ATTORNEYS FOR APPELLANTS:

ELLEN E. BOSHKOFF
CRAIG M. BOROWSKI
Baker & Daniels, LLP
Indianapolis, Indiana

ATTORNEY FOR APPELLEE:

NATHAN D. FOUSHEE
Morse Foushee, P.C.
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

ELI LILLY and COMPANY and MARK HUGHES,	)	
Appellants-Defendants,	)	
vs.	)	No. 49A02-0708-CV-710
CHARLES GREEN,	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Cale Bradford, Judge
Cause No. 49D01-0602-PL-7433

April 1, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Eli Lilly and Company and Mark Hughes (collectively Appellants) appeal the trial court's denial of their motion for summary judgment on Charles Green's intentional infliction of emotional distress claim. Appellants raise the following restated issue: Did the trial court properly deny Appellants' motion for summary judgment on Green's intentional infliction of emotional distress claim?

We reverse.

Green began working for Eli Lilly in 2000. In 2002, he took a position in Eli Lilly's global process automation division where he was supervised by Hughes. Green and Hughes did not have a good working relationship. Hughes repeatedly threatened to fire Green and sent him numerous condescending emails. When Green would make suggestions to Hughes, he would often respond tersely by email simply stating "No way," or "Not going to happen". *Appellant's Appendix* at 83. Hughes would often give Green assignments that required him to formulate a plan of action. When Hughes and Green would discuss Green's proposed plan of action in a private meeting, Hughes would agree with Green's plan. But, when Green would present his plan at company meetings, Hughes would make the plan sound "insignificant or stupid." *Id.* at 84.

In 2002, Green asked Hughes to represent him before Eli Lilly's promotion board, but Hughes failed to show up. The next year, Hughes did represent Green before the promotion board. After the promotion interview, Green heard Hughes tell another employee that he had told the promotion board that Green was sometimes hard to manage. Based on this comment, Green concluded that Hughes had sabotaged his chances for promotion. In 2004, when Green again asked Hughes to attend the

promotion board meeting, Hughes told him, "Don't even think about it. It is not going to happen." *Id.* at 84.

Green's relationship with Hughes took a turn for the worse in mid-2004 when Green was assigned to perform an audit of Eli Lilly's Exenatide Pen project. Green's report on the project noted several areas of concern. Hughes was not pleased with Green's report and told him that he was being removed from the audit. When Green attempted to follow-up on his concerns with the Exenatide Pen project, he sent Hughes a copy of his email. Hughes first responded to this email by stating, "So which piece of bull in the friggin [sic] china shoppe [sic] did you not think this was." *Id.* at 127. In his next email to Green, Hughes responded:

> Consider the following for your next introduction. "Hi babe, I checked it out with your dad and he says you and me a [sic] gonna happen".
>
> My head is in my hands, it is rocking back and forth and I am snorting through my nostrils. I even think the [sic] might be flaring at this point.
>
> Man . . . . man . . . . man . . .

Id. at 128.

In the fall of 2004, Hughes told Green and other employees that if they could not perform a task the way he wanted it done, he would fire them and find replacements. Shortly thereafter, Hughes gave Green his annual performance evaluation. Hughes rated Green's performance as satisfactory in six of the seven performance behaviors evaluated, but found that he was in need of development in the category of "Achieve Results with People". *Id.* at 118. He noted in the evaluation that Green was eligible to be considered for a merit increase. Hughes later authorized a one percent raise for Green, but as Green

points out, the inflation rate for that year was two and a half percent. Hughes also sent Green an email that provided him with additional feedback on his performance evaluation. In the email, Hughes stated:

> I appreciated your willingness to listen to my feedback and coaching this past year and in particular the conversation we had this past week around your final pm review discussion for 2004. While it was a very emotional and tense conversation at times, I felt we walked away with some expectations and common understandings.

Id. at 125. The remainder of the email discussed two areas Hughes felt Green needed to work on, "Respect for others/Effective communication" and "Demonstration of agility". *Id.* Green felt that Hughes' email was telling him that he better do exactly what Hughes told him to do or he would be fired.

In December 2004, Green suffered emotional problems including depression, anxiety, and loss of appetite allegedly because of his relationship with Hughes. Because of this, Green contacted Eli Lilly's Employee Assistance Program who referred him to Meridian Health Group where Green met with a psychologist. In early 2005, Green filed a complaint with Eli Lilly's Human Resources department about Hughes alleging that he had created a hostile work environment. Human Resources conducted an investigation but concluded that the facts discovered did not substantiate Green's allegations about Hughes. Human Resources offered Green the opportunity to move to a new position at Eli Lilly where he would not have to report to Hughes. Green turned down this offer and resigned his employment on April 1, 2005.

