The Three Faces of Eve: Tortious Interference Claims in the Employment-at-Will Setting

Rebecca Bernhard
Note

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Celia Zimmerman had a successful career at Direct Federal Credit Union (Direct)—until she learned she was pregnant.1 Zimmerman's supervisor, David Breslin, failed to grant the accommodations she needed by forcing her to work during doctor-required rest periods.2 In addition, Breslin stripped Zimmerman of her management responsibilities, moved her into a smaller office, and excluded her from management meetings and other activities that she had organized and participated in prior to her pregnancy.3 After pursuing a discrimination claim with the State authority,4 Zimmerman sued Direct and Breslin on several claims including tortious interference with advantageous relations.5 Although the court noted that "[c]ommon sense suggests that an employee may not sue her employer for interfering with its own contract,"6 it nonetheless

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2. Id. at 73.
3. Id. at 73-74.
4. Id. at 74. The administrative proceedings with the Massachusetts Commission Against Discrimination were preempted when the plaintiff filed suit in Massachusetts state court; the defendants subsequently removed her claim to federal court. Id.
5. Id. The elements of a tortious interference claim are (1) a valid and existing contract; (2) the interfering third party had knowledge of the contract; (3) the third party engaged in an intentional act that caused the contract to be breached; (4) the act was not justified; and (5) an injury occurred. RESTATEMENT (SECOND) OF TORTS § 766 (1977).
6. Zimmerman, 262 F.3d at 76.

1541
allowed Zimmerman's claim to proceed. Why did the court abandon common sense?

In a tortious interference claim, the employee must assert that the supervisor or manager improperly interfered and caused the employer to dismiss the employee. If an employer can dismiss for any reason or no reason at all, which is true in an at-will setting, common sense indicates that the supervisor or manager should be able to carry out the termination, and also for no reason. A plaintiff in a tortious interference claim must therefore assert that the supervisor or manager was not a party to the at-will contract and that he improperly carried out the termination.

The objections to a tortious interference claim in this context are twofold: (1) an at-will contract cannot be interfered with; and (2) the supervisor is indistinguishable from the employer. Thus, while a tortious interference claim may provide relief to the discharged employee, is it an end run around the

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7. Id. at 78.

8. The words "supervisors" and "managers" have distinct meanings within the field of labor and employment law. Supervisors are generally those employees who carry out the employer's policies and goals but do not make the policies. Managers generally have responsibility for developing and implementing employer policies. See, e.g., National Labor Relations Act, 29 U.S.C. § 152(11) (2000) (listing responsibilities typical of a "supervisor"); see also 29 C.F.R. § 541.102 (2000) (listing responsibilities typical of a "manager"). For the purposes of this Note, the terms will be used synonymously since the legal distinctions are not relevant to determining agent and principal liability. See infra Part II.C.


10. Adair v. United States, 208 U.S. 161, 174-76 (1908) (affirming the at-will rule that allows an employer to terminate an employee for any reason), overruled in part by Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); see also HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 133 (Albany, N.Y., John D. Parsons, Jr. 2d ed. 1886) ("When continuance of service is discretionary, either party may put an end to it ad libitum.").

11. Although women are also quite capable of being abusive managers, most managers are still male. See BUREAU OF LABOR STATISTICS, HOUSEHOLD DATA NOT SEASONALLY ADJUSTED tbl.A-19 (Sept. 2001), available at http://www.bls.gov. For simplicity, this Note uses the pronoun "he" to avoid the unwieldy combination "he or she."


13. E.g., Zimmerman v. Direct Fed. Credit Union, 262 F.3d 70, 76 (1st Cir. 2001) (noting that case law supports the "intuition" that an employee "may not sue her employer for interfering with its own contract").
This Note will examine tortious interference in the employment-at-will setting and consider whether allowing these claims improperly erodes the at-will doctrine or whether these claims put a proper restraint on otherwise abusive supervisors and managers. Part I places the claim in a legal context by detailing the three intersecting bodies of law: contract, tort, and agency law. Part II analyzes the practical application of these doctrines to claims of tortious interference. Part III proposes a solution to the apparent inconsistencies in the tortious interference claim while respecting the legal and policy implications of all three bodies of law involved.

The proposed solution recognizes the overlap of agency, tort, and contract law in the tortious interference claim. An at-will contract can only be improperly interfered with by a third party. By adhering to the principles of agency law, a supervisor can be separated from the entity-employer in the most egregious situations, and therefore the at-will doctrine is not undermined when supervisors are merely implementing standard business decisions.

I. SEEING THREE FACES IN THE TORTIOUS INTERFERENCE CLAIM

The United States has few laws governing the relationship between the employee and employer.\textsuperscript{14} The majority of those laws deal primarily, if not exclusively, with the existing employment relationship, as opposed to its termination.\textsuperscript{15} When it comes to severing an employment relationship, the employment-at-will doctrine dominates,\textsuperscript{16} notwithstanding a growing

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14. The United States has few employment regulations as compared to other industrialized nations with similar economies. \textit{See}, e.g., Samuel Estreicher, \textit{Unjust Dismissal Laws in Other Countries: Some Cautionary Notes}, 10 EMP. REL. L.J. 286, 287 (1984) (discussing several areas where the United States provides less protection for employees in comparison to other countries).

15. For example, the National Labor Relations Act (NLRA) primarily governs the relationship between employees, labor unions, and employers; it does not explicitly mandate just-cause terminations (although the NLRA does forbid discrimination based on union activities including termination of employment for such activities). 29 U.S.C. §§ 151-169 (2000). Additionally, the Fair Labor Standards Act (FLSA) regulates hours, wages, and child labor but not discharges. 29 U.S.C. §§ 201-219 (2000). The Occupational Safety and Health Act (OSHA) protects the physical environment of the workplace. 29 U.S.C. §§ 651-679 (2000).

number of exceptions. This doctrine is premised in part on the belief that both parties are equal and can freely choose to enter into, maintain, and terminate an employment contract.

17. Scholars have argued for judicial revision of common law rules to provide employees with greater private remedies for wrongful discharges. See Note, Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only In Good Faith, 93 HARV. L. REV. 1816, 1828-30 (1980); see also Stephen F. Befort, Employee Handbooks and the Legal Effect of Disclaimers, 13 INDUS. REL. L.J. 326, 330 (1992) ("Today, however, the [at-will] rule's detractors are numerous . . . ."). Courts have apparently heeded the scholars' calls because a growing number recognize some exceptions to the employment-at-will doctrine, most notably the public policy exception. E.g., Lucas v. Brown & Root, Inc., 736 F.2d 1202, 1204-05 (8th Cir. 1984) (recognizing a public policy exception to the at-will rule when the alleged basis for termination is so "repugnant" as to offend the public); Wagenseller v. Scottsdale Mem'l Hosp., 710 P.2d 1025, 1033 (Ariz. 1985) (en banc) ("adopt[ing] the public policy exception to the at-will termination rule"); Tameny v. Atl. Richfield Co., 610 P.2d 1330, 1336-37 (Cal. 1980) (recognizing a public policy exception to the at-will rule when an employer discharges an employee for refusing to commit a criminal act); Phipps v. Clark Oil & Ref. Corp., 408 N.W.2d 569, 571 (Minn. 1987) (holding that an at-will employee fired for refusing to violate the law has a cause of action for wrongful discharge). Additionally, certain laws prevent discrimination with regard to, inter alia, employee discharges. For example, Title VII of the Civil Rights Act prohibits terminating an employee on the basis of the five protected classes: race, color, religion, sex, and national origin. 42 U.S.C. § 2000e-2(a)(1) (2000). In addition, the Age Discrimination in Employment Act applies the same limits to decisions based on age, 29 U.S.C. § 623(a)(1) (2000), and the Americans with Disabilities Act (ADA) protects disabled employees from discharge based on disability, 42 U.S.C. § 12112(a) (2000), amended by 29 U.S.C. § 623(J) (Supp. 2001). Even within these exceptions, however, liability is placed on the corporate entity, not the individual acting on behalf of the corporation. See Note, supra, at 1839-44.

18. See Adair v. United States, 208 U.S. 161, 175 (1908) (noting that "the employer and employee have equality of right"), overruled in part by Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); Note, supra note 17, at 1825 ("The at will rule conformed with a premise of complete social freedom . . . ."). It is debatable whether this premise was true in the early years of United States economic history when employers were not large corporations and the individual employer and individual employee could engage in one on one bargaining. See generally TERESA L. AMOTT & JULIE A. MATTHAI, RACE, GENDER, AND WORK: A MULTICULTURAL ECONOMIC HISTORY OF WOMEN IN THE UNITED STATES 291 (1991) (providing a picture of unequal economic and social conditions during the growth of wage work in the United States). As the industrial revolution expanded the workplace, however, individual employees' bargaining power lessened; the NLRA was enacted in part because Congress recognized that inequality. See generally Note, supra note 17, at 1828-30 (discussing the theory of unequal bargaining power). As a legal fiction, a corporation can only act through its duly authorized agents. Thus, because the employee is not on an equal footing with the corporation, the at-will doctrine puts a great deal of power into the hands of the individual agents acting on behalf of the corporation. Within the limits provided by the minimal regulations governing em-
This premise supports the common-sense assertion that a supervisor cannot interfere with an at-will employee's contract.\footnote{Zimmerman v. Direct Fed. Credit Union, 262 F.3d 70, 76 (1st Cir. 2001).}

Nevertheless, many courts have determined that corporate managers can tortiously interfere with an employee's contract.\footnote{Id. at 78; \textit{see also} Nelson v. Fleet Nat'l Bank, 949 F. Supp. 254, 261 (D. Del. 1996) (relying on the Restatement (Second) of Torts when recognizing a tortious interference claim for at-will contracts); Agugliaro v. Brooks Bros., 802 F. Supp. 956, 963 (S.D.N.Y. 1992) (recognizing that an at-will relationship is a contract for the purposes of a tortious interference with contract claim).} Although tortious interference requires an outside actor who is not a party to the contract or business relationship,\footnote{\textit{RESTATEMENT (SECOND) OF TORTS} § 766 (1977).} employers are often legal fictions who act only through their duly authorized agents.\footnote{Corporations can be held liable for various employment-law violations, \textit{see supra} note 15, but it is individuals who carry out the corporate actions. These individuals are generally protected from personal liability for corporate acts taken on behalf of their employers. \textit{See} Nordling v. N. States Power Co., 478 N.W.2d 498, 506 (Minn. 1991) (noting that to expose corporate officers to personal liability would "chill [these employees] from performing their duties and would be contrary to the limited liability accorded incorporation"); \textit{see also} Wampler v. Palmerton, 439 P.2d 601, 606 (Or. 1968) (recognizing the economic and business reasons for shielding officers and employees from liability for actions taken on behalf of the corporation). As stated, corporations are legal entities, but they are also legal fictions. For more detail, see the discussion \textit{infra} Part I.C and notes 93-99. \textit{See also} Alex Long, \textit{The Disconnect Between At-Will Employment and Tortious Interference with Business Relations: Rethinking Tortious Interference Claims in the Employment Context}, 33 ARIZ. ST. L.J. 491, 493 (2001) [hereinafter Long, \textit{Disconnect}] (highlighting the fact that the corporate structure makes it difficult to separate the corporation from upper management).} As such, when applied in the context of the employee relationship, managers serve as the primary corporate agents. Managers, however, can be separated from the corporation according to established agency laws regarding the scope of their employment and the motives behind their actions.\footnote{Generally, employees are not shielded from liability for their own intentional tortious acts, even when their employer is also held liable under the respondeat superior theory. \textit{See} Wyss v. Gen. Dynamics Corp., 24 F. Supp. 2d 202, 208 (D.R.I. 1998) (concluding that respondeat superior liability does not absolve the employee-wrongdoer); \textit{see also} Shivvers v. Hertz Farm Mgmt., Inc., 595 N.W.2d 476, 480-81 (Iowa 1999) (citing \textit{Sit-Set}, A.G. v. Universal Jet Exch., Inc., 747 F.2d 921, 929 (4th Cir. 1984)). \textit{In} \textit{Sit-Set}, the plaintiff sued the defendant and the defendant's company for breach of contract and fraudulent misrepresentation. The \textit{Sit-Set} court noted that officers can be held.
employment or with improper motives, he could be considered a third party for purposes of a tortious interference claim.24

