unpublished). The Minnesota Court of Appeals' conclusion in both *Wise v. Digital Equip. Corp.*, No. C9-94-461, 1994 WL 664973, at *2

Likewise, standard negligent infliction of emotional distress claims do not depend on a violation of a right protected by the MHRA. To establish liability under this theory, a plaintiff must prove the employer negligently exposed an employee to the zone of danger of physical impact, and the employee suffered severe emotional distress with attendant physical manifestations.[162] The protections set forth in the MHRA are wholly irrelevant to this analysis.

In the unlikely event the Minnesota Supreme Court recognizes the "willful conduct" exception to the zone of danger requirement, however, such claims would be preempted to the extent they are premised on willful discriminatory conduct. Negligent infliction of emotional distress claims premised on a direct invasion of the plaintiff's right to be free from discrimination clearly depend on the rights and protections set forth in the MHRA. In other words, but for a violation of rights guaranteed by the MHRA, the "willful conduct" exception to the zone of danger requirement cannot be established. Thus, even if this exception were otherwise viable, where it is utilized to remedy discriminatory conduct, it is preempted by the MHRA.

In conclusion, except for "willful conduct" negligent infliction of emotional distress claims, none of the claims discussed herein are preempted by the MHRA. Despite some confusion in the Min-

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(Minn. Ct. App. Nov. 29, 1994), and *Sullivan v. Spot Weld, Inc.*, 560 N.W.2d 712, 717 (Minn. Ct. App. 1997), that the MHRA preempts common-law negligence claims are not to the contrary. As an initial matter, *Spot Weld*'s reliance on *Williams* (and its failure to discuss *Wirig* or *Vaughn)* was erroneous. Moreover, in both cases, the courts found plaintiffs' negligent supervision and retention claims were preempted by the MHRA because they were based on discriminatory practices covered under the MHRA. *See Spot Weld*, 560 N.W.2d at 716-17; *Wise*, 1994 WL 664973, at *2. Neither court reached the issue of the physical injury or threat of physical injury requirement. Because the *Wise* and *Spot Weld* courts failed to address first the issue of physical injury, their analyses of preemption are not inconsistent with that presented here.

This conclusion also is consistent with the court's finding of preemption in *Olson*, 1997 WL 561254, at *1 and *Moss*, 981 F. Supp. at 1252. The *Olson* court is correct that the MHRA would preempt such negligence claims if they were premised only on discriminatory behavior, not actionable independent of the MHRA. *See* 1997 WL 561254, at *1; *see also Moss*, 981 F. Supp. at 1252. As set forth above, however, negligent supervision, retention, and hiring claims cannot be based on mere discrimination; they must be premised on a breach of care that results in physical injury or a threat of physical injury. If there is resulting physical injury or a threat of physical injury, such claims are separately maintainable, without reference to the duties imposed by the MHRA.

162. *See supra* notes 112-119 and accompanying text.

nesota Court of Appeals, this commonly pleaded defense is of little or no significance in the context of analyzing the viability of negligence claims in employment discrimination cases.

B. WCA Preemption

The WCA was enacted to ensure prompt and certain compensation for injuries suffered in the workplace.[163] Under the WCA, employers are required to "pay compensation in every case of personal injury or death of an employee arising out of and in the course of employment without regard to the question of negligence."[164] The WCA provides the employee's exclusive remedy against the employer if the employee suffers "personal injury or death" arising out of and in the course of employment.[165] Where the WCA provides the exclusive remedy, the injured employee must seek compensation through the procedures provided for in the act, and the district courts therefore have no jurisdiction.[166] Hence, employees are precluded from bringing common-law negligence claims arising out injuries covered by the WCA.

The threshold issue in determining whether the WCA provides the exclusive remedy in a particular case, is whether the employee suffered "personal injury" (as a result of working or at work). It is beyond dispute that physical injuries are compensable personal injuries under the WCA, and any negligence claims arising from such injuries potentially are preempted.[167] Thus, whenever a plaintiff brings one of the four negligence claims discussed above in circumstances in which there has been an actual physical impact, the

163. *See* McGowan v. Our Savior's Lutheran Church, 527 N.W.2d 830, 833 (Minn. 1995) (citing MINN. STAT. § 176.001(1994)).

