

FILED

**United States Court of Appeals
Tenth Circuit**

May 30, 2006

**Elisabeth A. Shumaker
Clerk of Court
PUBLISH**

**UNITED STATES COURT OF APPEALS
TENTH CIRCUIT**

LEWIS HERRERA,

Plaintiff-Appellant,

v.

No. 04-8089

LUFKIN INDUSTRIES, INC.,

Defendant-Appellee.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING
(D.C. NO. 03-CV-1012-WFD)**

Jeffrey C. Gosman, Casper, Wyoming, for Plaintiff-Appellant.

Douglas E. Hamel of Vinson & Elkins, Houston, Texas (Amy S. Ferber of Vinson & Elkins, Houston, Texas; Frank D. Neville and P. Craig Silva of Williams, Porter, Day and Neville, Casper, Wyoming, with him on the briefs) for Defendant-Appellee.

Before **TACHA**, Chief Circuit Judge, **EBEL**, Circuit Judge, and **CASELL**,
District Judge.

CASELL, District Judge.

In September 2001, Lewis Herrera Sr. resigned from Lufkin Industries, Inc. after eleven years of employment in the Wyoming oilfields. He resigned largely due to treatment he received from two Lufkin employees: Buddy Moore, his regional supervisor, and Jason Dickerson, a relatively recent hire in Lufkin's Wyoming office. He claims that these two men subjected him to a campaign of racial discrimination and harassment.

Herrera filed suit seeking damages for alleged violations of 42 U.S.C. § 1981, Title VII, breach of contract, and various state torts. The district court dismissed some of Mr. Herrera's claims on summary judgment and on a directed verdict, and a jury found for Lufkin on the remaining causes of action. Herrera now appeals the district court's summary judgment and directed verdict rulings, as well as one of its discovery rulings. We find no error in the district court's rulings and therefore **AFFIRM**.

I. Background

In 1990, Mr. Herrera began working as a service representative in Lufkin's Wyoming oilfield operations center. Herrera climbed the company ladder during the next eleven years, becoming field service operations manager and then acting service center manager. Mr. Herrera and his son, Lewis Herrera Jr., were the only two Hispanic employees in Lufkin's Wyoming operations.

In 1997, Lufkin purchased a company called Fannie Lee Mitchell, which was co-owned by Mr. Buddy Moore. After Lufkin bought this company, Mr. Moore became responsible for Lufkin's entire domestic oilfield service division, including the Wyoming center and twelve other service centers throughout the West. As a result, Moore was in Herrera's supervisory chain of command.

The record indicates that Mr. Moore and Mr. Herrera never developed a

particularly close working relationship over the approximately four years they worked together. Indeed, Mr. Herrera attributes several instances of harassment to Moore. For instance, Herrera's complaint alleges that in 1999, Moore had Mr. Herrera's immediate supervisor give him a gift of peanut brittle with a note attached that read "Mexican peanut brittle." Moore also directed Mr. Herrera to call on customers because they "liked Mexicans" or were themselves Hispanic. Mr. Moore's office was not in Wyoming, so he interacted with Herrera mostly by telephone. Beginning in 2000, Mr. Moore would refer to Herrera as "that Mexican" or "the fucking Mexican" when he called Lufkin's Wyoming center. Mr. Herrera found out about these remarks through other employees; Mr. Moore did not make them directly to Herrera. Moore also instructed other employees to tell Mr. Herrera not to "Mexicanize" his company truck and to remove a cactus figure from the truck's antenna.

In August 2000, Mr. Moore hired Jason Dickerson to work at Lufkin's Wyoming center. Mr. Herrera claims that Dickerson harassed him by auditing the service center and alleging that Herrera was incompetent and a bad manager. The audit report also allegedly accused Herrera of causing problems between the shop and the field crew and contained lies about Herrera's profitability.

According to Mr. Herrera, his working environment continued to deteriorate after the audit. Profanity-laced shouting matches occurred; tensions between Dickerson and Herrera mounted; and rules were changed that required Herrera to submit receipts in conjunction with all road-trip reimbursement requests. He was also told not to use his work truck for personal reasons.

