08-2551-cv

To Be Argued By:
LAUREN M. NASH

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-2551-cv

JEFFREY JORDAN,
Plaintiff-Appellant,

-vs-

UNITED STATES OF AMERICA,
DEPARTMENT OF THE TREASURY,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The district court (Alfred V. Covello, J.) had subject matter jurisdiction under 28 U.S.C. § 1331, because this action arose under federal law – namely, the Federal Tort Claims Act, 28 U.S.C. § 2679. The district court denied Jordan's motion for reconsideration on March 24, 2008. *See* Plaintiff's Appendix ("PA") at A73. On May 20, 2008, Jordan filed a timely notice of appeal pursuant to Fed. R. App. P. 4(a)(1)(B). *See* Government's Appendix ("GA") at 237. This Court has appellate jurisdiction over the district court's final judgment pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Jordan quit his job as an IRS Revenue Officer after receiving negative evaluations from his supervisor, and thereafter became an enrolled agent over his supervisors' objections. Did the district court err in granting summary judgment for the IRS based on its conclusion that Jordan failed to establish a genuine issue of fact showing that he suffered severe emotional distress during and after his IRS employment?

II. Was summary judgment appropriate on the alternate grounds raised below that Jordan failed to establish a prima facie case of infliction of emotional distress?

III. Was summary judgment also proper on the alternate grounds raised below that the district court lacked subject matter jurisdiction over the claims in *Jordan II* on the basis of the discretionary function exception to the Federal Tort Claims Act?

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Preliminary Statement

The plaintiff-appellant, Jeffrey Jordan, was a Revenue Officer for the Internal Revenue Service in Norwalk, Connecticut, who resigned his position after receiving notice of unsatisfactory work performance. Jordan appeals from a grant of summary judgment against him with respect to his claims of infliction of emotional distress by his former supervisors at the IRS. After review of a detailed evidentiary record, the district court concluded

that Jordan failed to establish the existence of a genuine issue of fact necessary to show that he had suffered severe emotional distress. Because the undisputed evidence defeated all of Jordan's claims, this Court should affirm the grant of summary judgment.

Statement of the Case

This is a civil appeal from a final judgment granting summary judgment by the United States District Court for the District of Connecticut (Alfred V. Covello, J.). The district court dismissed claims of emotional distress against the defendant-appellee United States of America, Department of the Treasury (hereinafter, the "government" or the "IRS"). PA at A57-72.

Jordan brought these actions under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq., against the United States of America. These actions arise from incidents alleged to have occurred during his employment with the IRS in Norwalk, Connecticut, and also following his resignation from the IRS. In both actions, Jordan alleges that he suffered emotional distress at the hands of the federal government.

In the first action (No. 3:05CV865) (AVC) ("*Jordan I*"), Jordan alleged that he suffered emotional distress in connection with certain incidents that occurred while he was a Revenue Officer. In this case, there were three claims before the district court: intentional infliction of emotional distress (Count I); negligent infliction of emotional distress (Count II); and reckless infliction of

emotional distress (Count III). Jordan sought $1 million in damages in this first action.

In the second action (3:04CV2079)(AVC) ("*Jordan II*"), Jordan sought damages for emotional distress which he claims to have sustained as a result of letters sent by the Director of Practice[1] at the IRS to several accountants concerning Jordan's ineligibility to practice before the IRS as an enrolled agent. After the district court's ruling on the government's motion to dismiss, the only remaining claims in *Jordan II* were negligent infliction of emotional distress (Count II) and reckless infliction of emotional distress (Count III). Jordan sought $2 million in damages in this second action.

By order dated November 8, 2006, the district court granted the parties' motion to consolidate the two actions. The court granted summary judgment for the government

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[1] In 2007, the regulations governing practice before the IRS, known as "Circular 230" (31 C.F.R. Part 10), were amended, and changed the name of the Director of Practice to the Director of the Office of Professional Responsibility. *See* 72 Fed. Reg. 54540-01, at *54544 (2007); *see also Daniels v. United States,* No. 1:05-CV-0925-BBM, 2006 WL 1564260, at *1 (N.D. Ga. Apr. 11, 2006).

on August 8, 2007, and entered judgment the following day. Jordan filed a motion for reconsideration on August 23, 2007, which the government opposed. On March 24, 2008, the court granted the motion , but on reconsideration adhered to its earlier decision. Jordan filed a notice of appeal on May 20, 2008.

Statement of Facts and Proceedings Relevant to This Appeal

A. General background

In January 1991, Jordan began his employment with the Internal Revenue Service (IRS) in Norwalk, Connecticut. He was hired to be a Revenue Officer, GS-5 (Defendant's Fact # 1). As a Revenue Officer, Jordan worked under the supervision of IRS managers Sam DiGiovanni, Rick Stoller and Christopher Quill. From approximately 1991 to 1994, Jordan worked with Cheryl Pepe, another Revenue Officer. GA at 31-32.

In 1994, Cheryl Pepe transferred to the IRS in Hartford, Connecticut, to work as a Staff Assistant for the Division Chief, Patrick Spinola. In 1999, Pepe became a Group Manager at the IRS in Hartford. GA at 103. In January 2000, Pepe was named Group Manager for the IRS in Norwalk, Connecticut. At that time, Pepe became Jordan's direct supervisor. GA at 104 34. Jordan had applied to be the Group Manager for IRS Norwalk at or around the same time as Pepe applied for that position, but was not selected. GA at 35-36.

On January 26, 2000, Jordan sent a memorandum to Pepe as his new Group Manager. In this memorandum, Jordan indicated that because of annual leave, sick leave, and administrative duties, he had only been able to spend 39% of his time working directly on his inventory of cases from November 1999 until January 2000. He further indicated that if his inventory were reduced, "the quality of [his] case work will return." GA at 133.

On February 24, 2000, Pepe sent Jordan a memorandum concerning a comment he made at the workplace. When a cake was brought into the office to celebrate the birth of an employee's child, Jordan indicated that he did not want any cake, but wanted what the baby was having. GA at 37-38, 135. In this memorandum, Pepe advised Jordan that the comment had offended several individuals in the workplace, and counseled him not to make offensive comments in the future. Jordan agreed that his remarks could have been construed as sexual in nature. GA at 63, 135.

In March 2000, Pepe asked the Revenue Officers in her group to read the book *Who Moved My Cheese?* in preparation for a staff meeting. Pepe had the entire book photocopied for this purpose. GA at 107, 137. Jordan was concerned that Pepe had copied the book without permission of the book's publisher. He contacted the publisher to determine whether permission had been requested, and found that it had not. Jordan then contacted the IRS Ethics Hotline to discuss this matter. The ethics advisor with whom he spoke indicated that the copying "was not a big deal." GA at 41-43.