164. MINN. STAT. § 176.021, subd. 1 (1996).

165. MINN. STAT. § 176.031 (1996); *McGowan*, 527 N.W.2d at 833. The exclusive remedy provision is premised on the "quid pro quo" of an employer assuming liability for work-related injuries without fault in exchange for being relieved of liability for certain actions and the prospect of large damage awards. *See* Karst v. F.C. Hayer Co., 447 N.W.2d 180, 183-84 (Minn. 1989).

166. *See, e.g.*, MINN. STAT. § 176.031 (1996); *McGowan*, 527 N.W.2d at 833 ("Where the Act provides the employee's exclusive remedy, the district courts have no jurisdiction.") (citing Huhn v. Foley Bros., 221 Minn. 279, 22 N.W.2d 3 (1946)). Although the WCA does not provide for other types of damages, it is the employee's exclusive remedy against the employer. Thus, if an employee's common-law claims are preempted by the WCA, the employee loses any ability to recover certain types of damages or relief not provided for in the act.

167. *See, e.g.*, Lockwood v. Independent Sch. Dist. No. 877, 312 N.W.2d 924, 926-27 (Minn. 1981).

claim will fall within the general preemptive scope of the WCA.

Because psychological and mental injuries such as emotional distress and mental anguish are not compensable "personal injuries" under the act, however, certain claims based on such injuries may not preempted.[168] Clearly, claims for damages arising out of mental stimulus-induced psychological or mental injuries with no physical component are not preempted.[169] However, because even the doctrine of negligent infliction of emotional distress requires some "physical manifestation" of the emotional injury, the negligence claims discussed above will always have at least some physical component.

In addressing claims that involve both a psychological injury component and some physical injury or physical manifestation component, the Minnesota Supreme Court has carefully distinguished between those claims that fall within the reach of the WCA, and those that do not. First, if a employee's psychological injuries result from a physical injury, the plaintiff's claim is covered under the WCA and potentially preempted.[170] Second, claims for physical injuries caused by some mental stimulus are covered and therefore potentially preempted.[171] Third, claims for damages for mental stimulus-induced mental injuries with attendant physical manifestations or symptoms that are not independently treatable are *not* compensable under the WCA.[172] Claims within this third category therefore do not fall within the WCA's preemptive scope.[173]

168. *See, e.g., id.* at 927 (declaring mental injuries that are independent from work-related physical injuries are not covered under the WCA); *see also* Johnson v. Paul's Auto & Truck Sales, Inc., 409 N.W.2d 506, 508-09 (Minn. 1987) (reaffirming the same).

169. *See, e.g., Lockwood*, 321 N.W.2d at 926-27; *Johnson*, 409 N.W.2d at 508. "Mental stimulus" refers to conduct that does not involve a physical injury or impact and may include, among other things, abusive language, threats, or nonviolent discriminatory conduct.

170. *See, e.g., Johnson*, 409 N.W.2d at 508 (stating claims arising from physical injuries which produce mental injury are compensable under the act).

171. *Id.* (holding claims involving mental stimulus that produce physical injuries are compensable under the WCA).

172. *See id.* at 508-09 (finding noncompensable claims in which mental stimulus causes only mental injuries, even if those mental injuries produce physical symptoms).

173. *See Lockwood*, 312 N.W.2d at 927 (holding mental injuries are not covered under the WCA). In finding the WCA does not cover mental injuries with attendant physical symptoms, the *Johnson* court explained as follows:

> Here, on the other hand, the employee's tics, tremors, and stomach cramps have been characterized not as independently treatable physical injuries but as physical symptoms or manifestations of employee's anxiety

Thus, pure "zone of danger" claims for emotional distress damages—in other words, where there are physical manifestations or symptoms but no actual physical impact or injury—often will not be preempted. Negligent infliction of emotional distress claims therefore may be beyond the WCA's preemptive reach.