The employment-at-will doctrine, coupled with the immunity from personal liability for various employment law violations,25 creates fertile ground for abuse. As long as a mean, nasty supervisor does not violate Title VII or similar laws,26 he can make employees' lives extremely miserable, ultimately inflicting the workplace equivalent of capital punishment—termination—just because he wants to. In this context it is not surprising that discharged employees—searching for a remedy not found in the National Labor Relations Act (NLRA)27 or other laws—have pursued tortious interference claims against abusive supervisors.28

jointly and severally liable. 747 F.2d at 929 ("Corporate officers may of course be liable jointly and severally with their corporation for obligations arising out of tortious conduct of the officers . . . .") (citing RESTATEMENT (SECOND) OF AGENCY § 343 (1957)).

24. To determine whether an agent is acting outside the scope of his employment, the court will examine several factors, including but not limited to whether the conduct is of the sort the agent is employed to perform; whether the conduct occurs within the authorized time and location of the agent's employment; whether the conduct serves the principal; whether the act is commonly done by other similar agents; and whether the principal should reasonably expect the conduct. RESTATEMENT (SECOND) OF AGENCY §§ 228-229 (1957).

25. For example, individual supervisors are not personally liable under Title VII. Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000).

26. See statutes cited supra note 17.


28. Tort claims can provide a plaintiff relief where the statutes do not. See Zimmerman v. Direct Fed. Credit Union, 262 F.3d 70, 74 (1st Cir. 2001). Plaintiffs have found refuge in what one scholar calls "the white meat of employment related claims." Alex B. Long, Tortious Interference with Business Relations: "The Other White Meat" of Employment Law, 84 MINN. L. REV. 863, 864 (2000) [hereinafter Long, White Meat]. These tort claims can also hold individuals acting on behalf of their employers personally liable. See, e.g., Zimmerman, 262 F.3d at 74. The tortious interference claim is an example. In Celia Zimmerman's case, she sued her supervisor personally under tortious interference, claiming that he improperly interfered with her relationship with her employer—the corporation. Id. The court agreed that the supervisor's conduct interfered with Zimmerman's ability to perform her contractual obligations for her employer. Id. at 78. The supervisor-defendant degraded and humiliated Zimmerman during management meetings, assigned her demeaning work, and refused to grant her the accommodations her pregnancy necessi-
Thus, this Note now individually examines the three bodies of intersecting law relevant to tortious interference in at-will employment: contract law, which controls the employment-at-will doctrine; tort law, which governs claims of tortious interference; and agency law, which defines managers' status and scope of authority as well as their liability.

A. CONTRACT LAW AS APPLIED TO THE EMPLOYMENT RELATIONSHIP

The employer-employee relationship is considered a contractual relationship,\textsuperscript{25} regardless of the existence of a formal written contract. Under the traditional rule, an "oral contract of indefinite duration" is considered an at-will contract.\textsuperscript{30} Most employment relationships are oral agreements.\textsuperscript{31} Thus, it is not surprising that the at-will rule serves as the default rule when courts consider employment disputes.\textsuperscript{32}

The at-will doctrine is a rule of construction; it is the presumption of the employment relationship, but like most presumptions, it is rebuttable.\textsuperscript{33} The clearest evidence that can rebut the at-will presumption is the existence of a written employment contract, such as a collective bargaining agreement, that contains a provision for just-cause discharge.\textsuperscript{34} Courts, however, have begun to recognize that other actions taken by

\textsuperscript{25} Id. at 73-74. This improper conduct prevented Zimmerman from securing the contractual obligations and advantages offered to her by her employer. \textit{Id.} at 78.

\textsuperscript{29} Alam v. Reno Hilton Corp., 819 F. Supp. 905, 910 (D. Nev. 1993) ("Theoretically, employment-at-will is a contractual relationship governed by contract law."); \textsc{Rothstein et al., supra} note 16, § 1.27.

\textsuperscript{30} \textsc{Rothstein et al., supra} note 16, § 1.27.

\textsuperscript{31} \textit{Id.} § 8.2.

\textsuperscript{32} By the end of the nineteenth century, absent evidence indicating a specific duration of the relationship, employment was considered terminable at-will—by the employer or the employee—for any or no reason. \textsc{See Wood, supra} note 10, § 133; \textit{see also} Mark E. Brossman et al., \textit{Beyond the Implied Contract: the Public Policy Exception, the Implied Covenant of Good Faith and Fair Dealing, and Other Limitations on an Employer's Discretion in the At-Will Setting}, in \textsc{2 Handling Wrongful Termination Claims} 15 (PLI Litig. & Admin. Practice Course, Handbook Series, 2001). Since H.G. Wood announced the at-will doctrine in his treatise, it has been unquestioned as the presumptive rule. \textit{Befort, supra} note 17, at 329.

\textsuperscript{33} \textsc{Rothstein et al., supra} note 16, § 8.1; \textit{Befort, supra} note 17, at 332.

\textsuperscript{34} \textit{See Rothstein et al., supra} note 16, § 8.1 (stating that the "National Labor Relations Act . . . gave employees federally protected rights to organize, join unions, and bargain collectively. Eventually, most collective bargaining agreements contained protection from discharge except for 'just cause.'").
the employer may also be sufficient to rebut the at-will rule.\textsuperscript{35} For example, one of the earliest cases to find evidence rebutting the at-will presumption was \textit{Toussaint v. Blue Cross \& Blue Shield of Michigan}.\textsuperscript{36} The employer in that case issued a written just-cause discharge policy, which the court found to be a legally enforceable contract.\textsuperscript{37} In another landmark case, \textit{Pugh v. See's Candies, Inc.}, the California Court of Appeal recognized an employee's contractual rights to continued employment based on, \textit{inter alia}, the past actions of his employer.\textsuperscript{38} Finally, in \textit{Pine River State Bank v. Mettille}, an employee handbook that contained language regarding discipline and for-cause discharge was sufficient to constitute a unilateral contract binding on the employer and employee despite the retention of at-will status in the handbook.\textsuperscript{39} The court said that a violation of the disciplinary terms was sufficient to impose liability on the employer for its contract breach.\textsuperscript{40} Thus, as Professor Stephen Befort noted, employer policies and promises can provide courts with a legal basis for enforcing those policies and promises.\textsuperscript{41}

Although all states except Montana\textsuperscript{42} recognize the at-will doctrine as the default rule in employment settings, not all states accept that this rule provides a valid and enforceable contract.\textsuperscript{43} Nonetheless, these states still categorize the at-will rule within the body of contract law.\textsuperscript{44}

\begin{itemize}
\item 35. Befort, \textit{supra} note 17, at 331-34.
\item 36. 292 N.W.2d 880, 893 (Mich. 1980).
\item 37. \textit{Id.}
\item 39. 333 N.W.2d 622, 626-27 (Minn. 1983).
\item 40. \textit{Id.}
\item 41. \textit{See} Befort, \textit{supra} note 17, at 339-47 (describing how unilateral contract theory and promissory estoppel have served as doctrinal bases for enforcing handbooks).
\item 42. Montana is the only state with a just-cause statute, thus making it the only state that does not recognize at-will as the default rule. MONT. CODE ANN. §§ 39-2-901 to 914 (2001).
\item 43. \textit{See}, \textit{e.g.}, Alam v. Reno Hilton Corp., 819 F. Supp. 905, 911 (D. Nev. 1993) (concluding that an employment-at-will agreement is not a contract that can be interfered with); Hicks v. Clyde Fed. Sav. \& Loan, 696 F. Supp. 387, 389 (N.D. Ill. 1988) (finding that a third party cannot interfere in the employment-at-will setting because there is not an enforceable contract); \textit{cf} Francis v. Lee Enters., Inc., 971 P.2d 707, 717 (Haw. 1999) (certifying that Hawaii does not recognize tortious breach of contract actions in the employment context unless two conditions are met, and if those two conditions are met the employment is not at-will).
\item 44. \textit{See}, \textit{e.g.}, Alam, 819 F. Supp. at 911; \textit{see also} \textit{ROTHSTEIN ET AL.}, \textit{supra} note 16, § 1.27.
\end{itemize}
For those at-will employees without the benefit of handbooks or other express promises from their employers, the predominant opinion until the 1980s was that an at-will contract could not be breached.\textsuperscript{45} If the contract was terminable at the will of either party, then any reason was sufficient to terminate it; either party's actions to that end were within the bounds of the contract, and as a consequence, there could be no breach.\textsuperscript{46} Since that time, certain exceptions beyond the handbook cases have developed to limit the reach of the employment-at-will doctrine—notably the public policy exceptions.\textsuperscript{47}

The vast majority of states that recognize exceptions to the at-will rule do so in four public policy categories:\textsuperscript{48} (1) refusing to perform an illegal act;\textsuperscript{49} (2) exercising a legal right;\textsuperscript{50} (3) whistle-blowing;\textsuperscript{51} and (4) performing a public obligation.\textsuperscript{52} Additionally, a number of federal and state laws codify public policy against discrimination in connection with employee discharges.\textsuperscript{53} Outside these exceptions, however, the at-will rule

\textsuperscript{45} See generally ROTHSTEIN ET AL., supra note 16, §§ 8.2-8.7 (discussing various conditions supporting a breach, none of which involve at-will employees).

\textsuperscript{46} See Nees v. Hocks, 536 P.2d 512, 514-15 (Or. 1975) ("Such termination [for any or no reason] by the employer or employee is not a breach of [an at-will] contract . . . ."). See generally ROTHSTEIN ET AL., supra note 16, §§ 8.2-8.7.