Mr. Herrera eventually complained to Lufkin about these incidents. Unsatisfied by Lufkin's response to his complaints and wearied by his working conditions, Mr. Herrera resigned in September 2001. He filed this complaint in February 2003, raising claims of disparate treatment under 42 U.S.C. § 1981 and

Title VII; hostile work environment under those same statutes; retaliation; constructive discharge; negligent supervision and/or hiring; breach of contract; and intentional infliction of emotional distress.

The district court granted summary judgment in favor of Lufkin on Herrera's hostile work environment, constructive discharge, negligent supervision, and breach of contract claims. During a jury trial on the remaining claims, the district court granted Lufkin's motion for a judgment as a matter of law on Herrera's emotional distress claim. After hearing all the evidence, the jury found in Lufkin's favor on Herrera's disparate treatment and retaliation claims.

Herrera now appeals the district court's grant of summary judgment on his hostile environment claims and his breach of contract claim. He also appeals the directed verdict on his intentional infliction of emotional distress claim. Finally, he appeals a district court's decision that affirmed a magistrate judge's order that allowed Lufkin to obtain an independent medical examination of Herrera.

II. Discussion

A. The District Court Properly Granted Summary Judgment on Herrera's Hostile Work Environment Claims.

Mr. Herrera claims that Lufkin violated Title VII and 42 U.S.C. § 1981 by subjecting him to a race-based hostile work environment. Since these two statutes impose the same standards and burdens for proving a hostile work environment, we discuss them together. We review the district court's grant of summary judgment de novo, "drawing all reasonable inferences in favor of the nonmovant."

To survive a motion for summary judgment on a race-based hostile work environment claim, "a plaintiff must show 'that under the totality of the circumstances (1) the harassment was pervasive or severe enough to alter the terms, conditions, or privilege of employment, and (2) the harassment was racial or stemmed from racial animus.'" These two elements must be examined through the

“totality of the circumstances” lens because “the very term “environment” indicates that allegedly discriminatory incidents should not be examined in isolation.” We discuss each element separately.

1. Pervasiveness or Severity

A plaintiff may establish the first element of a hostile environment claim by proving that the unlawful conduct was either pervasive or severe; these two options “are independent and equal grounds” for establishing this element. Though Mr. Herrera did not separate his arguments into these two categories, we will analyze his claim under both standards.

To prove that discriminatory conduct was pervasive, a hostile work environment plaintiff must present evidence of more than “a few isolated incidents of racial enmity’ or ‘sporadic racial slurs.’” Instead, “there must be a steady barrage of opprobrious racial comments.”

Here, Mr. Herrera worked under Moore for approximately four years. In his deposition, he identified five specific instances of alleged harassment during those four years that unquestionably were linked to his race. Moore once sent him a package of peanut brittle; attached to it was a note that read “Mexican peanut brittle.” Herrera was twice asked to call on certain customers because they “liked Mexicans” or were themselves Hispanic. Moore, who worked out-of-state, would call the Wyoming office and ask for Herrera by calling him “that Mexican” or “that fucking Mexican.” Notably, Herrera does not allege that Moore said those things directly to him; rather, as the district court found, “his friends, knowing of these insults, largely concealed them from him.” Finally, Moore once had other employees tell Herrera not to “Mexicanize” his work truck and to remove a cactus figurine from the truck’s antenna.

These were the only specific incidents of undoubtedly race-based harassment Mr. Herrera recounted from his four years under Moore. But we must

view these acts in conjunction with other race-neutral incidents since our precedents require us to view the environment as a whole. Before describing the other instances of alleged harassment, however, we describe the general conditions of Mr. Herrera's working environment in his own words. Twice during his deposition he admitted that Lufkin was not the typical office setting. He testified, in response to a question regarding a coworker who said to him "fuck you,"

Q. [I]n the oil patch, people use that kind of [vulgar] language, right?

A. Okay. Yes.

Q. In the shop, people use that kind of language — Lufkin shop, yes?

A. Yes. I — some of them do.

He also testified:

Q. Have you ever told, quote, Mexican, end quote, jokes or anything such as that?

A. That I may have done. I told a lot of jokes, but I don't remember saying any Mexican jokes or black jokes, for that matter.

....

Q. Okay. You would not be extremely surprised that someone said, yes. I heard Lewis, Senior tell a joke with the reference to a Mexican in it, that would not be so out of the ordinary that you would be shocked?

A. I wouldn't be shocked, no. I told a lot of jokes in my day. I don't remember them.

Q. Sure. Okay. In fact, that happens in the work place, off color jokes and so forth are told?

A. Not in relation to anybody else. I don't do

that. Blacks or whites or religious, I don't do that.

