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INSURANCE COVERAGE FOR
EMPLOYMENT-RELATED LITIGATION:
CONNECTICUT LAW
CALUM ANDERSON*

INTRODUCTION

Connecticut, perhaps as much as any other state in the nation,\(^1\) has experienced a spectacular rise in employment-related litigation.\(^2\) This increased litigation can be explained by examining the confluence of two recent phenomena—one economic, one legal.

The first phenomenon is the dramatic downturn of the Connecticut economy, resulting in devastating job losses.\(^3\) Recent cuts in the defense industry and corporate downsizing of the insurance industry have dislocated tens of thousands of skilled Connecticut workers.\(^4\) During 1994 alone, the Connecticut labor force lost

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1. Several studies chronicle the rise of employment litigation nationwide. See, e.g., John J. Donahue, III & Peter Siegelman, The Changing Nature of Employment Discrimination Litigation, 43 STAN. L. REV. 983, 985 (1991) (between 1970 and 1989, the federal courts' employment discrimination caseload grew by 2,166% while the general federal caseload grew by only 125% during the same time period); John Edward Davidson, The Temptation of Performance Appraisal Abuse in Employment Litigation, 81 VA. L. REV. 1605, 1614-17 (1995) (referring to a recent study that "found that there were 20,000 wrongful discharge cases on court dockets in 1992 [whereas] before the 1980s such cases were virtually nonexistent").

2. In this Article, the phrase "employment-related litigation" refers to tort and contract-based common-law action for wrongful termination, breach of implied contract, breach of the implied covenant of good faith and fair dealing, intentional and negligent infliction of emotional distress and defamation, and also state and federal statute-based actions for unlawful discrimination.

3. Job loss is not unique to Connecticut; it appears, however, to be more prevalent. During 1991 and 1992, about 5.5 million workers nationwide lost jobs because of plant closings, relocations, or insufficient work. About half of those displaced were "long-tenured workers," meaning that they had worked for three years or more. "Displacement rates were highest in the Northeast, particularly in New England." JENNIFER M. GARDENER, U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, WORKER DISPLACEMENT: A DECADE OF CHANGE, DISPLACED WORKERS, 1991-92, BULLETIN 2464, 1, 9 (1995).

4. Id. Between 1988 and 1994, private defense-related employment fell by 30,300 jobs, or 31.5%. LINCOLN DYER, LABOR SITUATION, CONNECTICUT LABOR DEPARTMENT (June 27, 1995). To make matters worse, the loss of these defense-related jobs
47,000 jobs, climaxing three consecutive years of job loss.\textsuperscript{5} Unfortunately, that distressing trend appears to be continuing. In June, 1995, there were 5,652 initial unemployment claims; an increase of 535 claims from the previous month.\textsuperscript{6} In July, the labor force lost an additional 4,300 jobs.\textsuperscript{7}

The corresponding phenomenon is the recent creation of new statutory\textsuperscript{8} and common-law\textsuperscript{9} causes of action for alleged wrongful discharges and other attendant torts. With each wave of layoffs comes the prospect of alleged wrongful employer conduct. Not surprisingly, employees are taking increasing advantage of the new statutory, contract, and tort-based remedies now available. Conse-

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\textsuperscript{6} Labor Situation, Connecticut Department of Labor (August 2, 1995).

\textsuperscript{7} Andrew Julian & Dan Haar, Connecticut Shed 4,300 Jobs in Month of July, Hartford Courant, Aug. 31, 1995 at F1.


Connecticut legislation designed to protect employees from unlawful discrimination includes Conn. Gen. Stat. § 46a-60 (1993) (barring discrimination in the terms, conditions, or privileges of employment on the basis of race, color, religious creed, age, sex, marital status, national origin, ancestry, present or past history of mental disorder, mental retardation, learning disability, or physical disability); § 46a-81b (1993) (barring discrimination in the terms, conditions, or privileges of employment on the basis of sexual orientation).

\textsuperscript{9} Morris v. Hartford Courant Co., 200 Conn. 676, 513 A.2d 66 (1986) (the Connecticut Supreme Court first recognized that an employer may be liable to a current or former employee for negligent infliction of emotional distress if the employer should have realized that his conduct involved an unreasonable risk of causing distress that might result in illness or bodily harm); Petyan v. Ellis, 200 Conn. 243, 254-55, 510 A.2d 1337, 1343 (1986) (the Connecticut Supreme Court first recognized that an employer may be liable to a current or former employee for intentional infliction of emotional distress for acts occurring during the course of employment or in connection with a discharge); Magnan v. Anaconda Indus., Inc., 193 Conn. 558, 569, 479 A.2d 781, 787 (1984) (the Connecticut Supreme Court first recognized, in every employment contract, an implied covenant of good faith and fair dealing); Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 475, 427 A.2d 385, 386-87 (1980) (the Connecticut Supreme Court first recognized a common-law cause of action in tort for discharge of an at-will employee "if the former employee can prove a demonstrably improper reason for dismissal, a reason whose impropriety is derived from some important violation of public policy").
sequently, what started out as a cottage industry in the 1980s has now become a major area of Connecticut litigation practice.

Faced with this dramatic increase in employment-related claims and the potential liabilities they represent, employers are looking to their liability insurers for defense and indemnity. In response, insurers have asserted that general liability policies were never intended to cover employment-related claims and have raised numerous arguments to justify denial of coverage. Until very recently these coverage defenses were not tested in the courts, and even now the resolution of many is uncertain, particularly in Connecticut.

This Article analyzes the duties and responsibilities of a general liability insurer under Connecticut law when one of its policyholders presents an employment-related coverage claim. Those duties and responsibilities are determined by a close reading of the underlying complaint to glean whether any of the claims asserted could possibly be covered by the policy. In that regard, the insurer must have significant familiarity with each common-law and statutory cause of action asserted in order to determine whether the claim is covered by the Insuring Agreement and if so, whether an exclusion is applicable. Therefore, Part I of this Article briefly describes the elements of the various common-law and statutory causes of action available to Connecticut employees for employment-related claims. Part II outlines Connecticut law governing the insurer's duty to defend, including the consequences of wrongfully refusing to defend. Part III identifies the coverage issues presented by each of the causes of action and attempts to determine how Connecticut courts might resolve those issues. Part IV concludes that Connecticut case law is largely silent with respect to most of the coverage issues presented and that the insurers and policy holders must postulate their respective rights and obligations based on general Connecticut insurance law principles and case law from other jurisdictions.

I. Employment-Tort Causes of Action in Connecticut

In order for an insurer to determine its coverage obligations, it

10. "In 1991, the National Conference of Uniform State Law found that in California, 70% of plaintiffs won wrongful discharge cases going to a jury trial, receiving average awards of $300,000 to $500,000. The commissioners also found that awards of over $1,000,000 were common throughout the country, and that the average cost of defending a wrongful discharge lawsuit was $80,000." Davidson, supra note 1, at 1615-16.
must have a full understanding of each cause of action presented for coverage. That understanding must be derived from a careful reading of the underlying complaint and knowledge of the substantive, statutory, contract, and tort-based causes of action alleged. The determination of coverage obligations is particularly challenging in a rapidly changing area of the law such as employment, where the substantive law is relatively new and still developing.

The remaining section of Part I outlines the elements of the various causes of action available to employees under Connecticut and federal law. These elements constitute the predicate for insurance coverage analysis.

A. Discharge

1. Wrongful Discharge of At-Will Employees

Until very recently, a Connecticut employer was free to terminate the employment of an at-will employee for any reason or for no reason at all.12 In *Sheets v. Teddy's Frosted Foods, Inc.*,13 the Connecticut Supreme Court created a narrow exception to this rule by recognizing a common-law cause of action in tort "if the former employee can prove a demonstrably improper reason for dismissal, a reason whose impropriety is derived from some important violation of public policy."14 The court went on to conclude that "[t]he issue then becomes the familiar common-law problem of deciding where and how to draw the line between claims that genuinely involve the mandates of public policy and are actionable, and ordinary disputes between employee and employer that are not."15 In deciding the issue within the context of a particular case, the Con-

11. Each theory of liability merits a full-length article to explore the intricacies of the developing case law. This Article provides an overview of the elements of each cause of action, especially those elements that impact insurance coverage.

12. Fisher v. Jackson, 142 Conn. 734, 736-37, 188 A.2d 316, 317 (1955). "In the absence of a consideration in addition to the rendering of services incident to the employment, an agreement for a permanent employment is no more than an indefinite general hiring, terminable at the will of either party without incurring liability to the other." Id. at 736, 188 A.2d at 317. Furthermore, the court stated that "the mere giving up of a job by one who decides to accept a contract for alleged life employment is but an incident necessary on his part to place himself in a position to accept and perform the contract; it is not consideration for a life employment." Id. at 737, 188 A.2d at 317. See also Sommers v. Cooley Chevrolet Co., 146 Conn. 627, 629, 153 A.2d 426, 428 (1959); Carter v. Bartek, 142 Conn. 448, 450, 114 A.2d 923, 924 (1955); Boucher v. Godfrey, 119 Conn. 622, 627, 178 A. 655, 657 (1935).

13. Id. at 473, 427 A.2d 385 (1980).

14. Id. at 475, 427 A.2d at 386-87.

15. Id. at 477, 427 A.2d at 387.
necticut Supreme Court advised "that courts should not lightly intervene to impair the exercise of managerial discretion or to foment unwarranted litigation." The court stated that state statutes may evidence a public policy consideration sufficient to support a wrongful discharge claim. On the facts of the Sheets case, the court held that where an employee alleged that he had been discharged in retaliation for his efforts to compel his employer's compliance with the state Food, Drug, and Cosmetic Act, he had stated a valid cause of action.

Since Sheets, courts construing Connecticut law have held that termination of an at will employee does not violate public policy in cases where: (1) the employer had failed to thoroughly investigate charges of misappropriation of funds by an employee before firing him; (2) the employer required accurate reporting of competitor pricing practices (no allegation of antitrust violations) and the employee was terminated in an abusive manner; and (3) the discharge would have "the effect" of undermining the public policy of promoting energy conservation. Connecticut courts have held that termination of an at-will employee did violate public policy in cases where: (1) the employer fired the employee in retaliation for

16. Id.
17. Id. at 480, 427 A.2d at 389 ("We need not decide whether violation of a state statute is invariably a prerequisite to the conclusion that a challenged discharge violates public policy. Certainly when there is a relevant state statute we should not ignore the statement of public policy that it represents.").
18. Id.
19. Morris v. Hartford Courant Co., 200 Conn. 676, 679, 513 A.2d 66, 68 (1986): This public policy exception to the employment at will rule carved out in Sheets attempts to balance the competing interests of employer and employee. Under the exception, the employee has the burden of pleading and proving that his dismissal occurred for a reason violating public policy. The employer is allowed, in ordinary circumstances, to make personnel decisions without fear of incurring civil liability. Employee job security, however, is protected against employer actions that contravene public policy.
21. Battista v. United Illuminating Co., 10 Conn. App. 486, 497, 523 A.2d 1356, 1362 (Borden, J.), cert. denied, 204 Conn. 803, 525 A.2d 1352 (1987): We also note that the public policy exception to the general rule of the employment at will doctrine is narrowly constructed to serve a limited purpose . . . . The language in Magnan and Morris suggests that for a discharge to be actionable, there must be more than an incidental effect on public policy. The defendant's reason for discharging the plaintiff must contravene public policy.
Id. at 496-97, 523 A.2d at 1362-63 (emphasis added).
emptying a movie theater at the request of police officers; and (2) the employer fired the employee to avoid paying him a bonus and vested benefits.

2. Breach of Implied Contract

Numerous Connecticut cases hold that an employee may prove that the parties had an implied agreement that the plaintiff's employment could not be terminated except for cause or following appropriate disciplinary procedures. In analyzing such claims, the courts start with the premise that "all employer-employee relationships not governed by express contracts involve some type of implied 'contract' of employment." Typically, an implied contract of employment does not limit the terminability of an employee's employment, but merely includes terms specifying wages, working hours, job responsibilities, and the like. Thus, "[a]s a general rule, contracts of permanent employment, or for an indefinite term, are terminable at will." In order to overcome the presumption that, unless otherwise agreed, employment contracts are terminable "at will," the employee must prove by a fair preponderance of the evidence that "[the employer had] agreed, either by words or action or conduct, to undertake any form of actual contract commitment" that employment not be terminated without just cause. Thus, the finder of fact must weigh all the facts and circumstances that give rise to the formation of the employment contract in order to decide whether an implied intention existed that the at-will presumption


25. Torosyan, 234 Conn. at 13, 662 A.2d at 96. "There cannot be any serious dispute that there is a bargain of some kind; otherwise the employee would not be working." Id. (quoting 1 H. Perritt, Employee Dismissal Law and Practice § 4.32, at 326 (3d ed. 1982)).