\textsuperscript{47} See Befort, supra note 17, at 332-33.

\textsuperscript{48} Brossman et al., supra note 32, at 49-65. Not all states that recognize public policy exceptions do so on all four grounds. ROTHSTEIN ET AL., supra note 16, § 8.9. Of the states that have a public policy exception, the majority recognize an exception for refusal to perform an illegal act and for exercising a statutory right. Befort, supra note 17, at 332-33.

\textsuperscript{49} E.g., Phipps v. Clark Oil & Ref. Corp., 408 N.W.2d 569, 571 (Minn. 1987) (holding that an at-will employee fired for refusal to violate the law has a cause of action for wrongful discharge).

\textsuperscript{50} E.g., Kelsay v. Motorola Inc., 384 N.E.2d 353, 357 (Ill. 1978) (recognizing a cause of action for an employee discharged for filing a workers compensation claim).

\textsuperscript{51} E.g., Lynch v. Blanke Baer & Bowey Krinko, Inc., 901 S.W.2d 147, 152 (Mo. 1995), reprinted in 11 IER Cases (BNA) 808 (recognizing a cause of action for wrongful discharge when an employee reports illegal corporate activity).

\textsuperscript{52} E.g., Nees v. Hocks, 536 P.2d 512, 516 (Or. 1975) (finding a public policy exception for an employee discharged for serving on a jury).

dominates. Thus, although contract principles guide courts in analyzing claims in the employment-at-will setting, the remedies available under traditional contract theory vary according to whether an individual court concludes that the at-will relationship is an enforceable contract.

B. TORT LAW AND THE TORTIOUS INTERFERENCE CLAIM

Although a tort is generally defined as a civil wrong outside the realm of contract law, the body of tort doctrine is nevertheless "a field which pervades the entire law." Thus, tort law intersects with contract doctrine, and tortious interference claims explicitly unite the two bodies of law. State courts consider tortious interference claims in the employment-at-will setting as either interference-with-contract claims or interference-with-business-relations claims. The basic premise of the tortious interference claim is straightforward: A third party is liable if he interferes with one party to a contract and thereby causes that party to breach his agreement with the other party to the contract. The elements of a tortious interference claim are (1) a valid and existing contract (or a reasonable expectation of continued business relations); (2) a third-party defendant who knows of this contract; (3) an intentional act by the third party that is a significant factor in causing the breach of the contract; (4) a lack of justification for the intentional act; and (5) an injury-in-fact. Courts in different jurisdictions

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55. See id. § 8.21.
56. See BLACK'S LAW DICTIONARY 1496 (Deluxe 7th ed. 1999).
58. States label the claims differently based primarily on whether they consider at-will relationships as valid and enforceable contracts or as relationships with an expectation of continued business dealings. See Long, Disconnect, supra note 22, at 499-500 (discussing the utility of tortious interference with business relations in the at-will setting despite the Restatement's treatment of an at-will contract as valid and subsisting and citing many cases that rely on the Restatement in either tortious interference with contract or tortious interference with business relations); cf. Long, White Meat, supra note 28, at 865 (noting that tortious interference claims "seek to protect not only existing contractual relationships, but also prospective contractual and business relationships").
59. This Note refers to the claims collectively as "tortious interference" unless a distinction is necessary.
60. RESTATEMENT (SECOND) OF TORTS § 766 (1977).
have applied each element inconsistently in the employment-at-will context.

The first element requires a valid contract. Although contract law provides the background for analyzing employment-at-will relationships, it does not follow that every at-will relationship yields an enforceable contract. Some jurisdictions refuse to consider employment-at-will relationships as contractual relationships capable of being disrupted through tortious interference. Others recognize a claim of tortious interference with contract because "the [at-will] contract is valid and subsisting" until it is terminated. Yet others recognize only the claim of tortious interference with business relations, rejecting contract-based assertions but simultaneously endorsing reliance on the continuation of an employment relationship that is subject only to the will of the actual parties to the relationship. Although determining the existence of a valid contract is necessary for any contract claim an employee may bring, doing so is also an important threshold test for the tort claim of interference.

Staudenraus, 901 P.2d 841, 844 (Or. 1995); see also RESTATEMENT (SECOND) OF TORTS § 766 (1977) (explaining and illustrating the rule pertaining to intentional interference with performance of a contract by a third party).

62. Cf. ARTHUR LINTON CORBIN ET AL., CONTRACTS § 4.2, at 556 (Joseph M. Perillo ed., rev. ed. 1993) (noting that where parties agree that "performance is terminable at will by either party, the agreement is not a contract at all").

63. See, e.g., Alam, 819 F. Supp. at 911 (noting that an employment-at-will agreement is not a contract that can be interfered with); Hicks v. Clyde Fed. Sav. & Loan, 696 F. Supp 387, 389 (N.D. Ill. 1988) (finding that a third party cannot interfere in the employment-at-will setting because an enforceable contract does not exist); cf. Francis v. Lee Enter., Inc., 971 P.2d 707, 717 (Haw. 1999) (certifying that Hawaii "does not recognize tortious breach of contract actions in . . . employment [situations]").


65. See, e.g., Varrallo v. Hammond Inc., 94 F.3d 842, 848 (3d Cir. 1996) (holding that under New Jersey law, an at-will employee may assert a claim of tortious interference with prospective economic advantage without even having a contractual right). In some respects, this method resembles that taken in the jurisdictions that adopt a promissory-estoppel approach to the enforcement of handbook provisions. Cf. Befort, supra note 17, at 343-45 (explaining how courts apply the promissory-estoppel approach and discussing the advantages and disadvantages of doing so).

66. See, e.g., Nelson, 949 F. Supp. at 260 (listing the existence of a valid contract as the first element of a tortious interference claim).
The second element—the third-party requirement—has also produced conflicting results. Some states flatly refuse to consider a managerial or supervisory employee as a third party for this purpose, although the courts’ reasons are not consistent. For example, in *Halvorsen v. Aramark Uniform Services, Inc.*, a California court examined the scope of a manager’s privilege in the context of the tortious interference claim. The *Halvorsen* court ultimately concluded that an absolute privilege would best protect the employer’s interest in “full and open participation of [its] management.” In *McGanty v. Staudenraus*, the Oregon court took a formalistic approach and separated the third-party inquiry from the improper interference inquiry. *McGanty* held that when a supervising employee is acting within the scope of his employment, he is not a third party to the contract.

Other jurisdictions incorporate agency law on a case by case basis to determine whether a supervising employee is indeed a third party for the purpose of an interference claim.

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67. See *Halvorsen v. Aramark Unif. Servs., Inc.*, 77 Cal. Rptr. 2d 383, 390 (Cal. Ct. App. 1998) (holding that the manager’s privilege to interfere with an at-will contract between the employer and the employee is absolute); *West v. Troelstrup*, 367 So. 2d 253, 255 (Fla. Dist. Ct. App. 1979) (finding that because an entity must act through its agents, a director is considered to be a party to a contract for the purposes of an interference claim and not an outside party); *Eggleston v. Phillips*, 838 S.W.2d 80, 82 (Mo. Ct. App. 1992) (concluding that a supervisor is legally justified in interfering with an employee’s at-will relationship because the corporate employer vested the supervisor with its authority to terminate); *McGanty v. Staudenraus*, 901 P.2d 841, 847 (Or. 1995) (finding that the third-party requirement is a threshold test that must be satisfied before any inquiry regarding improper motive takes place).

68. 77 Cal. Rptr. 2d at 387-90.

69. *Id.* at 390.

70. 901 P.2d at 847.

71. *Id.* at 849. In its determination of whether an improper interference exists, the *McGanty* court’s decision not to examine the supervisor-employee’s motive under the third-party test imposes a substantial burden under the second element of a tortious interference claim. See supra text accompanying note 61 (listing the elements of a tortious interference claim).

72. *Finley v. Giacobbe*, 79 F.3d 1285, 1295 (2d Cir. 1996) (requiring that a defendant-employee exceed the bounds of her authority to be considered a third party for an interference claim); *Nelson*, 949 F. Supp. at 263-64 (relying on the Restatement (Second) of Agency to decide whether an employee acted outside the scope of his employment in determining whether a claim of tortious interference with contract should proceed); *Wagenseller v. Scottsdale Mem’l Hosp.*, 710 P.2d 1025, 1043 (Ariz. 1985) (rejecting an absolute privilege for supervisors because it would allow them to interfere in employment relationships with impunity); *Richards v. O’Neil*, 2000 WL 640314, at *3 (Conn. Super. Ct. 2000) (mem.) (noting that an agent who does not act “legitimately”
The Restatement (Second) of Agency sets out a scope of employment test that mirrors the approach courts take under their tort analysis for determining whether a manager is a third party for the purpose of an interference claim. For example, in *Finley v. Giacobbe*, without explicitly citing the Restatement, the Second Circuit, applying New York law, engaged in a scope of employment analysis and found organizational charts and other employer records to be relevant factors in determining whether the defendant employer was authorized to hire and fire the plaintiff.

Similarly, in *Hunter v. Board of Trustees of Broadlawns Medical Center*, the Iowa court noted that the defendant did not follow authorized standard procedures when reducing the staff, and concluded that a jury might find he exceeded the qualified privilege afforded to managers in the context of a tortious interference claim. Although the *Hunter* court was not explicit about the significance of its finding that the defendant abused his privilege by not following authorized procedures, the court considered the abuse of the manager's privilege sufficient to find the defendant to be an outsider for the purposes of the tort claim. As a result, the supervising employees' improper motives can satisfy both the third-party requirement—insofar as it takes the supervisor-defendant outside the scope of his employment—and the interference element.

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may be liable under an interference claim); Sorrells v. Garfinckel's, 565 A.2d 235, 290-91 (D.C. 1989) (concluding that when an employee's supervisor acts with malice, the supervisor can be considered a third party for the purposes of an interference claim); Hunter v. Bd. of Trs. of Broadlawns Med. Ctr., 481 N.W.2d 510, 518 (Iowa 1992) (holding that a defendant's status as an employee "does not ipso facto make him a party to any contracts" for the purpose of a tortious interference claim); Nordling v. N. States Power Co., 478 N.W.2d 498, 506 (Minn. 1991) (recognizing that "a corporate officer or agent may be liable for tortious contract interference if he or she acts outside the scope of his or her duties"); Eib v. Fed. Reserve Bank of Kansas City, 633 S.W.2d 432, 436 (Mo. Ct. App. 1982) (finding that corporate officers are privileged to induce a breach of contract unless they are acting with improper motives, such as for their own personal benefit).

73. E.g., Nelson, 949 F. Supp. at 263; see RESTATEMENT (SECOND) OF AGENCY §§ 228-229 (1957). The relevant elements of the test are whether the conduct is the kind the agent is retained to perform, whether the conduct occurred within authorized time and space limits, and whether the conduct is performed at least in part to serve the principal. Id. § 228.

74. 79 F.3d at 1295 & n.10.