Jordan was not satisfied with this opinion. He continued to believe that the copying was an ethics violation. GA at 43. Jordan claims that he approached Pepe after the meeting to discuss the copyright issue; Pepe denies that Jordan ever discussed the issue with her. GA at 66, 105-06.

Thereafter, on May 11, 2000, Pepe prepared and signed Jordan's annual performance appraisal. Pepe rated Jordan's performance as overall fully successful, the same rating Jordan had received in the prior two rating periods in 1999 and 1998. GA at 44, 141-42.

In June and July of 2000, Pepe wrote several memoranda to Jordan which pointed out performance issues and offered him assistance in addressing these issues. On June 8, 2000, Pepe wrote a memorandum to Jordan concerning her recent reviews of his cases, and noted a decrease in his performance on certain critical elements. In this memorandum, Pepe indicated her concern over this decrease and suggested ways for improvement. GA at 144-45. On June 29, 2000, Pepe wrote a memorandum to Jordan and another Revenue Officer, both of whom were participating in the IRS Flexiplace Program which allowed them to work flexible hours. The memorandum summarized the pertinent provisions of the program. GA at 147-48.

On July 5, 2000, Pepe wrote a memorandum to Jordan concerning violations of the Flexiplace Program. Pepe outlined several instances in which Jordan had failed to comply with the terms of that program, including failure to

arrive at work at the time directed; bringing his child to work; and combining his lunch and breaks to shorten the work day. The memorandum advised that further violations could result in disciplinary action. GA at 150. Also on July 5, 2000, Pepe wrote a memorandum to Jordan concerning a Workload Management Review, or Morning After Review. The purpose of this document was to set forth the manager's review of the previous day's case work. GA at 48, 113, 152-55. Jordan did not feel that the suggestions Pepe made in this Morning After Review were harassing or retaliatory. GA at 49-51.

Jordan claims that he experienced emotional distress each time he received a memorandum from Pepe which was in any way critical of his performance or conduct. He felt each memorandum was part of a pattern of harassment. GA at 46-47. However, he admitted that Pepe never raised her voice at him, never called him names, and never said anything derogatory to him of a personal nature. GA at 62.

In July 2000, Jordan claims, he was anxious because he thought he was going to lose his job. He felt he was heading in that direction because of the progressive discipline he was receiving. He admits that Pepe never told him she was going to terminate his employment. GA at 53. Jordan also spoke with Territory Manager Patrick Spinola about his job concerns. Spinola responded that he did not believe Jordan would lose his job. GA at 54; 164-65. Jordan admits that in July 2000, there was still a problem with the quality of his work, and deficiencies were facially evident on certain cases Pepe was reviewing. GA at 52.

From July 25, 2000, until September 2000, Jordan was out of work from the IRS on medical leave. According to his doctor, Jordan was suffering from heart palpitations. GA at 174-75.

When Jordan returned to work in September 2000, he became upset when Pepe advised him he had to carry his IRS Receipt Book with him when he went to meet with taxpayers. Jordan does not know if Pepe advised any other employees to carry the receipt book. In fact, she did require all Revenue Officers to keep the book with them, and did quarterly reviews for compliance. GA at 58-61, 130-31.

In October 2000, several personnel issues arose with Jordan. First, Jordan asked Pepe to lower his case inventory. But he understood that the decision as to whether he functioned better at a lower inventory was a decision to be made by his manager, Pepe. GA at 63-66. On October 20, 2000, Pepe wrote a memorandum to Jordan indicating that she had tried to contact him at home during working hours but could not reach him by telephone or pager. Pepe indicated that this was not acceptable. GA at 177.

On October 26, 2000, Jordan was notified of a potential noncompliance issue with respect to the payment of his 1997 taxes. Pepe had nothing to do with the notification.

As a result of this notice, Jordan was required to make an additional payment to resolve the issue. Pepe had nothing to do with this notification. GA at 67-68; 179-81.

Jordan had a similar issue in January 1997 when he was notified of a potential noncompliance issue with respect to the payment of his 1993 taxes. Jordan also had to make additional payments to resolve this issue. GA at 33; 94-96.

Also on October 26, 2000, Jordan gave an affidavit to the Treasury Inspector General for Tax Administration (TIGTA) in support of a complaint he made against Pepe in connection with her copying the book *Who Moved My Cheese?* GA at 69, 183-84.

In his affidavit, Jordan also claimed that Pepe had violated his rights under the Hatch Act when she signed the minutes of a staff meeting at which the Hatch Act was discussed. Pepe reflected in the meeting minutes that there was a discussion that employees could not have political bumper stickers on their cars. GA at 70-71. Apparently, Jordan had two stickers on his car, a National Rifle Association (NRA) sticker and a sticker that read "Charlton Heston is my President." GA at 125-26. Jordan did not attend this meeting. Accordingly, he had no idea if Pepe spoke at the meeting or whether she made any of the statements to which he took offense. GA at 70, 74.

In fact, on August 9, 2000, Pepe and another Group Manager, Rick Stoller, held a meeting on the Hatch Act. Several Revenue Officers other than Jordan were in attendance. During this meeting, it was mentioned by someone other than Pepe that the Hatch Act may prohibit the placement of bumper stickers of groups known to support political organizations. After the meeting, an employee approached Pepe and indicated that Jordan had

some type of sticker on his car that might be prohibited. GA at 124-28.

To address the question, Pepe made an inquiry with the Office of Special Counsel. She learned that while the NRA and Charlton Heston stickers might not violate the Hatch Act, they may conflict with IRS rules of conduct because they might intimidate taxpayers during field visits. GA at 125-26. Pepe never took any formal action against Jordan in connection with this issue, and Jordan never removed the stickers. GA at 73, 127.

On November 6, 2000, Pepe gave Jordan a Mid-Year Review. In this review, Jordan was rated as to four critical elements for the period from May 1, 2000, through October 31, 2000. On the element of Customer Relations, Pepe rated his performance as "Unacceptable." On the element of Case Resolution, Pepe rated his performance as "Fully Successful." On the element of Case Management, Pepe rated his performance as "Minimally Successful." And on the final element of Other Duties and Assignments, Pepe rated Jordan's performance as "Meets." GA at 186-89.

On November 28, 2000, the IRS Employee Tax Compliance Branch sent Jordan a letter indicating that the office had not received any response to the letter dated October 26, 2000, and that the office would be forwarding the matter to Jordan's personnel office for further action. GA at 179-81, 191. Jordan admits that he made no written reply to the letters from the IRS Employee Tax Compliance Branch, and that when the matter was referred

to the IRS in Norwalk, the file would not contain any written response from him. GA at 75-76.