26. D'Ulisse-Cupo, 202 Conn. at 211 n.1, 520 A.2d at 220 n.1.

27. Id. at 212 n.2, 520 A.2d at 220 n.2; Therrien, 180 Conn. at 94-95, 429 A.2d at 809-10.
would not govern.\textsuperscript{28}

In order to overcome the at-will presumption, employees offer evidence of representations made to them during pre-employment interviews\textsuperscript{29} or those contained in personnel manuals\textsuperscript{30} that were accepted by the employee.\textsuperscript{31} The fact finder must then decide whether the employer's statements were mere expressions of exp-

\textsuperscript{28} Coelho, 208 Conn. at 113, 544 A.2d at 174 ("Absent ... definitive contract language, the determination of what the parties intended to encompass in their contractual commitments is a question of the intention of the parties and an inference of fact."); Bead Chain Mfg. Co. v. Saxton Prod., Inc., 183 Conn. 266, 274-75, 439 A.2d 314, 319 (1981); Pierce v. Albanese, 144 Conn. 241, 256, 129 A.2d 606, 615 ("This process of inference is peculiarly a jury function, the \textit{raison d'etre} of the jury system."); appeal dismissed, 355 U.S. 15 (1957).

\textsuperscript{29} See, e.g., Coelho, 208 Conn. at 110, 544 A.2d at 179. ("If you come to work with us, you'll never have to worry. Grow with us into the future. As long as you do your job, you'll ... have a good future with us."). \textit{See also} Barry v. Posti-Seal Int'l, Inc., 36 Conn. App. 1, 4, 647 A.2d 1031, 1034 (1994) ("[I]f you do your job, you do your work, you're going to have a job here. If we can make this place run and minimize the money loss—I mean, you do your job, you're going to have a job here.").

\textsuperscript{30} Whether the language of the employment manual creates a contractual obligation is sometimes a question of law for the court. Owens v. American Nat'l Red Cross, 673 F. Supp. 1156, 1165 (D. Conn. 1987).


\textit{Id.}

In most situations, however, interpretation becomes a question of fact for the jury to decide. \textit{D'Ulisse-Cupo}, 202 Conn. at 214 n.3, 520 A.2d at 221 n.3. It is a question of fact for the jury whether statements made in a policy manual constitute a binding employment contract which modifies an otherwise at-will employment relationship. \textit{Barry}, 36 Conn. App. at 7, 647 A.2d at 1035 (citing Finley v. Aetna Life & Casualty Co., 202 Conn. 190, 199, 520 A.2d 208, 213-14 (1987).
tations about the future and not manifestations of a present intention to create contractual obligations.32

3. Breach of Implied Covenant of Good Faith and Fair Dealing

In *Magnan v. Anaconda Industries, Inc.*, the Connecticut Supreme Court held that an implied covenant of good faith and fair dealing is implied in every employment contract.33 That covenant, however, is limited to an implied agreement not to discharge an employee based on an improper motive "derive[d] from some important violation of public policy,"34 identical to the standard in

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32. Employers who do not intend to create an implied contract by use of employee manuals can do so by careful draftsmanship or by means of an express disclaimer. “By eschewing language that could reasonably be construed as a basis for a contractual promise or by including appropriate disclaimers of the intention to contract, employers can protect themselves against employee contracting claims based on statements made in personnel manuals.” Finley, 202 Conn. at 199 n.5, 520 A.2d at 214 n.5.


33. Magnan v. Anaconda Indus., Inc., 193 Conn. 558, 571-72, 479 A.2d 781, 788-89 (1984) (“The implied covenant of good faith and fair dealing has been applied by [sic] Court in a variety of contractual relationships, including leases.”); see also Central New Haven Dev. Corp. v. La Crepe, Inc., 177 Conn. 212, 413 A.2d 840 (1979) (good faith and fair dealing applied to insurance contracts); Hoyt v. Factory Mut. Liberty Ins. Co., 120 Conn. 156, 159, 179 A. 842, 843 (1935); Bartlett v. Travelers Ins. Co., 117 Conn. 147, 155, 167 A. 180, 183 (1933). The implied covenant is “a rule of construction designed to fulfill the reasonable expectations of the contracting parties as they presumably intended.” Magnan, 193 Conn. at 567, 479 A.2d at 786.

34. Magnan, 193 Conn. at 572, 479 A.2d at 786 (quoting Sheets v. Teddy’s Frosted Foods, Inc., 179 Conn. 471, 475, 427 A.2d 385, 387 (1980)).
wrongful discharge cases. The court specifically rejected the employee's contention that the implied covenant of good faith and fair dealing requires that discharge be "for cause" or that it otherwise intrude on the at-will employment doctrine.

While we see no reason to exempt employment contracts from the implication of a covenant of good faith and fair dealing in the contractual relationship, we do not believe that this principle should be applied to transform a contract of employment terminable at the will of either party into one terminable only at the will of the employee or for just cause. We have previously acknowledged "that courts should not lightly intervene to impair the exercise of management discretion or to foment unwarranted litigation."

. . . . To hold otherwise would render the court a bargaining agent for every employee not protected by statute or collective bargaining agreement, including employees whom Congress has specifically excluded from the protection of the National Labor Relations Act, such as those in management positions. The complexity of the multifarious employment relationships militates against the establishment of the good cause standard for discharge to govern all at-will employment relationships.35

However, in cases involving the breach of an express contract or breach of an implied contract, the employee may prove a breach of the implied covenant of good faith and fair dealing even in the absence of a violation of public policy.36

B. Attendant Torts

1. Intentional Infliction of Emotional Distress

In Petyan v. Ellis,37 the Connecticut Supreme Court held that an employer may be liable to a current or former employee for intentional infliction of emotional distress for acts occurring during the course of the employment or in connection with the discharge.

In order for the plaintiff to prevail in a case for liability under . . . [the intentional infliction of emotional distress], four elements must be established. It must be shown: (1) that the actor intended to inflict emotional distress; or that he knew or should

35. Id. at 568-69, 571, 479 A.2d at 786-87, 789 (citations omitted).
have known that the emotional distress was a likely result of his conduct; (2) that the conduct was extreme and outrageous; (3) that the defendant's conduct was the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe. 38

Conduct is "extreme and outrageous" when it exceeds "all bounds usually tolerated by decent society." 39

Many of the reported cases involving the tort of intentional infliction of emotional distress concern whether, as a matter of law, the employer's conduct was sufficiently extreme and outrageous to make out a prima facie case. 40 Connecticut courts have frequently held that the employer's conduct had reached the threshold of outrageousness, thus making it an issue for the trier of fact. 41 In other

38. Id. at 253, 510 A.2d at 1342 (citing 1 Restatement (Second) of Torts § 46 (1965); Agis v. Howard Johnson Co., 371 Mass. 140, 145-46, 355 N.E.2d 315, 319 (1976); W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 12, at 54 (5th ed. 1984)).


Id. at 20, 597 A.2d at 847-48 (citing 1 Restatement (Second) of Torts § 46, cmt. d (1965)).

40. 1 Restatement (Second) of Torts § 46 cmt. h (1965).

It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, or whether it is necessarily so. Where reasonable men may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability.


Employers have cause for concern when a claim for intentional infliction of emotional distress survives a dispositive motion. Damages for emotional distress, given appropriate circumstances, can exceed lost wages. See, e.g., Wilson v. Monarch Paper Co., 939 F.2d 1138 (5th Cir. 1991) (upholding award of $156,000 in lost wages and over $3,000,000 for intentional infliction of emotional distress); Rulon-Miller v. International Business Mach. Corp., 208 Cal. Rptr. 524 (Cal. Ct. App. 1984) (upholding award of $100,000 for compensatory harm and $200,000 for emotional distress).
cases Connecticut courts have also held that, as a matter of law, conduct did *not* reach the extreme and outrageous threshold that results in dismissal.\(^{42}\)

2. Negligent Infliction of Emotional Distress

Under Connecticut law, a plaintiff makes out a prima facie case for "unintentionally-caused emotional distress" by proving that "the defendant should have realized that its conduct involved an unreasonable risk of causing emotional distress and that distress, if it was caused, might result in illness or bodily harm."\(^{43}\) Recovery for unintentionally-caused emotional distress is not dependent upon proof of an ensuing bodily injury. Emotional distress that might result in illness or injury is sufficient.\(^{44}\)

Claims for negligent infliction of emotional distress almost always attend causes of action for wrongful termination. Indeed, more than one court has observed that emotional distress is a natural consequence of a wrongful discharge.\(^{45}\) Furthermore, an employer may be liable to an at-will employee for negligent infliction of emotional distress based on unreasonable conduct during an

\(^{42}\) Ziobro v. Connecticut Inst. for the Blind, 818 F. Supp. 497, 502 (D. Conn. 1993) (employee alleged that employer failed to conduct an adequate investigation before dismissing her and that employer knew or should have known that the dismissal was unjustified); Petyan v. Ellis, 200 Conn. 243, 245, 510 A.2d 1337, 1338 (1986) (employee alleged that employer intentionally misrepresented employee’s performance on unemployment compensation commission fact-finding forms).


\(^{44}\) Montinieri, 175 Conn. at 344, 398 A.2d at 1180 ("[T]here is no logical reason for making a distinction for purposes of determining liability, between those cases where emotional distress results in bodily injury and those cases where there is emotional distress only."). See also Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1059 (1936).


We conclude that when recovery is sought for negligent, rather than intentional or reckless, infliction of emotional distress, evidence must be introduced that the plaintiff has suffered physical harm. This requirement, . . . will serve to limit frivolous suits and those in which only bad manners or mere hurt feelings are involved, and will provide a reasonable safeguard against false claims.

*Id.* See also *Restatement (Second) of Torts*, § 436 A, Negligence Resulting in Emotional Distress Alone (1965).

otherwise lawful termination.\textsuperscript{46}

3. Defamation

An employer may defame an employee by making an "unprivileged publication of a false and defamatory statement"\textsuperscript{47} concerning the employee or the employee's work. Defamatory publications may occur in connection with unfavorable references to prospective employers, or communications to others outside the company that would tend to disparage the employee's work.

Employers can also be liable for the publication of defamatory statements made within the company.\textsuperscript{48} While "communications between managers regarding the review of an employee's job performance and the preparation of documents regarding an employee's termination are protected by a qualified privilege,"\textsuperscript{49} that qualified privilege can be overcome if the statement was made with knowledge of its falsity or reckless disregard for the truth of the matter asserted.\textsuperscript{50} Connecticut courts define defamation as "a false and malicious publication of a person which exposes him to public ridicule, hatred or contempt, or hinders virtuous men from associating with him."\textsuperscript{51} Like most jurisdictions, Connecticut is solicitous of persons' business reputations. Therefore, "[l]ibel is actionable per se if it charges 'improper conduct or lack of skill or integrity in one's profession or business and is of such a nature that it is calculated to cause injury to one in his profession or business.'"\textsuperscript{52}

In order to recover general damages for libel, the plaintiff must prove that the employer made publication with "malice in fact."\textsuperscript{53}

\textsuperscript{46} Morris, 200 Conn. at 681-82, 513 A.2d at 89.
\textsuperscript{48} "Although intracorporate communications once were considered by many courts not to constitute 'publication' of a defamatory statement, that view has been almost entirely abandoned, and we reject it here." Torosyan v. Boehringer Ingelheim Pharmaceutical, Inc., 234 Conn. 1, 27-28, 662 A.2d 89, 103 (1995). \textit{See also} \textit{Restatement (Second) of Torts} § 577(1) & cmt. (i) (1977); \textit{Keeton et al., supra} note 38, § 113, at 798 (5th ed. 1984).
\textsuperscript{49} Torosyan, 234 Conn. at 29, 662 A.2d at 103.
\textsuperscript{50} \textit{Id. See also 4 Restatement (Second) of Torts} § 600 (1977).
\textsuperscript{51} Donaghue v. Gaffy, 54 Conn. 257, 268, 7 A. 552, 558 (1886).
\textsuperscript{52} Charles Parker Co. v. Silver City Crystal Co., 142 Conn. 605, 612, 116 A.2d 440, 444 (1955) (quoting Proto v. Bridgeport Herald Corp., 136 Conn. 557, 566, 72 A.2d 820, 826 (1950)) (libel per se is actionable without proof of special damage).

\begin{quote}
In any action for a libel the defendant may give proof of intention; and unless the plaintiff proves either malice in fact or that the defendant, after having been requested by him in writing to retract the libelous charge, in as public a
The phrase "malice in fact" means "any improper or unjustifiable motive" and does not necessarily connote "ill will or an intent or desire to injure." Malice can be proved by a showing that the publication was "made without authority, or such authority as would be regarded as entitled to credence among upright and careful men, or manifesting an entire indifference to the truth." Similarly, should the employee be a "public figure," the alleged defamation must have been made with "actual malice, that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

C. **Wrongful Discrimination In Employment**

1. **Race, Color, Religion, Sex and National Origin**

   Title VII of the Civil Rights Act of 1964 states that:

   It shall be an unlawful employment practice for an employer—
   (1) to fail or refuse to hire or to discharge any individual, or
   otherwise to discriminate against any individual with respect to
   his compensation, terms, conditions, or privileges of employ-
   ment, because of such individual's race, color, religion, sex, or
   national origin; or (2) to limit, segregate, or classify his employ-
   ees or applicants for employment in any way which would de-
   prive or tend to deprive any individual of employment
   opportunities or otherwise adversely affect his status as an em-
   ployee, because of such individual's race, color, religion, sex or
   national origin.