75. 481 N.W.2d at 518.

76. Id.

77. Although the cases all suggest a slightly different position on the rele-
The third element—an intentional act by the third party that is a significant factor in causing the breach of the contract—provides another interesting point of controversy. If the act concerns termination, it may be deemed within the defendant’s scope of employment, depending on the jurisdiction. If the plaintiff’s case is built around an intentional action that a manager is authorized to take, the plaintiff will have difficulty satisfying the third-party requirement of the second element. In jurisdictions that refuse to view employee-agents as third parties under any circumstances, the parties usually focus their arguments on the fourth element—the motive behind the act—and how the act is defined could make or break a plaintiff’s case. As the court noted in Eggleston v. Phillips, “Whatever the [defendants’] motives ... their positions gave them the authority to recommend the termination of the plaintiff ... ”

The requirement under the fourth element that the act be improper, or without justification, leaves the greatest room for confusion. The Restatement (Second) of Torts section 767 provides a list of factors to be balanced when considering whether an act is improper. Many courts still focus on whether the act...
was justified, or whether the defendant was privileged in acting;\textsuperscript{83} other courts simply look at a defendant’s motive.\textsuperscript{84} As comment b to section 767 states, the focus on whether the defendant was privileged is not necessarily misplaced. A traditional privilege—such as the manager’s privilege—can play a role in the balancing test suggested by section 767,\textsuperscript{85} especially under factors (d) and (e), which concern the interests of the defendant party and the social interests in protecting his freedom to act.\textsuperscript{86} The manager’s privilege has long been recognized as necessary to give corporations the same rights under contract law as individuals.\textsuperscript{87} Even in those jurisdictions that favor a manager’s privilege, however, the privilege cannot be absolute in this context if the managerial employees are not advancing the corporation’s interest.\textsuperscript{88} The courts do not always clarify, however, whether the manager’s privilege defeats the claim because he is not a third party to the contract, as required by the second element of a tortuous interference claim, or because the interference is not improper, as mandated by the fourth element.\textsuperscript{89}

Thus, a dismissed at-will plaintiff must establish three critical factors to present a proper tortious interference claim: that the employment relationship was valid and subsisting (even if not a legally enforceable contract), that the interfering defendant was not a party to the relationship, and that the interference was improper.

C. AGENCY LAW AND THE EMPLOYMENT RELATIONSHIP

The employer-employee relationship is described under


\textbf{\textsuperscript{85}} See \textit{Restatement (Second) Of Torts} § 767 cmt. b (1977).

\textbf{\textsuperscript{86}} See supra note 82.

\textbf{\textsuperscript{87}} See supra notes 22, 67 and accompanying text. Because a corporation can only act through its agents, managers—as the agents of corporations—would be hindered in carrying out their duties. Nordling v. N. States Power Co., 478 N.W.2d 498, 506 (Minn. 1991).

\textbf{\textsuperscript{88}} E.g., Wampler v. Palmerton, 439 P.2d 601, 606 (Or. 1968) (noting that it is possible for an officer to exceed his privilege).

\textbf{\textsuperscript{89}} See supra note 77 and accompanying text.
agency law as one between master and servant. "A master is a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the [agent] in the performance of the service. A servant is an agent employed by a master." The rules that generally govern principals and agents are applicable to the master-servant relationship.

A corporate employer can act only through its employees because the corporation is not an entity capable of its own actions; it is a legal fiction. The corporation has the legal power to be bound contractually and to be held liable under tort law, but it is incapable of directly performing any actions to either end. Thus, the corporation acts through its supervisors and managers. Managers and supervisors are agents of the corporation. If this were not the case, a corporation would evade responsibility and liability for actions taken on its behalf. Indeed the entire theory of respondeat superior is based upon this concept.

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90. See generally RESTATEMENT (SECOND) OF AGENCY § 2 (1957). The tentative draft for the Restatement (Third) eliminates this archaic description of master and servant; it replaces all references to master and servant in this context with employer and employee. RESTATEMENT (THIRD) OF AGENCY (Tentative Draft No. 2, Mar. 14, 2001).

91. RESTATEMENT (SECOND) OF AGENCY § 2 (1957).

92. Id. § 25.


94. The Planter's Bank of Miss. v. Sharp, 47 U.S. 301, 322 (1848) ("[A] corporation . . . has the implied power to make contracts . . . .").

95. Daniels v. Tearney, 102 U.S. 415, 420 (1880) (noting that a corporation may be liable for its malicious and negligent torts).

96. Halvorsen, 77 Cal. Rptr. 2d at 389.

97. Employees, including corporate officers, are servants within the meaning of agency doctrine. RESTATEMENT (SECOND) OF AGENCY § 2 cmt. c (1957).

98. See id. § 219 cmt. a ("With the growth of large enterprises, it became increasingly apparent that it would be unjust to permit an employer to gain from [the success of its employees] without being responsible for the mistakes, the errors of judgment and the frailties of those working under his direction and for his benefit."); cf. Wyss v. Gen. Dynamics Corp., 24 F. Supp. 2d 202, 208 (D.R.I. 1998) (holding an employer liable for an employee's conduct is based on sound social and economic reasons, in part because of the employer's control over the employee's conduct).

99. The respondeat superior doctrine, see infra note 103, is "fundamental
The analysis of principal and agent liability proceeds differently under contract law and tort law. Employee-agents can bind an employer to a contract and can carry out contractual obligations for the employer, but they are not considered bound by the contract. The principal is liable for contractual obligations, but the agent is not.

Liability of principals and agents under tort law is not so definitive. With regard to principal tort liability, since as early as Philadelphia & Reading Railroad Co. v. Derby, states have followed a respondeat superior doctrine. Some states established the theory through common law, while others have codified it in statutes. The doctrine of respondeat superior to the operation of the tort system in the United States.”


101. See McCarthy v. Azure, 22 F.3d 351, 363 (1st Cir. 1994) (concluding that a corporate officer is not an individual party to a contract signed in his capacity as agent of the corporate principal); Alexander, 78 F. Supp. 2d at 624 (quoting precedent that does not hold an agent liable for the contracts made on the disclosed principal’s behalf); Shivvers v. Hertz Farm Mgmt., Inc., 595 N.W.2d 476, 480 (Iowa 1999) (concluding that a manager had no liability to an employee under contract theory); Hirsovescu v. Shangri-La Corp., 831 P.2d 73, 74 (Or. Ct. App. 1992) (quoting RESTATEMENT (SECOND) OF AGENCY § 320 (“Unless otherwise agreed, a person making or purporting to make a contract with another as agent for a disclosed principal does not become a party to the contract.”)).

102. See RESTATEMENT (SECOND) OF AGENCY § 320 (1957).

103. 55 U.S. (14 How.) 468, 485 (1852) (establishing that “respondeat superior,” which, by legal imputation, makes the master liable for the acts of his servant, is wholly irrespective of any [relationship] between the injured party and the master).

104. E.g., Rodriguez v. Sarabyn, 129 F.3d 760, 767 (5th Cir. 1997) (applying respondeat superior to any conduct within the scope of employment, even that which is against direct orders); Martin v. Cavalier Hotel Corp., 48 F.3d 1343, 1351 (4th Cir. 1995) (noting that an employer is liable for the wrongful acts of its employees conducted within the scope of employment even if the employee’s motive is self-interested).

105. E.g., CAL. CIV. CODE § 2338 (West 1999) (declaring the principal responsible to third parties for the negligence, wrongful acts, and willful omissions of the agent); GA. CODE ANN. § 10-6-60 (2000) (stating that a principal will be liable for the “neglect and fraud” of his agent); MONT. CODE ANN. § 28-10-602 (2001) (same); N.D. CENT. CODE § 3-03-09 (1989) (same, with certain exclusions specified); S.D. CODIFIED LAWS § 59-6-9 (Michie 2000) (same as Georgia and Montana).
clearly holds the principal liable for an agent's torts while the agent is acting within the scope of his employment as the agent.\textsuperscript{106} The liability might not attach to the employer, or could be limited, if the employee is not acting within the scope of employment.\textsuperscript{107} The Restatement (Second) of Agency sets out a variety of factors to determine whether an employee-agent was acting within the scope of his employment.\textsuperscript{108} Most courts follow the Restatement when conducting scope of employment tests.\textsuperscript{109}

Liability may attach to the employer when the agent acts with a dual purpose, such as serving his own interests as well as his master's, provided the act is still within the agent's scope

\textsuperscript{106} See generally RESTATEMENT (SECOND) OF AGENCY § 219 (1957) (holding a master liable "for the torts of his servants committed while acting in the scope of their employment," but not generally for those committed "outside the scope of their employment").

\textsuperscript{107} See id. § 219(2).

\textsuperscript{108} These factors include, \textit{inter alia}, whether the conduct is of the sort the agent is employed to perform, whether the conduct occurs within the authorized time and location of the agent's employment, whether it is conducted to serve the principal, whether the act is commonly done by other similar agents, and whether the principal should reasonably expect the conduct. See RESTATEMENT (SECOND) OF AGENCY §§ 228-229 (1957).

\textsuperscript{109} See Finley v. Giacobbe, 79 F.3d 1285, 1295 (2d Cir. 1996) (requiring that a defendant-employee exceed the bounds of her authority to be considered a third party for an interference claim); Nelson v. Fleet Nat'l Bank, 949 F. Supp. 254, 263-64 (D. Del. 1996) (relying on the Restatement (Second) of Agency to decide whether an employee acted outside the scope of his employment for the purposes of allowing a tortious interference with contract claim to proceed); Richards v. O'Neil, 2000 WL 640314, *3 (Conn. Super. Ct. 2000) (noting that an agent who does not act "legitimately" may be liable under an interference claim); Nordling v. N. States Power Co., 478 N.W.2d 498, 506 (Minn. 1991) (recognizing that "a corporate officer or agent may be liable for tortious contract interference if he or she acts outside the scope of his or her duties").

