This paper discusses several of the ways that workers’ compensation may or may not preempt employment-based emotional distress claims. Emotional distress claims can arise out of numerous contexts. This paper focuses on claims arising from workplace assaults, exposure to stress or difficult conditions in the workplace, sexual harassment, and conduct associated with harassment. Because of my experience, North Carolina workers’ compensation law is used as a starting point for exploring these issues.

I. General Scope of Workers’ Compensation Preemption

In North Carolina, workers’ compensation covers injuries “by accident arising out of and in the course of the employment” and “occupational diseases.” N.C. Gen. Stat. §§ 97-2(6), 97-52. If workers’ compensation applies, it preempts all claims “against the employer at common law or otherwise on account of such injury or death.” N.C. Gen. Stat. § 97-10.1. “The social policy behind [this provision] is that injured workers should be provided with dignified, efficient[,] and certain benefits for work-related injuries and that the consumers of the product are the most appropriate group to bear the burden of the payments.” Pleasant v. Johnson, 325 S.E.2d 244, 246-47 (N.C. 1985).

“The most important feature of the typical workers’ compensation scheme is that the employee and his dependents give up their common law right to sue the employer for negligence in exchange for limited but assured benefits.” Id. As in many states, North Carolina workers’ compensation does not preclude claims for intentional misconduct, whether against the employer or against a co-worker who commits the intentional misconduct. Id. at 247; see also Id. at 249 (holding that tort claims against a co-worker are also permitted in cases of “willful, wanton and reckless negligence”).

Most states limit this exception to exclusivity to cases in which an “actual intent” to injure is shown. See, e.g., Valencia v. Freeland & Lemm Contr. Co., 108 S.W.3d 239, 243 (Tenn. 2003); Fenner v. Municipality of Anchorage, 53 P.3d 573, 576 (Alaska 2002). A minority of states apply a somewhat more lenient standard, in which misconduct is considered “intentional” if the injury was “substantially certain” to result from the misconduct. See, e.g., Rose v. XYZ Cable Co., Inc., 600 So. 2d 774, 775 (La. Ct. App. 1992); Suarez v. Dickmont Plastics Corp., 639 A.2d 507, 511 (Conn. 1994).
In many states, the exception to exclusivity for intentional torts is explicitly provided by statute. See, e.g., Ky. Rev. Stat. § 342.610; Mich. Comp. Laws § 418.131. In others, courts have construed workers’ compensation statutes as including such an exception despite the lack of an explicit textual provision. See Lentz v. Young, 536 N.W.2d 451, 470-73 (Wis. 1995); Pleasant, 325 S.E.2d at 246-47. Some states require victims to select either workers’ compensation or common law claims. See, e.g. Md. Cod § 9-509(d); Ky. Rev. Stat. Ann. §342.610(4). Others permit victims to pursue both remedies simultaneously. See, e.g., Gagnard v. Baldridge, 612 So. 2d 732, 736 (La. 1993); Jones v. VIP Dev. Co., 472 N.E.2d 1046, 1054 (Ohio 1984).

A minority of states have declined to read such an exception into their statutes, and have limited the rights of those injured by an employer’s intentional tort to those provided by workers’ compensation and criminal statutes. See, e.g., Li v. C.N. Brown Co., 645 A.2d 606, 607 (Me. 1994).

II. Workplace Assaults

“Injuries resulting from an assault are caused by ‘accident’ within the meaning of the [Workers’ Compensation] Act when, from the employee’s perspective, the assault was unexpected and was without design on her part.” Culpepper v. Fairfield Sapphire Valley, 377 S.E.2d 777, 780 (N.C. Ct. App. 1989), aff’d, 386 S.E.2d 174 (N.C. 1989). So, in cases of workplace assault, claims against the employer for negligent supervision or retention, negligence with regard to the premises, or negligent infliction of emotional distress will be preempted by workers’ compensation if the assault arises out of the employment.