   The purpose of Title VII is "to assure equality of employment
   opportunities and to eliminate those discriminatory practices." "Discriminatory preference for any group, minority or majority, is

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56. Id. at 19-20, 591 A.2d at 1277 (quoting Moore v. Stevenson, 27 Conn. 14, 28-29 (1858)).
58. Because classifications based on race, color, religion, sex and national origin are all governed by Title VII of the Civil Rights Act of 1964, and are the subject of very similar liability theories, it is convenient to discuss them together.
precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.61 A secondary purpose is to "mak[e] [persons] whole for injuries suffered on account of unlawful employment discrimination."62

Title VII does not preempt state employment discrimination laws unless such state laws are in conflict with the federal law.63 Connecticut law does not conflict with Title VII. In fact, Connecticut courts look to federal employment discrimination law for guidance in enforcing Connecticut's antidiscrimination legislation.64

a. Disparate treatment as a theory for wrongful discrimination claims

The disparate treatment theory is applicable where there is no direct evidence65 of discrimination, but the employer's actions give rise to an inference of discrimination. To establish a prima facie case of employment discrimination under the disparate treatment theory, the plaintiff must prove by a preponderance of the evidence that:

63. Tho separate sections of the act provide that state laws will be preempted only if they actually conflict with federal law. 42 U.S.C. §§ 2000e-7, 2000h-4 (1988).
65. "Direct evidence has been held to include discriminatory statements by decision makers related to the decision making process." Miko v. Commission on Human Rights & Opportunities, 220 Conn. 192, 206 n.13, 596 A.2d 396, 404 n.13 (1991). See also Price Waterhouse v. Hopkins, 490 U.S. 228, 255-58 (1989); EEOC v. Alton Packaging Corp., 901 F.2d 920, 924 (11th Cir. 1990). Further, "[d]irect evidence has also been held to include a policy discriminatory on its face." Miko, 220 Conn. at 206 n.13, 596 A.2d at 404 n.13. See also Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 112-22 (1985).
(1) he is a member of a protected class under the statute; (2) he applied for and was qualified for a position for which the employer was seeking applicants; (3) he was denied the position despite being qualified; and (4) the employer continued to seek applicants for the position after denying the plaintiff's application.66

If the plaintiff succeeds in establishing a prima facie case, he "in effect creates a presumption that the employer unlawfully discriminated against [him]."67 The burden then shifts to the employer to "produce[e] evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason."68 The employer "need not persuade the court that it was actually motivated by the proffered reasons."69 Should the employer carry its burden of production, the plaintiff then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer were a pretext for discrimination.70

b. Harassment as a theory for wrongful discrimination claims

Title VII of the Civil Rights Act of 1964 prohibits the form of disparate treatment described as "harassment."71 The most prevalent type, sexual harassment, can take two different forms: quid pro quo or hostile environment.

An allegation of quid pro quo harassment asserts that an employee uses supervisory72 power to induce a subordinate employee to grant sexual favors in return for employment benefits or oppor-
tunities or employment itself. In order to establish quid pro quo liability, the plaintiff must prove that the supervisory employee in fact "wielded the authority entrusted to him [by his employer] to subject the victim to adverse job consequences as a result of her refusal to submit to unwelcome sexual advances."

An allegation of hostile environment asserts that the employer has created or allows others to create unwelcome sexual conduct that "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment." Therefore, while a supervisor's "mere" job threat or "promise of job-related harm or benefits in exchange for sexual favors does not constitute quid pro quo harassment, either may create or contribute to a hostile work environment." Conduct violative of Title VII is that which due to either its severity or pervasiveness creates an objectively hostile or abusive work environment—"an environment that a reasonable person would find hostile or abusive." However, "if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation."

Employers, under appropriate circumstances, can be liable for

73. 42 U.S.C. § 2000e (1988); see Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370-71 (1993); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63 (1986); Gary v. Long, 59 F.3d 1391, 1395 (D.C. Cir. 1995) ("The gravamen of a quid pro quo claim is that a tangible job benefit or privilege is conditioned on an employee's submission to sexual black-mail and that adverse consequences follow from the employee's refusal.").

74. Gary, 59 F.3d at 1396; Kauffman v. Allied Signal, Inc., 970 F.2d 178, 186 (6th Cir.) ("the employee's refusal to submit to the supervisor's sexual demands [must have] resulted in a tangible job detriment"), cert. denied, 113 S. Ct. 831 (1992); Hicks v. Gates Rubber Co., 833 F.2d 1406, 1414 (10th Cir. 1987).


76. Gary, 59 F.3d at 1396.

77. Harris, 114 S. Ct. at 370; Meritor, 477 U.S. at 67 ("not all work place conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII"); see Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971) ("'mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee' would not affect the conditions of employment to [a] sufficiently significant degree to violate Title VII") (quoting Henson v. City Dundee, 682 F.2d 897, 904 (11th Cir. 1982)), cert. denied, 406 U.S. 957 (1972); Henson, 682 F.2d at 904 (for sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment").

78. Meritor, 477 U.S. at 70-72; 29 C.F.R. §§ 1604.11(c), and 1606.8(c) (1995).
acts of sexual or racial harassment committed by their employees. Courts typically look to common law agency principles to determine whether, under Title VII, the employer is vicariously liable for the conduct of its employees. As a general rule "[a] master is not subject to liability for torts of his servants acting outside the scope of their employment." However, a master may be so liable if "the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation." Vicarious liability, therefore, is appropriate when the "agent's position facilitates the consummation of the [tort], in that from the point of view of the third person the [conduct] seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him." However, "[i]f a person has information which would lead a reasonable man to believe that the agent is violating the orders of the principal or that the principal would not wish the agent to act under the circumstances known to the agent, he cannot subject the principal to liability." Following these agency principles, courts have held that if the victim knew that the supervisory employee's conduct was not tolerated by the employer and that, if reported, no adverse consequences would come to her, the employer is not vicariously liable. To avoid vicarious liability for conduct violative of Title VII an employer therefore must prove

79. See, e.g., Meritor, 477 U.S. at 57.
81. Meritor, 477 U.S. at 72 ("[W]e ... agree with the EEOC that Congress wanted courts to look to agency principles for guidance in [determining employer liabilities]. While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define 'employer' to include any 'agent' of an employer 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible."); Gary v. Long, 59 F.3d 1391 (D.C. Cir. 1995).
82. Restatement (Second) of Agency § 219(2) (1957).
83. Id. § 219(2)(d).
84. Id. § 261 cmt. a; see also, id. § 219 cmt. e.
85. Id. § 166 cmt. a.
86. Gary v. Long, 59 F.3d 1391 (D.C. Cir. 1995). In Bouton v. BMW of North America, Inc., 29 F.3d 103, 109 (3d Cir. 1994) the court stated:

Our agency precedent requires the belief in the agent's apparent authority to be reasonable before the principal will be bound. This theory reconciles the exonerating effect of a remedial policy, which appears to stem from the exonerating principles of § 219(2)(b) ["the master was negligent or reckless"] with the apparent authority of § 219(2)(d). It also indicates that the reasonableness of the employee's perception of the combined message from the harasser and the employer is important.

Id.
by act, word, and deed that it has a very strict anti-discrimination/anti-harassment policy that would lead a reasonable employee to conclude that the supervisory employee was without actual or apparent authority to engage in the wrongful conduct.

[When] an employer has taken energetic measures to discourage sexual harassment in the work place and has established, advertised, and enforced effective procedures to deal with it when it does occur, [the employer] must be absolved of Title VII liability under a hostile work environment theory of sexual harassment. That defense depends, of course, on the ability of the employer to establish that its employees could not reasonably have failed to know of those measures and that its grievance procedures were clearly "calculated to encourage victims of harassment to come forward."87

Connecticut, by statute, prohibits sexual discrimination both in the form of quid pro quo and hostile environment in a manner identical to federal practice.88

c. Disparate impact as a theory for wrongful discrimination claims

Title VII forbids not only overt discrimination "but also practices that are fair in form, but discriminatory in operation. . . . Congress directed the thrust of [Title VII] to the consequences of employment practices, not simply the motivation."89 Employment practices which, although facially neutral, are discriminatory in practice have given rise to the theory of liability known as disparate impact. Under this theory, a specific employment practice may be deemed violative of Title VII without proof of the employer's sub-

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88. CONN. GEN. STAT. § 46a-60(a)(8) (1993 & West Supp. 1995) prohibits any unwelcome sexual advances or requests for sexual favors or any conduct of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.
89. Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971) (where employment practice requiring high school diploma or passing tests operated to exclude blacks from employment and that practice could not be shown to be related to job performance, it was prohibited, notwithstanding employer's lack of discriminatory intent).
jective intent to discriminate. 90 "[P]roof of discriminatory motive . . . is not required under a disparate-impact theory." 91

In Albemarle Paper Co. v. Moody, 92 the Supreme Court outlined the burdens of the parties in disparate impact cases:

Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets "the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question." This burden arises, of course, only after the complaining party or class has made out a prima facie case of discrimination, i.e., has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants. If an employer does then meet the burden of proving that its tests are "job related," it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in "efficient and trustworthy workmanship." 93

The disparate impact theory has potential application during times of corporate downsizing. When employers develop a lay-off strategy, they employ a facially neutral criteria that has an adverse impact on a protected classification of worker. A facially neutral criterion such as seniority may have a disparate impact on racial minorities and women if those workers were late coming into the workforce being downsized.

(1) Disability discrimination

The Americans with Disabilities Act ("ADA") 94 is designed to remove barriers which prevent qualified persons with mental or physical disabilities from enjoying the same employment opportunities available to persons without disabilities. Title I of the ADA prohibits discrimination against a "qualified individual with a disability" in connection with job application procedures, hiring, training, compensation, fringe benefits, advancement, or any other term

92. 422 U.S. 405 (1975).
or condition of work. 95 Title I of the ADA requires that, when an individual's disability creates a barrier to an employment opportunity, the employer must assess whether a reasonable accommodation can be made to enable the individual to perform the essential functions of the job. 96

Similarly, Connecticut law prohibits employers from discriminating against persons "in compensation or in terms, conditions or privileges of employment because of the individual's . . . present or past history of mental disorder, mental retardation, learning disability or physical disability, including, but not limited to blindness." 97

(2) Age discrimination

The Age Discrimination in Employment Act ("ADEA") 98 prohibits employment discrimination on the basis of age. 99 As a means of accomplishing this objective, the ADEA sets up a two-tier liability scheme. Section 623 constitutes the first tier and provides in relevant part that "[i]t shall be unlawful for an employer—(1) to fail or to refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age." 100

The standard for establishing a prima facie case of age discrimination under the ADEA is modeled on the standard adopted by the Supreme Court in McDonnell Douglas Corp. v. Green,101 a case involving race discrimination under Title VII. As adapted to ADEA cases, the plaintiff must show that he: (1) falls within the protected age group, i.e., between ages 40 and 70; (2) was qualified for the position; (3) adverse employment actions were taken against him; and (4) he was replaced by a younger person. 102 At this point, the plaintiff has established a prima facie case without presenting evidence of discriminatory intent. However, once the prima facie case is established, the burden shifts to the employer to articulate a

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95. § 12112(a).
96. § 12112(b)(5).
99. The purpose of the ADEA is "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." § 621(b).
100. § 623(a)(1).
102. Oxman v. WLS-TV, 846 F.2d 448, 455 (7th Cir. 1988); Wilkins v. Eaton Corp., 790 F.2d 515, 520 (6th Cir. 1986).
non-discriminatory reason for the discharge. If the employer meets this burden of production, the plaintiff must then prove that the proffered reasons are pretextual.\textsuperscript{103} While in racial discrimination cases a finding of pretext evidences an intent to practice wrongful discrimination, in ADEA cases it does not necessarily do so.

Congress, in our opinion, intended that liability under the ADEA could be established without any showing as to the defendant’s state of mind. . . . Unlike race discrimination, age discrimination may simply arise from an \textit{unconscious} application of stereotyped notions of ability rather than from a deliberate desire to remove older employees from the workforce.\textsuperscript{104}

Section 626(b) of ADEA sets up a second tier of liability, subjecting the employer to double damages for willful violations.\textsuperscript{105} “Willful” violations sufficient to impose liquidated damages under the ADEA, are those where it is proved that “the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.”\textsuperscript{106}

Unless state law openly conflicts with the ADEA, the federal act does not preempt state law. Therefore, an employee may pursue age discrimination claims based on a state constitutional, statutory, or common-law theory that affords more protection or remedies than those provided by the ADEA. “Nothing in this chapter shall affect the jurisdiction of any agency of any state performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.”\textsuperscript{107} Connecticut General Statutes section 46a-60 also prohibits

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{103} Oxman, 846 F.2d at 456; Bethea v. Levi Strauss & Co., 827 F.2d 355, 357 (8th Cir. 1987).
\item \textsuperscript{104} Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 154-55 (7th Cir. 1981) (citations omitted), \textit{overruled in part by}, Coston v. Plitt Theaters, Inc., 860 F.2d 834 (7th Cir. 1988); \textit{see also} Burlew v. Eaton Corp., 869 F.2d 1063, 1066 (7th Cir. 1989).
\item \textsuperscript{105} 29 U.S.C. § 626(b) (1988) incorporates § 216(b) of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1988 & Supp. V 1993) (“FLSA”), which provides that employers who violate the FLSA shall be liable to the employee in the amount of lost or unpaid wages “and an additional equal amount as liquidated damages.” § 216(b).
\item \textsuperscript{106} Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 128 (1985); \textit{see also} McLaughlin v. Richland Shoe Co., 486 U.S. 128 (1988).
\item \textsuperscript{107} 29 U.S.C. § 633(a) (1988 & Supp. V 1993). \textit{See also} Bailey v. Container Corp. of Am., 594 F. Supp. 629, 633 (S.D. Ohio 1984) (state law providing for compensatory and punitive damages, not available under the ADEA, is not preempted; “[t]he Ohio legislature has, it appears, concluded that its constituency is permitted to seek such damages in age discrimination cases. This is not a case where State law requires either party ‘to do precisely what the federal Act forbids them to do.’”); Hulme v.
\end{enumerate}
\end{footnotesize}
age discrimination.