On December 11, 2000, Territory Manager Patrick Spinola sent an e-mail to Jordan concerning the fact that Jordan had made statements in certain taxpayer case histories concerning Pepe. Specifically, Jordan had written on the case histories that Pepe had not properly observed taxpayer rights, had not taken timely action on cases, and had required him to take actions on cases which he thought were inappropriate. In the e-mail message, Spinola indicated that he had reviewed each case in which Jordan had made an allegation and found his claims both inaccurate and unfounded. Spinola advised Jordan that it was inappropriate to make such editorial comments in a case history and that such practice should cease immediately. GA at 193.

On December 20, 2000, Pepe sent Jordan a memorandum indicating that she had performed a review on one of his cases, and that he had failed to perform work on the case that she had previously instructed him to complete. Pepe indicated in the memorandum that he was thereby ordered to complete the work, and that failure to do so could lead to charges of insubordination and disciplinary action, up to and including removal. GA at 195. Jordan admits that he was having trouble getting the work done but states that he had reasons why the work was not completed. GA at 77.

On December 22, 2000, Jordan made a note to himself that Pepe had given gifts to three Revenue Officers but not

to him. He admits that he has no idea why those gifts were given, and that if they were given for exemplary performance he would see nothing wrong with them. GA at 78, 197.

On January 21, 2001, Pepe placed Jordan on a Performance Improvement Plan (PIP). In a memorandum, Pepe advised Jordan that she had not seen any improvement in his performance and was providing the PIP to assist him in this regard. After detailing those elements in which improvement was required, Pepe indicated that she wanted to help Jordan improve, and to that end, was removing six cases from his inventory and reassigning them to other Revenue Officers. Pepe did note that Jordan's inventory was already several cases below the maximum, and that his inventory level had always been within the nationally negotiated acceptable range for his grade level. GA at 199-202.

B. Jordan resigns and applies to be an enrolled agent

Jordan resigned from the IRS on or about February 9, 2001. At the same time, Jordan submitted to the IRS Director of Practice an application to be an enrolled agent so that he could practice before the IRS. GA at 79, 204-07.

In this application, Jordan was asked whether he had ever been late in filing his tax returns or ever been reprimanded or notified of unsatisfactory job performance. He answered "no" to both questions. Jordan claims he answered the performance question that way because he

was told by Spinola that only the last annual review needed to be referenced when asked about job performance. As for Spinola, he states that Jordan never came to him to ask how to answer questions on an application for enrolled agent status. GA at 80, 170, 206.

After Jordan filed his application for enrollment, the Director of Practice wrote to the Norwalk IRS Office for input as to the application. In this letter, the Director asked that one of two boxes be checked, either that Jordan was technically or otherwise qualified to practice as an enrolled agent, or that he was not technically or otherwise qualified to so practice. On April 21, 2001, Spinola sent back the document after having checked the box that indicated that Jordan was not qualified. GA at 209-10. Spinola and Pepe indicated that Jordan was not qualified because when they reviewed the application, they found statements that they believed were untrue. First, they disputed Jordan's claim that he had timely filed his tax returns and paid all taxes due. This was disputed because at the time of his resignation, Jordan had been notified of an outstanding issue as to his 1997 taxes and had not responded in writing to the allegations. In fact, at the time of his resignation, Jordan's case was pending for enforcement at IRS Norwalk, having been referred by the Tax Compliance Unit. GA at 120-22, 167-69.

In addition, Spinola and Pepe disputed Jordan's claim that he had never received notice of unsatisfactory performance at work. In fact, Jordan had received oral and written notice of his unsatisfactory performance. GA at 123.

Following his resignation, Jordan filed a claim for workers' compensation charging that he suffered from anxiety as a result of work stress. On July 10, 2001, the Office of Workers' Compensation Programs (OWCP), U.S. Department of Labor, sent Jordan a letter concerning his claim. In this letter, OWCP indicated that Jordan had not identified aspects of his employment that he considered detrimental to his health. GA at 212-17. In particular, the letter indicated that Jordan had not explained how he was harassed at work by Pepe and how the workplace was stressful. The letter noted that OWCP had learned that Pepe had been cleared of Jordan's TIGTA charge. The letter further indicated that "reactions to administrative actions by the employer, unless determined to be in error or abusive, are considered self-generated rather than arising in and out of employment . . . and . . . not compensable" under the Federal Employees' Compensation Act. GA at 212.

On August 29, 2001, Patrick McDonough, then IRS Director of Practice, sent Jordan a letter indicating that his application for enrolled agent status was going to be denied. The Director found that Jordan "lacked the necessary technical qualifications to be granted full enrollment," but that even if he did possess those qualifications, his application would still be denied based on his conduct when he was an IRS employee. GA at 219-21. Specifically, Director McDonough found that Jordan had given false and misleading information on his application for enrollment when he indicated that he had never been notified of unsatisfactory performance. In addition, the Director noted that there were unfavorable

recommendations from Jordan's former supervisor based on his failure to comply with the Flexiplace Agreement and failure to timely pay his 1997 taxes. The Director gave Jordan thirty days to provide additional information to address these concerns. GA at 220.

On March 13, 2002, Director McDonough sent Jordan a formal denial of his application for enrollment. While the Director did note that the 1997 tax issue was no longer a basis for denial of the application, the application was still denied on the basis of Jordan's false information on the application. The Director took note of the fact that Jordan blamed Spinola for advising him to answer in the negative the question as to whether he had ever received unsatisfactory performance. In spite of this allegation, Director McDonough concluded that "an affirmative answer was called for." GA at 223-26.

In September 2003, Pepe made a referral concerning Jordan to the Office of Professional Responsibility. Specifically, Pepe believed that Jordan was attempting to practice before the IRS when he was ineligible to do so. This information came from documents Jordan had filed indicating he had enrolled agent status. Pepe was advised by OPR that because Jordan's conduct involved three Certified Public Accountants (CPAs), Pepe had to make the referral as to the CPAs. GA at 117-18.

On January 26 and 28, 2004, the IRS in Washington, D.C., sent letters to the three CPAs concerning this matter. According to the letters, the CPAs had obtained assistance from Jordan and allowed him to interact on their behalf

with the IRS. The letters state that because Jordan was ineligible to practice before the IRS, the CPAs were at risk of censure, suspension or disbarment from IRS practice by allowing Jordan to act for them pursuant to 31 C.F.R. § 10.51. GA at 228-35.

In 2005, Jordan was granted a license to act as an enrolled agent before the IRS. Jordan admits that between March 2002 and the time in 2005 when he was notified that he had been granted enrolled agent status, he acted as an enrolled agent on occasion. On those occasions, he used a card that identified him as an unenrolled preparer, a status with less authority than an enrolled agent. Jordan admits that he had been denied his request to be an enrolled agent, and he was ineligible to practice as an enrolled agent during the pendency of any appeal process. GA at 27, 81-84.