If the assault is connected to a work dispute or arises out of the worker relationship and not a personal relationship, then the assault will arise from the employment. See, e.g., Hauser v. Advanced Plastiform, Inc., 514 S.E.2d 545, 550 (N.C. Ct. App. 1999) (employee kidnapped and killed by laid-off employee after meeting with him to explain unemployment benefits); Culpepper, 377 S.E.2d at 781 (waitress kidnapped and sexually assaulted by guest of employer-resort after stopping to help him by the side of a road); Pittman v. Twin City Laundry & Cleaners, 300 S.E.2d 899, 903 (N.C. Ct. App. 1983) (supervisor shot by employee).

On the other hand, “an injury is not compensable when it is inflicted in an assault upon an employee by an outsider as the result of a personal relationship between them, and the attack was not created by and not reasonably related to the employment.” Hemric v. Reed & Prince Mfg. Co., 283 S.E.2d 436, 438-39 (N.C. Ct App 1981); see Robbins v. Nicholson, 188 S.E.2d 350, 354 (N.C. 1972) (male employees and a female co-workers were killed by the jealous husband of the female co-worker); Dildy v. MBW Invs., Inc., 566 S.E.2d 759, 765 (N.C. Ct. App. 2002) (assault by abusive estranged boyfriend did not arise out of employment because risk of abuse was independent of the employment).

This distinction between employment-based assaults and personal assaults is common in other states. See, e.g., Turner v. F.I.C. Secs. Servs., 306 A.D.2d 649, 649 (N.Y. S. Ct. App. Div. 2003) (presumption that injury caused by workplace assault arose out of employment can be rebutted by substantial evidence showing that the assault was the result of personal animosity);

III. Exposure to Workplace Stress or Conditions

Emotional distress can be caused by repeated incidents in the workplace, particularly traumatic incidents. When repeated incidents or the nature of the job cause emotional distress, no specific “accident” has occurred. Instead, workers’ compensation preemption will depend on whether the workplace experience constitutes a compensable “occupational disease.” The standard is whether “the mental illness or injury was due to stresses or conditions different from those borne by the general public.” Pitillo v. N.C. Dep’t of Envtl. Health & Natural Res., 566 S.E.2d 807, 813 (N.C. Ct. App. 2002).

For example, in Smith-Price v. Charter Pines Behavioral Center, 584 S.E.2d 881 (N.C. Ct. App. 2003), a registered nurse successfully sought workers’ compensation benefits for post-traumatic stress disorder (“PTSD”) she developed from her employment at a psychiatric hospital. Id. at 881. The plaintiff worked with patients who were disturbed, suicidal, and homicidal, in a very chaotic and stressful environment, where there had recently been a publicized patient death. Id. at 881-84. The court concluded that the plaintiff’s PTSD was an occupational disease because her working environment “with an aberrant population where treatment errors could (and did at least once) result in death” were not common workplace stresses. Id. at 887-88; see also Pulley v. City of Durham, 468 S.E.2d 506, 510 (N.C. Ct. App. 1996) (concluding that a police officer who developed PTSD and depression due to her work had a compensable occupational disease).

On the other hand, in Woody v. Thomasville Upholstery, Inc., 552 S.E.2d 202 (N.C. Ct. App. 2001), reversed and dissent adopted by 562 S.E.2d 422 (N.C. 2002), the plaintiff sought workers’ compensation for depression she alleged was caused by her employment as a marketing assistant. The evidence showed that the plaintiff suffered from pressure and stress at her work, in large measure due to her verbally abusive relationship with her emotionally unstable supervisor. Id. at 204-05. The North Carolina Supreme Court concluded that the plaintiff’s depression was not an occupational disease because she was “placed in the unfortunate position of working for an abusive supervisor, which can occur with any employee in any industry or profession, or indeed, in similar abusive relationships outside the workplace.” Id. at 211 (dissent adopted by Supreme Court); see also Lewis v. Duke Univ., 594 S.E.2d 100, 106 (N.C. Ct. App. 2004) (concluding that a nurse had not demonstrated increased risk of developing depression when the contributing factors were common workplace experiences such as a demanding workload, the lack of a support system, staffing decisions the plaintiff considered unfair, her perception that she was undervalued at her work, management changes, changes in shifts contributing to insomnia, and anxiety over her job security).