Q. Okay. But there are others that do that in the work place, don't they?

A. Yeah. *The oil field is very course.*

Q. Yeah. The oil patch has people —

A. *It's own language.*

With this general atmosphere in mind, we recite the instances of alleged race-neutral harassment that Herrera invokes in support of his hostile environment claim. He alleges that Moore refused to shake his hand; that coworkers told him to “watch your ass” because Moore was a bigot; that he was treated like a kid and yelled at, as was his son, another Lufkin employee; that coworkers swore at him and Lufkin did nothing about it; that he was audited and forced to produce receipts before he could be reimbursed for road trip expenses; that he was “hindered” from doing his job and made to look incompetent; that he had to drive his boss to the airport; and that some coworkers started prying into his personal life and accused him of conducting side businesses.

Given the atmosphere that Mr. Herrera testified existed at Lufkin, these incidents cannot be viewed as indicia of pervasive racial discrimination. Vulgarity and other socially unacceptable behavior that might lead to termination in a typical office setting were commonplace in the oilfields. Since raucous race-neutral behavior permeated Herrera's working environment, the conduct he describes above — even when viewed in light of the five unquestionably race-based incidents — is not evidence that Herrera's work environment was permeated with *discriminatory* ridicule.

This result comports with our previous cases. For instance, in *Bolden v. PRC Inc.*, we affirmed a district court's grant of summary judgment where the plaintiff cited two incidents of overtly racial discrimination and twenty instances of

race-neutral conduct during the last eighteen months of his employment. And in *Hicks v. Gates Rubber Co.*, we found that a district court's bench trial ruling of no hostile environment was not clearly erroneous despite evidence of approximately nine incidents of harassment over a period of eight months.

These cases, as well as *Herrera's*, reveal the continuing import of our prior holding that "Title VII is not a code of workplace conduct, or was it 'designed to bring about a magical transformation in the social mores of American workers.'" As we noted in *Gross v. Burggraf Construction Co.*, "[s]peech that might be offensive or unacceptable in a prep school faculty meeting, or on the floor of Congress, is tolerated in other work environments. . . . 'Title VII was not meant to — or can — change this.'" We therefore reiterate that in working environments where, as here, the tenor of workplace conduct is frequently boorish and the worker's social mores are fraught with incivility, such facts should be considered as part of the "totality of the circumstances" for Title VII purposes.

Even though *Herrera* fails to establish pervasiveness, he could still prevail if the harassment was severe. The severity inquiry includes both an objective and subjective analysis. *Herrera* no doubt found his environment subjectively offensive; the question here is whether an objectively reasonable person would have found it severely hostile or abusive. The Supreme Court has held that "whether an environment is 'hostile' or 'abusive' can be determined only looking at all the circumstances," including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Courts also must "consider the nature and context of the incidents, keeping in mind that the mere utterance of a statement which engenders offensive feelings in an employee would not affect the conditions of employment to a sufficiently significant degree to violate Title VII."

Under these precedents, Mr. Herrera fails to establish that the harassment was objectively severe for largely the same reasons that he fails to establish it was pervasive. The alleged harassment occurred in an oilfield setting and was no more severe than conduct Herrera and his coworkers frequently experienced. It was not “physically threatening or humiliating” and, based on Mr. Herrera’s evaluations — which consistently rated his performance as “commendable” — the incidents did not “unreasonably interfere[] with [his] work performance.” We do not doubt that the conduct complained of engendered offensive feelings in Mr. Herrera and was churlish and ill-mannered. Yet even with those qualities, the conduct was not so severe as to amount to a hostile work environment for Title VII or § 1981 purposes.

Since Mr. Herrera failed to show that the alleged harassment was severe or pervasive enough to alter the terms or conditions of his employment, we need not address whether he can prove that the harassment was based on or motivated by racial enmity. We therefore affirm the district court’s ruling on this issue.

B. The District Court Properly Granted Summary Judgment on Herrera’s Breach of Contract Claim.

1. We Have Jurisdiction over This Claim.

Before reaching the merits of Mr. Herrera’s breach of contract claim, we first address Lufkin’s argument that we lack jurisdiction over this claim because Mr. Herrera did not list his constructive discharge claim in his notice of appeal. We find no merit to Lufkin’s argument.