On February 22, 2006, Green filed a complaint against Appellants alleging claims for workplace harassment, constructive and retaliatory discharge, and intentional

infliction of emotional distress. Appellants filed a motion for summary judgment on all of Green's claims. In his response to Appellants' motion for summary judgment, Green abandoned all but his intentional infliction of emotional distress claim. On June 20, 2007, the trial court, without entering findings of fact or conclusions of law, issued an order granting Appellants' motion for summary judgment on Green's workplace harassment and constructive/retaliatory discharge claims, but denying the motion as to Green's intentional infliction of emotional distress claim. The trial court certified this case for interlocutory appeal, and shortly thereafter, we accepted jurisdiction.

Our standard of review for a summary judgment order is well settled. Summary judgment is appropriate if the "designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Ind. Trial Rule 56(C). The moving party bears the burden of making a prima facie showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Huntington v. Riggs*, 862 N.E.2d 1263 (Ind. Ct. App. 2007), *trans. denied*. If the moving party meets these two requirements, the burden shifts to the nonmovant to set forth specifically designated facts showing that there is a genuine issue of material fact for trial. *Id.* "A genuine issue of material fact exists where facts concerning an issue which would dispose of the litigation are in dispute or where the undisputed material facts are capable of supporting conflicting inferences on such an issue." *Huntington v. Riggs*, 862 N.E.2d at 1266.

"On appeal, we are bound by the same standard as the trial court, and we consider only those matters which were designated at the summary judgment stage." *Id.* We do

not reweigh the evidence, and we will liberally construe all designated evidentiary material in the light most favorable to the nonmoving party to determine whether there is a genuine issue of material fact for trial. *Huntington v. Riggs*, 862 N.E.2d 1263.

Appellants argue that the trial court erred in denying their motion for summary judgment on Green's intentional infliction of emotional distress claim. A person commits intentional infliction of emotional distress when he or she (1) engages in extreme or outrageous conduct that (2) intentionally or recklessly (3) causes (4) severe emotional distress to another. *Creel v. I.C.E. & Assocs., Inc.*, 771 N.E.2d 1276 (Ind. Ct. App. 2002). "The intent to harm emotionally constitutes the basis of this tort." *Id.* at 1282. The requirements to prove intentional infliction of emotional distress are rigorous. *Lachenman v. Stice*, 838 N.E.2d 451 (Ind. Ct. App. 2005), *trans. denied*.

Appellants contend that they are entitled to summary judgment on Green's intentional infliction of emotional distress claim because no genuine issues of material fact exist about whether Hughes' conduct was extreme or outrageous. "Liability for intentional infliction of emotional distress is found only if there is extreme and outrageous conduct." *Bradley v. Hall*, 720 N.E.2d 747, 752 (Ind. Ct. App. 1999). In describing the extreme and outrageous conduct required to sustain a claim of intentional infliction of emotional distress, we have quoted with approval the following comment to Section 46 of the Restatement (Second) of Torts:

> d. *Extreme and outrageous conduct.* The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by

> "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability 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. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

We have previously stated that "[i]ntentional infliction of emotional distress is found where conduct exceeds all bounds usually tolerated by a decent society and causes mental distress of a very serious kind." *Lachenman v. Stice*, 838 N.E.2d at 457. What constitutes extreme and outrageous conduct will depend upon prevailing cultural norms and values. *Bradley v. Hall*, 720 N.E.2d 747. In the appropriate case, this question can be decided as a matter of law. *Id.*

Green argues that genuine issues of material fact exist regarding whether Hughes's conduct was extreme or outrageous, and as such, the trial court properly denied Appellants' motion for summary judgment. He contends that this case is analogous to *Bradley*. In that case, Bradley worked for Farm Bureau and her immediate supervisor was Carmen Hall. Bradley alleged that Hall harassed her, shouted at her and criticized her in front of other employees, and unnecessarily reprimanded her about her work. Bradley's relationship with Hall deteriorated after Bradley complained to a Farm Bureau vice-president about Hall. Thereafter, Hall asked Bradley on several occasions about her menopause and once asked if Bradley's husband was sexually impotent due to his diabetes. Hall also told Bradley that her position might be eliminated. In July 1995, Bradley went on medical leave. Several months later, she informed Farm Bureau that she

was ready to return to work, but Farm Bureau would not allow her to do so and terminated her employment in July of 1996. Bradley filed a complaint against Hall alleging intentional infliction of emotional distress. Hall filed a motion for summary judgment on this claim, which the trial court granted.