Other states have likewise distinguished between cases involving ordinary workplace stress and those with stressors unique to a particular workplace. See, e.g., Department of Labor

On the other hand, some states have excluded coverage of all psychological injuries when they lack a physical cause – so called “mental-mental” injuries. See W. Va. Code § 23-4-1f (an injury or disease is not compensable if it was “solely caused by nonphysical means” and “did not result in any physical injury or disease”); Bennett v. Beiersdorf, Inc., 889 F. Supp. 46, 50 (D. Conn. 1995) (noting that Connecticut workers’ compensation law excludes from the definition of “personal injury” a mention or emotional impairment “unless such impairment arises from a physical injury or occupational disease.”).

Claims based on workplace abuse will also escape workers’ compensation preemption if they are brought as intentional torts, such as intentional infliction of emotional distress (“IIED”). See Pleasant v. Johnson, 325 S.E.2d 244, 246-47 (N.C. 1985) (holding intentional injuries are not preempted); Hogan v. Forsyth Country Club Co., 340 S.E.2d 116, 121 (N.C. Ct. App. 1986) (holding that IIED claims are not preempted because the “essence of [IIED] is non-physical; the injuries alleged by plaintiffs do not involve physical injuries resulting in disability”).

However, workplace IIED claims have not fared well in North Carolina outside of claims for sexual harassment. See, e.g., Thomas v. N. Telecom, Inc., 157 F. Supp. 2d 627, 635 (M.D.N.C. 2000) (observing that “it is extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary to support a claim” of IIED, and rejecting such a claim based on excessive workload, excessive supervision, and an unlawful termination); Hogan, 340 S.E.2d at 122-23 (finding conduct not sufficiently outrageous where supervisors screamed and shouted at a plaintiff, called her names, interfered with her supervision of others, and refused to grant a plaintiff pregnancy leave).

IV. Sexual Harassment

While federal Title VII claims for sexual or other types of harassment are plainly not preempted by workers’ compensation, the situation is more complicated for harassment-related state law claims. Again, IIED claims based on harassment are typically not preempted. Tricky questions can arise, however, with negligence claims.

For example, in Hogan v. Forsyth Country Club Co., 340 S.E.2d 116 (N.C. Ct. App. 1986), one of the plaintiffs was sexually harassed by the club’s chef. The court found sufficient harassment – “non-consensual sexual touchings, constant suggestive remarks and on-going sexual harassment” – to constitute IIED. Id. at 121. The court also found sufficient evidence to support a negligent retention claim against the employer for its retention of the chef. Id. at 124.

The court then considered whether the negligent retention claim was preempted by workers’ compensation. The court analyzed the question in terms of whether sexual harassment
arises from the employment or is independent. The court concluded that the “emotional injury allegedly suffered by [the plaintiff], resulting from the chef’s sexual harassment, is not, in our view, a ‘natural and probable consequence or incident of the employment.’” *Id.* “Sexual harassment is not a risk to which an employee is exposed because of the nature of the employment but is a risk to which the employee could be equally exposed outside the employment.” *Id.* Therefore, the court concluded that the negligent retention claim was not preempted. *Id.*

The North Carolina Court of Appeals later reached the same result in a case involving sexual harassment by a supervisor because “sexual harassment is a risk the public generally is exposed to.” *Sisk v. Tar Heel Capital Corp.*, 603 S.E.2d 564, 568 (N.C. Ct. App. 2004). The plaintiff argued for workers’ compensation coverage on the basis that the harassment included physical touching and injury, but the court rejected that argument as well. It concluded that any assault by the supervisor was not covered because the misconduct did not result “from a dispute over employment issues,” did not differ “from harassment experienced in everyday life” and the supervisor’s “motive and actions were entirely personal in nature.” *Id.*

The federal courts have extended Hogan’s analysis to other types of actionable discrimination, permitting IIED and negligent infliction of emotional distress (“NIED”) claims based on such discrimination. See *Atkins v. USF Dugan, Inc.*, 106 F.Supp.2d 799, 814 (M.D.N.C. 1999) (holding that Workers’ Compensation Act did not bar claim of NIED based on the allegation of age/disability discrimination); *Buser v. Southern Food Service, Inc.*, 73 F.Supp.2d 556, 570-71 (M.D.N.C. 1999) (holding that Act did not bar claims of IIED and NIED against the employer and the employer’s vice president based on alleged violations of the Family Medical Leave Act); *Thomas v. Northern Telecom, Inc.*, 157 F.Supp.2d 627, 636 (M.D.N.C. 2000) (holding that the Act did not bar claims of NIED against the employer based on the allegations of racial discrimination).