The Federal Rules of Appellate Procedure require that a notice of appeal list the “judgment, order, or part thereof being appealed,” and a proper notice of appeal is a jurisdictional prerequisite to proceedings in this court. Interpreting this requirement, we have previously held that “[w]hen a notice of appeal fails to designate the order from which the appeal is taken, our jurisdiction will not be defeated if other papers filed within the time period for filing the notice of appeal

provide the ‘functional equivalent’ of what Rule 3 requires.”

This court’s previous holding in *Denver & Rio Grande Western Railroad Co. v. Union Pacific Railroad Co.* is instructive because it presents facts nearly identical to those here. In that case, Union Pacific argued that we lacked jurisdiction because Denver & Rio Grande Western failed “to designate the orders from which it appeals in its notice of appeal.” We rejected that argument because Denver & Rio Grande Western had timely filed a proper docketing statement that “clearly set[] forth its intention to appeal from the undesignated orders, and Union Pacific had adequate notice of the issue being appealed and [would] not be prejudiced.”

Denver & Rio Grande Western prevents us from accepting Lufkin’s argument here. Lufkin correctly states that Herrera’s notice of appeal raises his constructive discharge claim relative to his Title VII and § 1981 claims, but not relative to his breach of contract claim. As in *Denver & Rio Grande Western*, however, Mr. Herrera’s timely and properly filed docketing statement lists under the heading “Issues Raised on Appeal” this point: “Did the District Court Err in Disallowing Plaintiff’s Claim of Constructive Discharge where it was an element of the Following Claims: . . . Breach of Contract?” Therefore, Lufkin’s jurisdictional argument fails.

Finally, it is worth noting that Lufkin apparently had some notice of this issue — it devoted nearly ten percent of its brief to arguing that Herrera was not constructively discharged. Based on this briefing, no prejudice will accrue to Lufkin if we hear this claim.

2. *Herrera Was Not Constructively Discharged.*

Mr. Herrera argues that Lufkin breached his employment contract, which allegedly guaranteed him employment “as long as [he] did [his] job,” by subjecting him to working conditions so

intolerable that he was forced to resign. The district court granted Lufkin summary judgment on this claim. To determine whether this ruling was proper, we must address (1) whether Herrera had a contract of guaranteed employment, and if so, (2) whether he was constructively discharged.

In Wyoming, “all employment occurs by either express contract or by some type of implied contract of employment.” It is undisputed that there was no express contract between Herrera and Lufkin. Rather, Herrera’s contract with Lufkin was an “implied in fact contract” because it was “found from employee handbooks or policies.”

Implied employment contracts for infinite duration are presumed to be at-will, which means they are terminable by either party “for any reason or for no reason at all.” This presumption “may be rebutted by a showing that the parties entered into an express or implied agreement which prohibited the employer from discharging the employee without just cause.” When determining whether the parties have entered into such an agreement, their subjective intent is irrelevant — the “test is whether there has been an objective manifestation of assent” from both the employer and the employee “to an employment contract containing a job security provision.”

Here, Mr. Herrera argues that he has rebutted the at-will presumption and could be fired only for cause because a provision in Lufkin’s employee handbook, coupled with an alleged oral

promise from his supervisor, gave him the impression that he “had a job there [at Lufkin] as long as I did my job.” Mr. Herrera’s position is strikingly similar to the plaintiff’s in the Wyoming Supreme Court’s case of *Wilder v. Cody Country Chamber of Commerce*, who claimed that his employer had promised to employ him “as long as I did the work that was required.” The *Wilder* court held that an employee’s claim that an employer offered “permanent” employment did not by itself “alter the at will presumption.” Instead, an employee must show “additional consideration supplied by the employee or explicit language in the contract of employment stating that termination may only be for cause.”

Mr. Herrera does not point to any additional consideration he supplied that would have changed his employment status from at-will to permanent. Therefore, to prove he had job security, he must point to “explicit language in the contract of employment stating that” he may be terminated only for cause.