(3) Sexual orientation

Title VII’s prohibition against discrimination on the basis of sex applies only to discrimination on the basis of gender; discrimination on the basis of sexual orientation falls outside the purview of Title VII.\(^\text{108}\)

Under Connecticut law it is unlawful, “except in the case of a bona fide occupational qualification or need, to refuse to hire or employ or to bar or discharge from employment any individual or to discriminate against him in compensation or in terms, conditions or privileges of employment because of the individual’s sexual orientation.”\(^\text{109}\)

(4) Punitive damages for wrongful discrimination

The Civil Rights Act of 1991\(^\text{110}\) provides that a party under the Civil Rights Act of 1964 or the Americans with Disabilities Act of 1990, aggrieved by a respondent employer who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) may recover punitive damages under some circumstances. To recover punitive damages, the complaining party must demonstrate that the respondent employer engaged in a discriminatory practice “with malice or with reckless indifference to the federally protected rights of an aggrieved individual.”\(^\text{111}\) Plaintiffs may also recover compensation for “future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.”\(^\text{112}\)

II. THE INSURER’S DUTY TO DEFEND

In Connecticut, the insurer’s obligation to defend its policy-
holder is contractual in nature and is determined by matching the allegations contained in the complaint with the scope of the indemnity coverage described in the policy. In the policy, the insurer agrees to "defend any 'suit' seeking . . . damages because of 'bodily injury' or 'property damage' to which this insurance applies." Therefore, the insurer must defend the suit if the complaint states a claim for an injury covered by the policy.

[I]t is the claim which determines the insurer's duty to defend; and it is irrelevant that the insurer may get information from the insured, or from anyone else, which indicates, or even demonstrates, that the injury is not in fact "covered." The insurer has promised to relieve the insured of the burden of satisfying the tribunal where the suit is tried, that the claim as pleaded is "groundless." In Connecticut, the insurer must defend the policyholder if the allegations contained in the complaint "appear" to state a claim covered by the policy terms. That is, if the underlying complaint would permit proof of facts establishing coverage, or, put another way, if the complaint does not exclude the possibility of coverage, the insurer must defend.

Where a complaint in an action against one insured under such a policy of liability insurance states a cause of action against the insured which appears to bring the claimed injury within the policy coverage, it is the contractual duty of the insurer to defend.

113. ISO Form CG 00 01 011 85, copyright 1982, 1984, [hereinafter ISO Form] section I, Coverage A., 1.a. There are a number of different forms of ISO general liability policies. Unless another form is referenced in the discussion of a particular case, all references in this Article will be to this form.


115. The insurer is relieved of its obligation to defend only if there is no possible factual or legal basis on which the claims could be said to be covered by the policy, or the allegations of the complaint are solely and entirely within the policy exclusions, and that the conclusion is not susceptible of any other interpretation. Schwartz v. Stevenson, 37 Conn. App. 581, 584-86, 657 A.2d 244, 246-47 (1995); Labonte v. Federal Mut. Ins. Co., 159 Conn. 252, 255, 268 A.2d 663, 665 (1970) ("[A] duty to defend an insured arises if the complaint states a cause of action which appears on its face to be within the terms of the policy coverage."); Missionaries of the Co. of Mary, Inc. v. Aetna Casualty & Sur. Co., 155 Conn. 104, 110, 230 A.2d 21, 24 (1967) ("The question whether the defendant had a duty to defend the action brought by [the plaintiff] depends on whether the complaint [brought] in that action stated facts which appeared to bring [the plaintiff's] claimed injury within the policy coverage."). Therefore, properly considered, the only two exhibits that should be examined by a court on a motion for summary judgment concerning the obligation to defend would be the complaint and the insurance policy.
the insured in the action and that duty exists regardless of the
duty of the insurer to indemnify.116

When the policyholder requests the insurer to defend a claim,
the insurer must exercise its judgment as to what is required of it
under the terms of its contractual obligation with the policyholder.
The insurer, basically, has three options: (1) it may decide that the
allegations do not "appear" to be covered by the policy and deny
the request; (2) it can defend the action under a "reservation of
rights" wherein it preserves its right to contest the obligation to in­
demnify; or (3) it can accept defense of the action without issuing a
reservation of rights letter, thereby effectively waiving its right to
contest the indemnity obligation.117 Under Connecticut law, an in­
surer runs a considerable downside risk should it wrongfully deny
its policyholder a defense of a covered claim. Insurers that wrong­
fully refuse to defend effectively waive any defenses they may have
had on the indemnity obligation.

Where an insurer is guilty of a breach of its contract to defend, it
is liable to pay to the insured not only his reasonable expenses in
conducting his own defense, but in the absence of fraud or collu­
sion, the amount of a judgment obtained against the insured up
to the limit of liability fixed by its policy.118

III. Coverage Analysis

A. Whether the Policyholder Has Alleged an Occurrence

Under general liability policies, the insurer promises to "pay
those sums which the insured becomes legally obligated to pay as
damages because of 'bodily injury' or 'property damage' to which
this insurance applies . . . caused by an occurrence."119 The word
"occurrence" is then defined as "an accident."120 Connecticut
courts hold that an injury that ensues from the volitional act of a
policyholder is an "accident" within the meaning of an insurance
policy if the policyholder does not specifically intend to cause the

117. Id. at 139, 267 A.2d at 666; see also Schurgast v. Schumann, 156 Conn. 471,
118. Keithan, 159 Conn. at 139, 267 A.2d at 666; Schurgast, 156 Conn. at 490-91,
242 A.2d at 705; Missionaries, 144 Conn. at 113, 230 A.2d at 26; Sacharko v. Center
119. ISO Form, supra note 113, Section I, Coverage A.1.a.
120. ISO Form, supra note 113, Section V, 9.
resulting harm or is not substantially certain that such harm will occur. The policyholder need not intend to cause the exact extent of the injury that occurs, only the type or kind. The leading case, *American National Fire Insurance Co. v. Schuss,*\(^{121}\) states:

"Intent" involves "(1) . . . A state of mind (2) about consequences of an act (or omission) and not about the act itself, and (3) it extends not only to having in the mind a purpose (or desire) to bring about given consequences but also to having in mind a belief (or knowledge) that given consequences are substantially certain to result from the act." Also, the intentional state of mind must exist when the act occurs. Thus, intentional conduct "extends not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what the actor does." Furthermore, "[i]t is not essential that the precise injury which was done be the one intended. Rather, it is an intent to bring about a result which will invade the interests of another in a way that the law forbids."\(^{122}\)

Similarly, according to the Restatement (Second) of Torts, "intent" refers "to the consequences of an act rather than to the act itself."\(^{123}\) "The word 'intent' . . . denote[s] that the actor desires to cause [the] consequences of his act, or that he believes that the consequences are substantially certain to result from it."\(^{124}\)

The mere knowledge and appreciation of a risk, short of substantial certainty, is not the equivalent of intent. The defendant who acts in the belief of consciousness that he is causing an appreciable risk of harm to another may be negligent, and if the risk is great his conduct may be characterized as reckless or wanton, but it is not classed as an intentional wrong. In such cases the distinction between intent and negligence obviously is a matter of degree. Apparently the line has been drawn by the courts at the point where the known danger ceases to be only a foreseeable risk which a reasonable man would avoid, and becomes a substantial certainty.\(^{125}\)

\(^{121}\) 221 Conn. 768, 607 A.2d 418 (1992).
\(^{122}\) Id. at 776, 607 A.2d at 422 (citations omitted).
\(^{123}\) 1 Restatement (Second) of Torts § 8A cmt. a (1965).
\(^{124}\) Id. § 8A.
\(^{125}\) Mingachos v. CBS, Inc., 196 Conn. 91, 103, 491 A.2d 368, 375 (1985) (quoting Keeting v. Shell Chem. Co., 610 F.2d 328, 332 (5th Cir. 1980); American Nat'l Fire Ins. Co. v. Schuss, 221 Conn. 768, 776, 607 A.2d 418, 422 (1992) ("Although in a given case there may be doubt about whether one acted intentionally or negligently, the difference in meaning is clear. 'As Holmes observed, even a dog knows the difference between being tripped over and being kicked.'").
Essentially, there are three classes of allegations for which an insurer may deny coverage on the grounds that the allegations made by the underlying plaintiff do not allege an “occurrence.” First are those cases in which the employee specifically alleges that the employer acted with the intent to harm the employee. Second would be where intent to harm is an essential element of the cause of action alleged by the employee. Third would be allegations in which intent to harm may not be an essential element of the cause of action, but where the very nature of the wrongful act is laden with an intent to cause injury. Our task, then, is to examine the various causes of action available to employees and determine whether or not they may allege an “occurrence.”

1. Wrongful Termination of At-Will Employees

In Connecticut, the tort of wrongful termination requires that the employee plead and prove “a demonstrably improper reason for dismissal, a reason whose impropriety is derived from some important violation of public policy.” Furthermore, “for the discharge to be actionable there must be more than an incidental effect on public policy. The defendant’s reason for discharging the plaintiff must contravene public policy.”

There is no reported case construing Connecticut law on this issue. However, analogous precedent comes from the United States District Court for the District of Connecticut. In *Providence Washington Insurance Group v. Albarello,* the employer sought coverage for a claim brought by a former employee alleging that the employer had breached a five-year employment contract by terminating his employment without just cause. The employee also alleged that, as the direct and proximate result of such discharge, he “suffered a loss of morale, confidence, and/or self-esteem, humiliation, nervousness, anxiety and mental distress, which has resulted in severe mental and physical injury.” The employer made demand on the insurer that it defend it against the claims and indemnify it for any loss under its general liability policy. The insurer denied coverage on the grounds that the alleged damages were not caused by an “occurrence,” that is, they were not caused by “an accident,

129. Id. at 952.
including continuous or repeated exposure to conditions, which results in bodily damage or property damage neither expected nor intended from the standpoint of the Insured."\textsuperscript{130}

In its opposition to a motion for summary judgment, the employer sought to create a genuine issue of material fact by filing an affidavit in which the employer swore that it was neither its purpose nor expectation that the underlying plaintiff would "suffer severe mental and physical injuries as a result of his discharge from employment."\textsuperscript{131} That is, the employer denied any subjective intent to do the employee harm, averring that any harm done was caused by an accident.

Judge Cabranes granted summary judgment in favor of the insurer, ruling that the allegations did not constitute an "occurrence" because: (1) the discharge was a "concededly intended event[ ]" and therefore not an accident; and (2) because wrongful termination of employment is so inherently injurious, the party intentionally discharging the employee must have intended the mental or emotional distress flowing from the act.\textsuperscript{132}

The court also had practical considerations in mind when ruling that, despite the insured’s protestations to the contrary, the ob-

\textsuperscript{130} Id.

\textsuperscript{131} Id.

\textsuperscript{132} Id. at 954. The court relied on Jespersen v. United States Fidelity & Guaranty Co., 131 N.H. 257, 261, 551 A.2d 530, 533 (1988), which came to the same conclusion on substantially identical facts. In that case the Supreme Court of New Hampshire held that the affidavit filed in opposition purporting to claim that the employer intended no harm was "of no consequence" because some degree of mental and physical distress was the "natural consequence" of losing one's job. Id. at 533 (quoting Provider Washington Ins. Group v. Albarello, 784 F. Supp. 950, 954 (D. Conn. 1992)). See also Daly Ditches Irrigation Dist. v. National Sur. Corp., 764 P.2d 1276, 1278 (Mont. 1988) (holding that emotional and mental injury is an intended or expected consequence of employment termination); Mary & Alice Ford Nursing Home Co. v. Fireman's Ins. Co., 86 A.D.2d 736, 737, 446 N.Y.S.2d 599, 601 (3d Dept. 1982), which stated:

If, in fact, plaintiff discharged Kathleen Wood from her employment because of her disability, it cannot be said that the mental and emotional injuries alleged by the Woods as flowing directly from plaintiff's intentional discriminatory practice were unexpected and unforeseen by plaintiff, the insured. While it is not legally impossible to find accidental results flowing from intentional causes, i.e., that the resulting damage was unintended although the original act or acts leading to the damage were intentional such is not the case here, for the damages alleged in the Woods' complaint are the intended result which flows directly and immediately from plaintiff's intentional act, rather than arising out of a chain of unintended though foreseeable events that occurred after the intentional act.