Most states have reached similar preemption results with sexual harassment-related claims. See, e.g., *Anderson v. Save-A-Lot, Ltd.*, 989 S.W.2d 277, 290 (Tenn. 1999) (“[S]exual harassment is completely outside the contemplation of the workers’ compensation scheme, and employers should not be allowed to use the exclusive remedy provision as a shield to avoid liability for permitting sexual harassment to occur in the workplace.”); *Estate of Underwood v. Nat’l Credit Union Admin.*, 665 A.2d 621, 634 (D.C. 1995) (“[S]exual harassment is not ‘a risk involved in or incidental to’ employment . . . because sexual harassment is altogether unrelated to any work task.”).

Some, however, apply preemption regardless of whether the offending conduct was sexual in nature. See, e.g., *Konstantopoulos v. Westvaco Corp.*, 690 A.2d 936, 939 (Del. 1996) (“Because the Act does not contain any provision excluding sexual harassment claims, an employee cannot maintain a common law action against her employer for personal injury caused by the on-job sexual harassment by co-employees.”); *Green v. Wyman-Gordon Co.*, 664 N.E.2d 808, 815 n.15 (Mass. 1996) (rejecting an exception to the exclusivity rule for “tort claims arising out of sexual harassment allegations” in part because Massachusetts does not allow any such exception when an employee intentionally injures a co-worker for personal reasons).
V. Responding to Sexual Harassment

Although the preemption standard for harassment cases had been well-established in North Carolina, a recent unusual case generated a surprising result. In Shaw v. Goodyear Tire & Rubber Co., 737 S.E.2d 168 (N.C. Ct. App. 2013), the plaintiff had a male supervisor who harassed her. The harassment consisted of rudeness and intimidation, but not physical contact or sexual harassment. Despite the plaintiff’s complaints to the appropriate personnel, her supervisor remained in his position, where he continued to harass her, and eventually, the defendant terminated the plaintiff’s employment. After some claims were dismissed on summary judgment, the case went to trial on claims of wrongful discharge and NIED. Those claims were based on the allegations that the plaintiff complained to defendant about the harassment by her supervisor; the defendant negligently handled plaintiff’s complaint; and defendant’s negligence caused plaintiff’s emotional distress and eventually led to her wrongful discharge. Id. at 171. The jury found for the plaintiff on the NIED claim, found that the negligence was “willful and wanton,” and awarded her $450,000 in compensatory damages. Id. at 172.

On appeal, the defendant argued that the NIED claim was preempted by workers’ compensation. The court first concluded that the “willful and wanton” negligence found by the jury was not sufficiently close to being intentional conduct such that the intentional-act exception to preemption applied. Id. at 176-77.

The court then considered whether the negligence at issue satisfied the general workers’ compensation standard of being an accident that arises out of and in the course of employment. The court noted that “mental” injuries are covered by workers’ compensation along with physical injuries. Id. at 177. The court focused on the fact that the plaintiff’s asserted emotional distress was caused by the defendant’s mishandling of her complaints, and not the harassment itself. Id. The court then found that the plaintiff’s “injury was caused by an accident as defendant’s mishandling of her complaint was ‘an unlooked for and untoward event which is not expected or designed by the injured employee.’” Id. The court also had no trouble finding that the injury arose out of and was in the course of the plaintiff’s employment. Id. Therefore, the NIED claim was preempted by workers’ compensation.

The court stressed that this case was “unique.” Id. “Plaintiff’s NIED claim regarding the mishandling of her harassment complaints was valid, and her injuries were very real, yet she could not obtain relief from a jury because this case came to us not as claims for an intentional tort, gender or racial discrimination or wrongful termination, but solely as a NIED claim, an obviously negligence-based claim.” Id.

This case demonstrates that the further away one gets from seeking liability for the harassment itself, the more likely that negligence-based claims against an employer will be preempted by workers’ compensation.