Jordan saw Dr. Donald Westerberg, a psychologist and family counselor, for symptoms of anxiety. Jordan first saw Dr. Westerberg on July 25, 2000, and then saw him four additional times between August and September, 2000. Jordan did not see Dr. Westerberg again until January 2006, almost six years later. GA at 86. Dr. Westerberg noted that in 2000, Jordan had some anxiety related to his job and his belief that he was being harassed at work. In 2006, Dr. Westerberg saw Jordan in January and February and noted that Jordan was good by his own report. He did not opine that Jordan's symptoms were permanent in nature. GA at 87-88.

Since leaving the IRS, Jordan has worked as an unenrolled tax preparer, an enrolled agent, and a part-time manager at UPS. He estimates his gross business income since 2001 at approximately $45,000 to $55,000 per year. In addition to this income, Jordan estimates that he earned from $15,000 to $18,000 per year from UPS from 2001 to about 2003. GA at 89-92.

C. The district court grants summary judgment for the government

By ruling dated August 8, 2007, the district court granted the government's motion for summary judgment as to all pending claims. The court agreed with the government that Jordan had failed to prove any infliction of emotional distress because he failed to establish that he had suffered such distress to an "extraordinary degree." PA at A68-72. [2]

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[2] The Court noted that the government had raised several others grounds in its moving papers, but did not reach those issues:

> The IRS also argues that its conduct wasn't extreme and outrageous; that its conduct did not create an unreasonable risk of causing Jordan emotional distress; that it did not know or have reason to know its conduct created an unreasonable risk of causing Jordan distress; and that the court lacks subject matter jurisdiction as to the claims in "Jordan II." The record seems to support these arguments, but, having concluded the motion should be granted on other grounds, the court does not

(continued...)

After a careful review of the record evidence, the court concluded that Jordan had failed to establish that he suffered severe emotional distress, severity being a prerequisite for all claims of infliction of emotional distress. The court found that Jordan's evidence consisted primarily of his own self-serving statements that he had suffered severe distress. The court also noted that contrary to his claims, Jordan had only visited a mental health professional a handful of times in 2000 and then not again until 2006. Further, Jordan failed to offer any objective evidence that would support his claim of severe emotional distress, such as medical records, depositions or affidavits from his family. *Id.* at A70-71.

The court concluded that in light of Jordan's failure of proof, summary judgment should enter in favor of the government as to all remaining claims in the case. *Id.* Judgment entered on August 9, 2007. PA at A72.

On August 23, 2007, Jordan filed a motion for reconsideration of the Court's August 8, 2007, ruling. PA at A25-26. In support of this motion, Jordan filed a memorandum of law, as well as ten exhibits totaling 117 pages. Of these ten exhibits, several were new exhibits and several had already been presented to the court in connection with the government's motion for summary judgment. *Id.*

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[2] (...continued)
reach these issues.

PA at A68.

The government opposed Jordan's motion for reconsideration on several grounds, including that he was impermissibly seeking to relitigate the issues raised in the summary judgment motion by presenting evidence that was either already before the district court or that could have been presented to the court before its ruling. On March 24, 2008, the Court issued a ruling granting the motion for reconsideration but denying the relief requested. PA at A73.

SUMMARY OF ARGUMENT

The district court correctly held that Jordan failed to establish that he had suffered severe emotional distress during and after his employment with the IRS. Jordan did not offer any evidence that showed that he had suffered emotional distress which a reasonable person could not be expected to endure.

Summary judgment was also proper because Jordan failed to prove the remaining elements of each of his claims of infliction of emotional distress. He failed to prove intentional infliction because he did not show that the conduct of his IRS supervisors constituted extreme and outrageous behavior. As for negligent infliction, Jordan failed to establish that the alleged distress occurred in connection with termination – as required by Connecticut law – because he resigned from IRS employment. He also failed to show that the IRS recklessly inflicted emotional distress upon him; he did not offer any evidence that his supervisors were wanton or willful in disregarding a high risk of physical harm or danger.

Finally, summary judgment was appropriate as to the claims in *Jordan II* since the actions taken by the IRS with regard to Jordan's application for enrolled agent status were discretionary. Therefore, the district court lacked subject matter jurisdiction over those claims on the basis of the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a).

ARGUMENT

I. The district court correctly held that Jordan failed to establish a genuine issue of fact necessary to show that the IRS caused him severe emotional distress.

A. Governing law and standard of review

1. Standard governing summary judgment

This Court reviews *de novo* a district court's grant of summary judgment. *Town of Southold v. Town of East Hampton,* 477 F.3d 38, 46 (2d Cir. 2007) (citing *Tufariello v. Long Island R.R. Co.*, 458 F.3d 80, 85 (2d Cir. 2006)).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-50 (1986).

When ruling on a motion for summary judgment, the district court must construe the facts in a light most favorable to the non-movant, and must draw all reasonable inferences against the moving party. *See Anderson,* 477 U.S. at 255; *see also Sanozky v. Int'l Ass'n of Machinists & Aerospace Workers*, 415 F.3d 279, 282 (2d Cir. 2005) (citing *Anderson, supra*, and *Maguire v. Citicorp Retail Servs.,* 147 F.3d 232, 235 (2d Cir. 1998)).

"If the movant demonstrates an absence of a genuine issue of material fact, a limited burden of production shifts to the nonmovant, who must 'demonstrate more than some metaphysical doubt as to the material facts,' and come forward with 'specific facts showing that there is a genuine issue for trial.'" *Powell v. Nat'l Board of Med. Examiners*, 364 F.3d 79, 84 (2d Cir. 2004) (quoting *Aslanidis v. United States Lines, Inc.*, 7 F.3d 1067, 1072 (2d Cir. 1993)). "[T]he existence of a mere scintilla of evidence in support of nonmovant's position is insufficient to defeat the motion; there must be evidence on which a jury could reasonably find for the nonmovant." *Powell*, 364 F.3d at 84. Accordingly, "'[c]onclusory allegations, conjecture, and speculation . . . are insufficient to create a genuine issue of fact.'" *Shannon v. NYC Transit Auth.*, 332 F.3d 95, 99 (2d Cir. 2003) (quoting *Kerzer v. Kingly Mfg.*, 156 F.3d 396, 400 (2d Cir. 1998)).

