Retiring Workplace Tortious Interference Claims

Donn C. Meindertsma
Are you a rung or two lower on the corporate ladder than you expected to be at this point in your career? Sue your boss.

Suits by unhappy employees against supervisors or cubicle-mates are nothing new. In at least one manifestation, however, the right to sue coworkers over workplace disputes has developed in an *ad hoc* manner based on an all-purpose tort theory, tortious interference. As a result of this organic development, the law is unclear and in many respects confounded by inconsistencies. The lack of clarity leaves employers and employees guessing about the legal duties coworkers owe to each other in the workplace.¹

Courts should freshly examine the viability of claims that a coworker tortiously interfered with the plaintiff's job. The common law has long recognized that when a third party improperly interferes with an established relationship between two others, the third party may be liable for the damages caused. Application of this tort theory to coworker disputes, however, is not the result of studied consideration whether coworker tort actions are necessary or proper, insofar as courts rarely pause to consider whether these claims should be available in the first place.²


2. See Brett J. Chessin, *Individual Liability for Wrongful Discharge in Violation of Public Policy: An Emerging Trend*, 48 WAKE FOREST L. REV. 1345, 1345 (2013) (showing the wide swath of courts that have changed the landscape of employment law by allowing claims based upon tort theory seemingly without considering the widespread ramifications of allowing such claims).
This Article contends that tortious interference claims are inappropriate to settle conflicts between colleagues. In this context, the tort conflicts with narrower legal causes of action tailored to resolve workplace disputes, fails to efficiently promote societal interests, and fails to provide adequate notice of the scope of duties owed by workers to one another. Statutory and workplace-specific tort claims better balance relevant interests and adequately protect employment rights.\(^3\)

Part I reviews the legal landscape of employment claims and summarizes the role of tortious interference claims in that context. Part II discusses how courts attempt to apply the theory of tortious interference when workers sue each other. Part III argues that courts should pay their last respects to claims of tortious interference against coworkers arising out of workplace disputes.\(^4\)

I. THE LEGAL LANDSCAPE

A. Case in Point

For the past two years now, Ryan did not get the annual performance evaluation he hoped for. He believes his work for TD & Co. has been outstanding, but his supervisor, Mindy, gave him low ratings. This has hurt his bank account more than his self-esteem: his below-average performance review disqualifies him from a raise, a bonus, and promotion opportunities.

Ryan theorizes that Mindy is trying to sabotage him because he is an up-and-coming company star. He concludes he no longer needs to tolerate Mindy’s nonsense, so he sues her for bungling his relationship with TD & Co. He claims that Mindy tortiously interfered with his relationship with TD & Co.

The complaint alleges that Ryan’s work met company expectations; he reasonably assumed that the company would fairly compensate him and consider him for advancement; Mindy does not like him; she gave him poor evaluations to sabotage him; and she did so solely to preserve

---

3. See, e.g., Ray v. Wal-Mart Stores, Inc., 359 P.3d 614, 636 (Utah 2015) (holding the preservation of an employee’s right to self-defense in the workplace was a valid protectable right as a means to properly balance workplace safety and employee rights).

4. See infra Part III. Employment-related interference claims may of course take other forms, such as a claim that a former employer provided negative references that interfered with the plaintiff’s prospective employment, a claim that a company improperly poached its competitor’s staff, or a claim that a former employee breached a non-solicitation covenant. See generally BRIAN M. MALSBERGER, TORTIOUS INTERFERENCE IN THE EMPLOYMENT CONTEXT: A STATE-BY-STATE SURVEY (4th ed. 2014) (demonstrating these types of claims).
her own prospects for advancement. He demands a jury trial and remedies, including remuneration for the raises and bonuses he did not get due to Mindy’s interference; an order barring Mindy from giving him anything less than superior evaluations in the future; a promotion; compensatory damages for his tarnished reputation and emotional distress; and punitive damages.

While Mindy is confident in the evaluation ratings she gave Ryan, she knows that no case is black and white. She also knows that Ryan has some supporters who perceive his abilities more favorably than she does. And what if the jury simply dislikes her and buys Ryan’s golden-boy theory?

Still, Mindy did what a supervisor should: she held Ryan accountable and advised him how to improve his performance. Mindy also cannot imagine that the court will hold her personally responsible for damages because any lost earnings would have come from the company, not her. Plus, Mindy lacks the power to single-handedly promote Ryan, so a court could not order her to promote him. Surely, the court will see that the complaint is frivolous and throw this case out. Whether the court will do so may hinge on the court’s readiness to recognize claims for tortious interference in workplace disputes.

B. Tortious Interference Claims in Context

Employment claims today include: a) modern causes of action (mostly statutory) tailored to protect workers, while also balancing the sometimes competing interests of employees, employers, and the public, and b) pedigreed general tort theories applied to jobsite tribulations. Some causes of action allow suits against coworkers; others only against the employer.

1. Statutory Employment Claims

Modern employment protections derive primarily from statutes that identify particular aims, such as to deter and remedy race, gender, and age discrimination. Statutes spell out the prohibited employment action


6. See id. at 280.

7. See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2012); Age
(e.g., whistleblower retaliation), identify (sometimes) who can be held liable for a violation, specify the process for resolving the dispute, and designate available remedies. Statutes often impose procedural steps designed to channel and streamline the resolution of disputes, such as an abbreviated limitations period or a mandatory administrative process.

The most well-known federal employee protection statutes establish only corporate, not coworker, liability, and courts are likely to interpret a law that prohibits "employers" from discriminating against employees to permit suit only against the employer. State statutes sometimes track their federal counterparts, but vary on whether suits against coworkers are permitted. Where a statute fails to address whether coworkers make proper defendants, courts have reached varying conclusions on the question.

Legislatures are positioned to gather data and devise efficient paths to resolve disputes. When enacting statutes, they presumably consider costs and benefits from the relevant perspectives—commercial, public, private, moral—and tailor the scope of liability and remedies to achieve those interests. Where interests compete, they presumably attempt to balance them. Among other societal objectives, a legislature might...
wish to promote a business-friendly environment that offers limited liability and clarity regarding the scope of potential employment claims. Alternatively, a state’s political disposition might favor strong deterrents against workplace unfairness and generous remedies, perhaps to foster social equality. No legislature has enacted a statute that restrains how supervisors may evaluate subordinates and provides a cause of action against them for unfair reviews. Ryan has therefore resorted to a tort claim.

2. Public Policy Claims

Almost all states recognize a tort action for wrongful discharge in violation of public policy. This claim is an exception to the legal presumption that employment is at-will, available where the reason for discharging an employee was so contrary to public policy as to be actionable. Wrongful discharge claims may challenge “unlawful” reasons for discharge, such as retaliation for filing a worker’s compensation claim, or for refusing a superior’s directive to violate a law. They may also protect employee rights, such as the right to engage in self-defense.

Maryland immunity law).

16. See, e.g., id. (explaining how an employer’s liability is limited by an employee having to show “actual malice” in order to bring a successful negative employment reference claim).


19. See Bagenstos, supra note 17 at 262.

20. Finkin, supra note 5, at 293 (“The gravamen of the wrong is the harm ‘to third parties and society as a whole’ that a discharge works in contradistinction to a wrong done the individual alone.”).

21. 82 AM. JUR. 2D Wrongful Discharge § 56 (2016) (“The termination itself must be motivated by an unlawful reason or purpose that is against public policy. However, the fact that the employee’s discharge was motivated by bad faith, malice, or retaliation does not support an action for wrongful discharge if the jury does not find that the discharge was in violation of public policy for either performing an act which public policy favored or for refusing to perform an act which public policy condemned.”).


Courts permit public policy claims only if the policy is clear, such as when a statute expresses it.\textsuperscript{25} Courts have reasoned that this limitation is justified because without it, judges would be making up public policy as they go, thus treading upon the territory of legislatures.\textsuperscript{26} Public policies are "not found in the varying personal opinions and whims of judges or courts, charged with the interpretation and declaration of the established law, as to what they themselves believe to be the demands or interests of the public."\textsuperscript{27}

Ryan considered a public policy claim against Mindy. In some jurisdictions, courts limit this action to discharges.\textsuperscript{28} One concern leading to this limitation is the potential for widespread litigation:

Recognizing a retaliation tort for actions short of termination could subject employers to torrents of unwarranted and vexatious suits filed by disgruntled employees at every juncture in the employment process. And why stop at demotions? If, as [plaintiff] argues, a demotion raises the same policy concerns as a termination, so too would transfers, alterations in job duties, and perhaps even disciplinary proceedings. The potential for expansion of this type of litigation is enormous.\textsuperscript{29}

Another court reasoned: "Subjecting each disciplinary decision of an employer to the scrutiny of the judiciary would not strike the proper balance between the employer's right to run his business as he sees fit and the employee's right to job security."\textsuperscript{30} Some states nonetheless

\begin{itemize}
\item \textsuperscript{25} See, e.g., Carl v. Children's Hosp., 702 A.2d 159, 162 (D.C. 1997) (Terry, J., concurring) ("[L]est we allow 'public policy' exceptions to swallow up the at-will doctrine, I would also hold that the recognition of any such exception must be firmly anchored either in the Constitution or in a statute or regulation which clearly reflects the particular 'public policy' being relied upon.").
\item \textsuperscript{26} Id.
\item \textsuperscript{27} Farrow v. St. Francis Med. Ctr., 407 S.W.3d 579, 595 (Mo. 2013) (en banc) (internal quotations and citations omitted).
\item \textsuperscript{29} Ludwig, 960 F.2d at 43.
\item \textsuperscript{30} White v. State, 929 P.2d 396, 408 (Wash. 1997) (en banc).
\end{itemize}
allow public policy claims based on personnel decisions short of discharge, often reasoning that limiting claims to discharges would simply encourage employers to punish workers in roundabout ways, such as by demoting them.31

Courts in most states have not yet decided whether public policy claims extend to grievances short of termination.32 A draft restatement of employment law titles the claim as one for “wrongful discipline in violation of public policy.”33 Under this proposal, an employee could sue over any personnel decision “that significantly affects compensation or working conditions,” or other action “that is reasonably likely to deter a similarly situated employee from engaging in protected activity.”34 In other words, employees could bring a public policy claim based on any “materially adverse” employment action.35

As Ryan’s case suggests, the line between material and immaterial adverse actions is thin. Might a rock bottom performance rating in one area of job responsibility (e.g., “teamwork”) be “materially adverse,” or must the overall evaluation score be unsatisfactory? Is consequential pecuniary harm also required? In Ryan’s case, the evaluations by Mindy are hardly damming, but they have meaningfully impaired his compensation and promotion opportunities for two years. If he has a “wrongful discipline” public policy claim, a court might find Ryan’s harm meets the threshold.

But can Ryan bring a wrongful discipline claim against Mindy? Mindy wrote the evaluations in her capacity as his supervisor. In some states, a public policy claim is viable only against the employer.36

31. See Brigham v. Dillon Cos., 935 P.2d 1054, 1059-60 (Kan. 1997) (“We conclude that the recognition of a cause of action for retaliatory demotion is a necessary and logical extension of the cause of action for retaliatory discharge.”); see also Trosper v. Bag ‘N Save, 734 N.W.2d 704, 711 (Neb. 2007) (“If we fail to recognize a claim for retaliatory demotion, it would create an incentive for employers to merely demote, rather than discharge, employees who exercise their rights. To promote such behavior would compromise the act and would render illusory the cause of action for retaliatory discharge.”).

32. See RESTATEMENT (THIRD) EMP’T LAW, § 4.01 reporters’ notes, cmt. a (AM. LAW INST., Tentative Draft No. 2, 2009).

33. Id. § 4.01 cmt. a (emphasis added).

34. Id. § 4.01(b).

35. The U.S. Supreme Court established this “materially adverse” or “reasonably likely to deter” standard in a case involving the anti-retaliation provisions of Title VII of the Civil Rights Act. See Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 57, 60-61 (2006).

36. See, e.g., Farrow v. St. Francis Med. Ctr., 407 S.W.3d 579, 595 (Mo. 2013) (en banc) (holding that because wrongful discharge claims requires an “employer-employee relationship,” a nurse employed by a hospital could not bring a claim against a supervising doctor); Buckner v. Atlantic Plant Maint. Co., 694 N.E.2d 565, 570 (Ill. 1998) (“[W]e hold that the only proper defendant in a retaliatory discharge action is the plaintiff’s former employer.”); Reno v. Baird, 957
Courts so holding reason that only the employer has an employment relationship with its workers and, furthermore, that “[f]ear of financial responsibility for a potential lawsuit could discourage supervisors from terminating employees in legitimate situations.”

According to one commentator, the “overwhelming weight of the case law” excludes coworkers from potential wrongful discharge/discipline liability. In some states, nonetheless, an employee may sue coworkers.

Whether coworkers may be sued for wrongful discharge or wrongful discipline is a question that courts sometimes resolve with scant analysis. A court may catalogue practical pros and cons by reasoning that “individual liability promotes deterrence and better decision making because it allows the active wrongdoer to be held directly responsible”, but on the other hand, it may dispose of a case simply by the opposite reasoning that the risk of individual liability could chill legitimate decision-making. A more legalistic analysis considers what duty is owed to the employee, and a court may conclude that any duty arises from the employment relationship itself, between the

P.2d 1333, 1348 (Cal. 1998) (ruling that where a statute establishes a public policy, and coworker is not an “employer” under the statute, plaintiff may not sue the coworker for public policy wrongful discharge), superseded by statute, CAL G0V’T CODE § 12940(j)(3) (West 2016), as recognized in Martinez v. Michaels, No. CV 15-02104, 2015 U.S. Dist. LEXIS 92180 (C.D. Cal. July 15, 2015).

37. See Physio GP, Inc. v. Naifeh, 306 S.W.3d 886, 888-89 (Tex. Ct. App. 2010) (“Only the employer has the power to hire and fire, and supervisors merely exercise that power on the employer’s behalf. Corporate employees cannot, in their personal capacity, wrongfully discharge an employee because they have no personal authority to fire an employee.”); Johnson v. North Carolina, 905 F. Supp. 2d 712, 726 (W.D.N.C. 2012) (“Pursuant to established North Carolina law, ‘a plaintiff may only bring a wrongful discharge action against the plaintiff’s employer, not against the employer’s agents (such as co-workers and supervisors).’”); DeCarlo v. Bonus Stores, Inc., 989 So. 2d 351, 359 (Miss. 2008) (holding individuals acting in the course and scope of their employment are not liable for retaliatory discharge).

38. Physio GP, 306 S.W.3d at 889.


40. See Vanburen v. Grubb, 733 S.E.2d 919, 924 (Va. 2012) (“Virginia recognizes a common law tort claim of wrongful discharge in violation of established public policy against an individual who was not the plaintiff’s actual employer but who was the actor in violation of public policy and who participated in the wrongful firing of the plaintiff, such as a supervisor or manager.”); Id. at 925 (Kinser, C.J., dissenting) (“Because the legal duty at issue in a claim for wrongful discharge does not flow from one employee to another employee, it is irrelevant if a manager or supervisor also engaged in the conduct that violated public policy.”).