Negligent supervision, retention, and hiring claims—which may require or at least often involve some physical impact—usually will fall within the general preemptive scope of the WCA. However, there is an exception to this general rule which may exempt from coverage many such claims in the discrimination context. This so-called "assault exception" is contained in the WCA's definition of personal injury:

> "Personal injury" means injury arising out of and in the course of employment and includes personal injury caused by occupational disease; but does not cover an employee except while engaged in, on, or about the premises where the employee's service requires the employee's presence as a part of such service at the time of the injury and during the hours of such service. . . . Personal injury does not include an injury caused by the act of a third person or fellow employee intended to injure the employee because of personal reasons, and not directed against the employee as an employee, or because of the employment.[174]

Minnesota courts have confronted a significant amount of litigation over the reach of this exception. The Minnesota Supreme Court has attempted to categorize which kinds of assaults are preempted and which are not:

> As we have said before, assault cases generally fall into three categories: (1) those that are noncompensable [not preempted] under the Act because the assailant was motivated by personal animosity toward his victim, arising from

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> or personality disorder and amenable to treatment only as an inseparable aspect of employee's psychiatric condition. . . . [T]he presence of physical symptoms does not convert a claim based on mental injury caused by mental stress into a claim based on physical injury . . . .

409 N.W.2d at 508-09 (citation omitted); *see also* Unruh v. St. Mary's Med. Ctr., Nos. C4-96-1909 & C0-96-1910, 1997 WL 88947, at *2 (Minn. Ct. App. March 4, 1997) (same). In light of the Minnesota Supreme Court's holding on this issue, the court of appeals' decision in *Wise v. Digital Equip. Corp.*, No. C9-94-461, 1994 WL 664973, at *2 (Minn. Ct. App. Nov. 29, 1994), in which recovery for mental injuries was found to be within the preemptive scope of the WCA, is unpersuasive.

174. MINN. STAT. § 176.011, subd. 16 (1996).

> circumstances wholly unconnected with the employment; (2) those that are compensable [preempted] under the Act because the provocation or motivation for the assault arises solely out of the activity of the victim as an employee; and (3) those that are compensable [preempted] under the act because they are neither directed against the victim as an employee nor for reasons personal to the employee.[175]

The types of conduct giving rise to negligent supervision, retention, and hiring claims in the discrimination context appear to fall within the first category. A co-employee's harassing conduct based on discriminatory animus—which causes physical injury to the plaintiff—is by definition motivated by personal animosity (based on sex, race, etc.) or personal reasons, and not by the type or nature of the victim's employment.

However, the language of the Minnesota Supreme Court's recent decision in *McGowan v. Our Savior's Lutheran Church*, has muddied the waters enough to raise questions about this seemingly intuitive conclusion. In *McGowan*, the court concluded the WCA barred a negligence action brought by a church employee who was raped by an otherwise disruptive shelter client while working as the director of the church's homeless shelter.[176] The court reached this conclusion despite recognizing that the perpetrator raped the plaintiff for personal reasons unrelated to her work.[177] In so holding, the court reasoned as follows:

> Based on the record before us, we conclude McGowan's injuries are covered under the Act because they resulted from an assault arising solely out of McGowan's activities as an employee. "While it may be admitted that there is no clearer example of non-industrial motive than rape, it is equally clear * * * that employment that requires women to be in isolated places is a causal factor contributing to such an attack." 1 Arthur Larson & Lex K. Larson, *The Law of Workmen's Compensation*, § 11.11(b) at 3-197 to 3-198 (1994) (footnote omitted). It is also equally clear that McGowan's employment was a causal factor contributing to her being raped. At the time she was raped,

175. McGowan v. Our Savior's Lutheran Church, 527 N.W.2d 830, 834 (Minn. 1995) (citing Hanson v. Robitshek-Schneider Co., 209 Minn. 596, 600, 297 N.W. 19, 22 (1941)).