2. Connecticut law on severity of harm in proving infliction of emotional distress

In order to prevail on any claim of infliction of emotional distress, a plaintiff bears the burden of proving

that he suffered stress severe enough that it might result in illness or bodily harm. *Petyan v. Ellis*, 200 Conn. 243, 253 (1986), *superseded by statute on other grounds as recognized in Chadha v. Charlotte Hungerford Hosp.*, 272 Conn. 776 (2005); *Storm v. ITW Insert Molded Products*, 470 F. Supp. 2d 117, 123 (D. Conn. 2007) (severity required to show intentional and negligent infliction); *Elliott v. Waterbury*, 245 Conn. 385, 415 (1998) (concepts of wanton and reckless conduct not distinguishable from concept of wilful, intentional and malicious conduct). The emotional distress must be "so severe that no reasonable [person] could be expected to endure it." *Buster v. City of Wallingford*, 557 F. Supp. 2d 294, 302 (D. Conn. 2008) (quoting the Restatement (Second) of Torts § 46 cmt. j (1965)) (additional citation omitted).

In the employment context, symptoms such as sleeplessness, depression, and anxiety are not uncommon among employees who have been fired. *Almonte v. Coca-Cola Bottling Co. of N.Y., Inc.,* 959 F. Supp. 569, 575-76 (D. Conn. 1997). "Absent some evidence that plaintiff suffered these symptoms to an extraordinary degree," a plaintiff cannot establish a claim of severe emotional distress. *Id*. at 576.

B. Discussion

Jordan did not establish that he suffered such severe emotional distress that it had the potential to result in bodily harm or illness. The district court correctly entered summary judgment on this basis.

The undisputed evidence reflects that Jordan might have had some anxiety related to his work situation, but it was not to any extraordinary degree. The record shows that Jordan saw Dr. Donald Westerberg, a psychologist and family counselor, for symptoms of anxiety on several occasions in 2000. GA at 86-88. However, he waited six years to see the doctor again, until January 2006, when this lawsuit was pending. *Id.* The doctor's notes indicate that in 2000 Jordan had some anxiety related to his job and his belief that he was being harassed at work. However, by 2006, the doctor's report was that Jordan was "good by his own report," and did not opine that Jordan's symptoms were permanent. *Id.*

The district court examined the record and properly concluded that there was no medical evidence that Jordan suffered severe emotional trauma as a result of getting negative feedback at work, or from being challenged for the misstatements on his enrolled agent application. In addition to noting the infrequency of Jordan's medical treatment:

> Even more illuminating is the lack of documentary evidence indicating that Jordan, in fact, suffered from the conditions alleged. The defendants have provided the court with a note from Dr. Fitch, indicating that he found "it necessary for [Jordan] to be on a medical leave of absence from work." But Jordan himself has offered no medical records, no depositions of either Dr. Fitch or Dr. Westerberg and no affidavits from his wife or children describing the impact of his distress on their lives.

PA at A71.

The court correctly took Jordan's lack of treatment into account when determining whether he had established severe distress. Connecticut law provides that while a plaintiff must prove that his emotional distress was severe, "such determination may stand despite the absence of evidence of medical or other treatment." *Green v. St. Vincent's Medical Center,* 252 F.R.D. 125, 128 (D. Conn. 2008) (citing *Berry v. Loiseau*, 223 Conn. 786, 808-811, (1992)). *See also Bloom v. Town of Stratford*, No. 3:05-CV-217 (PCD), 2006 WL 3388396, at *15 (D. Conn. Nov. 16, 2006) (citing *Almonte,* 959 F. Supp. at 575, noting that "[i]t is unclear whether a plaintiff must seek treatment in order to maintain a claim of intentional infliction distress under Connecticut law"); *Birdsall v. City of Hartford*, 249 F. Supp. 2d 163, 175 (D. Conn. 2003) (observing that "[j]ust as the fact of treatment is not sufficient to prove the existence of severe emotional distress, the absence of treatment does not preclude proof of severe emotional distress.") However, the nature of treatment or the absence of treatment is probative on the question of severity. *See, e.g., Josie v. Filene's, Inc.*, 187 F. Supp. 2d 9, 16 (D. Conn. 2002) (granting summary judgment on claim for emotional distress where plaintiff did not seek medical attention for his alleged distress); *Reed v. Signode Corp.*, 652 F. Supp. 129, 137 (D. Conn. 1986) (granting summary judgment where "[p]laintiff was neither treated nor did he seek medical assistance for the distress he allegedly suffered").

The district court also observed:

> The evidence provided consists primarily of Jordan's self-serving statements regarding his mental state. Jordan testified in his deposition that he "became distant, kind of almost zoned out" and that he had "trouble concentrating." Jordan also testified that he endured heart palpitations "several times a week," for which he sought treatment. . . . But Jordan admitted that the doctor could find no discernable physical problem with him, stating "all tests came back positive to being healthy."As this court held in *Reed* . . . 652 F. Supp. [at] 137. . ., a plaintiff's own descriptions of his alleged symptoms cannot, without more, support a claim for severe emotional distress.

PA at A70.

The district court properly considered that the only evidence supporting Jordan's claim of severe distress was his own testimony. The mere allegation of emotional distress, without more, is insufficient to withstand summary judgment. *Bloom*, 2006 WL 3388396, at *15 (citations omitted) (rejecting claim of severe emotional distress where plaintiff's statements are the only evidence in the record); *see also Josie*, 187 F. Supp. 2d at 16 (same).

Jordan argues that he has met his burden of establishing severe emotional distress because he visited a psychologist for anxiety and had depression, sleeping

difficulty, weight loss and palpitations. Jordan Brief at 23. This showing is insufficient. As noted, *supra*, these symptoms in the employment context are common among employees who have been fired, or for that matter, feel they have been fired. *See, e.g. Almonte,* 959 F. Supp. at 575-76. Jordan has failed his burden in this regard.

II. Summary judgment was proper on the alternate grounds raised below that Jordan failed to establish the elements of infliction of emotional distress

This Court has "discretion to consider issues that were raised, briefed, and argued in the District Court, but that were not reached there." *Booking v. General Star Management Co.*, 254 F.3d 414, 418-19 (2d Cir. 2001). *See also In re U.S. Lines, Inc*., 216 F.3d 228, 233 (2d Cir. 2000) (noting that Court "may affirm on any basis supported by the record, including grounds on which the district court did not rely") (quoting *Richardson v. Selsky,* 5 F.3d 616, 621 (2d Cir.1993)).

The government raised several alternate arguments below which the district court acknowledged but did not reach. *See supra*, n. 1. Each of these arguments supports the entry of summary judgment in the government's favor.

A. Connecticut law on infliction of emotional distress

1. Intentional infliction

Under Connecticut law, a plaintiff alleging intentional infliction of emotional distress must meet a four-part test:

> . . . (1) the defendant intended to inflict emotional distress or knew or should have known that it would result; (2) the defendant's conduct was extreme and outrageous; (3) the conduct caused the plaintiff's distress; and (4) the plaintiff's resulting emotional distress was severe. *Petyan* [ ]., 200 Conn. [at] 253 . . . (multiple citations omitted). Extreme and outrageous conduct is that which "go[es] beyond all possible bounds of decency, [is] regarded as atrocious, and [is] utterly intolerable in a civilized society." *Appleton v. Bd. of Educ. of the Town of Stonington*, 254 Conn. 205, 211 (2000) (quotations & citation omitted). It does not include conduct that is "merely insulting or displays bad manners or results in hurt feelings." *Id.* (citation omitted).