41. See, e.g., Myers v. Alutiiq Int’l Solutions, LLC, 811 F. Supp. 2d 261, 268 (D.D.C. 2011) (showing how the court may apply a simple “decision making” balancing test to determine the outcome of cases).

42. Id. (citations omitted). “The purposes of tort law are served by holding liable individual supervisors as well as the employer institutionally.” PERRIT, supra note 39, at 9-12.7.

43. Myers, 811 F. Supp. 2d at 268-69.
employee and the employer, so coworkers may not be sued.44

Assuming that Ryan filed his complaint in a jurisdiction that permits suits for wrongful discipline (not just discharge) and permits him to sue supervisors (not just his employer), a public policy claim still has a fatal flaw. That claim is available only where the employment action offends public policy. Had Ryan alleged that Mindy was giving him undeservedly poor evaluations because he rebuffed demands by Mindy to violate a law, he might have a claim. But Ryan only argues that Mindy is out to get him because she is jealous of his potential for corporate superstardom. This dispute involving Mindy’s alleged self-centeredness and Ryan’s stalled career path is one in which “the public” has no interest.

3. Other Tort Causes of Action in the Employment Context

Other tort claims can, of course, arise from workplace occurrences.45 A worker punched in the face during a heated argument in the break room might win damages for the battery.46 An employee who slanders his boss might face a defamation suit.47 A worker who engages in truly outrageous behavior that causes severe distress to a colleague might be liable under a claim for intentional infliction of emotional distress.48 While claims of this type might sometimes serve

---

44. See id. (holding that public policy claims may be brought against individuals primarily based on local precedent permitting tortious interference claims against coworkers); see also Brett J. Chessin, Individual Liability for Wrongful Discharge in Violation of Public Policy: An Emerging Trend, 48 WAKE FOREST L. REV. 1345, 1354, 1365 (2013) (positing a trend toward recognizing claims against individuals, but arguing that such actions should be available only if the individual’s conduct was extreme and outrageous).
45. See infra notes 46-48.
46. State law would determine the scope of the aggressor’s liability and whether exclusive workers’ compensation remedies would bar a claim against the company. See, e.g., Redman Indus. v. Lang, 943 P.2d 208, 212 (Or. 1997) (This court held that exclusivity of workers’ compensation barred tort claim against employer for an on-the-job assault by a coworker: “The normal work environment necessitates that employees work together and exposes them to each other, based solely on their employment status.”); Eser hut v. Heister, 762 P.2d 6, 9 (Wash. 1988) (holding that workers’ compensation law did not bar action against coworkers for harassment).
48. Tort claims may also result from negligence, although, presumably, negligence claims would typically name the employer as the defendant (as for example in a claim of failure to properly supervise). See, e.g., Fogley v. Meridian Joint Sch. Dist. No. 2, 314 P.3d 613, 625 (Idaho 2013) (allowing assistant principal’s negligent infliction of emotional distress claim to proceed against school district based on inconsiderate verbal remarks to him; questions of fact existed whether school officials’ conduct “exceeded that degree of inconsiderate verbal remarks to which an
as a "garnish for a wrongful discharge claim, collateral torts are sometimes the white meat of employment law, serving as the chief cause of action where a wrongful discharge claim could not succeed." 49

Mindy did not "lie" about Ryan when she wrote his evaluations. The narrative comments she made and the ratings boxes she checked mostly expressed her subjective opinions, albeit perhaps as a "hard grader"—although it remains Ryan’s contention that Mindy’s evaluation of him was for the sole purpose of elevating herself. Ryan therefore would have little chance of advancing a defamation case; in addition, Ryan would need to overcome the qualified privilege for workplace communications. A court would dismiss a claim for intentional infliction of emotional distress, both because Mindy did not engage in outrageous conduct and because her actions could not reasonably be expected to cause Ryan severe emotional distress. 50 Ryan is probably out of luck—unless he has a viable claim that Mindy tortiously interfered with his relationship with TD & Co.

4. Tortious Interference Claims

Tortious interference is among the business torts long recognized by the common law. 51 If two parties have established duties to each other under a contract, a third party should not be able, without penalty, to interfere with that contract to the detriment of the parties. 52 Thus, "tortious interference with contract" claims are recognized where a contract between two parties was disrupted by the wrongful behavior of a third party. 53

ordinary person is expected to be hardened”). No cause of action exists for negligent interference with relationships. RESTATEMENT (SECOND) OF TORTS § 766B cmt. a (AM. LAW INST. 1979) [hereinafter, RESTATEMENT].


50. See, e.g., Frogley, 314 P.3d at 625 (stating that in order to have a successful claim for intentional emotional distress, the person must engage in outrageous conduct and the actions must be reasonably expected to cause severe emotional distress).

51. An act is "tortious" if it is "of such a character as to subject the actor to liability" under tort principles. RESTATEMENT (SECOND) OF TORTS § 6 (AM. LAW INST. 1965).

52. See Walnut St. Assoc.'s v. Brokerage Concepts, Inc., 20 A.3d 468, 475 (Pa. 2011) ("Ours is a free society where citizens may freely interact and exchange information. Tortious interference, as a basis for civil liability, does not operate to burden such interactions, but rather, to attach a reasonable consequence when the defendant's intentional interference was 'improper.'").

53. See RESTATEMENT § 766 ("One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform
Tortious interference claims are viable even if no formal contract exists. Claims may be brought for interference with “business relationships,” even prospective ones. “The point of a business relationship is to advance the interests of the parties involved. Tortious interference protects the interests of parties to an agreement against interference by outsiders, who would not be liable otherwise for breach.” This variation of the claim goes by many titles, including interference with economic advantage or prospective economic advantage.

Although most employment relationships are at will, courts have not necessarily been consistent in labeling a breach of an at-will relationship as a breach of contract or of a business relationship. The distinction may be important because interference with a contract may be viewed as a more serious matter than interference with an economic relationship or a mere prospective one. In the context of disputes between workers, this Article refers to the cause of action as a claim for employment interference, although there is no well-recognized tort by the contract.

54. See, e.g., Glenn v. Point Park Coll., 272 A.2d 895, 897 (Pa. 1971) (“We see no reason whatever why an intentional interference with a prospective business relationship which results in economic loss is not as actionable as where the relation is presently existing, although we recognize that there well may be more difficult problems of proof in the latter situation.”).

55. See RESTATEMENT § 766B (“One who intentionally and improperly interferes with another’s prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation.”).


57. See Donastorg v. Daily News Publ’g Co., 63 V.I. 196, 279-80 (V.I. Super. Ct. 2015) (observing that the cause of action “enjoys no less than twenty-four similar, yet distinct titles across fifty-four jurisdictions”).


59. See RESTATEMENT § 766 cmt. c (“The added element of a definite contract may be a basis for greater protection.”); see also Popescu v. Apple, Inc., 204 Cal. Rptr. 3d 302, 306 (Cal. Dist. Ct. App. 2016) (“[A] plaintiff alleging business interference must also show that the defendant’s action ‘was wrongful ‘by some measure beyond the fact of the interference itself.’ As a general rule, this wrongfulness element is not required in a contract interference claim because contracts are entitled to greater protection from interference.” (quoting Della Penna v. Toyota Motor Sales, U.S.A., Inc., 902 P.2d 740 (Cal. 1995)). On the other hand, if Ryan had a short-term employment contract with TD & Co., a jury likely would view the harm to him from negative evaluations and lack of promotion as less significant than would be the case if the term of his relationship was indefinite and potentially lengthy. Conversely, if Ryan has a short-term job contract with TD & Co., a jury likely would view the alleged harms as less significant than would be the case if might have had long-term opportunities for career advancement.
that name.\textsuperscript{60}

Public policy and tortious interference theories are distinct but overlap.\textsuperscript{61} At least one court has stated that a public policy claim represents the application of a tortious interference claim in workplace disputes.\textsuperscript{62} The interference is wrongful, and thus actionable, because it offends public policy.\textsuperscript{63} A key difference between the two theories, of course, is who ends up in the complaint’s caption: the employer for violating public policy, or a coworker for interference.\textsuperscript{64} The more the defendant-coworker seems to be the corporation (e.g., the chief executive), the more likely a court will recognize incongruence between allowing an interference claim against the individual but not a public policy claim against the entity.\textsuperscript{65} "Subject to rare public policy exceptions, employment at will can be terminated for any reason or for no reason. We would do considerable damage to this familiar policy if we permitted a tortious interference claim against an individual decision maker who is indistinguishable from the corporation itself."\textsuperscript{66}

If tortious interference claims apply in the run of the mill employment situation, Ryan may be in luck. Because Ryan is an at-will employee, he does not have a viable claim that Mindy interfered with a contract between Ryan and TD & Co., but he expected to continue working for TD & Co. indefinitely. In fact, he expected to stride up the corporate ladder right into the C-Suite. Mindy interfered, then, with his ongoing employment relationship and his prospective bright career path.

\textsuperscript{60} Cf. Dryden v. Cincinnati Bell Tel. Co., 734 N.E.2d 409, 413 (Ohio Ct. App. 1999) ("Ohio law recognizes both a claim of tortious interference with contractual (or business) relations and a claim of wrongful interference with an employment relationship."); Hustler Cincinnati, Inc. v. Cambria, 625 F. App'x 712, 720 (6th Cir. 2015) (stating that "tortious interference with employment relations [is] recognized as a distinct tort under Ohio law.").

\textsuperscript{61} See Springer v. Weeks & Leo Co., 429 N.W.2d 558, 560 (Iowa 1988); see also Long, Tortious Interference, supra note 49, at 874 (stating that of all collateral torts, "none bears as close a relationship to a wrongful discharge claim as tortious interference...").

\textsuperscript{62} "We believe a cause of action should exist for tortious interference with the contract of hire when the discharge serves to frustrate a well-recognized and defined public policy of the state." Springer, 429 N.W.2d at 560.

\textsuperscript{63} See id. at 560-61.

\textsuperscript{64} See Boers v. Payline Sys., 918 P.2d 432, 437 n.5 (Or. Ct. App. 1996) (The case notes that plaintiff could not bring a public policy claim against his supervisor, but "[t]he allegation of an improper purpose was sufficient without consideration of the public policy issue" to state an interference claim.).

\textsuperscript{65} Id. (emphasis added).

\textsuperscript{66} Harrison v. Netcentric Corp., 744 N.E.2d 622, 632 (Mass. 2001) ("Where the corporation and the individual defendant are indistinguishable, including without limitation, where the individual is the corporation’s sole stockholder, it would exalt form over substance to hold that the corporation could not be sued successfully in contract, but that the corporation’s alter ego could be sued successfully in tort.").
How will a court analyze Ryan’s claim that Mindy gave unfair appraisals of his performance for the sole purpose of protecting her own career opportunities?

II. APPLICATION OF TORTIOUS INTERFERENCE ELEMENTS IN COWORKER DISPUTES

Like any tort claim, an employment interference lawsuit begins with a complaint that identifies the elements of the claim and offers factual gloss sufficient to satisfy pleading rules. The claim’s elements vary from state to state but most often are identified by reference to the appropriate provisions of the Restatement (Second) of Torts. The defense will then attempt to demonstrate why the plaintiff cannot satisfy each of the elements. That routine rarely, if ever, leads to predicate consideration by the court, or even the defense, whether that tort theory should apply in suits between coworkers and, if so, whether its traditional elements warrant refinement in such disputes.

Because employment is predominantly at will, courts most often resolve employment interference claims by resorting to the Restatement’s provision on interference with relationships rather than contracts. A job holder’s interest is “primarily an interest in future relations between the parties” although “he has no legal assurance of them.” “For this reason, an interference with [a job] interest is closely analogous to interference with prospective contractual relations.” Section 766B of the Restatement defines this claim as follows:

One who intentionally and improperly interferes with another’s prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b)...

67. See, e.g., id. (demonstrating the typical structure of an employment interference lawsuit).
68. See, e.g., Newmyer v. Sidwell Friends Sch., 128 A.3d 1023, 1039 (D.C. 2015) (“The District of Columbia derives the elements of tortious interference with a contract and/or prospective advantage from the Restatement.”).
69. See Harrison, 744 N.E.2d at 632.
71. Id. at 513; RESTATEMENT § 766 cmt. g.
72. Cavico, supra note 70, at 513; RESTATEMENT § 766 cmt. g.
preventing the other from acquiring or continuing the prospective relation. 73

Paraphrased for coworker suits, this standard creates liability for a coworker who "prevent[s]" an employee from "acquiring" a job or "continuing" his employment relationship by "intentionally and improperly interfer[ing]." 74

Section 766B's expansive definition of the claim—thou shalt not improperly interfere—offers scant practical direction. 75 Noting the difficulty its own courts had encountered in defining what conduct is improper, the Texas Supreme Court stated:

[T]he core concept of liability—what conduct is prohibited—has never been clearly defined. Texas courts have variously stated that a defendant may be liable for conduct that is "wrongful," "malicious," "improper," of "no useful purpose," "below the behavior of fair men similarly situated," or done "with the purpose of harming the plaintiff," but not for conduct that is "competitive," "privileged," or "justified," even if intended to harm the plaintiff. Repetition of these abstractions in the case law has not imbued them with content or made them more useful, and tensions among them, which exist not only in Texas law but American law generally, have for decades been the subject of considerable critical commentary. 76

Nor has section 766B brought uniformity to application of this claim. 77 Courts rely on the guidance of the Restatement to varying degrees, and may ignore or modify its provisions as they wish. 78 If a state's supreme court has not explicitly adopted a Restatement provision, appellate courts will be uncertain to what extent they should rely on it. Courts that adopt the Restatement do not necessarily agree on what its

---

73. Id. § 766B.
74. Id.
75. Id. at cmt. a.
77. See id. at 720.
78. See id. at 720-21 (showing how the court ignored the Restatement's notions of "malice" and "justification" and modified the meaning of "improper" when it comes to conduct that is actionable).
elements mean. As a result, the law of employment interference is anything but uniform. The following summarizes judicial application of the claim.

A. The Protectable Relationship: Is the Hope of Continuing Employment Enough?

The Restatement defines this claim as protecting a "prospective contractual relation." Is an employee's hope that, because he has a job today, he will have that job tomorrow, the type of relationship worthy of protection? The general answer is yes.

Rarely do employment interference claims falter on the requirement of a protected relationship. The tort claim protects ongoing relationships, even if not strictly contractual. Courts generally assume that employees have a protectable interest in continued employment. A comment in the Restatement states that a contract terminable at-will "is valid and subsisting, and the defendant may not improperly interfere with it." "In protecting at-will employment relationships, courts have reasoned that although an employment relationship is terminable at will, the fact that a relationship is at the will of the employer and employee does not make it at the will of others who wrongfully interfere with the relationship."