A similar approach is used to determine employer liability in Title VII sexual harassment claims. The Supreme Court, in \textit{Meritor Savings Bank, FSB v. Vinson}, instructed "courts to look to agency principles for guidance" in determining employer liability for such sexual harassment claims, while also cautioning that the "common-law principles may not be [completely] transferable." 477 U.S. 57, 72 (1986). The Court clarified how agency principles are and are not transferable in \textit{Faragher v. City of Boca Raton}, 524 U.S. 775 (1998), and its companion case, \textit{Burlington Industries, Inc. v. Ellerth}, 524 U.S. 742 (1998). The Court modified the scope of employment test by creating a "tangible employment action" threshold test to ensure employer liability when a harassing supervisor or manager took such an adverse action against the plaintiff and provided the employer an affirmative defense if the harasser took no tangible employment action. \textit{Faragher}, 524 U.S. at 807; \textit{Burlington Indus.}, 524 U.S. at 760-63. Examples of tangible employment actions include terminations, demotions, or formal disciplinary actions. \textit{Faragher}, 524 U.S. at 807.
of employment.\footnote{110} In the employment context, a supervisor with the power to fire an employee can act within his scope of employment when carrying out a termination, even if his motives are tainted with personal reasons or not authorized explicitly by the employer.\footnote{111} To determine whether an employee was acting within the scope of his employment for the purposes of holding the employer liable, courts will ask when the act took place, where it took place, and whether it was foreseeable.\footnote{112} Courts also look to the actor's motivations.\footnote{113} In Zimmerman, the First Circuit noted that the motivation behind the act, even within the logistic bounds of employment, could be dispositive when determining liability.\footnote{114}

Holding a principal liable for the tortious conduct of its agent does not relieve the agent from personal responsibility for such actions.\footnote{115} Employees remain liable for their own torts, regardless of whether liability attaches to their employer.\footnote{116} Thus, an employee is always responsible for his intentional torts, whether or not he is acting outside the scope of

\begin{itemize}
  \item \footnote{110} Martin v. Cavalier Hotel Corp., 48 F.3d 1343, 1351 (4th Cir. 1995) (confirming that an employer may be liable for an employee's acts even when the employee acts for his own interests).
  \item \footnote{111} See Rodriguez v. Sarabyn, 129 F.3d 760, 767 (5th Cir. 1997) (applying respondeat superior to any conduct by the employee so long as it was within the scope of employment, even if it was contrary to express orders); Martin, 48 F.3d at 1351 ("An employer may be liable for its employee's unauthorized use of force if such use was foreseeable in view of the employee's duties.").
  \item \footnote{112} See Zimmerman v. Direct Fed. Credit Union, 262 F.3d 70, 78 (1st Cir. 2001); Lyons v. Brown, 158 F.3d 605, 609 (1st Cir. 1998) (following criteria set forth in the Restatement (Second) of Agency to determine the scope of employment); Martin, 48 F.3d at 1351; Nelson, 949 F. Supp. at 263; see also \textit{RESTATEMENT (SECOND) OF AGENCY § 229} (1957); \textit{Martin}, 48 F.3d at 1351; \textit{Nelson}, 949 F. Supp. at 263; \textit{Zimmerman}, 262 F.3d at 76; Lyons, 158 F.3d at 610; Nordling, 478 N.W.2d at 506.
  \item \footnote{113} Zimmerman, 262 F.3d at 76; Lyons, 158 F.3d at 610; Nordling, 478 N.W.2d at 506 ("While motive or malice is only one factor to consider . . . in a scope of employment determination, it can be the critical factor.").
  \item \footnote{114} 262 F.3d at 77 ("Since [t]here is no practical difference . . . between 'actual malice' and \textit{improper} motives and means for the purposes of [tortious interference], proven retaliation may serve as a proxy for actual malice." ) (alteration in original) (citation omitted).
  \item \footnote{115} See, \textit{e.g.}, Wyss v. Gen. Dynamics Corp., 24 F. Supp. 2d 202, 208 (D.R.I. 1998) (concluding that respondeat superior liability does not remove liability from the employee-wrongdoer); \textit{see also} Sit-Set, A.G. v. Universal Jet Exch., Inc., 747 F.2d 921, 929 (4th Cir. 1984) ("Corporate officers may of course be liable jointly and severally with their corporation for obligations arising out of tortious conduct of the officers . . . ."), quoted in Shivvers v. Hertz Farm Mgmt., Inc., 595 N.W.2d 476, 480-81 (Iowa 1999).
  \item \footnote{116} \textit{See generally \textit{RESTATEMENT (SECOND) OF AGENCY § 343} (1957).}
Courts will also use the agency approach to determine if a supervisor or manager was acting outside the scope of his employment and therefore acting as a third party subject to liability for tortious interference claims. Some of these decisions merge the analysis of improper interference under the tort claim, which requires that a defendant improperly interfere with a contract, with the analysis of improper actions under the agency law scope of employment test. Under the scope of employment test, an agent acting improperly could be acting outside his employment scope. For example, in Zimmerman, the court discussed the supervisor-defendant's improper actions to determine whether he acted outside the scope of his employment—not whether those actions were improper interference. Even cases that purport to block an interference claim against a supervising employee acknowledge that the primary reason the employee is shielded is because he is acting within the scope of his employment.

The agency scope of employment test determines whether an employer-principal will be held liable for an employee-agent's torts. A plaintiff can satisfy the tort requirement that a defendant be a third party to a contract by applying these agency principles in reverse—to determine whether a supervisor-defendant in a tortious interference claim was acting outside the scope of employment. She may also meet her burden under the improper interference element of the tortious interference claim with this same showing.

Although courts do not agree about the validity of an at-will relationship for the purposes of contract enforcement, they nonetheless look to contract principles in at-will employment claims. Likewise, although courts are not consistent in their approach to tortious interference claims in the at-will context,

117. Wyss, 24 F. Supp. 2d at 208.
118. See supra note 72 and accompanying text. These cases use the tort aspect of liability under agency law, as opposed to the contract aspect discussed supra note 101.
119. See, e.g., Zimmerman, 262 F.3d at 75-78.
120. See id. at 76.
121. See id.
122. See supra notes 67-71 and accompanying text.
123. See supra notes 72-77 and accompanying text.
124. See supra note 77.
125. See supra note 29 and accompanying text.
they are united in recognizing three important elements of any such claim: a valid and existing contract, a third-party defendant, and conduct amounting to improper interference.\textsuperscript{126} Finally, agency law provides a test for determining the scope of an agent's employment. Primarily used to determine employer liability for agent conduct, this test is sometimes used to decide whether a supervisor is a third party in a tortious interference claim.\textsuperscript{127} Conscientiously applying all three of these legal doctrines leads to a consistent treatment of tortious interference claims in the at-will setting.

## II. CONNECTING THE DISCONNECT: THREE FACES ARE BETTER THAN ONE

To understand how these three bodies of law intersect, consider three hypothetical situations. Assume that in each circumstance, the plaintiff is an at-will employee. Next, assume the supervisor-defendant has malice toward the plaintiff-employee. Each plaintiff, dismissed for poor performance by a supervisor who did not like her,\textsuperscript{128} probably generates sympathy, but the culpability of each supervisor-defendant varies with the methods each uses to terminate the employment.

In scenario one, the supervisor acts abusively toward the plaintiff, publicly humiliating the employee in her work area and during company meetings.\textsuperscript{129} The supervisor excludes the employee from training meetings, increasing the difficulty she will face meeting minimum productivity standards. When the employee makes mistakes, the supervisor reprimands her aggressively. The supervisor berates the employee on a daily basis, culminating in a heated argument that results in the employee's termination.

Scenario two involves a supervisor whose job is to conduct routine evaluations of employee productivity. The evaluations are to be based on objective criteria such as attendance, on-time arrival records, and quantitative production goals. Although the employer generally uses these evaluations to determine in-
individual employee merit wage increases and for disciplinary purposes, there is no express or implied promise to the employees that the employer will only make such decisions for cause. Therefore, the employment relationship remains at-will. The supervisor falsifies the specific employee output records to make it appear that the employee is not meeting her production quotas. The employee receives poor evaluations that eventually lead to her dismissal.

Scenario three involves a sales team supervisor who has unlimited discretion to assign sales territories to sales employees. The supervisor dislikes a certain employee and consistently assigns her the hardest territories, thereby increasing the chances that the sales employee will fail to perform adequately. When the salesperson is ultimately dismissed for failure to meet company-established sales goals, she sues her supervisor, claiming that the poor assignments improperly interfered with her employment relationship.

Taking each hypothetical in turn, the next section will explore how the different jurisdictions would approach each scenario, illustrating the problems with the inconsistencies among the various approaches.

A. Confusion and Inconsistency

The first obstacle our plaintiff in scenario one faces is whether the at-will relationship is even capable of being interfered with: Is the at-will employment relationship a valid contract, or at least, as it is classified in certain states like New Jersey, a prospective business (or contractual) relationship? If the plaintiff sues in Nevada, Illinois, or Hawaii, she will not even get through the courtroom door because those states do not recognize an interference claim in the at-will employment setting. If she makes it into court, our plaintiff still faces ambiguity. Will the supervisor be considered a third party with respect to the plaintiff's contract (or business relationship) with her employer? If this scenario occurs in California, Missouri, or Florida, the plaintiff will lose because these jurisdictions will

132. See cases cited supra note 67.
not consider a supervisor-defendant an outsider, even if the supervisor acted with malice. For example, in California, although an at-will employment contract is valid for the purpose of a tortious interference claim, the supervisor has an absolute privilege and his "state of mind is irrelevant." In Oregon, the plaintiff must show that the supervisor exceeded his authority before a court will consider whether he acted with malice. If the scenario occurs in jurisdictions that follow an agency scope of employment test, the malice allegation may enhance the plaintiff's claim that the supervisor exceeded his scope of employment. The plaintiff has the best chance to succeed in the states that blur the lines between the third party and improper interference requirements.

None of the jurisdictions provide a predictable outcome as to whether this supervisor's actions—namely, humiliating the plaintiff and hindering her ability to succeed at work—exceed the bounds of his authority, place him outside the scope of his employment, or render his actions toward the plaintiff improper. Yet, in most cases, the courts will inquire into the supervisor's state of mind, despite the fact that at-will employers are generally free from such inquiries.

The second scenario also reveals inconsistency. This plaintiff faces the same initial hurdle the first plaintiff faced regarding the recognition of her at-will status as an enforceable contract for the purposes of the tortious interference claim. Assuming she crosses that hurdle successfully, this plaintiff has a more tangible allegation against her supervisor—the falsification of records. While the allegation may be clearer in this scenario, the treatment from the various jurisdictions is not: A fraudulent act could destroy any protection the supervi-

133. See cases cited supra note 67.
135. A showing of malice is relevant only to prove improper purpose. McGanty v. Staudenraus, 901 P.2d 841, 847 (Or. 1995) (requiring that the third-party element must be satisfied before any inquiry takes place regarding improper motive).
137. See cases cited supra note 113.
138. See supra notes 120-121 and accompanying text.
139. See supra note 10 and accompanying text.
140. See supra notes 130-131 and accompanying text.
sor might enjoy in those states that follow an agency test, but it
might not in the other states.141 Arguably, where the man-
ger's privilege is absolute, the plaintiff has no relief despite
the clearly fraudulent actions of the supervisor-defendant.142
Where the courts consider the acts of the defendants for both
the improper interference element and the third-party defen-
dant element, this plaintiff will likely succeed.143

The third hypothetical plaintiff will again face the initial
challenge of asserting that her at-will employment relationship
is a valid and enforceable contract for the purposes of the tor-
tious interference claim, and she will fail in those jurisdictions
that have an absolute manager's privilege. This supervisor has
acted with malice, but has hardly demonstrated behavior that
is outside the scope of his employment, nor improper in that
context.144 Yet this plaintiff may have success in the jurisdic-
tions that merge the elements and allow malice to suffice for
both an improper interference showing and a third-party de-
fendant showing.145 If the jurisdiction allows a showing of mal-
ice under the scope of employment test, she may also suc-
ceed.146 The plaintiff is likely to fail in those jurisdictions that
will not consider malice for the third-party element because the
supervisor in this scenario did not act out of bounds.