Williams v. Ragaglia, No. 3:01-CV-1398 (JGM), 2007 WL 638498, *13 (D. Conn. Feb. 26, 2007).

Courts have noted that "it is the intent to cause injury that is the gravamen of the tort." *Wilson v. Jefferson*, 98 Conn. App. 147, 160 (2006) (quoting *Ancona v. Manafort Bros., Inc.*, 56 Conn. App. 701, 708, *cert. denied*, 252 Conn. 953 (2000)). The law is clear that all four elements

must be established in order to prevail on a claim of intentional infliction of emotional distress. *Muniz v. Kravis*, 59 Conn. App. 704, 708-09 (2000) (citing *Reed*, 652 F. Supp. at 137).

Whether a defendant's conduct is sufficiently "extreme and outrageous" is initially a question for the court to decide. *Lee v. Verizon Wireless, Inc*., No. 07-CV-532 (AHN), 2008 WL 4479410, at *11 (D. Conn. Sept. 26, 2008) (citing *Johnson v. Chesebrough-Pond's USA Co.*, 918 F. Supp. 543, 552 (D. Conn.), *aff'd*, 104 F.3d. 355 (2d Cir. 1996); *Crocco v. Advance Stores Co. Inc*., 421 F. Supp. 2d 485, 503 (D. Conn. 2006) (citing *Appleton*, 254 Conn. at 210). It is only "where reasonable minds disagree" that it will become an issue for the jury. *Storm,* 470 F. Supp. 2d at 123 (quoting *Appleton,* 254 Conn. at 210).

The foregoing standard is a strict one, for "[l]iability for intentional infliction of emotional distress requires conduct exceeding all bounds usually tolerated by decent society, of a nature which is especially calculated to cause, and does cause, mental distress of a very serious kind." *Wilson*, 98 Conn. App. at 160 (quoting *Muniz*, 59 Conn. App. at 712). As one court has noted:

> 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!

Heim v. California Federal Bank, 78 Conn. App. 351, 364-65 (quoting *Carnemolla v. Walsh*, 75 Conn. App. 319, 331-32, *cert. denied*, 263 Conn. 913 (2003), *cert. denied*, 266 Conn. 911 (2003)). Any lesser showing is insufficient to carry the plaintiff's burden of proof. "Mere conclusory allegations are insufficient to support a cause of action for this tort." *Tyszka v. Edward McMahon Agency*, 188 F. Supp. 2d 186, 196 (D. Conn. 2001) (citing *Huff v. West Haven Bd. of Educ.*, 10 F. Supp. 2d 117, 122 (D. Conn. 1998)).

Further, "individuals in the workplace reasonably should expect to experience some level of emotional distress, even significant emotional distress, as a result of conduct in the workplace . . . . That is simply an unavoidable part of being employed." *Storm*, 470 F. Supp. 2d at 124 (quoting *Perodeau v. City of Hartford*, 259 Conn. 729, 757 (2002)); *see also Lee*, 2008 WL 4479410, at *11 (same)."This standard for offensive conduct does not include, for example, "insults, verbal taunts, threats, indignities, annoyances, petty oppressions or conduct that displays bad manners or results in hurt feelings." *Buster,* 557 F. Supp. 2d at 301-02 (quoting *Miner v. Town of Cheshire,* 126 F. Supp. 2d 184, 195 (D. Conn. 2000)).

In addition, "it is the employer's conduct, not the motive behind the conduct, that must be extreme or outrageous . . . . An employer's adverse yet routine

employment action, even if improperly motivated, does not constitute extreme and outrageous behavior when the employer does not conduct that action in an egregious and oppressive manner." *Miner,* 126 F. Supp. 2d at 195 (internal citations omitted).

2. Negligent infliction

With regard to a claim for negligent infliction of emotional distress in the workplace, Connecticut law provides that this claim can arise only in the context of a termination from employment. *Perodeau,* 259 Conn. at 762-63[3]; *Worster v. Carlson Wagon Lit Travel, Inc*., No. 3:02-CV-167 (EBB), 2005 WL 1595596, at *3 (D. Conn. Jul. 6, 2005), *aff'd,* 169 Fed. Appx. 602 (2d Cir. 2006). This state law tort must be based on unreasonable conduct during termination. *Worster* at *3 (citing *Parsons v. United Tech. Corp*., 243 Conn. 66, 89 (1997)). As the

[3] In *Perodeau*, the Connecticut Supreme Court observed that in *Malik v. Carrier Corp*., 202 F. 3d 97 (2d Cir. 2000), the Second Circuit had questioned whether, under Connecticut law, negligent infliction of emotional distress could be cognizable in the workplace in the absence of a termination. The court observed that in *Malik,* this Court "concluded in dicta that, after *Morris [v. Hartford Courant Co.,* 200 Conn. 676 (1986)], and *Parsons [v. United Tech. Corp*., 243 Conn. 66, 89 (1997)], "[w]hether a viable emotional distress claim for negligent acts in the employment context exists under Connecticut law is . . . unclear." *Perodeau*, 259 Conn. at 766 (citing *Malik*, 202 F.3d at 103-04 n.1). The Connecticut Supreme Court clarified in *Perodeau* that termination had to be shown in order to maintain a negligence claim in the workplace.

Connecticut Supreme Court noted, "The mere termination of employment, even where it is wrongful, is therefore not, by itself, enough to sustain a claim for negligent infliction of emotional distress. The mere act of firing an employee, even if wrongfully motivated, does not transgress the bounds of socially tolerable behavior." *Parsons*, 243 Conn. at 88-89 (internal citations omitted). *See also Buster*, 557 F. Supp. 2d at 302; *Boateng v. Apple Health Care, Inc.*, 156 F. Supp. 2d 247, 254 (D. Conn. 2001). In addition, "[n]ormally, an employee who resigns is not regarded as having been discharged and [therefore] would have no right of action for [abuse] [during] such discharge." *Boateng* at 254 (quoting *Hart v. Knights of Columbus*, No. CV980417112S, 1999 WL 682046, at *4 (Conn. Super. Aug. 17, 1999)).