New York law is more restrictive in that a termination, without more, will not support an employment interference claim against

79. See id. at 723-24.
80. RESTATEMENT § 766B.
83. See id. at 126-27 (relying on recognized protection of at-will employment relationships in the tort context in holding that job interference may give rise to federal civil rights claim).
84. See id.
85. See RESTATEMENT § 766 cmt. g ("A similar situation exists with a contract that, by its terms or otherwise, permits the third person to terminate the agreement at will. Until he has so terminated it, the contract is valid and subsisting, and the defendant may not improperly interfere with it . . . . One's interest in a contract terminable at will is primarily an interest in future relations between the parties, and he has no legal assurance of them. For this reason, an interference with this interest is closely analogous to interference with prospective contractual relations."). But see Favrot v. Favrot, 68 So. 3d 1099, 1111 (La. App. 2011) (stating that Louisiana does not recognize a cause of action for tortious interference with at-will employment).
coworkers. “Inasmuch as the length of employment is not a material term of at-will employment, a party cannot be injured merely by the termination of her employment.” Absent injury independent of termination, the plaintiff cannot recover damages for what is, in essence, an alleged wrongful discharge claim in the guise of a tort claim against her fellow employees and supervisor. In contrast, in a slightly different context, a California appeals court recently held that an at-will employee is “not required to allege that he was directly harmed by an independently wrongful act” beyond the interference with his job.

What if the employee claiming interference had a record of poor performance prior to his discharge? His employment relationship was “subsisting” (perhaps barely), but was it “valid” and worthy of protection? In that instance, the employee’s expectation of continuing employment should be a glimmer of hope at best. In one case, the court stated that “an at-will employee who enjoys the confidence of his or her employer has the right to expect that a third party will not wrongfully undermine the existing favorable relationship.” While poor performers might not have an interference claim, courts have not often discussed this nuance. Of course, Ryan contends that the evaluations Mindy has given him are themselves unfair, a contention that would complicate resolving whether he “enjoyed the confidence” of TD & Co.

Some courts temper their readiness to recognize a protectable relationship by imposing more demanding requirements to satisfy other elements of an employment interference claim. The Iowa courts have

88. Id.
90. Popescu v. Apple, 204 Cal. Rptr. 3d 302, 307 (Cal. Dist. Ct. App. 2016). Popescu alleged that Apple wrongfully persuaded his employer to fire him. Id. at 307. His claim was not against a coworker. Id.
92. But see, e.g., Eakins v. Hanna Cylinders, L.L.C., 42 N.E.3d 858, 864 (Ill. App. Ct. 2015) (holding the “plaintiff’s level of performance was not among the contract’s terms and was not a basis for termination”); Berutti v. Dierks Foods, Inc., 496 N.E.2d 350, 354 (Ill. App. Ct. 1986) (holding that “the level of performance here was not within the contract terms nor was it the basis for discharge for a cause which the law would impose”). These cases seem to suggest that if the necessary level of performance is included in the contract’s terms, employees may have no interference claim when terminated.
93. See, e.g., Gray v. Harding, 807 N.W.2d 296, 33 (Iowa Ct. App. 2011) (noting the interference has to be “improper”); Compiano v. Hawkeye Bank & Tr., 588 N.W.2d 462, 464 (Iowa...
said that an at-will employee must prove not simply that the coworker intentionally and improperly interfered, but did so “with the sole or predominant purpose to injure or financially destroy” the plaintiff.\textsuperscript{94}

That broken at-will employment relationships may give rise to a claim of tortious interference does not mean that a plaintiff will recoup meaningful remedies.\textsuperscript{95} According to the Restatement, “[t]he fact that the contract is terminable at will . . . is to be taken into account in determining the damages that the plaintiff has suffered by reason of its breach.”\textsuperscript{96} Once the employer has decided to end an at-will relationship, whether and for how long the employee would have continued to work is a matter of speculation.\textsuperscript{97} Some courts have held that a prevailing employee is entitled only to nominal damages from coworkers for employment interference absent unique circumstances.\textsuperscript{98}

\begin{itemize}
  \item \textbf{B. Into the Breach: What is Actionable “Interference”?}
\end{itemize}

Another topic raised by employment interference claims is the degree of interference required to support a claim.\textsuperscript{99} Must the plaintiff lose his job, or is something less dramatic actionable? In our hypothetical, Ryan claims the loss of income and employment opportunities, among other things. But he still has the same duties and compensation he agreed to when he accepted his job offer. In that sense, there was no breach. Ryan’s claim focuses on what might have been.

\begin{footnotes}
\item 1999) (noting “to recover for interference with \textit{prospective} business relations, a plaintiff must prove the defendant acted with the sole or predominant purpose to injure or financially destroy the plaintiff”) (emphasis in original).
\item 94. \textit{Compiano}, 588 N.W.2d at 464; \textit{Gray}, 807 N.W.2d at 13 (applying the standard to an at-will employee’s interference claim).
\item 95. \textit{Health Call v. Atrium Home & Health Care Servs., Inc.}, 706 N.W.2d 843, 859 (Mich. Ct. App. 2005) (Sawyer, J., concurring in part) (“The trial court . . . must assess the merits of each individual case to determine if the plaintiff . . . has made a sufficiently tangible showing of damages to warrant allowing the jury to consider an award of more than nominal damages.”).
\item 96. RESTATEMENT § 766 cmt. g.
\item 97. \textit{See Health Call}, 706 N.W.2d at 857 (discussing this speculation in the context of determining lost profits).
\item 98. But see id. at 857 (holding that “a blanket rule limiting recovery to nominal damages as a matter of law in all actions arising out of or related to the termination of at-will contracts is not legally sound”); \textit{Everton v. Williams}, 715 N.W.2d 320, 323 (Mich. Ct. App. 2006) (applying \textit{Health Call} to employment at will relationships but expressing “no opinion on whether, in this case, there exists a tangible basis on which to assess future damages that is not overly speculative”). Both of these courts overruled lower court decisions limiting the prevailing plaintiff to nominal damages only.
\end{footnotes}
Although courts have not drawn particularly clear lines on this topic, actions short of discharge have been litigated. An improper interference that causes an employee not to be hired in the first place is likely actionable because the tort protects against impairment of prospective relationships and because, as noted above, the Restatement advises that inducing an employee not to "enter into" a relationship is actionable. On the other hand, a plaintiff claiming that she would have gotten a job absent interference did not state a claim where she did not have a job offer in hand and had not even been offered an interview. In that case, the expectation of employment was "mere speculation" and the business expectancy was no more than "a subjective hope."

Restatement section 766B does not further indicate what degree of breach is necessary. Section 766A, comment a, states that liability attaches where one intentionally interferes with a plaintiff's performance of his own contract "either by preventing that performance or making it more expensive or burdensome." That provision, however, addresses interference with the plaintiff’s performance of his own obligations. Nonetheless, plaintiffs have successfully advanced interference claims against coworkers based on the contention that harassment forced them to resign. In one case, the court rejected the defense’s argument that the plaintiff breached the contract because she quit. Such a claim may be viable even if the defendant did not intend to force the employee to resign. As one court summarized, an interference claim does not require intent to terminate, but merely intent to interfere with employment.

Some courts adopt the “material impairment” standard that applies

100 See Zimmerman v. Buchheit of Sparta, Inc., 645 N.E.2d 877, 878, 882 (Ill. 1994) (discussing “whether a cause of action should be recognized which is predicated on an employer’s alleged retaliation against an employee who is not discharged from employment but rather is allegedly demoted or discriminated against for asserting rights under the Workers’ Compensation Act” but declining to extend existing doctrine to “retaliatory demotion”).
101. RESTATEMENT § 766B.
102. Kerr, 824 F.3d at 77.
103. RESTATEMENT § 766B (discussing only interference with another’s prospective contract).
105. Id.
107. Id. at 630.
108. See id.
in discrimination, retaliation, and wrongful discipline cases.\textsuperscript{110} One court, for example, permitted the employee to pursue an interference claim to challenge the denial of a pay increase.\textsuperscript{111} A disciplinary action that could result in termination may constitute actionable interference.\textsuperscript{112} On the other hand, an employee who transferred to another department to escape alleged harassment did not show a breach because she did not incur any monetary loss.\textsuperscript{113}

“Bullying” might also support an employment interference claim.\textsuperscript{114} A federal court recently permitted an employee to pursue a claim against her superiors, alleging they more closely scrutinized her work than the work of others, more frequently criticized her, screamed at her, and gave her a negative performance appraisal.\textsuperscript{115} On the other hand, coworker ostracism has been deemed outside the scope of a tortious interference claim.\textsuperscript{116}

\textbf{C. The Third Party Element: How Strange Must the “Stranger” to the Work Relationship Be?}

Only a “stranger” to an employment relationship can meddle with it.\textsuperscript{117} Yet, applying the seemingly straight-forward principle that interference claims require a third party “become[s] more complicated” when the “party alleged to have interfered is a supervisor or co-employee.”\textsuperscript{118} The complication arises because companies can only act

\begin{itemize}
\item \textsuperscript{110} Levee, 729 N.E. 2d at 222 (“[W]here a third party's conduct substantially and materially impairs the execution of an employment contract, frustrating an employee’s expectations under her contract and making performance of her contractual duties more burdensome, the inducement of breach element of a claim for tortious interference with a contractual relationship is satisfied.”).
\item \textsuperscript{111} See id.
\item \textsuperscript{112} Morris, 2016 WL 2354642, at *4.
\item \textsuperscript{113} See Koehler v. Cty. of Grand Forks, 658 N.W.2d 741, 748 (N.D. 2003) (“Under [Restatement section] 766A, a plaintiff may only recover pecuniary loss resulting from the interference with contract.”).
\item \textsuperscript{114} See Jon D. Bible, The Jerk at Work: Workplace Bullying and the Law’s Inability to Combat It, 38 EMP. REL. L.J. 32, 39 (2012) (discussing use of interference claims to remedy bullying).
\item \textsuperscript{115} Burton v. Cmty. & Econ. Dev. Ass’n of Cook Cty., Inc., No. 15-C-4556, 2016 WL 3027901, at *5 (N.D. Ill. May 27, 2016).
\item \textsuperscript{117} Atlanta Market Center Mgmt. v. McLane, 503 S.E.2d 278, 283 (Ga. 1998).
\item \textsuperscript{118} Bussing v. COR Clearing, LLC, 20 F. Supp. 3d 719, 737 (D. Neb. 2014); see also Zimmerman v. Direct Fed. Credit Union, 262 F.3d 70, 76 (1st Cir. 2001) (citations omitted) (“Tortious interference takes an intriguing turn in the employment context. Common sense suggests that an employee may not sue her employer for interfering with its own contract, and the case law verifies this intuition. Despite the employer’s immunity, however, a supervisor may be personally liable if he tortiously interferes with a subordinate’s employment relationship. This seeming
through their employees. Coworkers are agents of the employer, and, under traditional laws of agency, agents are not third parties. 119

Courts favor varying approaches in tackling this complication. 120 Although those approaches cannot be neatly binned, and although court opinions occasionally conflate other elements of interference claims with the third-party inquiry, the following lines of attack are identifiable.

1. Whether the Defendant was Outside the Scope of “the Relationship”

Though a relatively rare occurrence, now and then a court will flatly assert that an employee’s supervisor or a corporate officer is not a third party. 121 The Georgia Supreme Court has held that “to be liable for tortious interference with contractual relations the defendant must be a stranger to both the contract and the business relationship giving rise to and underpinning the contract.” 122 That approach “reduce[s] the number of entities against which a claim of tortious interference with contract may be maintained.” 123 Because coworkers are part of the job scene, they are within the relevant relationship, and not third parties under this approach. 124

A Florida decision similarly held that a tortious interference claim is available only if the interference was “unrelated” to the relationship

paradox has led the Massachusetts courts to construct a matrix of rules designed to ensure against irrational results.”).

119. See Bussing, 20 F. Supp. 3d at 737; see generally John Alan Doran, It Takes Three to Tango: Arizona’s Intentional Interference with Contract Tort and Individual Supervisor Liability in the Employment Setting, 35 Ariz. St. L.J. 477, 483 (2003); Long, Tortious Interference, supra note 1, at 506-07 (“One area in which courts have demonstrated a frustrating lack of consistency is in the assessment of one of the most basic requirements of an interference claim—whether there are actually three parties involved.”).

120. See infra notes 122, 125, 127, 137 and accompanying text.

121. D’Agostino v. Musical Heritage Soc., No. L-4886-09, 2015 WL 5090862, at *10 (N.J. Super. Ct. App. Div. Aug. 20, 2015) (citations omitted) (“Because Cilento was D’Agostino’s supervisor at MHS, he cannot be said to have tortiously interfered with D’Agostino’s relationship with MHS. ‘[I]t is “fundamental” to a cause of action for tortious interference with a prospective economic relationship that the claim be directed against defendants who are not parties to the relationship.’”); Farrow v. St. Francis Med. Ctr., 407 S.W.3d 579, 603 (Mo. 2013) (en banc) (“[W]hile acting as Farrow’s supervisor, [defendant] was Hospital’s agent, not a third party.”).


123. Id. at 610.

124. See Brathwaite v. Fulton-Dekalb Hosp. Auth., 729 S.E.2d 625, 628 (Ga. Ct. App. 2012) (“It is true that actions taken by Quinn while employed by Grady as Brathwaite’s manager cannot support the tortious interference claim because, when Quinn took those actions, she was not a stranger to the employment contact.”).
between the plaintiff and defendant. Only a true stranger to the relationship may be properly sued for interference. In California, “as a matter of public policy ‘except where a statutory exception applies, an employee or former employee cannot sue other employees based on their conduct relating to personnel actions.’” This doctrine immunizes coworkers from employment interference claims whether or not they are supervisors. Thus, Ryan would not have a claim against Mindy there because her evaluations of Ryan were related to personnel actions.

2. The Defendant’s Place on the Corporate Ladder

Hierarchy matters. Generally speaking, it is more difficult to sustain an employment interference claim against a chief executive or other top officers than against coworkers lower in the chain of command. Applying an alter ego theory, some courts find that corporate officers “are” the company and therefore not third parties. Often, however, this alter ego approach is tempered by other factors discussed below, such as the officer’s motive. Some courts have held that the defendant’s status as an officer makes no difference to liability.