176. *See id.*

177. *See id.*

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> McGowan was the shelter's director and had never had any contact with her assailant outside the workplace. Further, the assault occurred during work hours, in her office, while she was directly engaged in the performance of her work duties. Based on these facts, we cannot say that the rape arose from circumstances unrelated to McGowan's employment.[178]

Based on the court's language, it is possible to conclude that as long as a victim's employment was a partial, causal factor in the attack, the resultant injuries are covered by the WCA. If this is the *McGowan* court's intended standard, nearly every type of injury caused by workplace harassment would be subject to preemption.

McGowan's holding cannot be that broad. Work and the workplace are going to be a causal factor in any workplace assault, even those falling in the first category.[179] Again, in order to reach the issue of whether the assault "exception" applies, the statute first provides that the injured victim must have been "engaged in, on, or about the premises where the employee's service require the employee's presence as a part of such service at the time of the injury and during the hours of such service."[180] Thus, unless the court intended to write the assault exception out of the statute, *McGowan* cannot stand for the proposition that simply because the employment was a causal factor in the assault, the assault exception does not apply.

Perhaps the relevant inquiry can be framed better as follows: the court must determine whether the "particular nature of the victim's work activity" caused the victim to be targeted, and hence, injured. If the assailant targeted the victim because of personal feelings—racism, animosity, etc.—towards the victim, and these feelings were unconnected to the victim's particular work activity (category one), the exception applies. If, however, the particular nature of the victim's work activity somehow provoked or motivated the attack (category two), or the particular nature of the victim's work activity placed the victim in the path an assailant's otherwise unpersonalized or random motivation (category three), the assault exception does not apply.

McGowan involved conduct falling outside category one; the

178. *Id.*

179. This is illustrated by applying "but for" causation: "but for the victim's presence in the workplace, the assault would not have occurred."

180. MINN. STAT. § 176.011, subd. 16 (1996).

particular nature of the victim's work activity either provoked the attack or placed her in the path of the assailant's rage.[181] In essence then, the particular nature of her work activity was the decisive factor in her being targeted.[182]

Whether or not one agrees with the court's conclusion in *McGowan*, its holding generally will not apply to negligence claims in the employment discrimination context. The negligence claims discussed above are only sustainable in cases involving the most severe forms of discriminatory harassment. As recent court of appeals' decisions conclude, co-employee discriminatory harassment (rising to the level of an assault) is usually personal to the victim and has nothing to do with the particular nature of the activity of the victim as an employee.[183] Generally, sex or race-based harass-

181. *McGowan* suggests the case falls into category two. *See* 527 N.W.2d at 834 (stating plaintiff's injuries "resulted from an assault arising solely out of McGowan's activities as an employee"). This view does not seem to comport with the language of category two, which focuses on the "provocation or motivation" for the assault on the plaintiff. It is unclear whether the perpetrator was "provoked or motivated" to rape the plaintiff, or in other words targeted the plaintiff, because she was the shelter's director. Nevertheless, even if this attack does not fit into category two, it fits into category three. The particular nature of plaintiff's work activity—including her hours, duties as shelter director, and isolated location—placed her directly in harm's way.

In addition, the recent court of appeals determination in *Xiong v. Golden Valley Microwave Foods, Inc.*, No. C4-97-1631, 1998 WL 27296, at *2 (Minn. Ct. App. Jan. 27, 1998), in which the court determined that a supervisor's locking the plaintiff in the freezer was preempted under the WCA, is not to the contrary. The statement of the facts in *Xiong* and the court's reasoning are so conclusory, it is impossible to determine into which category the assault in that case falls. Nothing in the court's opinion suggests that sex- or race-motivated assaults by co-employees fall within categories two or three.

182. In this critical way, *McGowan* is similar to the "random assault" cases in which the Minnesota Supreme Court has recognized the employment itself caused the injury because the victim was victimized simply because she was at work, not because of a motivation inherently personal to the employee. *See* Foley v. Honeywell, Inc., 488 N.W.2d 268, 273 (Minn.1992) (holding assault exception does not apply where employee sexually assaulted and murdered in employer's parking ramp); Bear v. Honeywell, 468 N.W.2d 546, 547 (Minn. 1991) (holding sexual assault committed by man plaintiff encountered in employer's parking ramp does not fit within assault exception).