In the district court, he claimed that a provision in Lufkin’s handbook was the “explicit language” that made him a permanent

employee. This provision reads:

Job Security: LUFKIN makes every effort to provide continuous employment. The ability to do so depends largely upon general business conditions, but continuous employment also depends to a great extent upon every LUFKIN employee. The Company can remain competitive only by producing more and better products and by providing faster service at the

lowest possible cost. When the price is right for quality products like ours we get more orders, which means more jobs and greater security for everyone. An individual employee can increase his job security by increasing his knowledge and skills. The more knowledge and skills you acquire, the more productive you are likely to be, and naturally the more productive, the better your chance for stable employment.

The district court, in granting summary judgment, said that “[t]here’s nothing in that language, not a thing, that would indicate an intent to create terms of [an] employment contract; and, therefore, no legally binding contract can be presumed from such language.” We agree with the district court’s assessment of this handbook language; it appears to be a recitation of business truisms and not an enforceable promise of permanent employment.

But besides this handbook provision, Mr. Herrera claims that when he was hired, his supervisor, Mr. Bruce Cunningham, orally promised him that Lufkin would employ him as long as he did his job. He was also promised that if layoffs occurred, hourly employees would be let go before salaried employees such as himself. If Cunningham made these promises to Herrera when he was hired, they may be enforceable as terms of Herrera’s implied contract. Such questions — whether an oral contract exists, what are its terms, and what was the parties’ intent — “are generally questions of fact” that preclude summary judgment. Therefore, it is arguable the district court erred by granting summary judgment.

Even assuming, however, that a triable issue of fact existed about whether Cunningham made these promises to Mr. Herrera and whether Herrera could thus be fired only for cause, summary judgment is still appropriate. Lufkin did not fire Mr. Herrera; he resigned. His breach of employment contract therefore turns on whether he was constructively discharged. Wyoming’s constructive discharge law,

which applies here to Mr. Herrera's state law breach of contract claim, imposes an imminence standard to prove constructive discharge: "Where an employee resigns due to the reasonable belief that his discharge is *imminent*, his resignation cannot properly be termed 'voluntary.'"

The record before us reveals that Mr. Herrera cannot prove he was constructively discharged under this standard. Even construing the facts in the light most favorable to Mr. Herrera, the strongest evidence that indicates Herrera's imminent termination was an argument he had with Jason Dickerson, another Lufkin employee, on August 17, 2001. In his deposition, Mr. Dickerson admitted that during this argument, he said to Mr. Herrera, "Your days are probably numbered if you continue this attitude." Mr. Dickerson, however, had no authority to terminate Herrera. And Mr. Herrera waited approximately two months after this argument to resign. His own actions therefore demonstrate he did not have a reasonable belief of *imminent* termination as a result of his argument with Dickerson. Summary judgment on Mr. Herrera's breach of employment contract claim was therefore proper.

C. The District Court Properly Granted Judgment as a Matter of Law on Herrera's Emotional Distress Claim.

Mr. Herrera next argues that the district court erred when it entered judgment as a matter of law for Lufkin on Herrera's intentional infliction of emotional distress claim. We see no reason to disturb this ruling.

A district court should grant a motion for judgment as a matter of law "only if the evidence points but one way and is susceptible to no reasonable inferences which may support the opposing party's position." "We review the grant of a motion for judgment as a matter of law *de novo*, reviewing all of the evidence in the record." We draw all reasonable inferences from the evidence in favor of the nonmoving party without making credibility determinations or

weighing the evidence. If the record evidence viewed in the light most favorable to the nonmovant could have permitted a jury to return a verdict in the nonmovant's favor, we must reverse the district court's grant of judgment as a matter of law. And where, as here, district courts sit in diversity, "the substantive law of the forum state governs the analysis of the underlying claims, including specification of the applicable standards of proof."

Wyoming courts recognize the tort of intentional infliction of emotional distress. A plaintiff alleging this cause of action "must prove that the defendant acted in an extreme and outrageous manner and that the defendant intentionally or recklessly caused the plaintiff severe emotional harm." While the nature of outrageous conduct sufficient to sustain liability often escapes precise definition, Wyoming courts have looked to Comment d of Section 46 in the *Restatement (Second) of Torts* for guidance. Under that comment, "liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." Indeed, conduct committed with tortious, criminal, or malicious intent — even though it may support punitive damages liability in other tort contexts — is insufficient to create liability for intentional infliction of emotional distress. Instead, "[l]iability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."