\textit{Id.} (citations omitted).
jectively foreseeable consequences of an act must be deemed to have been intended. The court stated:

Under the theory advocated by defendants, an insured could willfully breach a contract and then claim entitlement to insurance-funded defense on the theory that he did not desire or expect that the party bringing suit on the contract would suffer any damages. . . . In such circumstances the possibility of collusion between the insured and the party ostensibly bringing suit against him cannot be discounted especially in view of the fact that, in contrast to many tort suits, the parties to a contract dispute or a wrongful discharge claim are already acquainted and thus better situated to collude. 133

Therefore, while there are no Connecticut cases on point, substantial authority from other jurisdictions—including the local federal district construing the law of Connecticut—holds that wrongful termination is inherently injurious and that intent to harm will be inferred, as a matter of law.

2. Sexual Harassment

As set forth earlier in this article sexual harassment may take either of two forms: quid pro quo (supervisory employee uses power to induce subordinate to grant sexual favors in return for employment benefits) or hostile environment (creating an objectively hostile or abusive work environment).

No Connecticut court has ruled whether a claim of sexual harassment, under either form, is an “occurrence.” It is likely, however, that the courts would hold that: (1) claims of direct harassment or quid pro quo harassment against the employee who commits the offense would not constitute an occurrence; (2) claims made against an employer for negligently failing to supervise or for hiring employees who commit quid pro quo harassment would constitute an occurrence; and (3) claims made against employers based on the hostile environment theory probably would constitute an occurrence.

With respect to claims of direct harassment or quid pro quo harassment against the employee who commits the offense, most courts hold that intent to injure is inferred from commission of the act. That is, the sexual misconduct is objectively so certain to cause harm that the alleged bodily injury or personal injury is deemed to be “expected or intended from the standpoint of the insured as a

133. Albarello, 784 F. Supp. at 955.
In Continental Insurance Co. v. McDaniel, the employee in the underlying complaint alleged that her supervisor sexually harassed her by touching and fondling her, using vulgar language, and calling her at home. She also alleged attendant torts of assault, battery, and intentional infliction of emotional distress. The Arizona Court of Appeals held that the complaint did not allege an occurrence under the employer's policy because:

The conduct of [the employer] was so certain to cause injury to McDaniel that his intent to cause harm is inferred as a matter of law, despite his statements to the contrary that all he intended was to provide pleasure and satisfaction. ... [O]nce one intentionally commits an act against another and injury results as a natural and probable consequence of the intentional act, the injury is intended and expected and therefore excluded from coverage.

The inferred intent doctrine employed in sexual harassment cases is substantially similar to that employed in Albarello, in which Judge Cabranes held, as a matter of law, that discharge from employment was inherently injurious and that any emotional distress flowing from that act was intentionally caused. It is likely that the Connecticut Supreme Court, if presented with the opportunity, would adopt the inferred intent doctrine in direct harassment and quid pro quo claim against the offending employee.

It is common in direct harassment and quid pro quo cases for the employee to sue the employer as well as the abusive supervising employee. Since the alleged abuser often has scant means with

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134. Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co., 18 Cal. Rptr. 2d 692 (Cal. Ct. App. 1993); see also Commercial Union Ins. Co. v. Sky, Inc., 810 F. Supp. 249, 253-54 (W.D. Ark. 1992) ("[I]t strains the imagination to speculate how a pattern of sexual overtures and touching can be 'accidental.' ... [A]ny injury alleged to have been sustained by the [employee] was not the result of an 'occurrence' as defined in the policy."); Sena v. Travelers Ins. Co., 801 F. Supp. 471, 476 (D.N.M. 1992) ("[The employee] alleges sexual misconduct, done voluntarily and deliberately, resulting in emotional distress. I find that the insured's intent to harm can be inferred as a matter of law in cases involving sexual misconduct."). See also Old Republic Ins. v. Comprehensive Health Care, 786 F. Supp. 629, 633 (N.D. Tex. 1992), aff'd, 2 F.3d 105 (1993), which said that:

[T]he court finds that the insurers in this case did not have a duty to defend the underlying litigation that arose out of petitioners' claims of sexual harassment. Such claims allege intentional acts that are not "occurrences" for the purpose of policy coverage and there is no policy provision that creates a duty to defend under the facts of this case.

Id.

136. Id. at 8 (citations omitted).
which to compensate the victim, the insured employer is usually targeted, on the grounds that the employer negligently hired or supervised the abuser. With respect to those claims, insurers are generally obligated to provide coverage to the employer because the claimant alleged only negligence against the employer and because the intent of one insured cannot be imputed to another.\textsuperscript{137} In those circumstances, it cannot be said that the harm inflicted by the abusive supervisor "was expected or intended from the standpoint of the employer."\textsuperscript{138} For the injury to be expected or intended, the employer must have been "substantially certain"\textsuperscript{139} that bodily injury or personal injury would result from its acts.

By contrast, negligent hiring or supervising does not necessarily connote that the employer intends its employees to inflict harm and could therefore constitute an "occurrence" under the insured's policy. Similarly, allegations against an employer for hostile environment discrimination are probably also susceptible of constituting an 'occurrence' under Connecticut law. By definition, a hostile environment exists when the employer has created or allows others to create sexual conduct that "has the purpose or effect of unreasonably interfering with an individual's work performance."\textsuperscript{140} It is inherent in the definition of the cause of action that unwelcome sexual conduct may unintentionally create a hostile work environment. Consequently, it is possible that an employer could allow a hostile environment to exist without purposefully intending to cause harm.

3. Intentional Infliction of Emotional Distress

No Connecticut case law exists as to whether causes of action for intentional infliction of emotional distress may constitute an "occurrence" within the meaning of a general liability policy. The issue, of course, is whether intent to harm is an inherent element of the cause of action. In Connecticut, one element of the cause of action is that "the actor intended to inflict emotional distress; or

\textsuperscript{137} However, when a policy uses language referring to the expectation or intent of "an insured" or "any insured," courts may deny coverage to other insureds as well.

\textsuperscript{138} ISO Form, supra note 113, section I, 2.a. ("This insurance does not apply to a. 'Bodily injury' or 'property damage' expected or intended from the standpoint of the insured.").


\textsuperscript{140} 29 C.F.R. § 1604.11(a)(3) (1995) (emphasis added). The Connecticut statute that prohibits "hostile environment" in the workplace employs identical language.\textsuperscript{CONN. GEN. STAT. § 46a-60(a)(8) (1993).}
that he knew or should have known that the emotional distress was a likely result of his conduct."\textsuperscript{141} If the definition were limited to the first clause, i.e., "the actor intended to inflict emotional distress,"\textsuperscript{142} the resolution would be simple—there is no occurrence. However, an employee can recover for intentional infliction of emotional distress by merely proving that the employer "knew or should have known that the emotional distress was a likely result of his conduct."\textsuperscript{143} Standing alone, this requirement would not seem to meet the high standard necessary to constitute "intent" under Connecticut law:

The defendant who acts in the belief or consciousness that he is causing an appreciable risk of harm to another may be negligent, and if the risk is great his conduct may be characterized as reckless or wanton, but it is not classed as an intentional wrong. . . . The line \textsuperscript{144} drawn by the courts at the point where the known danger ceases to be only a foreseeable risk which a reasonable man would avoid, and becomes a substantial certainty.\textsuperscript{144}

The "knew or should have known" standard that "emotional distress was a likely result of his conduct" does not even constitute recklessness,\textsuperscript{145} let alone the "substantial certainty" standard necessary to prove intent.\textsuperscript{146}

However, another element of the cause of action is that the actor's conduct must have been "so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."\textsuperscript{147} Arguably, "substantial certainty" that harm will result, is inherent in the kind of "atrocious and utterly intolerable" behavior sufficient to sustain a cause of action for intentional infliction of emotional distress. When conduct is sufficiently "inherently

\textsuperscript{141} Petyan v. Ellis, 200 Conn. 243, 253, 510 A.2d 1337, 1342 (1986).
\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{145} "Recklessness" requires that the actor should "realize that there is a strong probability that harm may result." 3 RESTATEMENT (SECOND) OF TORTS § 500 cmt. f (1965) (emphasis added).
\textsuperscript{146} Mingachos, 196 Conn. at 103, 491 A.2d at 376.
\textsuperscript{147} Mellaly v. Eastman Kodak Co., 42 Conn. Supp. 17, 20, 597 A.2d 846, 847-48 (1991) ("Generally, the case is one in which the recitation of facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'") (quoting 1 RESTATEMENT (SECOND) OF TORTS § 46 cmt. [d]). See also Petyan v. Ellis, 200 Conn. 243, 254 n.5, 510 A.2d 1337, 1342 n.5 (1986).
injurious,” the actor is deemed to have intended the harm caused by it.148

In the absence of any definitive Connecticut case law as to whether the “atrocious and utterly intolerable” element of the intentional infliction of emotional distress cause of action connotes “inherently injurious” conduct, as a matter of law, insurers have no firm assurance that they can deny a defense of such a claim with impunity.

4. Negligent Infliction of Emotional Distress

Causes of action for negligent infliction of emotional distress may or may not be within the meaning of the word “occurrence” as used in a general liability policy, depending on the factual circumstances that give rise to the allegations. By definition, a claim for negligent infliction of emotional distress would seem to be an accident resulting in harm neither expected nor intended from the standpoint of the insured. The elements of the cause of action do not require the “substantial certainty” that the plaintiff would suffer harm as the proximate result of his act.149

However, if the claim arose out of a wrongful discharge, it would seem that, notwithstanding how the plaintiff characterized the nature of the claim, the injury was a substantially certain result of the discharge. Because a wrongful termination of employment is so inherently injurious, the party intentionally discharging the employee must have intended the mental or emotional distress flowing from the act.150 Therefore, if Connecticut courts follow Judge Cabranes’ lead, insurers should not be obligated to defend or indemnify policyholders for “negligent” infliction of emotional distress caused by means of a wrongful discharge.

5. Disparate Treatment

There exists no Connecticut case law on the issue as to whether allegations of disparate treatment under the Civil Rights Act of

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150. Albarello, 784 F. Supp. at 954 (citing Jespersen, 131 N.H. at 261, 551 A.2d at 533).
1964 or Connecticut General Statutes section 46a-60 constitute an "occurrence" under a general liability policy. However, the majority of jurisdictions that have considered the issue hold that it is not an occurrence because disparate treatment claims require proof of discriminatory intent. To prove "disparate treatment," a plaintiff must show that an employer treated an individual employee or group of employees differently because of sex, race, age, religion, or some other improper differentiation. Discriminatory motive is an essential element of the cause of action.

It is difficult to imagine a fact situation where an intent to harm would not necessarily be implied from an intentionally discriminatory act. That is, intentional discriminatory acts are so inherently injurious that the party intentionally discriminating against its employees must be charged with intending the adverse consequences. It is likely that, if given the opportunity, the Connecticut Supreme Court would hold that claims of disparate treatment on the basis of age, sex, race, religion, or national origin, which as a matter of law require a finding of "discriminatory intent," do not constitute an "occurrence."

6. Disparate Impact

No Connecticut case law exists regarding whether a claim of disparate impact under the Civil Rights Act of 1964 or Connecticut General Statutes section 46a-60 constitutes an "occurrence." Courts in other jurisdictions generally hold that disparate impact claims are susceptible of constituting an occurrence because, unlike disparate treatment claims, there is no requirement that discriminatory intent be proved. In contrast to disparate treatment claims,
disparate impact claims focus on the consequences of the employer's actions, not his intent.155 Employers may be liable under the disparate impact theory without proof that the employer "intend[ed] to bring about a result which [would] invade the interests of another in a way that the law forbids"156 or that the employer "desire[d] to cause the consequences of his act, or that he believe[d] that the consequences [were] substantially certain to follow from it."157 Therefore, under Connecticut's duty-to-defend standard, in the absence of some other policy defense, an insurer may not deny its policyholder a defense for a claim of discriminatory impact based upon lack of an "occurrence." The insurer, however, may very well desire to defend the action under a reservation of rights because the trial of the action may indeed turn on the employer's discriminatory intent.158 While the employee establishes a prima facie case by proving that a facially-neutral job requirement has an adverse impact on a protected group,159 the burden then shifts to the employer to prove that the requirement is job-related, in that it bears a "manifest relationship to the employment in question."160 If the employer meets this burden, the plaintiff can still prevail by


155. See, e.g., Dothard v. Rawlinson, 433 U.S. 321, 328-29 (1977) ("The gist of [a disparate impact claim] does not involve an assertion of purposeful discriminatory motive. . . . Rather, [the gist is] that . . . facially neutral qualification standards work in fact disproportionately to exclude women from eligibility for employment."); International Bhd. of Teamsters, 431 U.S. at 336 n.15 ("Proof of discriminatory motive . . . is not required under a disparate-impact theory.").