As these hypothetical situations demonstrate, the plaintiffs
will succeed or fail because of the jurisdictions' approach to the
tortious interference claim, and not because of the supervisors'
conduct. Even where a supervisor committed fraud to ensure

141. See supra Part I.B, C for a discussion regarding whether an employer
is liable for its employee's torts. If the employer is liable for the supervisor's
fraudulent act, it seems to follow that the supervisor would not be considered
a third party. However, as the discussion in Part I.B and C indicates, courts
do not always agree.

142. See Halvorsen v. Aramark Unif. Servs., Inc., 77 Cal. Rptr. 2d 383, 390
1968) (noting that it is possible for an officer to exceed his privilege).

143. See supra notes 120-121 and accompanying text.

144. The supervisor here is authorized to assign sales territories at his dis-
cretion. No facts exist to conclude that his actions exceeded his bounds of au-
thority. See, e.g., Finley v. Giacobbe, 79 F.3d 1285, 1295 (2d Cir. 1996) (inter-
preting the scope of employment test to require that a supervisor-defendant's
conduct must exceed the bounds of his authority to treat him as a third party).

145. See Zimmerman v. Direct Fed. Credit Union, 262 F.3d 70, 76 (1st Cir.
2001); Lyons v. Brown, 158 F.3d 605, 610 (1st Cir. 1998).

146. See Nordling v. N. States Power Co., 478 N.W.2d 498, 506 (Minn.
1991) ("While motive or malice is only one factor to consider . . . [in a scope
of employment determination], it can be the critical factor.").
the plaintiff's termination in the second scenario, the plaintiff may not prevail. Conversely, the plaintiff in scenario three could win in certain states even though her supervisor's actions were well within his authority.

B. THE PRACTICAL EFFECT OF SEEING THREE FACES AT ONCE

Despite the universal conclusion that the employment relationship is best analyzed under contract principles,\(^\text{147}\) inconsistency remains among the jurisdictions as to the enforceability of an at-will relationship.\(^\text{148}\) The policy justifications for the at-will presumption\(^\text{149}\) tip the scales toward viewing the relationship as one that does not consist of a valid and enforceable contract, because an at-will relationship will lose flexibility if an enforceable contract exists. Indeed, the fact that courts and legislatures have developed many exceptions to the at-will rule to find an enforceable contract reflects this view.\(^\text{150}\)

On the other hand, perhaps the judicial and legislative efforts to find public policy exceptions to the at-will relationship reflect a growing consensus that even though society still favors the idea of employer and employee freedom embodied in the at-will rule, bad bosses need to be reined in.\(^\text{151}\) Although courts support the presumption of at-will employment generally, because it logically flows from the long-standing and widely accepted basic economic philosophy of ensuring that employers and employees have the freedom to contract,\(^\text{152}\) factually specific circumstances—especially situations where employers acted egregiously when firing an employee—will often move courts to find an exception to the employment-at-will presump-


\(^{148}\) See supra notes 63-65 and accompanying text.

\(^{149}\) The at-will rule is generally favored to give employers and employees the freedom to enter and exit employment relationships and the flexibility to respond to market changes. See supra notes 17-18 and accompanying text.

\(^{150}\) See supra Part I.A regarding the development of public policy and handbook exceptions to the at-will rule.

\(^{151}\) Cf. Long, Disconnect, supra note 22, at 491 (discussing Pauline T. Kim's survey of more than three hundred unemployed people in Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World, 83 Cornell L. Rev. 105, 133-34 (1997), which found that almost ninety percent of the respondents believed that a supervisor could not legally fire an at-will employee because of personal dislike).

\(^{152}\) See supra note 18 and accompanying text.
Courts will allow a plaintiff to recover for a discharge that violates public policy even when the employment is at-will. Thus, decisions that recognize the at-will relationship as an enforceable contract enjoying protection from outside interference seem to strike the appropriate balance between the competing policies of protecting employees from abusive decisions and preserving employers' freedom to manage their businesses as they choose.

Outside the employment setting, at-will contracts receive protection under both contract law and tort law. It follows that at-will contracts in the employment setting should also get protection from outsiders. The question therefore becomes who is an outsider for the purposes of an at-will tortious interference claim.

Although there are a variety of approaches to a tortious interference claim in the employment setting, with no consistent outcome in the application of these approaches, the practical effect of these varying approaches may be a distinction without a difference. The Restatement (Second) of Agency suggests an examination of the actor's motive to determine whether he is indeed acting outside the scope of his relationship with the principal, and the Restatement (Second) of Torts suggests an inquiry into motive to determine whether the

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154. See, e.g., Phipps v. Clark Oil & Ref. Corp., 408 N.W.2d 569, 571 (Minn. 1987) (concluding that an at-will employee had a claim for wrongful discharge in violation of public policy).

155. See RESTATEMENT (SECOND) OF TORTS § 766 cmt. g (1977).

156. See supra Part I.A-C.

157. See supra notes 63-89 and accompanying text.

158. See discussion supra Part I.C. The Restatement (Second) of Agency suggests that malice can be a factor in determining whether a supervisor acted outside the scope of his employment. Malice, however, may not be sufficient to take a defendant outside the scope of his employment. Compare Rodriguez v. Saraby, 129 F.3d 760, 767 (5th Cir. 1997) (applying respondeat superior to any conduct within the scope of employment, even that which is against direct orders), and Martin v. Cavalier Hotel Corp., 48 F.3d 1343, 1351 (4th Cir. 1995) (noting that an employer is liable for the wrongful acts of its employees conducted within the scope of employment even if the employee's motive is self-interested), with Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 73 (1986) (instructing "courts to look to agency principles for guidance" in determining employer liability for such sexual harassment claims, while also cautioning that the "common-law principles may not be [completely] transferable"). The practical effect of these cases sets a high threshold to place a supervisor-defendant outside the scope of his employment.
interference was improper.\textsuperscript{159} Thus, the defendant's motive is likely to be a critical part of a plaintiff's prima facie case (either to meet her burden under the second element, which requires a third-party defendant, or the fourth element, requiring improper interference from this third-party defendant) in the at-will setting when the plaintiff is suing her former supervisor.

A successful plaintiff must show that the supervising employee acted outside the scope of employment and should thus be considered a third party.\textsuperscript{160} While certain types of unauthorized wrongful conduct will not place the employee outside the scope of employment to establish employer liability,\textsuperscript{161} there is at least a theoretical line that an agent-employee can cross, even in those jurisdictions that have not allowed tortious interference claims against supervisors.\textsuperscript{162} Because wrongful conduct alone does not necessarily put an agent-employee outside the scope of his employment, courts usually look to motive to determine if the agent-employee has crossed that theoretical line.\textsuperscript{163}

To satisfy the improper interference element, the plaintiff must also show that the supervising employee's interfering conduct was improper.\textsuperscript{164} One factor to consider in this analysis is the motive of the actor.\textsuperscript{165} If the plaintiff has already demonstrated improper conduct (with or without a showing of malice) to meet the higher threshold set by the scope of employment test,\textsuperscript{166} she is likely to prevail on the interference element as well.\textsuperscript{167} Scenario two is a good illustration of this

\textsuperscript{159}. See discussion supra Part I.B. An inquiry into motive is permissible but not necessary. A supervisor is generally empowered to fire an at-will employee on behalf of the employer—that is, firing is within the scope of his employment. The nature of an at-will employment relationship necessarily means that any or no reason is needed to terminate the employment (making the tests for exceeding the scope of employment and determining improper interference difficult to meet). The practical effect of applying both Restatement tests (Agency and then Torts) is to set a higher threshold to satisfy the agency prong than to satisfy the tortious interference prong.

\textsuperscript{160}. See discussion supra Part I.B, C.

\textsuperscript{161}. See supra note 111 and accompanying text.

\textsuperscript{162}. See supra note 67 and accompanying text.


\textsuperscript{164}. See discussion supra Part I.B.

\textsuperscript{165}. \textsc{Restatement (Second) of Torts} § 767 (1977).

\textsuperscript{166}. See supra note 159.

\textsuperscript{167}. Zimmerman v. Direct Fed. Credit Union, 262 F.3d 70, 77-78 (1st Cir. 2001) (noting that a reasonable jury could conclude that the defendant's "illegitimate purpose" was the primary factor in finding that the defendant's actions were not within the scope of employment.)
point: The supervisor falsified records in order to terminate the plaintiff's employment. Such conduct would easily be deemed improper with or without a motive showing.\textsuperscript{168}

Even when motive is not the gravamen of the plaintiff's case, it is difficult to invent a situation where a defendant's conduct is sufficiently improper to place him outside the scope of his employment but not improper enough to satisfy the interference element. In the third scenario, the supervisor's action may not seem sufficiently improper to satisfy either element, with or without a showing of malice. Conversely, the supervisor in the first scenario demonstrates enough malice to place him outside the scope of his employment even if his actions are arguably within the scope (and perhaps not improper). Such abuse may, however, generate a finding that his behavior was improper if the abuse was significant enough to place the supervisor outside the scope of his employment.\textsuperscript{169} Indeed, most courts blur this analysis when the plaintiff has shown the conduct was outside the scope of employment.\textsuperscript{170} Even if the plaintiff is not successful in placing the supervisor outside the scope of his employment, it is theoretically possible that the improper interference element will still be met with a showing of malice.\textsuperscript{171} When the plaintiff has not met her burden under the third-party element, however, most courts never reach the improper interference element.\textsuperscript{172} Under such circumstances, the plaintiff in scenario one would not prevail.

Where at-will status does not prevent a plaintiff from bringing her tortious interference claim, supervisor-defendants will be exposed to state-of-mind inquiries, whether to place them outside the employment relationship as third parties, to assess their actions as improper, or some combination of the

\textsuperscript{168} See \textit{Restatement (Second) of Torts} § 767 cmt. c (1977) (noting that fraud is wrongful even if the actor was authorized to "accomplish the same result by more suitable means").

\textsuperscript{169} Cf. \textit{Zimmerman}, 262 F.3d at 78.

\textsuperscript{170} See supra note 72.

\textsuperscript{171} See \textit{Restatement (Second) of Torts} § 767 cmt. d (1977) (stating that while motive may not be sufficient to meet the improper interference element, in some circumstances it could be enough, when "a desire to interfere...[i]s the sole motive").

\textsuperscript{172} See supra note 67.
two.