Besides these general rules, which apply to all intentional infliction of emotional distress cases, additional rules apply when the alleged tort occurred in an employment setting. The Wyoming Supreme Court recently adopted the Maryland Court of Appeals' holding "that the employment relationship is a factor to be considered when analyzing whether an employer's behavior was so outrageous that he or she has committed the tort of intentional infliction of

emotional distress.”” But the court was quick to note that this factor does not “lower the threshold for determining liability whenever the parties are employer and employee.”” Thus, even in the employment context, “[t]he conduct must still reach the same degree of outrageousness if an employee is to prove that his or her employer has committed this tort; the employment relationship is merely one factor among many to use in analyzing individual cases.””

A number of Wyoming cases discuss what type of conduct creates liability for intentional infliction of emotional distress. In *Worley v. Wyoming Bottling Co.*, the Wyoming Supreme Court reversed a grant of summary judgment in favor of an employer on an employee’s emotional distress claim. Despite the employee’s “stellar work record,” the employer repeatedly threatened to terminate his employment. The employer also demanded impossibly large sales increases and withheld a periodic pay raise. After the employee received a letter stating that he would be demoted, have his salary cut by \$11,000, and lose his company car and other perquisites, he asked his supervisor about the letter. He was told “he should just go ahead and quit because he would probably be fired in two or three weeks anyway.” The employee then called the company president and asked about the letter; the president allegedly said, “You either accept it [the demotion] or you’re fired. And [the company president] said it again, You’re fired. You’re just fired. I’m tired of your goddamn shit anyway, stupid silly ass shit. You’re fired.”

These facts, standing alone, were not outrageous enough to impose emotional distress liability. But the court also cited evidence that, mere months before he received the demotion letter, the employee had checked with his superiors about job stability because he planned to make significant financial commitments. His supervisors ensured him that his “job would remain available to [him] as long as he wanted it.” The court said that the employer’s “position of power over” the employee, particularly the supervisors’ “assurances of job

security, could be viewed as an important factor. Likewise, the fact that [the employer] knew [the employee] was relying on these assurances in making financial commitments furnishes added impetus for [the employee's] claim." The court said that this was "a close case" but held that all these facts may have led reasonable minds to "differ as to whether the conduct is outrageous."

In *Hatch v. State Farm Fire & Casualty Co.*, the Wyoming Supreme Court held that "evidence of crying, being upset and uncomfortable is insufficient to demonstrate severe emotional distress that attains a level no reasonable person could be expected to endure." The plaintiffs sued their insurance company after their house burned down. The family complained of mistreatment during the claim process, especially by the company's attorney and another of the company's claim representatives, who allegedly "stared up and down [the daughter's] body" after he went through the daughter's underwear cabinet. The house fire, followed by the alleged mistreatment, caused familial stress and led the mother to cry frequently. The Wyoming court found that while "State Farm's conduct may be characterized as insensitive or inappropriate at times, . . . the district court could reasonably find that conduct was not so outrageous in character or extreme in degree to reach the level of being beyond all possible bounds of decency." The family's claim failed because the stress they faced was "typical of the stress all people are expected to endure under the circumstances."

And in *Garcia v. Lawson*, the Wyoming Supreme Court affirmed summary judgment in favor of the defendant on a plaintiff's intentional infliction of emotional distress claim. The plaintiff — a woman who claimed her boyfriend broke into a house at which she was staying, held her hostage for three days, and raped her — sued the police officer who investigated her rape claim. The officer found physical evidence that corroborated her story but refused to have a rape kit performed since "it was a boyfriend/girlfriend situation and it would be her word

against his.” Though the officer refused to take a rape kit, he “did take the opportunity to discuss the size of a mutual acquaintance’s breasts and to invite [the plaintiff] to go out for a beer with him.”

The court said the officer “failed to complete a quality investigation and that he made two offensive remarks.” This, however, was insufficient for intentional infliction of emotional distress liability. The court reasoned: Although [the officer] could certainly have been more considerate in his dealings with [the victim], his conduct was at most annoying, insulting, and insensitive. His conduct was not, however, what we would characterize as being beyond all possible bounds of decency, atrocious, or utterly intolerable in a civilized world. “The law does not afford a cause of action for bad taste, boorishness, condescension, obnoxiousness, or social ineptitude.”