158. At least one commentator has observed that in many, if not most, disparate impact cases the employer, in fact, has intentionally discriminated against certain of its employees. Steven L. Willbom, Insurance, Public Policy, and Employment Discrimination, 66 MINN. L. REV. 1003, 1010 (1982):

Despite the conventional wisdom to the contrary, disparate impact cases may be intent-based. Although Title VII plaintiffs do not have to prove discriminatory intent to establish a prima facie case of disparate impact discrimination, it does not follow that discriminatory intent is always absent. Rather, it is equally, if not more, plausible that discriminatory intent is present but unproven.

Id.


160. Griggs, 401 U.S. at 432; see also New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 & n.31 (1979) (policy against employing narcotics users); Dothard, 433 U.S. at 329 (height and weight requirements); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (program of employment testing).
demonstrating that another requirement "without a similarly undesirable racial effect, would also serve the employer’s legitimate interest in ‘efficient and trustworthy workmanship.’” 161 The United States Supreme Court has stated that "[s]uch a showing would be evidence that the employer was using its [facially neutral job requirement] merely as a ‘pretext’ for discrimination." 162 "Pretext," of course, involves an intent to cleverly camouflage illegal discriminatory intent. 163 Therefore, a "discriminatory impact" case may play itself out to be one of discriminatory treatment, and the insurer ultimately may be able to deny indemnity coverage (but not defense) on the grounds that there was not an “occurrence.”

7. Violation of the ADEA

No Connecticut case law exists regarding whether a claim of age discrimination under the ADEA or Connecticut General Statute section 46a-60 is reasonably susceptible of constituting an “occurrence.” However, examination of the elements of proof necessary to state a cause of action under either section 623 or section 626(b) of the ADEA suggests that the employer need not intend to cause harm to the employee to state a claim; therefore, in the absence of another coverage defense, the insurer will owe the employer a defense of the claim.

To establish liability under Section 623, the plaintiff need not prove that the employer intentionally discriminated on the basis of age. An ADEA plaintiff establishes “tier one” liability by use of the burden-shifting method of proof adopted from McDonnell Douglas Corp. v. Green, 164 a Title VII case. Since the claim is susceptible to proof without a showing of intent to harm, the claim alleges an “occurrence,” and the insurer must defend. Furthermore, unlike disparate impact cases involving race discrimination, a showing that the employer used a facially-neutral job requirement as a pretext for discrimination does not necessarily connote discriminatory intent. 165 Therefore, unlike a racial discrimination case, an

161. Albemarle, 422 U.S. at 425 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973)).
162. Id. at 425 (quoting McDonnell Douglas, 411 U.S. at 804-05).
163. Menzel v. Western Auto Supply Co., 848 F.2d 327, 329 (1st Cir. 1988) (The “finding of pretext is the equivalent of a finding that the employer intentionally discriminated.”).
165. Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 154-55 (7th Cir. 1981) ("It is not the case, as the plaintiff contends, that because the jury might reasonably have inferred that [defendant's] post-hoc justifications for its actions were pretextual,
action under section 626(b) is not susceptible of "playing-out" to become a case involving proof of discriminatory intent and outside indemnity coverage (on that basis alone).

To impose liability resulting in double damages under the second tier liability scheme provided in section 626(b), the employee must allege and prove that "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA."166 This standard, however, does not require that the employee prove that the employer intended to cause the employee harm. Under Connecticut law, "recklessness" is not intentional behavior; it is an accident, and therefore the claim is susceptible to coming within the coverage of the policy. The Connecticut Supreme Court has stated:

Alleged misconduct deemed to be "reckless," ... differs from intentional misconduct. "While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it. It is enough that he realizes or, from facts which he knows, should realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless. However, a strong probability is a different thing from a substantial certainty without which he cannot be said to intend the harm in which his act results."167

Therefore, claims under either section 623 or 626(b) of the ADEA are susceptible of coming within the coverage of the policy.168

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168. Not all courts agree. In Kline v. The Kemper Group, 826 F. Supp. 123 (M.D. Pa. 1993), aff'd, 22 F.3d 301 (3d Cir. 1994), the court held that an age discrimination claim did not constitute an occurrence: "[The employee] alleges that his employment was terminated by [the employer] on the basis of his age. Termination of an employee's employment is obviously an intentional act. By no stretch of the imagination could it be considered an accidental or unintended consequence of one's conduct." Id. at 129. The court, however, did not examine the elements of a private cause of action under the ADEA, specifically, the fact that intent to discriminate or cause harm is not a required element.
B. Whether the Policyholder Has Alleged Bodily Injury

In general liability policies, insurers agree to "pay those sums that the insured becomes legally obligated to pay as damages because of . . . 'bodily injury'". Typically, the policies define "bodily injury" as "bodily injury, sickness, or disease sustained by a person, including death resulting from any of these at any time resulting therefrom." While it is possible that a physical bodily injury could be involved in an employment claim, most such claims make allegations of non-physical injuries such as mental or emotional distress. The issue, then, is whether claims of mental or emotional distress constitute "bodily injury."

No Connecticut case law exists that precisely answers the issue as to whether emotional distress constitutes a bodily injury within the meaning of a general liability policy. Cases from other jurisdictions are divided, the majority restricting its meaning of "bodily injury" to physical injury only and excluding non-physical harm such as emotional distress. These cases typically find that the definition is unambiguous and that the word "bodily" (connoting a physical harm) modifies "injury," "sickness" and "disease." Other

\[\text{References:}\]

169. ISO Form, supra note 113, Section I, 1.a.

170. ISO Form, supra note 113, Section V, 3.

171. Physical bodily injury can occur in sexual or racial harassment cases as the result of a battery. There is no dispute that a physical bodily injury constitutes a "bodily injury" under a policy.


The coverage contemplated actual bodily injury, sickness or disease resulting in physical impairment, as contrasted to mental impairment. Under the Travelers policy the terms "sickness" and "disease" are modified by the word "bodily." Mental anguish and illness and emotional distress are not covered by the express terms of the Travelers policy.

\[\text{Id.}\]
courts, however, have held that the term “bodily injury” is ambiguous, or at least broad enough to lead a reasonable policyholder to believe that it was purchasing coverage for emotional distress. For example, the New York Court of Appeals recently held that a claim for emotional distress, with no accompanying physical manifestations, is included within “bodily injury” coverage because the definition of this term was ambiguous. The court of appeals determined that the word “bodily” did not necessarily modify “sickness” or “disease,” and therefore, nonphysical sicknesses or diseases were within the coverage. “We decline to rewrite the contract to add ‘bodily sickness’ and bodily disease, and a requirement for prior physical contact for compensable mental injury.”

The Connecticut Supreme Court appears to be leaning toward restricting the meaning of “bodily injury” to physical harm and excluding emotional distress from “bodily injury” coverage. In *Izzo v. Colonial Pennsylvania Insurance Co.*, the Connecticut Supreme Court appeared to adopt the reasoning contained in cases from other jurisdictions that distinguish the meanings of “bodily injury” and “personal injury,” suggesting that the policy term “personal injury” is “broader, more comprehensive and significant than the term ‘bodily injury’.” The court also noted that “[i]t has been said that the term ‘bodily injury’... is narrower in that it connotes an element of personal contact.”

C. Whether the Policyholder Has Alleged Personal Injury

The terms “bodily injury” and “personal injury” are generally


176. Id. at 630, 595 N.E.2d at 822.


178. Id. at 313, 524 A.2d at 645.

179. Id. (citing Malone v. Costa, 9 So. 2d 275 (Fla. 1942)).

180. The court did go so far as to say that “[a] claim of loss of consortium, although a ‘personal injury,’ is not a ‘bodily injury’ to the claimant.” Id.
recognized as not being synonymous and as having distinct definitions. The term "personal injury" is generally regarded as being broader than "bodily injury" and includes not only physical injury but also affronts or insults to the reputation or sensibilities of a person. "Bodily injury," by comparison, is a narrower term and appears to encompass only physical injury to the body and the consequences thereof.

General liability policies typically define "personal injury" as:

- injury, other than 'bodily injury,' arising out of one or more of the following offenses: a. False arrest, detention or imprisonment; b. Malicious prosecution; c. Wrongful entry into or eviction of a person from a room, dwelling or premises that the person occupies; d. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organizations goods, products or services; or e. Oral or written, publication or material that violates a person's right of privacy.

While there is no Connecticut case law on the subject, the definition of "personal injury" in the general liability policy appears to include negligent infliction of emotional distress and defamation if the employer's liability is purely vicarious. Further, even if a defamation claim alleges that it was made "with reckless disregard," "falsely and maliciously," or "with malice" such statements do not necessarily connote "an intent or desire to injure" and, therefore, cause the claim to be outside coverage of the policy. If the employee were to claim that the employer defamed him with the specific intent to injure his reputation or hold him up to ridicule, then the defamation would not be an "accident" and the claim would not be within the scope of the policy.

D. Whether the Policyholder Has Alleged Property Damage

General liability policies typically define "property damage" as: "a. physical injury to tangible property including all loss of use

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181. See 7A JOHN A. APPLEMAN, INSURANCE LAW AND PRACTICE § 4501.14 (Berdel ed. 1979); see also Izzo, 203 Conn. at 313, 524 A.2d at 645.
182. ISO Form, supra note 113, Section V, 9.
183. See French Cleaners Inc., v. Aetna Casualty & Surety Co., No. CV 92 051 82 85, 1995 WL 91423 (Conn. Super. Ct. Feb. 17, 1995), in which the court strongly implies that, had the employee included a defamation claim in connection with her wrongful discharge action, the defamation claim would have fallen within the definition of "personal injury" and thus triggered the insurer's duty to defend.
of that property; or b. loss of use of tangible property that is not physically injured."

The question arises, then, as to whether an aggrieved employee's allegations of loss of past and future salary, loss of health benefits, seniority, pension benefits, and other incidents of employment as a result of an alleged discriminatory wrongful discharge may constitute "property damage."

While there is no Connecticut case law on this issue, cases from other jurisdictions uniformly hold that such claims do not involve "tangible property" and therefore do not constitute property damage.

Understood in its plain and ordinary sense, "tangible property" means "property" (as real estate) having physical substance apparent to the senses. To construe the explicit words "tangible property" to include intangible economic interests and property rights requires a strained and farfetched interpretation, doing violence to the plain language of the policies. Such an interpretation would rewrite the policies to fasten on the insurers a liability they have not assumed.

Therefore, those courts that have considered the issue hold that the purely economic losses claimed by aggrieved employees in wrongful discharge or discrimination cases (e.g., lost salary, death benefits, etc.) are not "tangible property" and therefore are not covered by a general liability policy. If presented with the issue, it is very likely that the Connecticut Supreme Court would reach a similar result.

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185. ISO Form, supra note 113, section V, 12.

[The employee's] complaint alleges loss of "past and future salary, loss of health benefits, and other benefits of employment," as a direct result of the alleged wrongful discharge. In this court's opinion, [the employee's] alleged damages do not involve tangible property and, therefore, any sums [the employer] might become obligated to pay in the underlying action would not be a result of "property damage" as defined in the subject policy.

E. Whether Employers May Obtain Insurance Coverage for Punitive Damages

Under the Civil Rights Act of 1991, punitive damages may be assessed if the defendant employer committed a discriminatory practice with "reckless indifference to the federally protected rights of an aggrieved individual." Punitive damages awards can be quite substantial, especially if the discriminatory practice was directed to a class of persons rather than to a single individual. When the employer/policyholder makes a claim against its insurer for coverage of such punitive damages, how should the insurer respond?

As in all coverage matters, the threshold inquiry is an examination of the policy language. There are at least three ways in which the policy may treat punitive damages. First, the policy may expressly exclude coverage, in which case resolution of the issue is simple. Second, the policy may be silent, that is, the policy may simply state that the insurer agrees "to pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies" and the phrase "punitive damages" never appears in the policy. Third, the policy may purport to expressly cover punitive damages, that is, it may state that the word "damages" wherever used in the policy shall include actual damages or statutory damages and shall also include punitive damages.

In those cases where the policy is silent, that is, when it states that the insurer will pay on behalf of the insured all sums that the insured shall become legally obligated to pay as damages because of bodily injury or property damage arising out of an occurrence, and there is no exclusion for punitive damages, the insurer must undergo a two-step process. The first is an analysis of the policy language itself to determine whether it admits of an interpretation which would permit coverage. Second, if the language does admit such an interpretation, the insurer must determine whether coverage for punitive damages would be void as being contrary to public policy. In those cases where the policy expressly purports to cover punitive damages, the insurer, somewhat awkwardly, is left with only the public policy issue.

189. ISO Form, supra note 113, section I, Coverage A.1a.
1. Policy Interpretation

Some courts hold that punitive damages are not damages "because of bodily injury" or "personal injury" but, rather, are imposed based on conduct society desires to reform; therefore, they are not included within the meaning of "damages."