126. Id. at 1094 (“Under Florida law, a defendant is not a stranger to a business relationship, and thus cannot be held liable for tortious interference, when it has a supervisory interest in how the relationship is conducted or a potential financial interest in how a contract is performed.”).
128. Sheppard, 79 Cal. Rptr. 2d at 16-17.
129. Whether shareholders who interfere with an employee’s job may be considered third parties is beyond the scope of this article. See D’Andrea v. Calcagni, 723 A.2d 276, 276-278 (R.I. 1999) (holding that an at-will employee was permitted to bring interference claim against a “minority shareholder with no official responsibilities”).
130. See infra notes 131-32.
131. Davis v. Ricketts, 765 F.3d 823, 830 (8th Cir. 2014) (applying Nebraska law).
132. Id. (“Even if his actions were taken out of ill-will, he was still acting in his capacity as CEO, and there is no claim for tortious interference.”); see also French v. Oxygen Plus Corp., No. 3:13-0577, 2015 WL 846743, at *11 (M.D. Tenn. Feb. 26, 2015), report and recommendation adopted in relevant part, 2015 WL 1467175 (M.D. Tenn. Mar. 30, 2015) (asserting that the officer “acted maliciously or in her own interest” insufficient to make the officer a third party).
3. Whether the Defendant’s Conduct was Outside the Scope of Employment

Courts most commonly consider whether coworkers acted within or outside the scope of their employment to assess if they are third parties liable for interference.\textsuperscript{134} In this respect, courts consider what the coworker was \textit{doing} when he engaged in the allegedly tortious conduct.\textsuperscript{135}

Notwithstanding the attention some courts pay to hierarchy, courts apply the scope-of-employment test even to high ranking officials.\textsuperscript{136}

[W]hen directors or officers act outside the scope of their official capacity, they no longer act as agents of the corporation and therefore act as a third party. Directors and officers who act outside the scope of their official duties therefore can be held personally liable for tortious interference with a contract.\textsuperscript{137}

Of course, the higher up the management chain, the broader, typically, the defendant’s authority to act as a company agent.\textsuperscript{138}

In one straightforward case, a court dismissed the plaintiff’s claim that her manager set an impossible sales quota so he could fire her.\textsuperscript{139} “The action of increasing the Plaintiff’s sales quota was within the scope of [defendant’s] duties as her manager. As such, this action cannot form the basis of a claim for tortious interference with the Plaintiff’s employment.”\textsuperscript{140} Some Ohio decisions similarly follow the rule that if the alleged interference involved actions taken by the accused coworker within the scope of his duties, including monitoring or supervising a subordinate, no tortious interference claim lies.\textsuperscript{141} Internal complaints

\begin{flushleft}
\textsuperscript{134} See infra notes 135, 137.
\textsuperscript{135} It is “conceptually incoherent” to permit a plaintiff to recover against a coworker for intentional interference while at the same time imputing liability to the employer for the misconduct. A coworker cannot simultaneously act outside the scope of employment and as an agent of the company. See Mailhiot v. Liberty Bank & Tr., 510 N.E.2d 773, 777 (Mass. App. Ct. 1987).
\textsuperscript{136} Trail v. Boys & Girls Clubs, 845 N.E.2d 130, 138 (Ind. 2006).
\textsuperscript{137} Id. (citations omitted).
\textsuperscript{138} See \textit{id}. at 139.
\textsuperscript{140} Id. at *5.
\end{flushleft}
by peers about the plaintiff’s conduct are unlikely to support employment interference claims because such complaints are within the scope of their employment.\footnote{142}{McHenry v. Lawrence, 66 A.D.3d 650, 651 (N.Y. App. Div. 2009) (holding that “coworkers were acting within the scope of their employment when they brought their concerns about the plaintiff’s behavior and ability to perform her job to the attention of the managing attorney and the human resources administrator”).}

How a court defines the scope of a defendant’s duties necessarily influences the outcome of its third-party analysis.\footnote{143}{See Trail v. Boys & Girls Clubs, 845 N.E.2d 130, 138 (Ind. 2006).} One court framed the inquiry as follows: “The [defendant] must be engaged in some type of work that is assigned to him or her in the general sense of doing something to serve the employer.”\footnote{144}{Wilson v. St. Luke’s Reg’l Med. Ctr., Ltd., No. 1:13-cv-00122-BLW, 2014 WL 7186811, at *12 (D. Idaho Dec. 16, 2014) (quoting Wooley Tr. v. DeBest Plumbing, 983 P.2d 834, 838 (Idaho 1999)).} In our hypothetical, Mindy was responsible to complete Ryan’s performance appraisals and thus acted within the scope of her duties. She was doing “some type of work that [was] assigned” to her, and in that sense was not a third party.

The scope-of-employment standard is a logical approach to the third-party question, in that coworkers are “immune,” so to speak, from employment interference claims in the first place only because they are agents of the employer.\footnote{145}{See Leslie v. St. Vincent New Hope, Inc., 873 F. Supp. 1250, 1254 (S.D. Ind. 1995).} But this standard requires courts to import agency concepts developed to address altogether unrelated issues.\footnote{146}{See id. at 1256 (“[T]he phrases ‘scope of employment’ and ‘course of employment’ take on different shades of meaning depending on whether the issue is an injured employee’s claim under the Worker’s Compensation Act or the ‘fellow servant’ rule under that Act, not to mention respondeat superior.”).} In the employment setting alone, agency law is used to address disputes ranging from employer liability under worker’s compensation schemes, wage payment obligations, personal injury liability, and more.\footnote{147}{See id. at 1256 (“While the allegations that Benward was motivated by his personal interests may suffice to establish absence of justification, the fact remains that under controlling Missouri law, Benward was an agent of Hubbs Machine at the time he made the statements that led to her termination. As such, Benward cannot be...”)} Whether agency standards should apply as a matter of policy is rarely if ever discussed.

Inevitably, the interfering coworker may have acted partly within the scope of his job duties but partly not. Yet, particularly in these dual-role cases, the inquiry whether the defendant was a third party may easily shift to a focus on the defendant’s motive—the question becoming what was the defendant thinking rather than what was he doing.\footnote{148}{Graham v. Hubbs Mach. & Mfg., 92 F. Supp. 3d 935, 944 (E.D. Mo. 2015) (“While the allegations that Benward was motivated by his personal interests may suffice to establish absence of justification, the fact remains that under controlling Missouri law, Benward was an agent of Hubbs Machine at the time he made the statements that led to her termination. As such, Benward cannot be...”)}
Ryan, of course, would like a court to focus on his argument that Mindy was ill-motivated in rating his performance, not on whether giving a performance evaluation was within the scope of Mindy’s duties.149

4. The Defendant’s Objective and the Interests Served by His Conduct

Although courts do not necessarily frame the inquiry this way, they often consider the defendant’s objective in making a personnel decision.150 This approach is something of a hybrid between the scope of employment inquiry (above) and the malice inquiry (below).151 The focus is less on what the defendant was doing or why he was doing it, and more on who was the beneficiary of the alleged tortious conduct.152 For example, courts following the provisions of the Restatement (Second) of Agency consider whether the coworker’s actions were “actuated, at least in part, by a purpose to serve” the employer.153 In some states, the plaintiff needs to prove that the coworker took “actions for his or her own personal benefit, or for the benefit of an entity other than the employer.”154 Some courts ask if the coworker intended to serve solely personal interests.155 For example, a defendant’s interest might be solely personal if his conduct was meant to benefit a side business he runs.
It may be difficult to separate the alleged wrongdoer's objective from his motive, and the terminology used in court opinions can be imprecise. Nonetheless, the interests test promises to involve a more objective analysis. A finder of fact does not need to determine what considerations subjectively motivated the defendant, but instead may consider whether his conduct could reasonably be viewed as serving the interests of the employer. This inquiry could produce outcomes similar to the inquiry discussed above as to whether the defendant "in the general sense" was "doing something" to serve the employer. Still, answering that question may not be simple: Does a supervisor's harsh, perhaps unfair, evaluation benefit the employer?

A question that usually escapes discussion is who determines what the employer's "interests" are (or should be). Does an employee present a triable issue of fact by contesting the wisdom of the defendant's claimed company interests? One court required the plaintiff to prove that the coworkers she sued "were not acting in furtherance of their view of" the company's interests. On the other hand, an employee might be able to argue that because she was a good employee, it could not have been in the company's interests for a superior to criticize or fire her—which suggests that the plaintiff's view of what is in the company's interest is entitled to some weight or at least that that is a question of fact.

5. The Means Employed

In some jurisdictions, a coworker may be a third party if the method of interfering constituted a tort in its own right. "A supervisor is considered to have acted outside the scope of his employment if there is evidence that the supervisor's manner of interference involved independent tortious acts such as fraud or misrepresentations." Of
course, in that event, the employee presumably could sue the supervisor for the underlying tort (e.g., defamation), so the interference claim is unnecessary.

6. Motive, Malice, and Ill Will

"The question of the supervisor’s motive can be pivotal to whether the supervisor is a third party to the contract."163 Unfortunately, the inquiry into the defendant’s motive for purposes of determining his third-party status is easily confused with the separate question whether the interference was “improper,” which may include both improper methods and improper motives.164 Some courts also seem to use motive and interests interchangeably.165

Under motive analysis, malice is often the main consideration.166 In some jurisdictions, a plaintiff must prove “legal malice” to prevail on an employment interference claim.167 Circling back to an agency approach, some decisions suggest that as long as the coworker’s actions were “taken in connection with the exercise of their duties,” they did not act with legal malice.168 In other words, if a coworker acts within the scope of his duties to the employer, he did not have the requisite malice and cannot be a third party.169 That is not really a motive inquiry, but rather a scope-of-employment one.

Malice may mean more than hostility toward or dislike of an


164. In Massachusetts, actual malice is “a proxy for proof that a supervisor was not acting on the employer’s behalf . . .” Zimmerman v. Direct Fed. Credit Union, 262 F.3d 70, 76 (1st Cir. 2001). As noted, the elements of a discrimination claim may be used to demonstrate malice in the context of a tortious interference claim; in other words, discrimination is among those “[c]ertain situations [that] lend themselves to proof of malice.” Id. at 77. Nonetheless, malice must have been the controlling factor in the supervisor’s conduct, requires more than a showing of hostility, must be based on probabilities rather than possibilities, and requires “an affirmative showing that the actions taken by the supervisor were not derived from a desire to advance” the company’s “legitimate interests.” Id.

165. E.g., Vazirani v. Heitz, 741 F.3d 1104, 1108 (10th Cir. 2013) (adopting test used by the district court that defendants were third parties only if their actions “were so contrary to [the company’s] interests that they could only have been motivated by personal interests”).


167. Id. (“It is not enough, however, to show that a defendant acted with actual malice; the plaintiff must forecast evidence that the defendant acted with legal malice. A person acts with legal malice if he does a wrongful act or exceeds his legal right or authority in order to prevent the continuation of the contract between the parties.”).


169. See id.
employee. "The fact that an employer may have breathed a sigh of relief when showing the door to a gadfly or a nettlesome employee does not transform a founded dismissal into a malicious act."\(^{170}\) Recognizing that in intentional interference claims "frequently 'some element of ill will'" is involved, one court stated that if a coworker is "generally acting in furtherance of the corporate interest, 'the addition of a spite motive usually is not regarded as sufficient to result in liability.'"\(^{171}\) Another court summarized:

The Court does not doubt that in many cases, a fired employee could allege and produce evidence that a supervisor made the decision for personal motives—allowed... "'personal feelings of pride, jealousy, anger, revenge and malice to color' the supervisor's attitude toward the employee. If such allegations of personal motives were enough to give the employee a cause of action... the landscape of Indiana employment law would shift dramatically.\(^{172}\)

The Vermont Supreme Court has indicated that the legal malice standard is more demanding in employment interference cases.\(^{173}\) The court upheld dismissal of a claim for lack of malice, noting:

Certainly, one may conclude that these defendants acted improperly, which would be sufficient under a traditional tortious interference claim involving a distinct third person. But here we are dealing with an exception to the rule that a third party cannot interfere with itself, which, if allowable at all, requires a higher showing of malice.\(^{174}\)

\(^{170}\) Bennett v. Saint-Gobain Corp., 507 F.3d 23, 34 (1st Cir. 2007).


\(^{172}\) Leslie v. St. Vincent New Hope, Inc., 873 F. Supp. 1250, 1257 (S.D. Ind. 1995); see also Trail v. Boys & Girls Clubs, 845 N.E.2d 130, 140 (Ind. 2006) (holding that if supervisor's authority included the right to terminate plaintiff, the termination was within the scope of his duties, and his motives could not affect that conclusion).


\(^{174}\) Id. It is not clear how the court intended this standard to differ from the other standards discussed in this section of the Article. The court continued:

Skaskiw did not allege that defendants were acting with actual malice or that they were acting outside of the scope of their employment, that is, acting for
In other jurisdictions, it is irrelevant whether the coworker acted with malice or for some other improper purpose: malice may make a bad case worse, but it does not make wrong that which is lawful.\textsuperscript{175} Other decisions similarly hold that a coworker’s motive is not material to the third-party element where the coworker acted within the scope of his employment.\textsuperscript{176}

7. Unfaithful or Unlawful Conduct

The fact that a coworker was unfaithful in executing his duties does not necessarily mean he acted as a third party. In addressing claims by an employee that a coworker’s actions were unfaithful to the company’s interests, courts typically turn to the scope of employment analysis.\textsuperscript{177} For example, where the defendant’s duties included providing information about the company’s executive director to the company’s board, the fact that the defendant provided false information did not make him a third party.\textsuperscript{178} According to the court, neither the fact that he was untruthful, nor his reasons for lying affect whether his actions fell within the scope of his duties.\textsuperscript{179}

What if the defendant’s actions toward the employee were illegal? Court decisions cut both ways, and the determining factor may be whether the focus is on the scope of employment or on motive.\textsuperscript{180} Some courts have explained that the fact that a coworker’s actions were illegal does not mean he acted outside the scope of his employment or for

\textsuperscript{175} 15 RULING CASE LAW 70 (William M. McKinney et al. eds., Edward Thompson Co. et al. 1929) (1917) ("It is unquestionably a general rule in the law of torts applicable in many cases involving interference with a trade or calling that, while malicious motives may make a bad case worse, the bad motive which inspires an act will not change its complexion, and render it unlawful, if otherwise the act was done in the exercise of an undoubted right."). That question is also particularly relevant to whether the coworker acted "improperly," discussed below.

\textsuperscript{176} Jones v. Wheelersburg Local Sch. Dist., 2013 WL4647645, No. 12CA3513, at *29 (Ohio App. 2013); Anderson v. Minter, 291 N.E.2d 457, 461 (Ohio 1972); see also Rose v. Zuwoski, 511 S.E.2d 265, 267 (Ga. Ct. App. 1999) ("Bad motive, a subjective prompter, does not poison the legitimacy of an act, which is measured objectively.").

\textsuperscript{177} Porter v. Oba., Inc., 42 P.3d 931, 946 (Or. Ct. App. 2002).

\textsuperscript{178} See id.

\textsuperscript{179} Id.

\textsuperscript{180} Id. at 937.
personal interests.\textsuperscript{181} Coworkers certainly may act as agents of the company when they violate laws or policies in taking employment action.\textsuperscript{182} For example, an officer carrying out a scheme to defraud the government, however inexcusable that conduct, is not a third party if that is the corporation’s objective. Therefore, if he fires an employee for objecting to the illegal scheme, he is acting as the company’s agent, not meddling. As a federal court explained:

Under [plaintiff’s theory], whenever an employee acts with an unlawful purpose, then they are automatically considered a third party—never mind that the employee was acting within the scope of his employment, or even acting with a purpose shared and encouraged by his employer. In such cases, the scope of employment inquiry would be entirely unnecessary. That, in turn, would be inconsistent with the purpose of this entire analysis—to determine if the coemployee was acting as a third person, i.e., one not aligned with the interests of the employer. And that analysis goes to the very thing that this tort was meant to protect against: interference from “outside intermeddlers.”\textsuperscript{183}

The court found, “While [plaintiff] has alleged that [defendant] acted with an unlawful purpose, it was apparently a purpose” the defendant shared with the company.\textsuperscript{184} He was not a third party.\textsuperscript{185}

Other courts assume that if a supervisor acted with a motive that was unlawful, such as age discrimination, he is liable for tortious interference.\textsuperscript{186} These courts reason that the supervisor could not have

\textsuperscript{181}. Verby v. Paypal, Inc., No. 8:13-CV-51, 2014 WL 1689684, at *17 (D. Neb. Apr. 29, 2014) ("Even if [defendants'] actions had been taken in contravention of Title VII or the FMLA, that would not establish that they had a personal interest in the plaintiff's termination.").