3. Reckless infliction

In *Craig v. Driscoll*, 64 Conn. App. 699, 718-23, *aff'd,* 262 Conn. 312 (2003),[4] the Connecticut Appellate Court implicitly recognized a cause of action for reckless infliction of emotional distress on a bystander.[5]

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[4] *Craig* was overturned in part by Public Acts 2003, No. 03-91, which amended General Statutes § 30-102 concerning the sale of alcoholic liquor. However, the section of that decision concerning reckless infliction was not affected. *Montanaro v. Baron,* No. CV065006991, 2008 WL 1798528, at *3, n.1 (Conn. Super. Mar. 28, 2008).

[5] In *Montanaro, supra*, one lower Connecticut court dismissed counts for reckless infliction of emotional distress on (continued...)

[5] (...continued)
the grounds that "Connecticut, even after *Craig*, does not recognize a distinct cause of action for reckless infliction of emotional distress and because the plaintiffs have adequately pleaded claims for intentional infliction of emotional distress that encompass the recklessness claims." *Montanaro*, 2008 WL 1798528 at *4-5 (reviewing cases). The court concluded that *Craig* was limited to bystander emotional distress, and that any claim of recklessness in a non-bystander context would be encompassed by a claim of intentional infliction. *Id.* This conclusion is supported by case law in this Circuit:

> To the extent that Plaintiffs allege recklessness, reckless conduct has been equated to wanton conduct, see, e.g., *Bhinder v. Sun Co.*, 246 Conn. 223, 242 n.14, (1998) ("Wilful misconduct has been defined as intentional conduct . . . [w]hile [courts] have attempted to draw definitional boundaries between the terms willful, wanton or reckless, in practice the three terms have been treated as meaning the same thing."), hence Plaintiffs' claim sounds in intentional infliction of emotional distress . . . .

Myslow v. New Milford School Dist., No. 3:03-CV-496 (MRK), 2006 WL 473735, at *17 (D. Conn. Feb. 28, 2006). To the extent that recklessness in general is distinct from intentional conduct, *see, e.g., Poe v. Leonard*, 282 F.3d 123, 140, n. 14 (2d Cir. 2002) (defining recklessness as the "kind of conduct . . . where [the] defendant has reason to know of facts creating a high degree of risk of physical harm to another and deliberately acts or fails to act in conscious disregard or indifference to that risk") (citations omitted), Jordan's claim of recklessness will be addressed herein. However, as shown below, Jordan cannot (continued...)

The court analyzed the reckless infliction of emotional distress claim using the principles of reckless conduct:

> Recklessness is a state of consciousness with reference to the consequences of one's acts. *Commonwealth v. Pierce*, 138 Mass. 165, 175 [1884]. . . . It is more than negligence, more than gross negligence. *Bordonaro v. Senk*, 109 Conn. 428, 431 [1929]. The state of mind amounting to recklessness may be inferred from conduct. But, in order to infer it, there must be something more than a failure to exercise a reasonable degree of watchfulness to avoid danger to others or to take reasonable precautions to avoid injury to them. *Mooney v. Wabrek*, 129 Conn. 302, 308 (1942). Wanton misconduct is reckless misconduct. *Menzie v. Kalmonowitz*, 107 Conn. 197, 199 (1928). It is such conduct as indicates a reckless disregard of the just rights or safety of others or of the consequences of the action.

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[5] (...continued)
meet this standard with respect to the IRS's conduct in this case.

Craig at 453 (additional citations omitted). The court noted that "[o]ne is guilty of reckless misconduct when 'knowing or having reason to know of facts which would lead a reasonable [person] to realize that the actor's conduct not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result to him." *Craig*, 699 Conn. App. at 721 (quoting *Brock v. Waldron*, 127 Conn. 79, 81 (1940)). In other words, "'[r]eckless conduct tends to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent . . . ." *Craig*, 699 Conn. App. at 721 (citing *Dubay v. Irish*, 207 Conn. 518, 532-33 (1988)).

B. Discussion

1. Jordan has failed to establish intentional infliction of emotional distress with respect to the claims in *Jordan I* because the alleged conduct was not extreme or outrageous

Not only did Jordan fail to establish that his alleged emotional distress was severe, he also failed to establish that the IRS's conduct was extreme and outrageous. This failure of proof is fatal to his claim of intentional infliction of emotional distress in *Jordan I* (Count I).

The undisputed facts show that the conduct that Jordan describes as extreme and outrageous was far from that. Jordan claims that after he complained to Pepe about her photocopying the book, *Who Moved My Cheese?* without

permission, he was given negative reviews, was humiliated and embarrassed, and had his rights under the Hatch Act violated. Even if these allegations were true, they do not rise to the level of "conduct [that] 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." *See Heim,* 78 Conn. App. at 138-39 (quoting *Carnemolla,* 75 Conn. App. at 331-32).

First, disagreement over the quality of an employee's performance,"absent intentional and malicious falsehoods or conduct of an egregious and clearly overreaching nature, cannot render an employer liable for the emotional distress of an employee under any accepted legal theory." *Malik*, 202 F.3d at 105. Courts have found that routine employment actions do not qualify as such intolerable conduct. *See White v. Martin,* 23 F. Supp. 2d 203, 208 (D. Conn. 1998), *aff'd*, 198 F.3d 235 (2d Cir. 1999) (dismissing claim of intentional infliction where plaintiff claimed he was disciplined, harassed, and denied a promotion); *Johnson,* 918 F. Supp. at 552 (dismissing same where plaintiff claimed he was terminated for unsatisfactory performance, even though "the methods by which Johnson's performance was reviewed and by which he was eventually terminated may not have been ideal employment practices").[6]

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[6] Jordan cannot establish that his alleged mistreatment after complaining about Pepe's unauthorized photocopying rose to the level of extreme and outrageous conduct. Even assuming (continued...)

Similarly, Jordan cannot show that the conduct of the IRS on the issue of the Hatch Act was extreme and outrageous. Jordan supposes that Pepe violated his rights under the Hatch Act when she signed the minutes of a staff meeting at which the Hatch Act was discussed. It is undisputed that Jordan was not present at this meeting and did not know if Pepe spoke at the meeting or whether she made any of the allegedly offensive statements. In fact, the record reveals that there was a discussion of the Hatch Act at the meeting on August 9, 2000, and that Pepe made an inquiry regarding whether the bumper stickers violated the Hatch Act. This conduct in no way constitutes the kind of intolerable behavior required to establish intentional infliction. Indeed, Pepe's investigation into the issue was warranted to insure that there was no violation of federal law. *See Malik*, 202 F.3d at 106 (noting that "corrective actions that a risk-averse employer might take to comply with federal law" is a defense to intentional infliction").[7]

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[6] (...continued)
that Pepe did threaten to retaliate against Jordan for his complaint, such conduct is not so intolerable or atrocious so as to meet the foregoing standard. *See Miner*, 126 F. Supp. 2d at 195 (holding that plaintiff had failed to establish extreme and outrageous conduct where employer allegedly retaliated against her for exercising her rights to be free from harassment).