Punitive damages are not in the same category as damages "for bodily injury" or "for personal injury." "The chief purpose of punitive damages is punishment to the offender, and a deterrent to similar conduct by others." Punitive damages are never awarded as compensation. They "are mere incidents to the cause of action and are considered separate and apart from and in addition to the assessment of actual damages." While actual damages are measured by the extent of the injury, punitive damages are measured by the extent of the malice of the actor. Since punitive damages are never awarded merely because of a "bodily injury" or "personal injury" but only when the actor's conduct displays the requisite malice, we find that they are not in the category of damages for "bodily injury" or "personal injury." 190

The majority of courts, however, disagree, holding that punitive damages are covered within the scope of the policy language or conclude that the language is ambiguous and employ the doctrine of contra proferentem to construe the policy in favor of coverage. 191 For example, in Norfolk & Western Railway Co. v. Hartford Accident & Indemnity Co., 192 the court reasoned:

Of course, a threshold question may be posed, whether the language of the insurance contract admits of a construction which allows for punitive damages. The contract covers "all sums which the insured shall become legally obligated to pay." . . . The contract nowhere mentions punitive damages, although it was within Hartford's power to exclude such coverage. The policy unambiguously covers "all sums." Punitive damages are a form of damages; when liquidated by judgment, they are a "sum." Thus, the contract does not even present such an ambiguity as would


call into play the rule that ambiguities in insurance contracts should be resolved in favor of the insured.\textsuperscript{193}

Similarly, in \textit{Harrell v. Travelers Indemnity Co.},\textsuperscript{194} the Supreme Court of Oregon stated that:

in the absence of an express exclusion of liability for punitive damages, a person insured by such a policy would have reason to suppose that he would be protected against liability for "all sums" which the insured might become "legally obligated to pay" and that the term "damages" would include all damages, including punitive damages which became, by judgment, a "sum" that he became "legally obligated to pay."\textsuperscript{195}

The Connecticut Supreme Court has resolved the contract interpretation issue in favor of the policyholder. In \textit{Avis Rent A Car System, Inc. v. Liberty Mutual Insurance Co.},\textsuperscript{196} the court held that the policy provision indemnifying the policyholder for "all sums which the insured shall become legally obligated to pay as damages because of . . . bodily injury" can reasonably be construed to include a judgment trebling a compensatory damages award because of the reckless nature of the conduct that produced the bodily injury.\textsuperscript{197} Liberty Mutual argued that the policy term "damages because of . . . bodily injury" did not include damages assessed as a statutory penalty for reckless misconduct, which was more in the nature of "a reward for securing the punishment of one who has committed a wrong of a public nature."\textsuperscript{198} The court rejected that argument, reasoning that the treble damages were "damages because of . . . bodily injury" insofar as the bodily injury was an "essential predicate" to recovery.\textsuperscript{199} The court also stated that "even though other interpretations may also be reasonable '[w]hen the words of an insurance contract are, without violence, susceptible of two interpretations, that which will sustain the claim and cover the loss must, in preference, be adopted.'"\textsuperscript{200}

\textsuperscript{193} \textit{Id.} at 94 n.1 (citation omitted).
\textsuperscript{194} 279 Or. 199, 567 P.2d 1013 (1977).
\textsuperscript{195} \textit{Id.} at 204-05, 567 P.2d at 1015.
\textsuperscript{196} 203 Conn. 667, 526 A.2d 522 (1987).
\textsuperscript{197} \textit{Id.} at 671, 526 A.2d at 524.
\textsuperscript{198} \textit{Id.} at 670-71, 526 A.2d at 524.
\textsuperscript{199} \textit{Id.} at 671, 526 A.2d at 524.
\textsuperscript{200} \textit{Id.} at 672, 526 A.2d at 524 (quoting Raffell v. Travelers Indem. Co., 141 Conn. 389, 392, 106 A.2d 716, 718 (1954)).
2. Public Policy Considerations

Even in those cases where the insurance policy may admit of an interpretation of coverage for punitive damages, courts may still determine that enforcement would be contrary to public policy. Generally, courts review two factors when determining whether public policy should bar insurance coverage for punitive damages. First, they assess the particular wrongful conduct upon which the award of punitive damages is predicated. If the presence of the insurance is likely to encourage the wrongful conduct, then courts tend not to enforce insurance coverage for punitive damages. Second, they assess the purpose for which the punitive damage award is made. If the primary purpose is deterrence rather than compensation for the victim, then courts are more likely to conclude that public policy requires that coverage for punitive damages be barred.

It would seem that the second prong of the test will almost always favor barring coverage for punitive damages. By definition, the purpose of punitive damages is not to compensate but rather to punish the wrongdoer and deter future wrongful conduct:

[P]unitive damages . . . are neither equitable nor corrective; punitive damages serve but one purpose — to punish and through punishment to deter. "Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct."202

The primary purpose served by punitive damages for discrimination under the Civil Rights Act of 1991, is the deterrence of em-

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201. Tedesco v. Maryland Casualty Co., 127 Conn. 533, 535, 18 A.2d 357, 358 (1941) (punitive damages are "awarded beyond those which [are] compensatory").

If that person were permitted to shift the burden to an insurance company, punitive damages would serve no useful purpose. Such damages do not compensate the plaintiff for his injury since compensatory damages already have made the plaintiff whole. And there is no point in punishing the insurance company; it has done no wrong. In actual fact, of course, and considering the extent to which the public is insured, the burden would ultimately come to rest not on the insurance companies but on the public, since the added liability to the insurance companies would be passed along to the premium payers. Society would then be punishing itself for the wrong committed by the insured.

Id.
employment discrimination. "This record and its subsequent interpretation by the courts, leaves no doubt that the primary purpose of [T]itle VII is to eliminate discrimination in employment and that its secondary purpose is to compensate victims of discrimination." Therefore, in the circumstances of employment discrimination cases, the second prong favors barring coverage for punitive damages.

With respect to the first prong, however, whether awarding punitive damages is more likely to encourage the behavior being punished, the analysis little more interesting. First, in cases where the imposition of punitive damages is based on an intentional wrongful act, with intent to harm, coverage is universally held to be contrary to the public policy and therefore void. Courts seem to agree that the threat of punitive damages serves to deter persons from engaging in intentional wrongful conduct and that permitting coverage would have the effect of encouraging such conduct. "Where a person is able to insure himself against punishment he gains a freedom of misconduct inconsistent with the establishment of sanctions against such misconduct."204

Where courts part company is in those situations where the imposition of punitive damages is based on conduct which is not intentionally harmful, such as recklessness or gross negligence. For example, punitive damages under the Civil Rights Act of 1991 are based upon a finding of "reckless indifference to the federally protected rights of an aggrieved individual."205 Many, indeed most, courts hold that when the basis of a punitive damage award is something less than that of an intentionally inflicted injury, insurance coverage for such punitive damages is not contrary to public policy.

\[\text{As long as insurance companies are willing, for a price, to contract for insurance to provide protection against liability for punitive damages to persons or corporations deemed by them to be "good risks" for such coverage, and as long as liability for punitive damages continues to be extended to "gross negligence," "recklessness" and for other conduct contrary to societal interests, we are in agreement with those authorities which hold that insurance contracts providing protection against such liability should not be held by courts to be void as against public policy.}\]206

203. Anastassiou, supra note 154, at 197.
204. Northwestern, 307 F.2d at 440.
The basis for such decisions is that, while punitive damages may serve to deter persons from engaging in intentionally harmful behavior, these courts believe that it is purely speculative whether the prohibition of coverage for punitive damages would deter reckless or grossly negligent conduct. In a case permitting coverage for punitive damages based on "recklessness," the Supreme Court of Tennessee stated:

We are not able to agree the closing of the insurance market, on the payment of punitive damages, to such drivers would necessarily accomplish the result of deterring them from their wrongful conduct. This State, in regard to the proper operator of motor vehicles, has a great many detailed criminal sanctions, which apparently have not deterred this slaughter on our highways and streets. Then to say the closing of the insurance market, in the payment of punitive damages, would act to deter guilty drivers would in our opinion contain some element of speculation.207

The court concluded that the reason for the prohibition on coverage for punitive damages ceases to exist when something less than intentional wrongful conduct is sufficient to justify such an award.208

Unlike the Tennessee courts, courts in other jurisdictions, such as Rhode Island, New York, and California, believe that punitive damages actually deter reckless conduct.209 These courts assert that (1977). What really seems to "stick in the craw" of these courts is the fact that the insurance companies collect premiums to cover punitive damages and then turn around and argue that coverage should not be enforced because it would be violative of public policy.

It is one thing for an insurance company to write a policy with provisions which exclude liability for punitive damages and to ask that this court construe and apply such policy provisions. It is quite another thing, however, for an insurance company which has written and issued an insurance policy in terms which include coverage for punitive damages—presumably at a premium which the insurance company believed to be sufficient as consideration for such coverage—to ask this court to relieve it from such liability under its own insurance contract for a judicial declaration that the contract is void for reasons of "public policy."

Id. 207. Lazenby v. Universal Underwriters Ins. Co., 383 S.W.2d 1, 5 (Tenn. 1964). 208. The court in Lazenby did not address the second rationale for the imposition of punitive damages, punishment. 209. See California State Auto. Ass’n Inter-Ins. Bureau v. Carter, 210 Cal. Rptr. 140, 144 (Cal. Ct. App. 1985). ("The state’s policy with respect to punitive damages would be frustrated by permitting punitive damages to be assessed against an insurance carrier."); Allen v. Simmons, 533 A.2d 541, 544 (R.I. 1987) (satisfaction of a punitive damages award should remain with the wrongdoer and should not be cast upon the
punitive damages deter the moral hazard upon which liability is predicated. The rationale is based on the premise that if a person has insurance, he will take more risks than before because he bears less of the cost for his conduct.

Insurance therefore tends to increase the likelihood that the insured risks will come to pass. . . . If an insurance policy were to cover [an employer's] willful racial discrimination, the people [making employment decisions for the employer] could indulge their own preference for discrimination at little risk to themselves. The [employer] would pay higher [premiums,] but given the insurance, [employers] would be more likely to discriminate.210

The Connecticut Supreme Court has held that insurance coverage to indemnify the actual wrongdoer211 for punitive damages imposed for reckless conduct is contrary to public policy. In *Tedesco v. Maryland Casualty Co.*,212 an injured plaintiff had recovered a punitive damage award from the operator of a motor vehicle by reason of the operator's negligence. The operator's insurance company denied coverage on the grounds that under the language of the policy "liability imposed upon him [the insured] by the law for damages . . . because of bodily injury" did not include punitive damages.213 The Connecticut Supreme Court agreed, observing that it would be contrary to public policy to enforce "a policy which expressly covered an obligation of the insured to pay a sum of money in no way representing injuries or losses suffered by the plaintiff but imposed as a penalty because of a public wrong."214 Therefore, it held that:

the additional sum representing the doubling of the compensatory damages is, in its essence, a liability imposed, not for damages because of bodily injury, but as a reward for securing the punishment of one who has committed a wrong of a public na-

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211. The Connecticut Supreme Court has recently held that insurance policies covering punitive damages imposed, not on the actual wrongdoer, but rather on someone vicariously liable, are enforceable. *Avis Rent A Car Sys., Inc. v. Liberty Mut. Ins. Co.*, 203 Conn. 667, 672-75, 526 A.2d 522, 524-26 (1987). See *supra* notes 196-199 and accompanying text.
212. 127 Conn. 533, 18 A.2d 357 (1941).
213. *Id.* at 538, 18 A.2d at 359.
214. *Id.* at 537, 18 A.2d at 359.
3. Vicarious Liability

A third issue concerns the insurability of punitive damages based on vicarious liability, that is, if the corporate employer is assessed punitive damages based on the wrongful discriminatory conduct of an employee, should punitive damages assessed against the employer be uninsurable as a matter of public policy? Some courts, such as those in Illinois, have held that an employer may insure itself against vicarious liability for punitive damages assessed against it as a consequence of the wrongful conduct of the employee, if the employer had not "in any way, directly or indirectly, participated in the wrongful conduct of the employee for which punitive damages were assessed."216

Other courts hold that insurability of punitive damages assessed for purely vicarious liability is against public policy because it detracts from the impetus on employers to control the behavior of their employees. "[T]he basis for the imposition of vicarious liability for punitive damages upon a corporation or other employer is also one of deterrence, i.e., the deterrent effect upon an employer of an award of punitive damages by encouraging him to exercise closer control over his employees."217

There is no Connecticut case law concerning whether it is against public policy for an employer to insure itself against vicarious liability for punitive damages assessed against it as a consequence of an employee's discriminatory conduct. However, the Connecticut Supreme Court has held that there is no violation of public policy for a lessor of automobiles to insure itself for vicarious liability based on the drunk driving of its lessee. In Avis Rent A Car System, Inc. v. Liberty Mutual Insurance Co.,218 the Connecticut Supreme Court stated that, while it may be against public policy to indemnify the actual wrongdoer for punitive damages, there is no reason to bar coverage of punitive damages against one whose liability is purely vicarious.