\textsuperscript{184}. Id. at *25.

\textsuperscript{185}. Id.

\textsuperscript{186}. Morris v. Young, No. 1:14-CV-136-SA-DAS, 2016 WL 2354642, at *4 (N.D. Miss. May 3, 2016) (permitting claim to proceed against supervisor where the gist of the claim was that the supervisor caused plaintiff’s termination because of her age, not in order to further his or the employer’s economic interests); Zimmerman v. Direct Fed. Credit Union, 121 F. Supp. 2d 133, 136 (D. Mass. 2000), aff’d, 262 F.3d 70 (1st Cir. 2001) (“The bottom line is that the jury concluded that Breslin engaged in unlawful conduct. Such actions quite simply cannot be viewed as falling either
been acting for the company’s interests or within the scope of his employment if his conduct was unlawful.187 In other jurisdictions, the violation of an anti-discrimination statute is not a tort under state law, so if the jurisdiction requires a showing that a coworker’s interference was independently tortious, statutory violations will not suffice.188 If Mindy’s status as a third-party depends on whether she was engaged in duties on behalf of TD & Co., she likely would obtain an early dismissal of Ryan’s case. If third-party status depends on Mindy’s motive, she likely will not.189

D. Tolerable Meddling Versus “Improper” Interference

It is a given that an employment interference claim requires intent.190 Under the Restatement, intent means that the defendant acted “for the primary purpose of interfering with the performance of the contract,” and also if he desired to interfere, even though he may have had an additional purpose.191 Even if he lacks a purpose or desire to interfere, he may have the requisite intent if he knows “that the interference is certain or substantially certain to occur as a result of his action.”192 In other words, the intent element is satisfied by “an

within the legitimate scope of a corporate officer’s employment or within the corporation’s legitimate interests. At least on the facts of this case, to conclude otherwise would be to cloak a wayward supervisor with impunity for his unlawful acts.”). As the First Circuit stated in affirming, “Massachusetts is far more plaintiff-friendly than other jurisdictions” because it establishes liability upon a showing of actual malice. Id. at 76 n.5.

189. See Rando v. Leonard, 826 F.3d 553, 556 (1st Cir. 2016). Some jurisdictions indicate that heightened proof requirements are imposed concerning the third party element if the defendant is a coworker, at least as to coworkers higher in the company hierarchy. Id. (“In assessing whether a defendant acted with improper motive or means, Massachusetts courts apply a heightened standard where defendants are ‘corporate officials’ acting ‘within the scope of their employment responsibilities.’”).
190. Restatement § 766C cmt. a (“Liability for interference with contracts and prospective contractual relations developed in the field of intentional torts... [T]here has been no general recognition of any liability for a negligent interference.”); see id. §§ 8A, 11 (intent means a desire to cause the consequences or a belief that the consequences are substantially certain). Whether the coworker must have intended to interfere, or must have intended the end result of the interference (e.g., termination) is not clear. See, e.g., Glenn v. Point Park Coll., 272 A.2d 895, 899 (Pa. 1971) (“It must be emphasized that the tort we are considering is an intentional one: the actor is acting as he does for the purpose of causing harm to the plaintiff.”).
191. Restatement § 766 cmt. j.
192. Id.
interference that is incidental to the actor's independent purpose and desire but known to him to be a necessary consequence of his action." 193

However, intent is not sufficient. 194 Obviously, every decision to fire an employee is "intended" to break the employment relationship. In a strong sense, supervisors and managers are expected to interfere with their subordinates' careers. No employee can take a job expecting that the boss will not influence his career trajectory, for better or for worse. The coworker's conduct must also have been "improper." 195

The question whether conduct was improper has spawned legions of court opinions. 196 Section 767 of the Restatement directs us to that familiar step in assessing tort claims: The balancing-of-interests. 197 As adapted to the employment context, courts are to consider:

(a) the nature of the coworker's conduct;
(b) the coworker's motive;
(c) the interests of the employee with which the coworker's conduct interferes;
(d) the interests sought to be advanced by the coworker;
(e) the social interests in protecting the freedom of action of the coworker and the contractual interests of the employee;
(f) the proximity or remoteness of the coworker's conduct to the interference; and
(g) the relations between the parties. 198

193. Id.
194. "We find nothing inherently wrongful in 'interference' itself." Wagenseller v. Scottsdale Mem'l Hosp., 710 P.2d 1025, 1043 (Ariz. 1985); Matrai v. AM Entm't, LLC, No. 14-2022-SAC, 2015 WL 1646214, at *8 (D. Kan. Apr. 14, 2015) ("[T]he complaint's allegation that Miller acted "intentionally" is a conclusion. It neither alleges that Miller acted with specific intent to injure Plaintiffs nor alleges facts otherwise sufficient to show malice. A party whose acts are motivated by his own self-interest does not necessarily act maliciously. Therefore, merely alleging that Miller intentionally dissuaded the contracting party from going forward with the Plaintiffs' business relationship is insufficient to allege malice.") (citations omitted).
195. See Wagenseller, 710 P.2d at 1043; Matrai, 2015 WL 1646214, at *2.
196. Some courts approach the "improper" element from another direction, asking whether the defendant's conduct was privileged or justified. See Glenn v. Point Park Coll., 441 Pa. 474, 482 (1971). However, the Restatement no longer follows that approach. Restatement § 767 cmt. b. (The law of tortious interference "has not developed a crystallized set of definite rules as to the existence or non-existence of a privilege to act. . . . Because of this fact, this [s]ection is expressed in terms of whether the interference is improper or not, rather than in terms of whether there was a specific privilege to act in the manner specified.").
197. See Restatement § 767 cmt. b.
Thus, courts are to determine whether an action is improper by considering the "nature" of the bad act, the defendant's motive, everyone's interests (including society's), the connection between the conduct and the interference, and the parties' relationship.\(^\text{199}\) This omits only the kitchen sink. As one authority stated more gauzily, the question is whether the conduct was "sanctioned by the rules of the game which society has adopted" and falls within "the area of socially acceptable conduct which the law regards as privileged."\(^\text{200}\) If Mindy's evaluation of Ryan was not "socially acceptable" or violated one of the unwritten "rules of the game," she apparently may be a tortfeasor.\(^\text{201}\)

As an initial matter, these factors can be applied in an outcome-determinative way.\(^\text{202}\) Under factor (g), for example, a court might reason that if the "relation[] between the parties" is their working relationship, no claim is available because the premise of at-will employment is that courts will not intervene to second-guess a discharge.\(^\text{203}\) Also, the tenuous nature of an at-will "relation[]" suggests the plaintiff deserved little or no protection, and under factor (e) the "contractual interests" of the plaintiff are negligible.\(^\text{204}\) Another court might conversely conclude that factor (g) favors the plaintiff in an employment interference case: jobs are essential to one's livelihood (see factor (c)), and coworkers should not lightly interfere with them.

Additionally, it is apparent that the factors to be considered in whether the interference was improper considerably overlap with those determinative of third-party status, discussed above. For example, the defendant's motive is relevant both to whether he is a third party and whether his conduct was improper.\(^\text{205}\)

1. Unlawful Conduct

Improper and unlawful conduct may be two sides of the same coin. In some jurisdictions, the plaintiff only has a potential claim if he can

---

199. Id.
201. "[T]he determination of whether the interference was improper or not is ordinarily left to the jury, to obtain its common feel for the state of community mores and for the manner in which they would operate upon the facts in question." RESTATEMENT § 767 cmt. l.
203. See RESTATEMENT § 767.
204. See id.
205. See id. § 767 cmt. d.
show that the interference was unlawful.206 The method of interference must be independently tortious or illegal (further discussed below).207 Improper conduct not otherwise unlawful is not actionable.208

Approaching the postulated symmetry in reverse, if the defendant’s conduct was unlawful it may for that reason be improper. According to the Restatement, “[c]onduct specifically in violation of statutory provisions or contrary to established public policy may for that reason make an interference improper . . . [such as] conduct that is in violation of statutes, regulations, or judicial or administrative holdings regarding labor relations.”209

Any number of court decisions conclude that if the defendant’s conduct was unlawful, it was improper.210 If the defendant’s refusal to pay wages violated a state wage payment law, that conduct was also improper for purposes of an interference claim.211 Discrimination or retaliation by a superior may also be improper.212 Some jurisdictions allow the plaintiff to satisfy this element by proving that the defendant’s action was “wrongful per se”—i.e., an act that is inherently wrongful or that can never be justified under any circumstances.”213

2. Motive, Malice and Personal Gain

Section 767 factor (b) indicates the defendant’s motive is relevant.214 However, a contrary trend may be developing.215 The motive factor has been criticized for failing to provide adequate standards “to guide juries’ improper-purpose findings or to inform private parties of their legal rights and obligations.”216 The trend shifts

207. Id. (applying Indiana law: “illegal conduct is an essential element in a claim for tortious interference with a business relationship”); Rutland v. Mullen, 798 A.2d 1104, 1110 (Me. 2002) (fraud or intimidation is an element of tortious interference claim; non-employment case).
208. See Pierce, 818 F.3d at 278.
209. RESTATEMENT § 767 cmt. c.
211. Stafford, 63 F.3d at 1442.
212. LeGoff, 23 F. Supp. 2d at 130 (“[I]n alleging that Haines and Strickler discriminated against her on the basis of gender, and threatened and retaliated against her for complaining of that discrimination, LeGoff has made out a prima facie case of tortious interference.”).
214. See RESTATEMENT § 767.
215. DAN B. DOBBS ET AL., THE LAW OF TORTS § 639 560 (2d ed. 2011) (observing “a definite movement toward limiting or even eliminating motive-based liability”).
the focus to whether the means of interference were improper, and, more specifically, whether the defendant’s conduct was independently tortious or unlawful. The Restatement suggests a sliding scale: The more improper the conduct, such as if the conduct is independently unlawful or tortious, the less significant motive becomes.

Some courts reason that an act is improper if it is unjustified and that malice in the form of “bad motive” is not determinative.

A key component in the analysis of a tortious interference claim under the Restatement involves an understanding of the term “improper” and how it differs from “malice”… actual malice, i.e., ill will toward the plaintiff, is not required…. Rather, actions are improper if they are not justified. An action may be justified if, for example, it was undertaken to protect the public interest.

Nonetheless, courts equate “bad motive” and “improper” all the time, and the focus on ill motive requires difficult line-drawing. On the one hand, personal dislike and favoritism would not normally be considered improper, although evidence that the defendant personally disliked the plaintiff would likely minimize the likelihood that the defendant would obtain summary judgment and color jury perceptions of the dispute, should one arise. The defendant’s pursuit of financial gain likewise is not likely improper conduct. “Without more, mere presentation of proof that [the defendant] may have been motivated by ‘personal gain, including financial gain’ is insufficient to show

malice are commonplace human emotions, and it would be neither possible nor desirable to treat every angry or malicious action as a tort. Even a tort allowing liability whenever a defendant maliciously interfered with a plaintiff’s economic relations would be unwise.” Id. at 561 (neither Eldridge nor Leigh Furniture were employment interference cases).

217. See Eldridge, 345 P.3d at 564; see also Williams v. Cobb Cty. Farm Bureau, Inc., 718 S.E.2d 540, 544 (Ga. Ct. App. 2011) (holding coworker’s actions must be malicious and unlawful).

218. See RESTATEMENT § 767 cmt. d.


220. Id. (citations omitted).

221. See, e.g., OfficeMax Inc. v. Sousa, 773 F. Supp. 2d 190, 241 (D. Me. 2011) (noting that a “bad motive” is not enough by itself to prove that the occurrence of an improper act in litigation).

222. Maniates v. Lake Cty. Or., No. CV 08-3038-PA, 2009 WL 395159, at *3 (D. Or. Feb. 12, 2009), as corrected (Feb. 17, 2009), aff’d sub nom. Maniates v. Lake Cty. Or., 370 App’x 853 (9th Cir. 2010) (“Imposing personal liability upon a manager merely for hiring a candidate who the manager likes could leave persons who make hiring decisions liable to every disappointed job applicant—and there can be dozens or even hundreds of applicants for a job opening.”).

intentional interference.\textsuperscript{224} If Mindy disliked Ryan, or if she viewed Ryan as a threat to her own standing and job security at TD & Co., and for that reason decided to knock Ryan down a peg, her motive might not be improper under this standard.

On the other hand, personal vindictiveness may be improper.\textsuperscript{225} Where, for example, an employee alleged that a coworker retaliated against her because she had reported alleged misconduct that harmed the coworker’s reputation, that allegation stated an employment interference claim. “Vindictiveness is, by its nature, malicious.”\textsuperscript{226}

As is the case regarding the third-party element, the inquiry into whether the defendant’s conduct was improper becomes more difficult if the conduct was partially for the employer’s benefit but partially personal.\textsuperscript{227} “[W]here, as in most cases, the defendant acts at least in part for the purpose of protecting some legitimate interest which conflicts with that of the plaintiff, a line must be drawn and the interests evaluated.”\textsuperscript{228}

3. The Means Employed

The means of the alleged interference is important in determining if the conduct was improper.\textsuperscript{229} Often, courts allow the plaintiff to show either improper motive or improper means.\textsuperscript{230} As noted, in New York, the propriety (or not) of the termination is not determinative.\textsuperscript{231} Only if the coworker used “wrongful means to effect” the termination is an employment interference claim viable.\textsuperscript{232} The focus is not on what the defendant was doing, what he was thinking, or whose interests he was serving, but rather whether the plaintiff has an independent viable claim against him.\textsuperscript{233}

\textsuperscript{224} Id.
\textsuperscript{226} Id.
\textsuperscript{228} Id.
\textsuperscript{230} Id. (“Plaintiff must show not only that the defendant intentionally interfered with his business relationship, but also that the defendant had a duty of noninterference; i.e., that he interfered for an improper purpose or used improper means.”) (citing Pleas v. City of Seattle, 112 Wash. 2d 794, 804 (Wash. 1989)).
\textsuperscript{232} Id.
\textsuperscript{233} See id. at 651-52 (The plaintiff's independent viable claim is satisfied by demonstrating that a business relationship existed between the parties, and that the relationship was terminated due to the defendant’s interference). Specifically,
Courts that reject premising interference liability on motive, as discussed above, require proof of “wrongful” conduct. Adopting that standard nonetheless requires a court to define what wrongful means. The Texas Supreme Court held:

[T]o recover for tortious interference with a prospective business relation a plaintiff must prove that the defendant’s conduct was independently tortious or wrongful. By independently tortious we do not mean that the plaintiff must be able to prove an independent tort. Rather, we mean only that the plaintiff must prove that the defendant’s conduct would be actionable under a recognized tort. Thus, for example, a plaintiff may recover for tortious interference from a defendant who makes fraudulent statements about the plaintiff to a third person without proving that the third person was actually defrauded. If, on the other hand, the defendant’s statements are not intended to deceive... they are not actionable.