C. JOINING THE FACES: AGENCY LAW PROVIDES HARMONY

Critics of the blurring analysis employed by some courts ignore agency principles with respect to employers and employees. This "freedom to interfere" is based upon an analysis of the tortious interference claim under the Restatement (Second) of Torts. But as the Restatement suggests, until the actual parties terminate the at-will agreement, a third-party defendant may not improperly interfere with the contract. This suggestion applies to all tortious interference claims, not just those in the employment-at-will setting. To apply this principle to the employment setting without a consideration of agency law ignores the "intriguing turn" such a tort claim takes in the employment context.

The unique relationship between employer-principals and their employee-agents requires an analysis that incorporates contract, agency, and tort law. Because of the preference for holding employers liable through respondeat superior principles, the threshold requirement of improper conduct that places a defendant outside the scope of employment is necessarily higher than the tortious interference requirement that the third-party defendant's interference be improper. This

173. See supra notes 82-89 and accompanying text.
174. See discussion supra notes 118, 120 and accompanying text (discussing how some jurisdictions merge the analysis of the elements of the third-party requirement and the improper actions of the third party).
175. See Long, Disconnect, supra note 22, at 525. Long argues that because the contract being interfered with is an at-will contract, deserving less protection, it necessarily follows that defendants have greater latitude within which to interfere. See id. Allowing an inquiry into a defendant's motive without a recognition of the rights of at-will employers to dismiss employees without regard to motive erodes the at-will benefits to employers. See id.
176. Id. (discussing the distinction in the Restatement (Second) of Torts between tortious interference with contract actions and tortious interference with business relations actions).
177. RESTATEMENT (SECOND) OF TORTS § 766 cmt. g (1977). It is certainly true that an at-will contract is relevant to determine damages, in the employment setting or otherwise. Id. § 767 cmt. e.
178. Id. § 766 cmt. g.
180. See RESTATEMENT (SECOND) OF AGENCY § 219 cmt. a (1957) (noting that it would be "unjust" to allow an employer to benefit from its employees' actions but not to take responsibility for such actions).
181. See supra notes 158-159.
higher threshold protects the benefits of at-will employment while providing plaintiffs an opportunity for redress. For example, a malicious supervisor, such as the one described in the first scenario, who harasses or humiliates an employee would be acting outside the scope of employment because it is unlikely that his employer has authorized him to act in such a way. On the other hand, a supervisor who reasonably terminates an employee, but also dislikes the employee (a bad motive), would not be considered to have acted outside the scope of employment.

The criticism of judicial inconsistency in tortious interference claims in the at-will setting does have some merit, albeit on a different basis. Courts that do not explicitly apply an agency analysis to the third-party element are not acknowledging the unique place that employment cases occupy. Agency law is crucial to understanding the relationship between the employer and the supervisor-defendant in a tort claim. Without this understanding, courts rely only on basic contract and tort liability theories and are inconsistent in holding—or refusing to hold—such defendants liable. When trying to harmonize the apparent inconsistencies, confusion occurs when determining whether an improper motive was dispositive for the third-party defendant element or the improper interference element.

Blurred reasoning does not help courts hearing such claims, employers seeking to avoid such claims, or employees seeking relief. When a court decides that a claim cannot proceed, but does not clarify whether the claim failed because the defendant was acting within the scope of employment or because the conduct was not improper, plaintiffs and future

182. Accord Zimmerman, 262 F.3d at 78; see also Nelson v. Fleet Nat'l Bank, 949 F. Supp. 254, 263 (D. Del. 1996) (recognizing that acts such as assault and battery do not fall within the scope of employment).
183. Accord Eggleston v. Phillips, 838 S.W.2d 80, 82 (Mo. Ct. App. 1992) (concluding that when an employer can terminate an at-will employee without cause, a supervisor can lawfully carry out such a termination).
184. See supra notes 175-176 and accompanying text.
185. See Zimmerman, 262 F.3d at 76 (discussing the “paradox” of the tortious interference claim in the employment context).
186. See supra notes 63-89 and accompanying text.
187. See supra notes 77, 84 and accompanying text.
188. As the Oregon Supreme Court noted in McGanty v. Staudenraus, none of the controlling cases in that jurisdiction provided guidance for resolving the issue of the third-party element of the tortious interference claim. 901 P.2d 841, 847 (Or. 1995).
courts lack guidance for framing such claims, and employers lack clarity for defending against the claims. Moreover, by ignoring agency theory, courts further confuse would-be plaintiffs and employers because an understanding of agency liability can reduce the confusion inherent in a tortious interference claim.\footnote{189}

Thus, although courts will inquire into the motive of a defendant to determine whether he was acting within the scope of his employment and whether his conduct was improper, when courts do not identify the purpose for which they are making the inquiry, the result is confusing and unhelpful.

III. AGENCY LAW AS THE CONNECTING PIN

A. SCOPE OF EMPLOYMENT—IMPROPER INTERFERENCE TWO-STEP

Tortious interference in the employment-at-will setting can be confusing at first glance. As at-will employment seems to imply an unbreachable contract between employer and employee, common sense seems to dictate that an employer's managers and supervisors cannot interfere with the employer's relationship with other employees. Nevertheless, in seeming disregard for common sense, courts allow such claims to proceed.\footnote{190} Adding to the confusion, courts often fail to provide thorough analyses when concluding that such claims are proper.\footnote{191} If courts would recognize and clearly adopt established principles of agency law, they would bring tortious interference claims in accord with common sense and with other theories of employer liability.\footnote{192}

The first common sense objection to a tortious interference claim reflects the general acceptance and understanding of the at-will employment rule: It gives the employer the right to terminate the employee's employment with or without a reason.

\footnote{189. See supra Part I.B-C for an explanation of tort liability theories with respect to employment relationships.}

\footnote{190. See supra Part I.B.}

\footnote{191. See supra notes 74-77 and accompanying text.}

\footnote{192. Acknowledging the notion of fairness that holds an employer liable for an employee's tortious conduct under respondeat superior theory, which also provides that an employer should not be liable when the employee acts outside the scope of employment, it follows that the employee should remain individually liable for his torts. See discussion supra Part I.C.}
The at-will rule recognizes the employer's legitimate interest to control its business, including its employees. The consensus is that the rule provides employers with the flexibility they need to run their businesses most efficiently. How, then, can such an open arrangement be subject to interference? While protecting the theoretical basis for the at-will rule, courts have consistently recognized certain exceptions that grant a discharged employee relief. For example, when the behavior of a specific employer offends public policy, courts will allow a wrongful discharge action to proceed, even in an at-will relationship. The growing concern to protect employees from abusive employers has included a growth in the number of tortious interference claims on behalf of aggrieved plaintiffs. The courts' acceptance of tortious interference claims follows logically from their acceptance of wrongful discharges under the public policy exceptions—if the courts protect employees from being terminated for whistle-blowing or filing a workers compensation claim, it is not difficult to understand why they would want to protect employees from abusive treatment, or at least from the most vicious instances thereof. Thus this first common sense objection is easily answered.

The second, and more troubling, objection—the question of how a supervisor can interfere with an employee's employment—has not been sufficiently addressed by courts that have allowed tortious interference claims to proceed. The inconsistent approach of courts to the third-party element has not provided employers with the predictability they need to operate a business within their rights, nor has it provided guidance for aggrieved plaintiffs. In order to balance employer and employee interests, courts must clarify when and why a tortious interference claim can proceed. If employers understand the

193. Adair v. United States, 208 U.S. 161, 174-76 (1908), overruled in part by Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); see also Long, Disconnect, supra note 22, at 517-19.
194. See Long, Disconnect, supra note 22, at 518.
195. See discussion supra Part I.A.
197. See supra notes 47-51 and accompanying text.
198. See discussion supra Part I.B.
199. See Long, Disconnect, supra note 22, at 511-12 (providing a categorical summary of courts' various approaches to the third-party status of supervisors).
200. See discussion supra Part II.B.
201. See, e.g., Nordling v. N. States Power Co., 478 N.W.2d 498, 506 (Minn.
liability principles to which they are subject, they can better control the actions of their supervisors while still exercising control over their employees. Likewise, when the types of conduct that can lead to employer liability are clear, plaintiffs will be able to gain relief from truly egregious treatment\textsuperscript{202} and will be deterred from pursuing frivolous claims.\textsuperscript{203}

The ability to overcome this confusion lies in the connection between agency law and tort law. Because tort law pervades other areas of law,\textsuperscript{204} and agency law covers the non-contractual relationship of employers and employees,\textsuperscript{205} courts should adopt an approach to tortious interference claims that explicitly incorporates both bodies of law.

Agency law respects both the employer’s right to control its employees and the at-will employment doctrine.\textsuperscript{206} Thus, application of the principles of agency law to the third-party analysis should address the fears of critics who view successful tortious interference claims as erosions of the at-will doctrine.\textsuperscript{207} These critics recognize that an inquiry into a supervisor’s motives is \textit{de facto} an inquiry into an employer’s motives, and they justly argue that the at-will rule should protect an employer from such an inquiry.\textsuperscript{208} However, when a court applies the scope of employment test set forth in the Restatement (Second) of Agency, not only the motives but the \textit{conduct} of the defendant will be examined.\textsuperscript{209} Borrowing further from the Supreme Court’s modification of the scope of employment test in \textit{Faragher}\textsuperscript{210} and \textit{Ellerth},\textsuperscript{211} the supervisor-defendant cannot be

\begin{footnotesize}
\begin{enumerate}
\item[1991] (acknowledging sound policy reasons to shield agents from liability for actions taken on behalf of their employers, while also recognizing that there may be compelling exceptions that should expose those agents to liability).
\item[202] Zimmerman v. Direct Fed. Credit Union, 262 F.3d 70, 78 (1st Cir. 2001) (finding the defendant’s “interference sank to depths more peccant than mere slights”).
\item[203] See, e.g., Eggleston v. Phillips, 838 S.W.2d 80, 82 (Mo. Ct. App. 1992) (finding that the facts of the case provide “adequate justification for the termination of [the] plaintiff if evidence of justification is in fact required”).
\item[204] See supra notes 56-57 and accompanying text.
\item[205] See RESTATEMENT (SECOND) OF AGENCY § 2 (1957).
\item[206] Id. §§ 1, 2, 20-25 (discussing the control exercised by the principal, and the freedom under some circumstances of the agents, and determining that in many contexts, the relation between master and servant is the same).
\item[207] See supra notes 175-176 and accompanying text.
\item[208] The at-will presumption implicitly acknowledges that if an employer can fire for any or no reason, then its reason to fire is irrelevant.
\item[209] RESTATEMENT (SECOND) OF AGENCY §§ 228-229 (1957).
\item[210] 524 U.S. 775 (1998); see supra note 109.
\end{enumerate}
\end{footnotesize}
outside the scope of his employment if his only conduct was taking an adverse tangible employment action such as a demotion, termination, or reprimand.\textsuperscript{211} Under \textit{Faragher} and \textit{Ellerth}, the employer is liable if the supervisor's conduct included adverse tangible employment actions.\textsuperscript{212} The analogy can work in reverse, so that for the purposes of the tortious interference claim, a supervisor-defendant would not exceed the scope of his employment if the only actions complained of were adverse tangible employment actions. Malice is still a factor under the agency scope of employment test,\textsuperscript{213} but with the \textit{Faragher-Ellerth} modification, it will not be determinative. Moreover, a factual examination of a defendant's conduct, rather than a state-of-mind test, should lead to more predictable results.\textsuperscript{214}