Based on these cases, we find that the district court properly granted Lufkin’s motion for judgment as a matter of law on Mr. Herrera’s intentional infliction claim. Mr. Herrera claims that the jury could have found in his favor because he was harassed until he cried in his doctor’s office. He cites alleged instances of racism, including being called a “fucking Mexican” behind his back and being told not to “Mexicanize” his company truck. He was passed over for a promotion and saw company rules change that eliminated his ability to get reimbursed for meals while out of town on company business and to let his son use his company truck on weekends. He cites increased friction between himself and new employees that led to decreased productivity and poor performance reviews. He also claims that vital equipment was unlawfully removed from his job site the night before he needed it without any explanation.

Viewing these allegations in Mr. Herrera’s favor, the conduct of his coworkers and superiors was undoubtedly “annoying, insulting, and insensitive”

and characterized by “bad taste, boorishness, condescension, obnoxiousness, [and] social ineptitude.” They levied “insults, indignities, [and] threats,” likely with tortious or malicious intent. Yet this is simply insufficient to establish intentional infliction of emotional distress. Under Wyoming law, liability for this tort attaches only for conduct that is “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” The conduct Mr. Herrera cites simply are not atrocities of this magnitude.

Worley does not change our result. *Worley* was a “close case” only because the employer knew that the employee made serious financial commitments based on the employer’s promise that the employee’s “job would remain available to [him] as long as he wanted it.” A few months after making this promise, the employer sent a letter threatening demotion and then fired the employee. Mr. Herrera does not cite anything in the record to show he sought assurances of continued employment during the months before he resigned or entered any long-term financial contracts based on such promises. We therefore affirm the district court’s ruling on this issue.

D. The Rule 35 Order Was Not an Abuse of Discretion.

Finally, Mr. Herrera argues that the district court erred when it affirmed the magistrate judge’s order requiring Mr. Herrera to submit to a medical examination under Rule 35. We review a district court’s discovery orders for abuse of discretion and find no such abuse here.

As discussed above, one of Mr. Herrera’s causes of action was intentional infliction of emotional distress. He conceded that this cause of action put his mental state at issue. On that basis, Lufkin invoked a provision of the parties’ stipulated pretrial order — which the court later adopted — that required Mr. Herrera to submit to a Rule 35 examination upon Lufkin’s request. Despite that

order, Mr. Herrera refused to coordinate with Lufkin and schedule an examination. He objected because Lufkin moved under Rule 37 to compel him to comply with the order instead of moving under Rule 35 for an order of examination.

Mr. Herrera's objections in the district court, and his argument in this court, center largely on the Supreme Court's decision in *Schlagenhauf v. Holder* interpreting Rule 35. There, the Court said that Rule 35 "requires discriminating application by the trial judge, who must decide, as an initial matter in every case, whether the party requesting a mental or physical examination or examinations has adequately demonstrated the existence of the Rule's requirements of 'in controversy' and 'good cause.'" The Court also said that there are situations where the pleadings alone are sufficient to meet these requirements. A plaintiff in a negligence action who asserts mental or physical injury places that mental or physical injury clearly in controversy and provides the defendant with good cause for an examination to determine the existence and extent of such asserted injury.

Mr. Herrera's claim for intentional infliction of emotional distress places him in the same category as the Supreme Court's hypothetical negligence plaintiff. His mental state, as he conceded, was "clearly in controversy" and provided Lufkin "with good cause for an examination to determine the existence and extent of such asserted injury." And even though Lufkin moved to compel under Rule 37 rather than Rule 35, the district court still addressed Rule 35's two requirements — "in controversy" and "good cause" — when it resolved Herrera's objection to the magistrate judge's report. The district court's inquiry also led to explicit limits on the exam. The court specifically said that the examination "should not be some fishing expedition into the dark recesses of the plaintiff's mind on every issue if they're unrelated to the issues we're addressing here, but a reasonably discrete and

prudent assessment — medical assessment is appropriate.”

We see no abuse of discretion in the judge’s order that allowed Lufkin to obtain a medical examination of Herrera so that its expert could rebut plaintiff’s expert. Though the issue came before the district judge by way of a Rule 37 motion to compel compliance with a discovery order instead of a Rule 35 motion, the district court made the same required findings. We therefore affirm the district court’s order.

III. Conclusion

For the foregoing reasons, we **AFFIRM** the district court’s grant of summary judgment on Mr. Herrera’s hostile work environment and breach of contract claims; its grant of judgment as a matter of law on his intentional infliction of emotional distress claim; and its discovery ruling.