A relatively common argument is that a coworker caused the plaintiff’s discharge by defamation. Because defamation is a recognized tort, a false statement may be wrongful conduct, as the Texas case indicates. In some jurisdictions, however, defamation is not sufficient to satisfy the improper means requirement. In other jurisdictions, courts have required the plaintiff to be specific as to the defamatory statements. In addition, where defamation is the asserted

the plaintiff is required to show: “(1) the existence of a business relationship between the plaintiff and a third party; (2) the defendants’ interference with that business relationship; (3) that the defendants acted with the sole purpose of harming plaintiff...; and (4) that such acts resulted in the injury to the plaintiff’s relationship with the third party.”

Id. (citations omitted). Proving a defendant’s intention alone, such as acting with malice, is insufficient to create an independent viable claim. Id. at 652.

235. See id. at 715.
236. Id. at 726.
237. See id. at 716 (“For centuries the common law continued to allow civil actions for interference with... other prospective business relationships, ... in all of them the actor’s conduct characterized by... defamatory. ...”).
238. Id. at 716, 726.
240. See id. at 223.
improper conduct, defendants who sue for employment interference claims may be entitled to the same qualified privilege that limits defamation claims.\footnote{241} If that is all true, then why not limit the plaintiff to a defamation claim?

Accepting an allegation of defamation to satisfy the wrongful means requirement would potentially open the door to a vast number of employment interference claims. Any former employee unhappy with his discharge could easily contend that any and all criticism of his performance was “a lie”—and, moreover, that the truth or falsity of the criticisms presents an issue of fact requiring a trial.

* * * * *

Multiple factors reveal that employment interference claims against coworkers rest on a fatally fractured foundation: (1) significant inconsistencies in judicial application of the claim,\footnote{242} especially regarding the defendant’s status as a third party; (2) imprecise language in court decisions about the claim’s elements, confounded by the fact that several inquiries (e.g., motive) apply to different elements; (3) the extraordinarily generic definition offered by the Restatement, which concedes that the claim has never really crystallized; (4) frequent attempts by courts to clarify the claim by changing the requirements (e.g., requiring improper means); and (5) a lack of clarity of the duties and expectations the tort theory imposes on coworkers, particularly on supervisors and managers who must make sometimes difficult employment decisions.

The reader may be the judge of the viability of Ryan’s employment interference claim. Is litigation required to determine if Mindy was motivated by spite or ill will? If she did in fact check Ryan’s progress because she feared his potential, is that an “improper” motive, and does it remove her from her standing as an agent of TD & Co.?\footnote{243} Should

\footnotetext{241}{See Calor v. Ashland Hosp. Corp., Nos. 2007-SC-000573-DG, 2008-SC-000317-DG, 2011 WL 4431143, at *12 (Ky. Sept. 22, 2011); Long, The Disconnect, supra note 1, at 539-40 (suggesting that if a supervisor allegedly caused the plaintiff’s termination “through the use of slanderous allegations,” the plaintiff should “be able to reach a jury” on an employment interference claim).}

\footnotetext{242}{See Long, The Disconnect, supra note 1, at 493 (explaining that one of the factors that contributes to the fatally fractured foundation and weakening of employment interference claims, is the "judicial treatment of interference claims in employment at-will settings").}

\footnotetext{243}{See id. at 492.}

[R]un-of-the-mill ‘dislike’ is hardly a strong basis upon which to bring a legal claim against anyone. However, if the ‘dislike’ can be characterized as
Ryan be permitted to maintain a claim that the evaluations were unfair if he would not be able to plead a viable claim that they were defamatory? And, if Ryan’s claim is allowed to advance, what effect would that have on supervisors and managers in that jurisdiction, who might now fear personal liability? Despite many unanswered questions and despite the lack of reasoned consideration for applying tortious interference theory to coworker disputes in the first place, the tort of employment interference survives.

III. IN MEMORIAM

About fifteen years ago, a flurry of legal commentary focused on the problems with employment interference claims. Some emphasized the conflict between these claims and the at-will doctrine and the restraints on public policy claims. Some focused on the difficulties courts encountered in attempting to apply the elements of the claim. Solutions, however, have not evolved. In fact, the considerable defects in employment interference claims are not curable. Courts should no longer recognize claims for tortious interference between coworkers arising from workplace disputes.

‘personal hostility,’ ‘ill will,’ or some other reasonable synonym, and the at-will employee can show that such feelings were the sole motivation... [the employment action] ‘is almost certain to be held’ unlawful.

Id. (citations omitted).


245. See Bernhard, supra note 244, at 1572 (discussing protection for at-will employees from abuse of employers by a correlation to other accepted claims that offend public policy, but noting the importance of balancing the interests of both employers and employees through judicial clarification of “when and why a tortious interference claim can proceed”).

246. See, e.g., Timmer, supra note 244, at 1474 (noting that although the court mentions the Restatement section for tortious interference, it never adopted the test).

247. See Bernhard, supra note 244, at 1573 (proposing that courts emphasize agency principles in determining employment interference liability); Cavico, supra note 70, at 569 (calling on judiciary to provide “the definitive answers, requirements, and standards, and order itself” because otherwise tortious interference in the employment context “will be an increasingly confounding and exceedingly challenging area of the law”); Long, Tortious Interference, supra note 49, at 914 (“Until some order is established in the judiciary’s resolution of such claims, the interference torts will continue to be a difficult meal to digest.”); Timmer, supra note 244, at 1477 (stating that “[t]he madness has to stop,” referring to the Michigan Court of Appeals’ failure to adopt the most essential section necessary to properly apply the tort of interference).

248. See, e.g., Timmer, supra note 244, at 1477 (explaining that if the court fails to clarify the inconsistent law, legitimate cases will continue to be improperly dismissed).
As a starting point, pedigree does not justify the perpetuation of a cause of action whose utility time has brought into question.\textsuperscript{249} "[M]any tort theories have not withstood the tests of time."\textsuperscript{250} In any event, what this Article proposes is not so much the cold-blooded murder of a celebrated tort but an earnest inquiry whether internal workplace contests should be subject to the claim in the first place. Courts have not seriously pondered that question. As employment protections have modernized, courts have not meaningfully considered whether employment interference theory comfortably and appropriately coexists with contemporary employment law. They should do so—and should decline to recognize employment interference claims.

\textit{A. Common-law Recognition of a Tort Theory Does Not Justify its Mechanical or Indiscreet Application in All Circumstances}

Perhaps further justification for the notion that torts may be abandoned is in order. That a tort theory evolved does not require that it apply in all contexts and to all relationships. Entire categories of relationships may be exempted from tortious interference claims, as marital relations have been.\textsuperscript{251} The workplace is likewise a setting where courts sometimes deem an otherwise viable tort theory inappropriate.\textsuperscript{252} For example, some courts have abolished negligence-based interference\textsuperscript{253} and emotional distress claims in the employment context.\textsuperscript{254}

\begin{flushright}
\textsuperscript{249} See Hartridge v. State Farm Mut. Auto. Ins. Co., 271 N.W.2d 598, 600 (Wis. 1978) (A "historical pedigree, albeit old and long... is insufficient authority on which to base a decision affirming [a common-law claim's] continued viability in the context of modern employment relations. The critical question is not whether the cause of action for which plaintiff argues once existed, but rather whether present circumstances and progressive social policy recommend its continued existence.").
\end{flushright}

\begin{flushright}
\textsuperscript{250} Kyle Graham, \textit{Why Torts Die}, 35 FLA. ST. U. L. Rev. 359, 377 (2008); Horton v. Or. Health & Sci. Univ., 376 P.3d 998, 1063 n.19 (Or. 2016) (Landau, J., concurring) ("Quite a number of torts have fallen by the wayside over the last century.").
\end{flushright}

\begin{flushright}
\textsuperscript{251} See, e.g., Horton, 376 P.3d at 1007; Graham, \textit{supra} note 250, at 428.
\end{flushright}

\begin{flushright}
\textsuperscript{252} See Timmer, \textit{supra} note 244, at 1477.
\end{flushright}

\begin{flushright}
\textsuperscript{253} See, e.g., Hartridge, 271 N.W.2d at 601. The Wisconsin Supreme Court held: The historic common-law right of a master to recover for loss of services due to a servant's injury by a negligent third party contemplated a quasi-familial relationship which does not exist between a modern-day employer and his employee. The action, however valid in feudal societies, is out of place in modern times. It is a carry-over from an earlier day, ill-adapted to current social and economic realities.
\end{flushright}

\begin{flushright}
\textit{Id.}
\end{flushright}

\begin{flushright}
\textsuperscript{254} See Perodeau v. City of Hartford, 792 A.2d 752, 769 (Conn. 2002) ("[E]mployees who
In some instances, courts have modified tort theories to take the employment context into account. Defamation claims have the potential to impinge upon legitimate employer interests, which justifies stricter scrutiny of workplace defamation claims. Courts have only grudgingly considered intentional emotional distress claims arising in the employment context. Even as courts recognize public policy claims, they remain mindful that distinctive interests are at stake in employment relationships and have attempted to confine the reach of those claims accordingly. To an extent, courts sometimes also elevate the proof requirements associated with tortious interference claims, which is effectively a step in eliminating the cause of action. For example, in Michigan, where malice is alleged, the "plaintiff must demonstrate, with specificity, affirmative acts ... which corroborate the unlawful purpose of the interference."

Legislatures also remove tort theories from the workplace via pre-fear lawsuits by fellow employees may be less competitive with each other, may promote the interests of their employer less vigorously, may refrain from reporting the improper or even illegal conduct of fellow employees, may be less frank in performance evaluations, and may make employment decisions such as demotions, promotions and transfers on the basis of fear of suit rather than business needs and desires. All of this conduct would contribute to a less vigorous and less productive workplace. We conclude that such a pervasive chilling effect outweighs the safety interest of employees in being protected from negligent infliction of emotional distress.

---

255. See Sheppard v. Freeman, 79 Cal. Rptr. 2d 13, 14 (Cal. Ct. App. 1998). As to common-law claims, "it is proper and appropriate for the court to limit them in the employment context." Id. at n.1.

256. See Murphy v. City of Kirkland, No. 61966-7-I, 2009 WL 8558827 at *4 (Wash. Ct. App. 2009) ("We note that courts in other jurisdictions have expressed great reluctance to allow judicial interference, specifically defamation claims, in the arena of performance evaluations. Given the importance of such evaluations in the workplace, their inherently subjective nature, and the need for candor in their execution, we agree that courts should exercise caution in this area.").

257. "Mindful of New York’s strong employment-at-will doctrine and the protections provided by ... statutes, however, courts have been particularly wary of claims for [emotional distress] in the [workplace] context, and have held plaintiffs to a very high standard for pleading outrageousness." Steven Aptheker & Russell Penzer, Rethinking Tort Claims in Employment Discrimination Cases, 248 N.Y.L.J. (Sept. 18, 2012); see also Futrell v. Dep’t of Labor Fed. Credit Union, 816 A.2d 793, 808 (D.C. 2003) ("[w]e have been exacting as to the proof required to sustain [emotional distress] claims ‘in an employment context’"); Dennis P. Duffy, Intentional Infliction of Emotional Distress and Employment at Will: The Case Against “Tortification” of Labor and Employment Law, 74 B. U. L. REV. 387, 412 (1994) ("The expansive application of intentional infliction of emotional distress in earlier cases has given way to the recent trend toward limiting the tort, either by using preemptive theories, such as workers’ compensation, or by narrowing its application in employment cases.").

258. See, e.g., Sheets v. Teddy’s Frosted Foods, Inc., 427 A.2d 385, 387-88 (Conn. 1980) ("We are mindful that courts should not lightly intervene to impair the exercise of managerial discretion or to foment unwarranted litigation.").


260. Id. at 886.
emptive laws. The Texas statute protecting workers against discrimination, for example, is the exclusive remedy for alleged wrongdoing that falls within the scope of the law, even if the wrongdoing might support common-law claims. "[A]llowing [a plaintiff] to recover on her tort claim would collide with [an] elaborately crafted statutory scheme [] that . . . incorporates a legislative attempt to balance various interests and concerns of employees and employers." Displacing interference claims in favor of workplace-tailored ones is not a novel proposal. The Uniform Commissioners’ Model Employment Termination Act proposed a wrongful termination cause of action that would “extinguish[] all common-law rights and claims of a terminated employee against the employer, its officers, directors, and employees, which are based on the termination or on acts taken or statements made that are reasonably necessary to initiate or effect the termination.” There are already calls to eliminate or at least limit public policy tort claims, even though they are designed for workplace disputes. Arguably, while perhaps once useful to serve a purpose, other causes of action provide adequate protection and the public policy claim in “its current application threatens to engulf the at-will employment rule.” In addition, some states do not permit an employee to bring a public policy claim for discharge or discipline if a statute provides a cause of action and a remedy adequate to vindicate that public policy.
example, the Oregon Supreme Court declined to recognize a public policy claim arising from alleged retaliation against a worker for reporting workplace safety concerns.\textsuperscript{268} The court reasoned that "existing remedies are adequate to protect both the interests of society in maintaining safe working conditions and the interests of employees who are discharged for complaining about safety and health problems."\textsuperscript{269} That reasoning applies here: At a minimum, courts should not recognize employment interference claims where another cause of action exists.

\textbf{B. Tortious Interference Claims Improperly Elevate the Duties of Coworkers Over those of the Employer}

The tort of interference imposes on everyone a general duty not to "intentionally and improperly interfere[] with another's" cognizable relationships to their harm.\textsuperscript{270} Those generalities, of course, do not usefully mark out Mindy's legal obligations to Ryan. Supervisors have no legal duty to be even-handed, accurate, or altruistic in writing performance appraisals. While one might presume, then, that any duties owed Ryan are owed primarily by TD & Co., employment interference theory shifts those duties to Mindy.

Rudimentary legal logic ordains that if an employee has no protected expectation of his employer about his employment, he likewise lacks that expectation vis-à-vis coworkers.\textsuperscript{271} If that is true, tortious


\textsuperscript{269} Id. at 1208; see also McLean v. Hyland Enters., Inc., 34 P.3d 1262, 1272 (Wyo. 2001) ("[T]here is no claim for wrongful termination in violation of public policy under Wyoming law ... where an administrative remedy exists.").

\textsuperscript{270} See \textit{RESTATEMENT} § 766B; see also \textit{RESTATEMENT (SECOND) OF TORTS} § 4 (AM. LAW INST. 1965) ("[T]he word 'duty' ... denote[s] the fact that the actor is required to conduct himself in a particular manner at the risk that if he does not do so he becomes subject to liability to another to whom the duty is owed for any injury sustained by such other, of which that actor's conduct is a legal cause.").

\textsuperscript{271} See Shaw v. Burchfield, 481 So.3d 247, 255 (Miss. 1985) (noting that "numerous cases from other states recognize that there is no right of recovery on the part of a discharged employee against one said to have interfered with a contract terminable at will").
interference claims defy logic. An employer has the right to discharge an employee at any time, even spitefully, so long as the discharge is not otherwise unlawful. Yet, a coworker might be liable merely for "improperly" harming a colleague's career. Thus, an employer may have no liability if an executive with the authority to discharge a worker does so simply because he hates the worker. But if Mindy's poor evaluations of Ryan were hate-driven, Ryan arguably has a claim against her. 272

Mindy's obligation to Ryan (not to act improperly) not only surpasses TD & Co.'s obligation (not to act unlawfully), but Mindy may be liable for workplace actions of far less consequence than those required for a claim against the employer. Ryan has no "wrongful evaluation" claim against TD & Co., but his unsatisfactory ratings may justify a lawsuit against Mindy. 273 In other words, while the "thou shalt not improperly interfere" standard does not apply to employers, it does apply to coworkers.