On appeal, we reversed the trial court's grant of summary judgment in favor of Hall. *Id.* We concluded as follows:

> Today the print and electronic media openly discuss bodily functions and dysfunctions as a matter of course, but these can be personal and private topics when they concern the health or physical condition of a particular individual. Hall's conduct may have been condescending, intrusive and offensive. Further, Hall may have misled Bradley about her job security. Reasonable persons may differ on the questions of whether Hall's conduct was extreme and outrageous and, if so, whether that conduct caused Bradley to suffer severe emotional distress. Accordingly, Hall was not entitled to summary judgment on Bradley's claim for the intentional infliction of emotional distress.

Id. at 753.

Hughes's conduct is not of the same nature as that seen in *Bradley*. Hughes's comments did not concern personal aspects of Green's life, his relatives, or his physical attributes. Instead, they centered on work-related matters. Additionally, Hughes's comments were not sexually explicit and did not use profane language. Therefore, *Bradley* is distinguishable.

Here, we have no doubt that Green felt that Hughes's comments were offensive. And, one can question the efficacy of threats to fire as a means of inspiring an employee to do his or her finest work. Nevertheless, this does not necessarily mean that Hughes's conduct falls within the narrow definition of what constitutes extreme or outrageous

conduct. As we have previously noted, '"The law does not provide a remedy for every annoyance that occurs in everyday life. Many things which are distressing or may be lacking in propriety or good taste are not actionable."' *Branham v. Celadon Trucking Servs., Inc.*, 744 N.E.2d 514, 518 (Ind. Ct. App. 2001)(quoting *Kelly v. Post Publ'g Co.*, 327 Mass. 275, 98 N.E.2d 286, 287 (1951)), *trans. denied*. In this instance, we cannot say that Hughes's conduct goes beyond all possible bounds of decency and would be regarded as atrocious and utterly intolerable in a civilized community. We conclude as a matter of law that Hughes's conduct does not constitute extreme or outrageous behavior sufficient to support a claim for intentional infliction of emotional distress.[1] Therefore, the trial court erred in denying Appellants' motion for summary judgment on Green's intentional infliction of emotional distress claim.

Judgment reversed.

MATHIAS, J., concurs.

ROBB, J., dissents with separate opinion.

[1] Because Appellants have negated the extreme and outrageous conduct element of Green's intentional infliction of emotional distress claim, we need not reach the issue of whether Appellants intended to cause harm to Green or whether Green suffered severe emotional distress. *See Creel v. I.C.E. & Assocs., Inc.*, 771 N.E.2d 1276.

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ROBB, Judge, dissenting

I respectfully dissent. I acknowledge that the conduct in this case is not of the same nature as that in Bradley. However, I believe at least as important as the nature of the conduct is the range and frequency of the conduct. As noted in the Restatement (Second) of Torts regarding intentional infliction of emotional distress claims:

> The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam.

Restatement (Second) of Torts § 46 at 72-73.

Green's allegations go beyond mere "occasional acts" and "unflattering opinions." This was not an isolated incident. See Branham v. Celadon Trucking Servs., Inc., 744 N.E.2d 514, 523-24 (Ind. Ct. App. 2001) (holding as a matter of law there was no outrageous conduct where supervisor and co-employee took and circulated a picture showing co-employee in underwear with his hand over his genitals standing next to sleeping employee), trans. denied; Gable v. Curtis, 673 N.E.2d 805, 809-11 (Ind. Ct. App. 1996) (no outrageous conduct where contractor's wife phoned purchaser seven times in one hour, screaming, threatening to repossess home and to come over, and stating repeatedly that the purchasers "would pay"). Rather, akin to Bradley, in which the multitude of conduct complained of occurred over a period of at least three years, Hughes's conduct toward Green took various forms and occurred on what appears to be a regular basis for over two years. Hughes repeatedly threatened to fire Green, sent Green numerous condescending emails, undermined Green as he attempted to fulfill his job assignments, subverted Green's attempts to obtain a promotion, and impacted Green's salary increases.

Considering the variety of conduct Green alleges Hughes engaged in, coupled with the frequency with which he is alleged to have engaged in it, I would hold there is at least an issue of fact as to whether Hughes's conduct was "extreme and outrageous." Accordingly, I would affirm the trial court's denial of the Appellants' motion for summary judgment and remand for further proceedings.