Thus, unless a supervisor's conduct goes beyond tangible employment actions, the employer still derives the benefits of the at-will presumption with respect to the lack of inquiry into its motives. Additionally, a court might never reach an inquiry into a supervisor's (and thus an employer's) motives for either of two reasons: (1) the supervisor-defendant's conduct may be sufficiently outrageous to conclude he was outside the scope of employment without ever inquiring into his motives,\textsuperscript{215} or (2) the conduct is sufficiently within the defendant's scope of employment that it fails to satisfy the third-party requirement of the tort claim, regardless of the defendant's motive.\textsuperscript{216}

\begin{enumerate}
\item \textsuperscript{211} 524 U.S. 742 (1998); see supra note 109.
\item \textsuperscript{212} Tangible employment actions were defined this way in \textit{Ellerth}. 524 U.S. at 762-63. Some courts have broadened this definition in subsequent employment cases, see, e.g., Phillips v. Bowen, 2002 WL 89394, at *5 (2d Cir. 2002), but for the tortious interference claim, the rationale of \textit{Ellerth} supports a narrow construction of the modification. See Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 294 (2d Cir. 1999) (comparing the rationale of \textit{Ellerth} to the rationale of the Restatement (Second) of Agency scope of employment test).
\item \textsuperscript{213} \textit{Faragher}, 524 U.S. at 807; \textit{Ellerth}, 524 U.S. at 762-63.
\item \textsuperscript{214} \textit{Restatement (Second) of Agency §§ 228, 235 (1957)} (allowing conduct to be considered in conjunction with motive).
\item \textsuperscript{215} \textit{See supra} Part I.B (discussing the importance of the plaintiff's care in defining the offending actions). That caution is still necessary under this modified test.
\item \textsuperscript{216} For example, the supervisor could have humiliated the plaintiff and acted as the defendant in \textit{Zimmerman} did—adversely affecting Zimmerman's employment, but without taking tangible employment actions to do so. \textit{Zimmerman} v. Direct Fed. Credit Union, 262 F.3d 70, 73-74 (1st Cir. 2001).
\item \textsuperscript{217} \textit{E.g.}, Eggleston v. Phillips, 838 S.W.2d 80, 83 (Mo. Ct. App. 1992) ("Defendants may not have liked plaintiff but that does not convert her discharge
though malice can be a critical factor in determining improper conduct and improper interference, it carries less weight in the scope of employment test,\textsuperscript{218} especially as modified by the adverse tangible employment action requirement.\textsuperscript{219} Thus, using a modified scope of employment test to determine third-party status in a tortious interference claim provides clear and consistent protection of an employer's at-will rights with regard to judicial scrutiny of motivation behind its agent's conduct. Indeed, the use of such an agency approach by courts, whether explicit or implicit, is an endorsement of the proposition that the employer's interests are well-served under agency theory.\textsuperscript{220}

The determination of improper interference should therefore proceed after it has been established that the defendant is indeed a third party. If the defendant has demonstrated egregious conduct and is considered a third party, it is unlikely that ordinarily permissible actions under the at-will umbrella (such as firing an employee) would be held to constitute improper interference.\textsuperscript{221} If a supervisor is authorized to evaluate, to terminate, or to recommend terminations, and he carries out such actions without egregious conduct, he remains within his scope of employment.\textsuperscript{222} If the supervisor's only interference was a tangible employment action, such as firing the plaintiff, or recommending that the plaintiff be fired, his conduct could not have been improper. This approach, therefore, protects the at-will rule by protecting the supervisor's authority to take tangible employment actions within his scope of employment.

\textsuperscript{218} Malice carries less weight because as long as some motive to serve the employer exists, a bad motive is not enough to place the employee outside his scope of employment. \textit{See} Martin v. Cavalier Hotel Corp., 48 F.3d 1343, 1351 (4th Cir. 1995) (recognizing that acting in self-interest is not enough to take the employee outside his scope of employment).

\textsuperscript{219} \textit{See supra} notes 209-215 and accompanying text.

\textsuperscript{220} \textit{See discussion supra} Part I.B-C. Even though courts that favor the at-will rule are likely to find that an employee-defendant acted within the scope of employment, they still conduct the analysis.

\textsuperscript{221} If the facts are enough to place the defendant outside his scope, then he necessarily behaved in a manner beyond executing an adverse tangible employment action. \textit{See supra} Part I.B-C; \textit{supra} notes 209-215 and accompanying text. Thus a court would not need to rely solely on the tangible employment action to meet the improper interference element.

\textsuperscript{222} \textit{See supra} notes 209-215 and accompanying text.
B. DANCING THE TWO-STEP: APPLICATION IN PRACTICE

To understand the benefits of this approach, let us revisit our three hypothetical scenarios. Recall that in the first scenario, the supervisor acts abusively toward the plaintiff and eventually fires her. The employee would not have any wrongful discharge claim against her employer because, however egregiously the supervisor behaved, abusive supervisors are not included in any of the public policy exceptions allowed by courts, unless the abuse is motivated by the plaintiff's sex, race, or other protected status. If this employee filed a tortious interference claim against this supervisor, under the proposed approach, the court would first look to the supervisor's conduct to determine whether he is a proper third party. Applying the modified agency scope of employment test, the court would ask whether the conduct in question was simply the implementation of an adverse tangible employment action or if it went beyond carrying out employment actions.

Applying the facts of the first scenario to this question would yield a finding that the supervisor exceeded his scope of employment: Although performance evaluations are tangible employment actions, the other conduct goes beyond the limits established in Ellerth. Preventing an employee from getting the necessary training, publicly humiliating an employee, and general abuse are arguably outside the definition of tangible employment action.

Thus, a court would be able to conclude that this supervisor acted outside his scope of employment and could proceed to analyze whether his conduct improperly interfered with the employee’s at-will contract with her employer. A court could make these conclusions without an explicit reliance on malice, despite the clear evidence of such a motive.

Scenario two involves a supervisor who falsified productivity reports in order to bring about the plaintiff’s dismissal. Under the modified scope of employment test, a court would look at the falsification of the employee's production records and easily conclude that it could never be in the employer’s in-

223. See supra Part II.A.
224. See supra notes 48-52 and accompanying text.
225. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998) (defining a tangible employment action as a “significant change in employment status ... causing a significant change in benefits”).
226. See id.
227. See supra Part II.A.
terest for supervisors to generate erroneous reports, even if the preparation of the reports could be considered a tangible employment action as part of a disciplinary review. Falsifying records is not a tangible employment action in the manner intended by the Supreme Court. Additionally, a court could look to other supervisors to see if they routinely falsified work records to conduct evaluations. It is unlikely this would be true. This supervisor would therefore be held a proper third party under the agency scope of employment test. A court would then look to the same conduct—preparing incorrect evaluations—to assess the improper interference element of the claim.

Scenario three involves a sales team supervisor who has unlimited discretion to assign sales territories to the sales employees. Applying first the modified scope of employment test, a court would look at the supervisor’s conduct in the context of his authorization from the employer. The supervisor is empowered with discretionary authority to assign territories. The assignment of territories is certainly a tangible employment action. Therefore, the assignment of these poor territories was within his authority, and would be considered a tangible employment action, regardless of the motive behind the assignments. Likewise, other sales supervisors routinely have unlimited discretion to assign territories to employees. This supervisor would thus be held within the scope of employment regardless of the malice he feels towards the plaintiff. Although poor work assignments could meet the improper interference test in some circumstances, a court would never reach that question in this hypothetical because the plaintiff’s claim fails under the first test—whether the defendant acted outside the scope of his employment.

The common denominator in the three scenarios is that the employees were dismissed for poor performance by supervisors who did not like them. Proponents of the at-will doctrine—and

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228. Compare Ellerth, 524 U.S. at 760-65 (adopting and defining the concept of “tangible employment action” for determining employer vicarious liability), with Faragher v. City of Boca Raton, 524 U.S. 775, 801-08 (1998) (discussing the rationale for holding employers vicariously liable under the tangible employment action concept as compared with the Restatement (Second) of Agency approach).

229. See supra Part II.A.

230. Cf. Faragher, 524 U.S. at 790 (noting that “work assignment[s]” are within the concept of tangible employment actions for the purpose of establishing employer liability).
critics of the tortious interference claim in an at-will setting—see tortious interference claims as limiting an employer's power to fire an employee for any reason. If a bad reason for termination can subject a supervisor to liability, it necessarily limits his ability to dismiss employees for any reason. As the application of the proposed approach demonstrates, however, the success of a tortious interference claim will depend on how severely the supervisor's malice influences his conduct. While each of the three plaintiffs may invoke sympathy, only the first two will have meritorious claims.

Therefore, if a court applies a modified agency scope of employment test before inquiring whether there was improper interference, it should not even reach the question of improper interference, provided the defendant had the authority to terminate an at-will employee, and the means for carrying out the termination did not exceed the scope of his authority. A proper application of agency law serves to protect both the interests of a wrongfully terminated at-will employee and the broad thrust of the entire at-will doctrine. Employers need not fear the uncertainty of a tortious interference claim, and the truly aggrieved plaintiff can find needed relief.

CONCLUSION

There is considerable obscurity surrounding tortious interference claims in the employment-at-will context. In addition to the difficulty in determining whether an at-will contract can even be interfered with, the relationship between a corporate employer and its supervisors makes it hard to distinguish between the supervisor and the employer. Courts that have allowed tortious interference claims to proceed—as well as those that have not—have based their decisions on conflicting analyses of whether a supervisor is a third party and whether that supervisor acted improperly.

Established principles of contract, tort, and agency law shed a great deal of light on tortious interference claims in an at-will setting. While courts accept the general value of the at-will rule, they nevertheless recognize the existence of certain exceptions, especially when the employer's actions offend public policy. Allowing tortious interference claims in the at-will setting is a logical extension of these public policy exceptions—it

231. See supra note 175.
232. See supra Part III.A.
provides much-needed relief to plaintiffs who are unable to find it in current law.

Moreover, the incorporation of agency law into the analyses of tortious interference claims in an at-will setting protects employers, because it provides a strict test to determine whether a terminating supervisor is a *bona fide* third party. Only the most egregious acts will place a supervisor outside the scope of his employment, and therefore only the most deserving claims will be permitted to proceed. Thus, the best way to approach claims of tortious interference in an at-will setting—the way that provides for both the appropriate level of protection for employers and the redress of substantial wrongs for terminated employees—is not to apply just contract law, nor even a combination of contract and tort law. To settle these claims fairly and consistently, the courts must apply agency law as the connecting pin between tort and contract law: They must look first to scope of employment and only then proceed to the interference claims themselves.