These results, or risks, have a potentially dramatic impact on the ability of managers and supervisors to manage their workers. 274 Managing workers involves the exercise of judgment and opinion, and impressions of workers may rely to a great extent on general notions regarding an employee's "fit." In smaller organizations particularly, personal preferences and plain-old likability are significant. To suggest that a coworker may be sued for the foolish, tainted, warped, or

272. Boers v. Payline Sys. Inc., 918 P.2d 432, 437 (Or. Ct. App. 1996) ("In Giordano, the defendant fired the plaintiff simply because he did not want the plaintiff to work for the corporation. He created false information in order to justify the firing. We held that that evidence was sufficient to support a finding that the defendant had acted with an improper purpose.") (citing Giordano v. Aerolift, Inc., 818 P.2d 950 (Or. App. 1991)).

273. See id. Courts may view a claim against a coworker as an improper attempt to plead a barred claim against the employer. See Barcellos v. Robbins, 858 N.Y.S.2d 658, 660 (N.Y. App. Div. 2008) (noting that a bar on a wrongful discharge claim "cannot be circumvented by casting the cause of action in terms of tortious interference with employment").


Personnel actions are made for the benefit of the enterprise—the employer, and it is the employer, not the individual employees, that must bear the risks and responsibilities attendant to these actions. Naturally, personnel actions are made with the input of employees, both as part of their official duties and otherwise. Without such input, the employer would be making decisions and taking action in a vacuum, and indeed, effective management and operation of an enterprise to a significant extent depends upon the free exchange of information, concerns, and ideas of all employees. This can hardly occur when the individual employees face the prospect of being sued for this conduct.

Id.
downright unfair treatment of a colleague is to deny necessary “breathing space.” “Important societal interests are served by corporations having the clear and candid advice of their officers and agents. Fear of personal liability would tend to limit such advice.”

As discussed above, that is one reason some courts do not recognize public policy claims against individuals.

Intensifying this potential chilling effect is that coworkers lack realistic contractual rights to define their obligations to coworkers and to minimize the risk that they may be accused of a breach. Employers may freely contract with workers, or their representatives, to define duties, such as through executive employment agreements or collective bargaining agreements. They may impose work rules. They may enter contracts that restrict litigation options. For example, as a general rule employers may require employees to arbitrate employment disputes, depending on the type of claim. But an arbitration agreement between Ryan and TD & Co. will not likely apply to Ryan’s claim against Mindy. Should, or may, Mindy require every worker assigned to her department to agree that any disputes between the two of them will be resolved through arbitration? Although coworkers could enter into an agreement that establishes legal duties between them, this is more impractical than realistically plausible of being implemented.

275. Forrester v. Stockstill, 869 S.W.2d 328, 334 (Tenn. 1994); Gram v. Liberty Mut. Ins. Co., 439 N.E.2d 21, 24 (Mass. 1981). “The rule assigning liability to corporate officials only when their actions are motivated by actual, and not merely implied, malice has particular force because ‘their freedom of action directed toward corporate purposes should not be curtailed by fear of personal liability. . . .’” Id. (citations omitted); Nording v. N. States Power Co., 478 N.W.2d 498, 505-06 (Minn. 1991) (“To allow the officer or agent to be sued and to be personally liable would chill corporate personnel from performing their duties and would be contrary to the limited liability accorded incorporation.”).

276. See, e.g., Nording, 478 N.W.2d at 506 (“Where we must balance a discharged employee’s need for a remedy against the concern not to chill company personnel in the performance of their duties, we conclude, when motive or malice becomes relevant on the issue of improper interference, that this malice be actual malice.”).


278. See Fenlon v. Burch, No. 4:15-CV-00185(JCH), 2015 WL 2374716, at *2 (E.D. Mo. May 18, 2015) (Burch’s “only argument is that both [she and plaintiff] signed independent agreements and that arbitration is therefore appropriate. The fatal flaw in Burch’s argument is that no agreement between the parties exists. Burch is therefore a nonsignatory of Fenlon’s arbitration agreement, and there must be some reason why she, although a nonsignatory, can enforce the contract. Since the Court is presented with none, there is no basis on which to compel arbitration.”).

279. See, e.g., id. (showing how two employees typically sign agreements with their employer and not with each other). The court did not compel arbitration between the parties because no reason was established as to why a nonsignatory could enforce an arbitration agreement. Id.
make a contract limiting the supervisor’s obligations enforceable.

C. Employment Interference Claims are Incompatible with the Employment At-will Doctrine and Limitations on Public Policy Claims

The compelling benefit of the at-will employment doctrine is that either party remains free to end the relationship without further ado—no muss, no fuss.280 Neither party to the relationship is required to justify its decision. If an employee, groomed over many years of service, decides to work for his employer’s arch-competitor, he may bid adieu.

Once courts append duties to the relationship, they risk making any employment decision fodder for a lawsuit and significantly diminish the benefits of at-will employment.281 Recognizing this concern, the Virginia Supreme Court recently held that the parties to an at-will employment relationship have no obligation to provide advance notice of termination of the relationship.282 “Every decision to terminate an employment relationship, or of an employee to quit a job, would become a jury question—hardly the clear, flexible rule that the at-will doctrine contemplates.”283

Claims dependent on the defendant’s motive are particularly incompatible with the notion of a “clear, flexible rule.”284 As discussed, in employment interference cases, motive is usually a key factor in determining a coworker’s standing as a third party and assessing whether her conduct was improper.285 Inviting an assessment of motive, however, effectively establishes a just cause standard for employee discipline or discharge: If an unhappy employee cries “improper,” the defense will focus on the legitimate basis for the discipline or discharge; in other words, it will attempt to prove the decision was “just.”286

281. See id.
282. See id. at 105-06.
284. See Johnston, 787 S.E.2d at 105.
286. See Sheets v. Teddy’s Frosted Foods, Inc., 427 A.2d 385, 386-87 (Conn. 1980). This is not necessarily the case for public policy claims. See id. (citations omitted) (“‘Just cause’ substantially limits employer discretion to terminate, by requiring the employer, in all instances, to proffer a proper reason for dismissal, by forbidding the employer to act arbitrarily or capriciously. By contrast, the plaintiff asks only that the employer be responsible in damages 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.”).

Published by Scholarly Commons at Hofstra Law, 2016
Ryan’s central argument is that he deserved higher ratings. Mindy is not likely to persuade a jury simply by testifying, “No, he didn’t.” She will be expected to justify each rating and withstand cross-examination designed to undermine her explanation. Mindy might have convincing explanations, but why does this dispute belong in the courtroom at all? The scenario that Ryan could easily sue Mindy, persuade a court that the case must go to a jury because Mindy’s motives present a fact issue, and then hope that Mindy makes a lousy witness, clearly would chill Mindy and similarly situated bosses from candid evaluations of their subordinates.

Interference claims against coworkers likewise are hard to square with limitations on public policy claims.287 One reason that courts hesitate to recognize or expand the application of those claims is that case-by-case judicial recognition of public policies leaves employers at the mercy of the courts.288 “A vague or general statute” fails to support public policy claims because “such vagueness would [] cause the duties imposed upon employers [to] become more vague and create difficulties for employers to plan around liability based on the vagaries of judges.”289 Employment interference claims, based on vague notions of impropriety, surely make it difficult for employers—or, more specifically here, coworkers—to “plan around liability.”

Public policy claims thus are restricted by the limitation that only conduct contrary to a well-defined policy is actionable, such as conduct that “strikes at the heart” of society.290 Also, as discussed, some

287. See Sheppard v. Freeman, 79 Cal. Rptr. 2d 13, 15-16 (Cal. Ct. App. 1998) (recognizing “the deleterious effects on business if disciplined employees may avoid [the requirements to state a public policy claim against the employer] by simply alleging malice and suing coemployees for damages on alternative tort theories, when the identical personnel action cannot give rise to tort damages against the employer.”).


289. Id. at 595-596 (quoting Margiotta v. Christian Hosp. Northeast Northwest, 315 S.W.3d 342, 346-47 (Mo. 2010)) (en banc); see also Sheets, 179 427 A.2d at 483, 427 A.2d at 390 (Cotter, C.J., dissenting) (“By establishing a cause of action, grounded upon ‘intentionally tortious conduct,’ for retaliatory discharges which do not necessarily in and of themselves directly contravene statutory mandates, the majority is creating an open-ended arena for judicial policy making and the usurpation of legislative functions. To base this new cause of action on a decision as to whether an alleged reason for discharge ‘is derived from some important violation of public policy’ is not to create adequate and carefully circumscribed standards for this new cause of action but is to invite the opening of a Pandora’s box of unwarranted litigation arising from the hope that the judicial estimate of derivation, importance, and public policy matches that of the plaintiff.”).

290. See 82 AM. JUR. 2D Wrongful Discharge § 56 (2016) (alteration in original) (“A public policy cause of action exists when a discharge violates an interest that is ‘fundamental,’ ‘substantial,’ and ‘distinctly public[,]’ will lead to an outrageous result clearly inconsistent with a stated public policy and the community interest[; and] will strike at the heart of a citizen’s social
jurisdictions recognize only wrongful discharge public policy claims, and lesser forms of discipline are not actionable.\textsuperscript{291} In contrast, Ryan may have a tortious interference claim against Mindy even though the dispute involves no public policy at all, much less a clearly expressed and significant one, and even though his alleged harm is well short of job loss.\textsuperscript{292} Why go through the trouble of attempting to limit public policy claims if the employer's agents may be sued for just about anything that rattles a worker?\textsuperscript{293}

These concerns raise another issue, that of vicarious liability, further discussion of which is beyond the scope of this Article. If a coworker commits an intentional tort, her employer may be, as a general rule, vicariously liable.\textsuperscript{294} That is why employers are sued for sexual harassment committed by their agents.\textsuperscript{295} If TD & Co. is liable to Ryan because Mindy intentionally harmed him by writing a negative evaluation, neither the at-will doctrine nor the limitations constraining the reach of public policy claims will be of any benefit. TD & Co. will be vicariously liable even though employment laws have otherwise been designed to limit Ryan's ability to sue the company. Vicarious liability principles have "potentially momentous ramifications for employment law, and especially for the employment-at-will-doctrine."\textsuperscript{296}
D. Employment Interference Claims Impose Unclear Obligations and are Particularly Difficult to Resolve

That a tort theory cannot be tidily applied may not itself justify its retirement. Much of law is not neat, employing broad concepts ("gross negligence") and dependent on the judgment of the reasonable man. Nonetheless, a tort claim is brittle if it is defined by vague notions of wrongdoing ("improper"), resolved by reference to vague interests (i.e., "nature" and "relations"), requires findings that cannot be made with certainty (i.e., "motive" and "malice"), fails to offer clear advance notice of obligations, and is decided against the "social norms" of jurors. It is surprising that such a tort should live on:

[S]ome claims seem impervious to even sustained and potent criticism. One tort, for example, still "suffers from considerable doctrinal confusion" long after its inception. A commentator has written that "courts [have] impose[d] liability under the rubric of [this tort] in a variety of contexts, but they have failed to develop common or consistent doctrines." Liability under this theory hinges in large part on the tricky question of the defendant's motive, creating knotty problems of proof. The tort has produced enormous (and heavily criticized) jury verdicts, with billions of dollars being awarded to individual plaintiffs. Scholars have criticized the tort on the ground that it deters efficient conduct while unduly chilling free speech. From all these facts, one might conclude that this unnamed tort is in grave danger of extinction. This is far from the truth, however, for the tort is none other than intentional interference with contract.

One of the most significant shortcomings of claims for employment


298. See RESTATEMENT § 767; Mark P. Gergen, A Grudging Defense of the Role of the Collateral Torts in Wrongful Termination Litigation, 74 TEX. L. REV. 1693, 1693-95 (1996). The author argues that the "more formless torts," including intentional interference with business relations, should "disappear in the shadow of other, more specific doctrines in contract or tort law relations." Gergen, supra note 298, at 1696-97.

299. Graham, supra note 250, at 377-78.
interference, noted above, is the lack of advance notice of the extent of obligations owed to colleagues.\textsuperscript{300} This fault has several damaging consequences: If coworkers do not know what "improper" interference is, they may and will unwittingly cross the line. If the law does not distinguish between right and wrong, courts will only infrequently dismiss employment interference claims and instead will defer to jury determinations as to impropriety.\textsuperscript{301} And if no one really knows what interests the tort protects, it clearly is an ineffective, if not defective, means to promote societal interests.

Because improper-purpose findings are so dependent on fact-finders’ personal sympathies, and so insulated from appellate review, the outcome of an improper-purpose suit becomes unpredictable as soon as any evidence of improper purpose is introduced. This is a problem not merely because it may lead to unjust outcomes in individual cases, but because it makes it impossible for private parties to understand their rights and duties under tortious interference law.\textsuperscript{302}

The survey in Part II exposes the difficulty courts have in applying tortious interference claims in coworker disputes. In particular, the “third-party” inquiry is formulaic insofar as courts adhere to agency principles, unpredictable insofar as it depends on the defendant’s objectives and motives, and in a significant sense a fiction because the workplace is a collaborative effort where coworkers are not individual “parties,” but participate in a common process to achieve a common objective. Countless enterprises tout teamwork as an uppermost corporate value, as in, we are “one team [with] one dream.”\textsuperscript{303} A discharge or discipline decision against an employee—which naturally only impacts him \textit{in his capacity as an employee}—is ultimately a company decision.\textsuperscript{304}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{300} See Gary Myers, \textit{The Differing Treatment of Efficiency and Competition in Antitrust and Tortious Interference Law}, 77 Minn. L. Rev. 1097, 1109-10, 1135-36 (1993); see also Graham, supra note 250, at 384 (“[A] tort may be challenged as overly taxing to litigants and courts, failing to generate predictable outcomes, producing divergent liability standards across jurisdictions, or as an ineffective vehicle for developing optimal public policy.”).
\item \textsuperscript{301} See, e.g., Eldridge v. Johndrow, 345 P.3d 553, 562-63 (Utah 2015).
\item \textsuperscript{302} Id.
\item \textsuperscript{304} See, e.g., Sheets v. Teddy’s Frosted, 427 A.2d 385, 389 (Conn. 1980) (showing that a}
\end{itemize}
\end{footnotesize}
The focus in employment interference claims on motive not only tests the claim’s compatibility with the at-will employment doctrine, it is also a clumsy test for determining a coworker’s standing as a third party. Even the coworker accused of interfering is unlikely to be able to bin all the factors that motivated the challenged employment decision. Perhaps Mindy is a Second Amendment enthusiast and harbors subconscious disdain for Ryan’s off-duty advocacy of gun control laws. Perhaps she is jealous of Ryan’s colorful social life. Perhaps his workplace ambitions are threatening to her. Yet some courts rather breezily accept the argument that, if the plaintiff pleads that his supervisor had a bad reason for the discipline or discharge, the plaintiff has presented a factual question of whether the supervisor was a third party.

