You're Going to Need a Bigger Boat: Intentional Interference Claims Now Hold Water in Context of At-Will Employment Relationships

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When talking about the practice of law with other lawyers—whether long time practitioners, first year associates, or any stage in between—I have been known to advocate for my chosen practice area by pointing out that employment lawyers never get bored with the fact patterns we encounter. I am of course willing to acknowledge that other commercial litigators surely come across an exciting case occasionally, but employment lawyers routinely deal with allegations that at the very least are interesting and sometimes include personality conflicts that are akin to a soap opera. In late February, the Pennsylvania Supreme Court issued a decision in *Salsberg v. Mann*, — A.3d —- (2024), that could help to ensure that employment litigation will continue to have the "best" fact patterns for years to come, when it ruled that plaintiffs can maintain a cause of action for intentional interference with an at-will employment relationship against third-parties, including coworkers who act outside the scope of their authority to the point they are rendered a "stranger" to the plaintiff's at-will employment relationship with their employer.

Drexel University employed Cara Salsberg as its Tax Manager; an at-will position within the University's Tax Department. Salsberg reported to Donna Mann, whose supervisory responsibilities included determining Salsberg's schedule and assignments, evaluating Salsberg's performance, and making recommendations to the University related to Salsberg's employment. During a staff meeting in anticipation of the 2017 tax season, Mann told Salsberg and another Tax Department employee that they would soon need to work a yet-to-be-determined amount of overtime during the upcoming "busy season." Salsberg expressed her disagreement to Mann, who in turn blamed her own supervisor, David Rusenko, for the increased workload. Salsberg then decided to meet with Rusenko directly. During her meeting with Rusenko, Salsberg addressed the mandatory overtime issue but also raised additional alleged "concerning" behaviors about Mann. She claimed that Mann "did nothing all day" and was "crazy." She also told Rusenko that Mann would regularly "pick her head until it bled," and "run through the office," bump into walls, and slam her office door. Rusenko declined to intervene and instead recommended that Salsberg address these matters with Mann directly. Shortly after Salsberg did so, Mann issued Salsberg a Performance Improvement Plan. In early June 2017, Drexel terminated Salsberg's employment for poor performance.

Following her discharge, Salsberg commenced litigation against both Drexel and Mann, alleging, among other claims, that Mann interfered with Salsberg's contractual relationship with Drexel. The Court of Common Pleas of Philadelphia County granted summary judgment in favor of the defendants, and Salsberg appealed. The Superior Court issued a divided, *en banc* opinion in favor of Mann, in which the majority relied upon *Hennessy v. Santiago*, 708 A.2d 1269 (Pa. Super. 1998), a twenty-five-year-old case which held that claims for intentional interference with contractual relationships are only cognizable in Pennsylvania in the employment context relative to *prospective* at-will employment relationships but not to *current* at-will employment relationships. The Superior Court held that, like the plaintiff in *Hennessy*, a current at-will employee, Salsberg did not have any reasonable expectation of continued employment guaranteed by a contract, and therefore any such expectation is nothing more than a "mere hope." In its opinion, the Superior Court noted that *Hennessy* made this "critical" distinction between prospective and current at-will employment relationships "without much explanation."

The Pennsylvania Supreme Court disagreed with the distinction drawn by the Superior Court in *Hennessy* because it "ignores the expectation interest that a party to the at-will employment relationship has in continued employment absent unlawful interference by a third party…." The Court therefore overruled *Hennessy* and its progeny and held that "Pennsylvania does not categorically bar claims for intentional interference with an at-will employment contract or relationship by a third-party." In doing so, the Court acknowledged that even though at-will employment "does not confer a contractual 'right' to continued employment *as between the parties to the employment relationship*, it does not follow that an employee has no protectable interest whatsoever in the continuance of that employment relationship vis-à-vis *third parties*:

> The fact that the employment is at the will of the parties … does not make it one at the will of others. The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of authority, the unjustified interference of third persons is actionable although the employment is at will."

Stated differently, at-will employees in Pennsylvania should be free from third-party interference with their employment.

To assert a claim for intentional interference against a coworker, "at a minimum" the coworker must have been "acting outside the scope of her employment pursuant to Section 228 of the Restatement (Second) of Agency such that she qualifies as a true third party, or stranger, to the contractual relationship." Such conduct is within the scope of employment if it: (a) is the kind she is employed to perform; (b) occurs substantially within the authorized time and space limits; (c) is actuated, at least in part, by a purpose to serve the employer; and (d) if force is intentionally used, it is not unexpectable force.

Salsberg claimed that Mann's conduct interfered with the at-will relationship between Salsberg and Drexel. She argued that Mann's conduct was intentional, improper, without privilege, and outside the scope of her authority to the point she was rendered a third-party, or "true stranger" to the at-will relationship between Salsberg and Drexel. Mann argued, among other things, that she always acted within the scope of her authority and that, as Salsberg's supervisor, she had the privilege to cause Drexel to terminate Salsberg's employment. Mann also argued that there was no record evidence that she acted solely with actual malice or against Drexel's interests when evaluating Salsberg's performance.

On this matter, the Court agreed with Mann because it found that there was no genuine issue of material fact as to whether Mann actually acted outside the scope of her authority to the extent that she should be considered a third party that could intentionally interfere with the employment at-will relationship between Salsberg and Drexel. In other words, Mann's conduct fell within authorized time and space limits, did not involve the use of force, and was clearly the kind of conduct that she was employed to perform as Salsberg's supervisor. Moreover, the Court determined that Mann's actions were taken, "at least in part," with the purpose to serve Drexel. Salsberg admitted that she disagreed with Mann on the workload issue, circumvented Mann by raising the issue with Rusenko even though she knew this would anger Mann, and then told Rusenko that she believed Mann to have mental health issues. Salsberg also did not dispute the fact that Mann was not pleased with the number of hours Salsberg had been working, her attitude at work, and her substantive work performance (which included admitted errors). Relying upon its well-settled precedent in *Geary v. U.S. Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974), a wrongful termination case with "similar circumstances," the Court reinforced the notion that employers have a legitimate interest in "preserving administrative order" in their own houses. In short, the Court deemed Salsberg's case to be an attempt to circumvent the employment at-will doctrine and therefore rejected it.

Although the Court recognized the potential for parties to use the *Salsberg* opinion as a means to attempt to "maneuver around" the employment at-will doctrine, the fact remains that the door has been opened for cognizable suits by an employee against a coworker for intentional interference in at-will employment relationships if the coworker had a hand or influence in the employee's termination. Employers should be cautioned, as an uptick in these types of claims may encourage employers to take up the coworker's defense. In many instances, it would benefit the employer to argue that the coworker acted in the employer's interest and within their scope of authority when influencing the employee's

termination. In these instances, drafting an air-tight joint defense agreement with the defendant coworker will be imperative. The agreement should include a caveat that representation can and will be withdrawn if the employer determines a conflict or adverse interest between the employer and the defendant coworker. For example, if discovery reveals that the coworker acted with discriminatory animus in their influencing of the employee's termination, the employer could be at risk of a later finding of vicarious liability for discrimination. Therefore, it is critical for employers to fully investigate allegations of intentional interference between an employee and a coworker prior to agreeing to defend the coworker, and to draft joint defense agreements in a manner that provides an escape route should the facts pan out in a manner that supports an intentional interference claim on the basis of discriminatory animus, as discriminatory acts do not fall within an employee's scope of duties or authority.

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