183. *See, e.g.*, Johnson v. Motel 6 G.P., Inc., No. C7-96-897, 1996 WL 653978, at *2 (Minn. Ct. App. Nov. 12, 1996) (holding WCA did not preempt plaintiff's various negligence claims arising from her rape by co-employee, because sexual assault was entirely unrelated to her role as an employee and not directed against her as an employee); Huffman v. Pepsi-Cola Bottling Co., No. C7-94-2404, 1995 WL 434467, at *6 (Minn. Ct. App. July 25, 1995) (finding no preemption of negligence claims under the WCA in the sexual harassment context because plaintiff's "injuries were not associated with the job, despite the fact that they took place at

ment of a co-employee is not tied to any particular type or activity of employment.[184] Although the employment situation provided the opportunity and context for the co-employee's actions, the discriminatory motive intervened, and the particular nature of the work activity itself did not determine ultimately the target of the harassment.[185] Thus, virtually all negligent supervision, retention, and hiring claims in the discrimination context will withstand the preclusive bar of the WCA.

IV. CONCLUSION

Plaintiffs' counsel in employment discrimination cases are constantly searching for innovative theories to redress discriminatory behavior in the workplace. Negligent supervision, negligent retention, negligent hiring, and negligent infliction of emotional

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the work site," and the harassing conduct therefore was "separable from her employment"). The analysis in these cases is consistent with the conclusion in *Johnson v. Ramsey County*, 424 N.W.2d 800, 805 (Minn. Ct. App. 1988), a pre-*McGowan* case in which an employee was the victim of unwanted sexual advances and physical contact.

184. *See, e.g., Johnson*, 1996 WL 653978, at *2; *Huffman*, 1995 WL 434467, at *6.

185. *See, e.g., Johnson*, 1996 WL 653978, at *2; *Huffman*, 1995 WL 434467, at *6. On this issue, the reasoning in *Johnson* is particularly instructive:

> The facts in the record demonstrate that Williams [the co-employee] acted out of personal reasons—simply put, his own self-gratification. Williams has a long record of inappropriate and unwelcome conduct toward Johnson. The last and most heinous act, to break into her room and rape her, was not directed against Johnson "as an employee or because of [her] employment." [*McGowan*, 527 N.W.2d at 834.] Johnson's job as front desk clerk was not the reason that Williams attacked her. Johnson simply had become the unfortunate object of Williams' attention in that environment. Under these circumstances, where the injury was unrelated to Johnson in her role as an employee, the incident falls under the assault exception to the Act.

1996 WL 653978, at *2; *see also* B.E.M. v. Bridgeman's Restaurants, Inc., No. C8-96-2187, 1997 WL 161852, at *2-3 (Minn. Ct. App. April 8, 1997) (suggesting the assault exception applies to situations in which some prior relationship exists between the assailant and the victim).

Arguably, "quid pro quo" sexual harassment is directly tied to the particular nature of the victim's work activity. In other words, the harasser uses the victim's subordinate work position to attempt to manipulate the victim into accepting unwelcome advances. However, where such a harasser's conduct rises to the level of an assault or battery, the harasser is attacking the victim directly for personal reasons, without reliance on the nature of the victim's work activity. In such a circumstance, although the victim's position provides the attacker with the opportunity to be abusive, the nature of the victim's work activity does not form a basis for the attack. Negligence claims against the employer premised on such harassing conduct therefore should fall within the "assault exception" to WCA preemption.

distress claims have become increasingly popular supplemental causes of action in employment discrimination cases in Minnesota. However, the substantive limitations of these four theories, in particular the "physical injury or threat of physical injury" and "zone of danger" requirements (rather than common preemption defenses) render them futile in most circumstances. These negligence claims are only viable in discrimination cases involving severe forms of harassment — namely, acts rising to the level of an assault, battery, or other physically threatening conduct. In these narrow circumstances, negligence claims can be useful alternative or supplementary causes of action. In the majority of employment discrimination cases, however, plaintiffs will have to rely on other theories.