Indeed, the fact-intensive nature of tortious interference claims typically precludes prompt resolution. It has been said that “the central question to be answered is whether the defendant’s conduct has been fair and reasonable under the circumstances.” Even if fairness and reasonableness were not questions of fact, “improper,” “motive,” “malice,” and other elements certainly are.

Malice may be shown by the proof of facts from which

court will not interfere company’s decision, unless employee rights are being violated).

305. *See*, e.g., Mark R. Hinkston, *Wisconsin Lawyer September 2001: Tortious Interference with At-will Employment*, 74 *Wis. Lawyer* (2011), http://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=74&Issue=9&ArticleID=21799 (“[D]ischarged at-will employees should resort to a tortious interference claim only when their termination actually was triggered by ‘improper motive’...”).

306. *See* Cohen v. Davis, 926 F. Supp. 399, 404-05 (S.D.N.Y. 1996) (“[T]he plaintiff has satisfied the third party element of a claim for tortious interference because she has alleged that the defendants were not acting in good faith as employees of [employer] when they caused her termination. The plaintiff claims that the defendants caused her termination to serve their own self-interest because they wanted to prevent her from revealing possible financial improprieties, and that the defendants used fraudulent means to effect her termination.”); *see also* Giordano v. Aerolift, Inc., 818 P.2d 950, 953 (Or. Ct. App. 1991) (“We conclude that there was evidence from which an improper motive could be found. Although there was also contrary evidence, that evidence does not compel a finding that defendant also acted to benefit [the employer].”).


309. Hayes v. Advanced Towing Servs., 40 S.W.3d 800, 803-05 (Ark. Ct. App. 2001) (“[W]hen there is room for different views, the determination of whether the interference was improper or not is ordinarily left to the jury, to obtain its common feel for the state of community mores and for the manner in which they would operate upon the facts in questions.” (quoting *RESTATEMENT § 767 cmt. l*).
a reasonable inference of malice may be drawn. The line between a proper inference and unwarranted conjecture is not easily drawn. The answer depends on the evidence in each case and on what the trier of fact may reasonably infer from that evidence. The fact that there is no direct evidence that [defendants] acted with malice to obtain Gram’s discharge is not dispositive. There might be sufficient proof that spite or ill will was the controlling factor in urging Gram’s discharge, derived from a “rational inference of probabilities from established facts.”

Accordingly, coworkers sued for employment interference likely will endure laborious discovery at a minimum, if not a full-fledged trial, before vindication is possible. For example, even where the named defendant was a founder of the company, the chairman of the board, the chief executive officer, and a large shareholder of the closely held corporation, the court concluded that issues of fact remained as to whether he was a “third party.” While modern employment causes of action may streamline resolution of the dispute through administrative and other processes, employment interference claims introduce coworkers to the messy, whole nine yards of litigation.

E. Statutory Claims Tailored to the Workplace and Other Available Tort Claims are More Efficient and More Directly Address Improper Conduct

In practice, and as Ryan’s situation demonstrates, tortious interference serves as a catchall cause of action in situations where neither the courts nor legislature have afforded employment protections. Plaintiffs often assert them as tag-along claims in complaints that may assert multiple causes of action. As an appellate judge once summarized:

311. See, e.g., Harrison v. Netcentric Corp., 744 N.E.2d 622, 632 (Mass. 2001) (showing that despite there being an abundance of evidence, the court still proceeded to harp on facts which drew out the trial’s length).
312. Id.
313. See, e.g., Hayes, 40 S.W.3d at 800 (showing that tortious interference claims can be brought as the sole cause of action).
314. See generally Gergen, supra note 298 (showing how multifaceted torts can be).
Congress and the Washington Legislature have passed legislation to eliminate discrimination on the basis of race, gender, age, handicap and religion from the workplace. Additionally, there is detailed regulation of the safety aspects of the workplace and to protect union activity by employees. In view of this pervasive regulation and in the total absence of any legislative direction, I find it inappropriate for the courts to expand the parameters of tortious interference to include unsociable conduct of co-employees as a basis for such a claim.\textsuperscript{315}

As this quote suggests, comprehensive regulation is a rational basis for refusing to recognize add-on tort claims.\textsuperscript{316} Indeed, tort theories play relatively little role in the expansive field of labor law because that field is highly regulated.\textsuperscript{317}

Whatever wild-west-free-for-all the at-will concept might conjure up, private employment is comprehensively regulated.\textsuperscript{318} These strictures limit the need for interference tort theories in the workplace:

The tort of inducing breach of contract, or interfering with a contract, was never intended and does not apply to the relationship between employer and employee. An employee has a veritable arsenal of remedies against his employer. Among other things, an employee has the benefit of the Workmen’s Compensation laws, fair employment practices legislation, unemployment compensation laws, collective bargaining agreements and the general law affording damages for breach of contract, all of which bear in various ways on hiring and firing.\textsuperscript{319}


\textsuperscript{316} See Graham, supra note 250, at 373-74 (discussing how comprehensive regulation of telegraph industry contributed to the demise of common-law tort claims for negligent transmission of telegrams).

\textsuperscript{317} See id. at 374-75.

\textsuperscript{318} See, e.g., IV. Employment Litigation and Dispute Resolution, supra note 277 (showing how regulated private employment can be).

Legislation and other forms of workplace regulation permit tailoring the scope of claims to the interests they foster.\textsuperscript{320} Causation standards provide an example. As a common-law tort action, interference is subject to common-law causation standards.\textsuperscript{321} Whether applying that standard in a dispute between coworkers best promotes the interests underlying tortious interference claims is an unanswered, and apparently unconsidered, question. For one thing, employment interference claims simply evolved, and jurists cannot truly identify what jobsite interests the claim was “designed” to protect.\textsuperscript{322}

In contrast, legislatures and courts have pondered what causation standards promote the interests underlying claims available against employers.\textsuperscript{323} Anti-discrimination laws might require an employee to prove that the protected characteristic was the “primary basis”\textsuperscript{324} or a “motivating factor”\textsuperscript{325} in the alleged discriminatory act. If a statute does not supply a standard of proof, courts may consider what standard best applies given the nature of the employment dispute.\textsuperscript{326} For example, a recent California Supreme Court decision considered what the legislature “sought to accomplish in enacting” employment discrimination prohibitions and decided that to “give effect to” the legislature’s purpose, a plaintiff must show that discrimination was a “substantial factor motivating” the employment decision.\textsuperscript{327} Courts in jurisdictions recognizing public policy claims also consider what causation standard is appropriate in light of the competing workplace interests served by public policy claims—such as the “sole reason” or “contributing factor” standards.\textsuperscript{328}

\textsuperscript{320} See, e.g., IV. Employment Litigation and Dispute Resolution, supra note 277 (showing how regulations can tailor how and what type of claims can be brought).

\textsuperscript{321} See, e.g., Taylor v. Pratt, 195 A. 205, 206 (Me. 1937). Traditionally, an employee alleging that a third party interfered with his employment had to show that the harm would not have occurred “but for” the interference. \textit{Id}.

\textsuperscript{322} See, e.g., Yuan v. Johns Hopkins Univ., 135 A.3d 519, 536 (Md. 2016).

\textsuperscript{323} See, e.g., Wells v. Franklin Broadcasting Corp., 403 A.2d 771, 773 (Me. 1979).

\textsuperscript{324} DEL. CODE ANN. tit. 19, \S 1708 (West 2004).

\textsuperscript{325} WYO. STAT. ANN. \S 19-11-104(b) (West 1998).

\textsuperscript{326} See, e.g., Walsh v. Town of Millinocket, 28 A.3d 610, 616-17 (Me. 2011) (showing that in employment discrimination cases, plaintiff must show that discrimination “was a substantial, even though perhaps not the only, factor motivating [the employment decision]”; see also, e.g., Wells, 403 A.2d at 773 (using a “substantial factor” causation standard “after careful consideration of the purposes underlying the legislature’s ban on age discrimination.”)).

\textsuperscript{327} Harris v. City of Santa Monica, 294 P.3d 49, 54, 59, 64 (Cal. 2013).

\textsuperscript{328} See Adams v. George W. Cochran & Co., 597 A.2d 28, 34 (D.C. 1991) (recognizing a “very narrow exception to the at-will doctrine under which a discharged at-will employee may sue his or her former employer for wrongful discharge when the sole reason for the discharge is the employee’s refusal to violate the law”); cf. Templemire v. W & M Welding, Inc., 433 S.W.3d 371,
True, judicial reasoning for selecting the causation standard sometimes goes little beyond *ipse dixit*, as where an opinion declares that a certain standard would better promote the underlying public policy, or simply opts for a middle ground between more lenient and strict causation showings. As well, there has been no hue and cry that traditional tort causation standards are ill-suited to employment interference claims. Nonetheless, as it stands, employees are able to plow ahead with suits against coworkers in which no one gives particular thought to what causation standard should apply.

At some point in time, tortious interference claims against coworkers perhaps served an otherwise unserved purpose. Modern employment theories have created a sufficiently inhospitable environment for employment interference claims that courts should pay them their last respects and decree their passing. "The original social value of an action, however worthy and significant, cannot operate to justify its continued existence in different times and under changed social circumstances." There is little argument that tortious interference claims are effective to promote societal interests in employment relationships without unduly impairing the interests of employers and their workforces; or that they are the most efficient means of achieving desirable objectives. As has been said about

---

329. See *Fleshner*, 304 S.W.3d at 93 ("Employees would be discouraged from reporting their employers’ violations of the law or for refusing to violate the law if ‘exclusive causation’ were the standard.").

330. See *Allison v. Hous. Auth. of City of Seattle*, 821 P.2d 34, 42 (Wash. 1991) ("Rejecting both the ‘to any degree’ and the ‘but for’ standards of causation, this court instead requires plaintiff to prove that retaliation was a substantial factor behind the decision.").

331. See, e.g., *Timmer*, supra note 244, at 1477 (stating, on the contrary, that if the court “truly intended to base its adoption of the tort of interference . . . on the Restatement, then it must officially adopt the section that is most essential to a proper application of the tort”).

332. See *id.* at 1476 (discussing the elements of tortious interference with a business relationship but failing to mention causation).


334. Id. at 600.

335. See *id.* at 600-01 (explaining that tort claims are sometimes denied due to ever-changing public policy and the evolution of the master-servant relationship).

The historic common-law right of a master to recover for loss of services due to a servant’s injury by a negligent third party contemplated a quasi-familial
emotional distress claims in the workplace, a tortious interference cause of action “is not a particularly useful instrument to conduct the delicate balance between employees’ personal interests and employers’ economic interests that must be made when evaluating the legality of employers’ conduct.”

Certainly, abolishing the claim of tortious interference in coworker disputes will leave some unhappy workers without any claim. Abolishing the claim is warranted not only because it is duplicative of and in some ways inconsistent with other causes of action, but also because these claims are based on unclear duties, they unduly impair the broad rights to manage employees, and they are inherently difficult to resolve. Even without an employment interference claim, employees have access to other claims that have been tailored to workplace disputes (e.g., discrimination) or address concrete wrongs (e.g., defamation).

* * * *

Of course, the law is not the only guard against workplace unfairness. Internal policies and procedures almost always allow recourse within the employer’s organization. Larger organizations typically have safeguards built into employment decision-making to ensure that decisions are justifiable, such as internal management review of proposed performance evaluations. As a general rule, employers have no desire for supervisors to incorrectly evaluate their subordinates’ relationship which does not exist between a modern-day employer and his employee. The action, however valid in feudal societies, is out of place in modern times. It is a carry-over from an earlier day, ill-adapted to current social and economic realities, and should not be recognized under Wisconsin law as a viable foundation upon which to base a claim for recovery of lost earnings by an employer on account of negligent injury to his employee. Its application to the normal present-day employer-employee relationship is repudiated.

Id. 336. Duffy, supra note 257, at 414.

337. See Theodore J. St. Antoine, The Making of the Model Employment Termination Act, 69 WASH. L. REV. 361, 374 (1994). Although the model act’s proposal requiring good cause for discharge would preempt tort claims based on a termination, “[k]icking an employee on his way out the door would still be actionable.” Id. at 374-75.

338. See, e.g., Using Proper Employee Termination Procedures, BIZFILINGS (May 24, 2012), http://www.bizfilings.com/toolkit/sbg/office-hr/managing-the-workplace/employee-termination-procedures.aspx (describing how an employer would be wise to follow the procedures that they have previously laid out in the company handbook when terminating employees and any previous documentation while reviewing the termination process).
This process will be imperfect; internal biases in favor of certain employees, undue deference to mid-level management decisions, or more pressing corporate priorities might lead to some inadequate resolutions of workplace disputes. Ryan may have attempted, without success, to make his case that Mindy was unfair to him by seeking out his human resources department or higher levels of management.

The judicial process for resolving disputes is also—at best—imperfect. In the end, "[t]he interest in allowing all employees the freedom to act and speak in relation to personnel actions without the threat of debilitating litigation outweighs the risk that a few employees will act maliciously and go undetected by their employers."  

IV. CONCLUSION

How should we pay our last respects to employment interference claims? Some tort theories are slowly abandoned, but proactive abolition would reset and define workplace expectations and duties far more quickly. Legislative action is an option. Legislatures extinguish workplace tort claims whenever they enact laws that provide exclusive remedies, but the judiciary need not await legislative abolition. Courts have a continuing obligation to assess common-law precepts for validity in light of present day realities. Courts "have a ‘charge to keep,’ but that charge is not to perpetuate error or to allow our reasoning or conscience to decay or to turn deaf ears to new light and new life."  

339. See Sheppard v. Freeman, 79 Cal. Rptr. 2d 13, 17 (Cal. Ct. App. 1998) ("[I]t will behoove the employer to be thorough in its investigation and analysis relating to personnel actions . . . to retain and reward good employees and to root out those who are dishonest or who act with ulterior motives which undermine the effective operation of the company.").  

340. Id. ("[I]nternal review] does not guarantee that some cases will not ‘fall through the cracks.’ Some employees will be discharged or demoted based on incorrect or false information from other employees that is not discovered by the employer through a good faith investigation, or revealed through grievance procedures. However, this risk is outweighed by the vital need for all employees to have the freedom to act and exchange information relating to personnel actions without fear and risk of being sued.").  

341. Id.  

342. See Graham, supra note 250, at 387 (explaining that available alternatives to torts are impacting their desirability, as alternative methods may be more effective).  

343. See id. ("The advent of worker’s compensation programs offers the paradigmatic case-in-point of an alternative remedy displacing a tort.").  

344. See Dini v. Naiditch, 170 N.E.2d 881, 892 (Ill. 1960) ("We find no wisdom in abdicating to the legislature our essential function of re-evaluating common-law concepts in the light of present day realities.").  

It is past time to retire tortious interference claims against coworkers concerning workplace harms.

Now, in hypothetical two: Ryan decides to leave for a new job, but Mindy tells his prospective employer that he was a below average performer. . . .