215. Id. at 538, 18 A.2d at 359.
Liberty [Mutual] does not, however, point out, nor can we con­ceive of, any consideration of public policy that would be off­fended by affording insurance coverage for a liability imposed upon Avis under our statutes by virtue of its status as lessor of the motor vehicle involved and not because of any actual wrong­doing on its part.219

Avis, of course, is distinguishable from a matter involving lia­bility for discriminatory practices that would justify liability for pu­nitive damages under the Civil Rights Act of 1991. The imposition of punitive damages on the lessor of motor vehicles would in no way deter the wrongful behavior (drunken driving by lessee) sought to be punished in the circumstances of Avis. However, as the Ore­gon Supreme Court has held, employers are in a far better position to control the on-site behavior of their employees, and the threat of punitive damages may very well stimulate them to take a strong affirmative action to prevent discriminatory behavior.220 Therefore, the insurability of punitive damages for vicarious liability assessed under the Civil Rights Act of 1991 should still be considered to be an open question in Connecticut.

F. Whether Actions Before the EEOC or CCHRO221 Are “Suits”

Under the terms of a general liability policy, the insurer has the right and duty to defend any “suit” seeking damages on account of bodily injury or property damage to which the insurance applies. The word “suit” typically is defined as a civil proceeding in which damages because of bodily injury, property damage, personal in­jury, or advertising injury to which this insurance applies are al­leged. “Suit” includes an arbitration proceeding alleging such damages to which the insured must submit or submit to with the insurer’s consent. Sometimes the word “suit” is undefined in the policy.222

Some courts have found that, when not defined, the word “suit” can have several meanings, or have a meaning sufficiently broad to cover administrative proceedings before the EEOC or

219. Id. at 674, 526 A.2d at 525-26.
221. The Equal Employment Opportunity Commission (“EEOC”) and the Connecticut Commission of Human Rights and Opportunities (“CCHRO”) are, respectively, the federal and state agencies responsible for enforcement of employment discrimination legislation.
state agencies charged with responsibility for enforcing anti-discrimination laws. These courts rely on dictionary definitions that do not limit the meaning to a "court proceeding." In sum, these courts interpret "suit" broadly to include any kind of legal proceeding in which legal liability can be imposed on the policyholder. As the court held in Campbell Soup:

An analysis of the quoted language compels the conclusion that the duty to defend is triggered when the insured is involved in an adversarial proceeding, a consequence of which is the factual determination that legal liability may or may not be imposed on the insured. It matters not whether the factual determination is made by a judicial body after the filing of a complaint and a plenary hearing, or whether the determination is made by an administrative body which has the authority to impose liability upon the insured. It is not the forum in which the proceeding is held that is critical, but whether, as a result of the hearing, liability may be imposed.

Therefore, under the law of New Jersey, when the policyholder is before an administrative agency that has initiated a coercive process with the authority to impose liability, there exists a "suit," and the insurer has a duty to defend such claims if other policy requirements are met.

Application of this standard to proceedings before the EEOC and the CCHRO create different results, the reason being that proceedings before the EEOC do not possess the requisite coerciveness or ability to impose liability, while CCHRO proceedings do.

A review of the Equal Employment Opportunity Act and the regulations of the EEOC reveal that proceedings are voluntary, not coercive, and that the EEOC seeks to resolve issues between employer and employee by means of conciliation and persuasion, not through imposition of legal liability. The heart of the Equal Employment Opportunity Act provides:

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224. See School Dist., 58 Or. App. at 703, 650 P.2d at 937. In School District, the court defined "suit" in pertinent part, as "the attempt to gain an end by legal process; prosecution of right before any tribunal," and more narrowly as "an action or process in a court for recovery of a right or claim: a legal application to a court for justice." See also Campbell Soup, 239 N.J. Super. at 496-97, 571 A.2d at 1017.


Whenever a charge is filed by or on behalf of a person claiming to be aggrieved... alleging that an employer... has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer... within ten days, and shall make an investigation thereof. ... If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion.228

The procedural regulations of the EEOC also evidence the non-coercive nature of the conciliation process:

Where the Commission determines that there is reasonable cause to believe that an unlawful employment practice has occurred or is occurring [and after the review provided for in § 1601.19,] the Commission shall endeavor to eliminate such practice by informal methods of conference, conciliation and persuasion. In conciliating a case in which a determination of reasonable cause has been made, the Commission shall attempt to achieve a just resolution of all violations found and to obtain agreement that the respondent will eliminate the unlawful employment practice and provide appropriate affirmative relief.229

The statute does not empower the EEOC to impose sanctions on the employer who refuses to conciliate or to reach an agreement. Nor can any statements made by the employer during the conciliation process be used against the employer in a later proceeding.230

In the event that conciliation efforts fail or the employer refuses to conciliate, the EEOC may initiate a civil action pursuant to 42 U.S.C. § 2000e-5(f)(1). If the EEOC decides not to initiate a civil action, it will issue a right-to-sue letter to the aggrieved employee, who is then free to pursue such an action.

Therefore, since no adjudication process takes place during an EEOC conciliation proceeding, there is no "suit," and the insurer has no duty to defend the policyholder. It is only after the EEOC or aggrieved employee files suit in the federal district court that an adjudicatory process begins. "It is then, for the first time, that the obligation of the insurer to defend should properly be raised."231

230. § 1601.26(a).
CCHRO proceedings are an entirely different matter. Unlike EEOC proceedings, they possess indicia of coerciveness and the authority to establish legal liability, including ordering payment of back pay.  

Thus, an aggrieved employee, by filing “a complaint in writing under oath” with the CCHRO setting forth the particulars of the alleged discriminatory practice has in essence filed a “suit” invoking the insurer’s duty to defend. Within ten days after filing the complaint, the CCHRO must cause the complaint to be served upon the employer, and the employer “shall” file a written answer under oath within thirty days of receipt. The employer will be defaulted if it fails to answer the complaint. Within 90 days of the filing of the complaint, the executive director of the CCHRO shall review the file, consisting of the complaint, answer, and responses to the CCHRO’s requests for information, if any, to determine whether “the complaint fails to state a claim for relief or is frivolous on its face, or there is no reasonable possibility that investigating the complaint will result in a finding of reasonable cause.” If it does not, the complaint is dismissed. If the complaint is not dismissed, the CHRO “may conduct mandatory mediation sessions, expedited or extended fact-finding conferences or complete investigations or any combination thereof . . . for the purpose of finding facts, promoting voluntary resolution of complaints or determining if there is reasonable cause for believing that a discriminatory practice has or is being committed.” A mediator may recommend but not order a resolution of the complaint.

Before issuing a finding of reasonable cause, the investigator

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232. The CCHRO does not have authority to impose damages for emotional distress or attorney’s fees. Bridgeport Hosp. v. Commission on Human Rights and Opportunities, 232 Conn. 91, 653 A.2d 782 (1995).

233. CONN. GEN. STAT. § 46a-82(a) (1993). A complaint filed pursuant to this section must be filed within 180 days after the alleged act of discrimination. § 46a-82(e).

234. § 46a-83(a) (West Supp. 1995).

235. § 46a-83(g).

236. § 46a-83(b).

237. Id.

238. “[R]easonable cause means a bona fide belief that the material issues of fact are such that a person of ordinary caution, prudence and judgment could believe the facts alleged in the complaint.” § 46a-83a(a) (1993). See Adriani v. Commission on Human Rights & Opportunities, 220 Conn. 307, 316, 596 A.2d 426, 433 (1991).

239. § 46a-83(c).
must permit each party the opportunity to provide written or verbal comments on all evidence in the investigator's file. In the investigation, the CCHRO may issue subpoenas requiring the production of documents and promulgate interrogatories related to the complaint under investigation. The employer can be defaulted for failure to answer such interrogatories or produce the subpoenaed documents. Within nine months from the filing of the complaint, the investigator must make a finding of reasonable cause or no reasonable cause in writing and must list the factual findings upon which the decision is based. If the investigator makes a finding that reasonable cause exists, the parties have twenty days from receipt of the notice to elect a civil action in lieu of an administrative hearing. Finally, within 45 days of a finding of reasonable cause, the investigator shall certify the complaint to the executive director of the CCHRO and to the attorney general.

A hearing officer then conducts a de novo hearing on the merits of the complaint; this is not a review of the investigator's findings. If the respondent fails to answer the certified complaint or to appear at the hearing it can be defaulted. If the presiding officer finds, by a preponderance of the evidence, that an employer has engaged in a discriminatory practice, the presiding officer must state his findings of fact and serve the respondent with an order to cease and desist from such discriminatory practice; the presiding officer may also order the hiring or reinstatement of employees with or without back pay. Upon review by the superior court, the findings of fact made by the presiding officer, if supported by substantial and competent evidence, are conclusive. "In an appeal from the decision of the commission, the Superior Court may not try the case de novo, adjudicate facts or substitute its own discretion for that of the tribunal. The ultimate duty of the trial court [is] to decide whether, in light of the evidence, the agency had acted unreasonably, arbitrarily, illegally or in abuse of its discretion."

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240. §§ 46a-83(f), 46a-54(ll).
241. § 46a-83(b).
242. § 46a-83(b).
243. Id.
244. § 46a-84(b).
245. § 46a-84(f).
247. § 46a-95.
view of the decision is solely a determination as to whether it was rendered in accordance with the Uniform Administrative Procedure Act.

If Connecticut courts were to interpret "suit" as any adjudicatory proceeding in which legal liability may be imposed, they would have to determine when during the course of the CCHRO proceedings the process becomes sufficiently "coercive" or sufficiently "adjudicatory" to be deemed a "suit." The policyholder personally will demand that the insurer defend the "suit" when it is served with the initial "complaint," which it must "answer" within 30 days or be "defaulted." If the insurer refuses, the policyholder will probably renew the demand, as each step in the process becomes increasingly more "coercive" and the CCHRO "ratchets-up" its ability to impose legal liability.

While no Connecticut appellate court has defined the word "suit" in a general liability policy, in a lengthy decision interpreting whether a potential responsibility letter ("PRP") issued by the U.S. Environmental Policy Administration constitutes a suit, a Superior Court judge held that a "suit" is an action filed in court to secure damages or injunctive relief.249 It is unclear what meaning the Connecticut Supreme Court would give to the word "suit" where it is not defined in the policy.

G. Whether the Employee Exclusion Applies

In recent years, general liability policies have typically included exclusions for injuries arising out of the employment relationship. The particular language may take a number of forms but generally they provide that the policy does not apply to "bodily injury or personal injury sustained by any person as a result of an offense directly or indirectly related to the employment of such person by the named insured." Courts that have had occasion to interpret the exclusion find them to be unambiguous and enforceable.250 The primary issue in these cases tends to be whether the alleged wrong was

sufficiently related to the "employment relationship" to come within the exclusion. For example, it has been held that publication that an employee had been drinking alcohol at a time he was supposed to be available for flight duty,251 sexual harassment on the job,252 and invasion of the employee's privacy in a women's bathroom253 all were directly or indirectly related to the employment relationship and thus excluded from coverage. Factual issues also arise in wrongful termination actions wherein allegedly defamatory remarks are made either when the claimant is still an employee or when the claimant is a former employee.254 Arguably, alleged defamatory remarks made post-employment, if they relate to the claimant's work, may be sufficiently related to the employment relationship to come within the exclusion.

In addition, the employer liability exclusion may not apply to claims made against an insured who is not the employee's "employer." That is, claims made against supervisors or co-employees may not fall within the exclusion.255 For example, in *Western Heritage Insurance Co. v. Magic Years Learning Centers and Child Care, Inc.*,256 the court observed that the employer liability exclusion barred coverage of claims made by "any employee of the insured" and not "any employee of any insured."257 When read in conjunction with the severability clause, the United States Court of Appeals for Fifth Circuit Court concluded that "we must read the employer liability exclusion as applying separately to each insured,

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251. *Pennsylvania Nat'1*, 964 F.2d at 480 (the defamation claim—otherwise a "personal injury" and covered by the Insuring Agreement was—excluded).

252. *Teague Motor Co.*, 73 Wash. App. 479, 869 P.2d 1130 (sexual harassment was directly or indirectly related to employment of the claimant and therefore was excluded from coverage).


254. Robert A. Machson & Joseph P. Monteleone, *Insurance Coverage for Wrongful Employment Practices Claims Under Various Liability Policies*, 49 BUS. LAWyer 689, 708 (1994) ("For example, coverage could depend on whether the employer said 'you're a stupid and incompetent jerk and you're fired' (arguably not covered because the insult occurred during employment), or 'you're fired, you stupid and incompetent jerk' (possibly covered because the insult occurred post-employment)").


256. 45 F.3d 85 (5th Cir. 1995).

257. *Id.* at 89 (emphasis added).
excluding coverage of an insured only if that insured is the employer of the injured party."^{258}

IV. CONCLUSION

The resolution of employment insurance coverage issues requires thorough knowledge of the underlying causes of action presented for coverage and the insurance law principles applicable to the claims. It also requires careful reading of the underlying complaint because a claimant may, by the particular language used, cause potentially covered causes of action to be excluded.\footnote{259}

Unfortunately, little Connecticut case law regarding insurance coverage for employment related claims exists. Case law from other jurisdictions provides some guidance, but much of it is conflicting. The primary value of these cases, to Connecticut practitioners, is to define the issues and suggest solutions. The resolutions of these issue, under Connecticut law, remains to be meted out, issue by issue, case by case.

\footnote{258. \textit{Id.} at 89-90.}

\footnote{259. This most often occurs where a claimant specifically alleges an intent to harm where none is required to make out a prima facie case.}