[7] In addition, Jordan suffered no negative consequence as a result of that meeting. He was not censured for having two stickers on his car, nor was he required to remove or cover those stickers. It is clear that Jordan suffered no harm in (continued...)

Jordan contends that the government's conduct was extreme and outrageous based on continued acts of harassment. Jordan Brief at 10-11. However, the incidents Jordan complains of do not rise to the level of such conduct. Like any employee, Jordan was obviously troubled by getting negative feedback from his supervisor. However, the record in this case does not reflect that this was anything other than the normal stress of being employed. *Storm,* 470 F. Supp. 2d at 124; *see also Sebold v. City of Middletown,* No. 3:05-CV-1205 (AHN), 2007 WL 2782527, at * 30 (D. Conn. Sept. 21, 2007) (granting summary judgment on claim of intentional infliction even though record indicated that the conduct of the employer "was at times, belittling, intimidating, and retaliatory," noting that "it was not 'so naturally humiliating or devastating to a person's emotional well[-]being to rise to the level of conduct which satisfies a claim of intentional infliction of emotional distress.'") (quoting *Jamilik v. Yale Univ.*, No. 3:06 CV 0566 (PCD), 2007 WL 214607, at *3 (D. Conn. Jan. 25, 2007)). There is no evidence that Jordan was treated "in an unprofessional, embarrassing or humiliating manner." *Storm,* 470 F. Supp. 2d at 124.

In sum, Jordan has not established that the IRS engaged in extreme and outrageous conduct towards him while he

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[7] (...continued)
connection with Pepe signing off on the staff meeting minutes, and there can be no claim of intentional infliction of emotional distress on this basis.

was employed as a Revenue Officer. His claim of intentional infliction of emotional distress must fail.

2. Jordan has not proven negligent infliction of emotional distress because he has not shown that he suffered distress during a termination process

Similarly, Jordan cannot establish that Pepe and Spinola negligently inflicted emotional distress upon him. This claim is raised as Count II in both *Jordan I* and *Jordan II*. Neither claim has any factual support because the necessary factual predicate for this claim – that he was terminated – is not present in either case.

Jordan resigned his employment as a Revenue Officer. Given that Jordan was never terminated as Connecticut case law requires, he cannot establish a claim for negligent infliction of emotional distress as a matter of law. *Ramsey v. Network Installation Services, Inc.*, No. 3:08-CV-00259 (JCH), 2008 WL 4447091, at *2 (D. Conn. Sept. 3, 2008) (barring claim for negligent infliction where challenged conduct occurred in a continuing employment context, not in terminating his employment); *Buster*, 557 F. Supp. 2d at 303 (dismissing claim for negligent infliction where plaintiff resigned).

Jordan attempts to circumvent the requirement of termination by arguing that he was constructively discharged. Jordan Brief at 16-18. However, he has failed to establish this claim. His complaints about conduct which allegedly compelled his resignation are akin to

complaints about conduct within the employment relationship, and do not constitute a challenge to the termination of his employment.

Negligent infliction is cognizable in the employment context "only where 'the defendant's conduct during the termination process was sufficiently wrongful that the defendant should have realized that its conduct involved an unreasonable risk of causing emotional distress and that [that] distress, if it were caused, might result in illness or bodily harm.'" *Lincoln v. St. Francis Hosp. & Medical Center*, No. 3:03-CV-1418 (AWT), 2006 WL 2475029, at * 10 (D. Conn. Aug. 24, 2006) (quoting *Perodeau*, 259 Conn. at 751) (denying the claim of constructive discharge, holding that "[n]o reasonable juror could conclude, based on the plaintiff's conclusory statements about [her employer's] behavior, that [the] conduct was particularly egregious"). Further, where a plaintiff bases a claim of negligent infliction on acts that occurred during the employment relationship, there must be evidence of negligent infliction during the forced termination. *Edwards v. New Opportunities, Inc.*, No. 3:05-CV-1238 (JCH), 2007 WL 947996, at *6 (D. Conn. Mar. 26, 2007). "[C]onduct that is not sufficiently unreasonable or wrongful does not support a negligent infliction of emotional distress claim." *Id.* (citing *Grey v. City of Norwalk Bd. of Educ.*, 304 F. Supp. 2d 314, 333 (D. Conn. 2004)). The district court in *Edwards* noted:

> Conduct justifying the termination, or, on the other hand, compelling the resignation, is not itself the actual termination. Termination means the ending,

> not the conduct which caused the ending. When one analyzes the policy reasons underlying *Perodeau*, one sees that conduct taking place within the employment relationship, even if wrongful and providing the basis for the claim of unlawful discharge, cannot provide the factual predicate for the emotional distress claim.

Edwards, 2007 WL 947996, at *6 (quoting *Michaud v. Farmington Community Ins. Agency*, 2002 WL 31415478, at *3 (Conn. Super. Ct. 2002)).

In the present case, Jordan is clearly predicating his claim of negligent infliction of emotional distress upon alleged wrongful conduct which he claims occurred during and after his employment. Jordan complains of alleged harassment that continued both during and after his IRS employment; he does not allege any facts in connection with the resignation process itself. This allegedly wrongful conduct cannot provide the basis of Jordan's negligent infliction claim. Accordingly, he has failed to establish this claim as well.

3. Jordan's claim of reckless infliction must fail because he has not shown that the IRS acted with willful or wanton disregard for his safety

Jordan's claim that his IRS supervisors recklessly inflicted emotional distress on him must fail for the same deficiency of proof. Although he alleges that Pepe and Spinola acted unreasonably by continually harassing and

punishing him, *see* Jordan Brief at 20, the record does not support this argument.

To the extent that reckless conduct is indistinguishable from willful or intentional conduct with regard to a claim of infliction of emotional distress, *Myslow*, 2006 WL 473735, at *17, Jordan's claim for reckless infliction in *Jordan I* "sounds in intentional infliction of emotional distress and fails for the reasons explained above." *Id.* Similarly, the claim for reckless infliction in *Jordan II* that Pepe and Spinola attempted to stop him from becoming an enrolled agent after he left the IRS must also fail. The managers' conduct does not rise to the level of extreme and outrageous conduct required for such a tort.

The record shows that when Jordan applied to the IRS Director of Practice be an enrolled agent, he indicated on his application that he had never been late in filing his tax returns, and that he had never been reprimanded or notified of unsatisfactory job performance. The record also shows that when asked by the Director of Practice for input as to the application, Pepe and Spinola indicated that Jordan was not technically or otherwise qualified to so practice because in their view he had made untrue statements on his application. While it is true that the Director of Practice initially denied Jordan's application based on the input from Pepe and Spinola, this conduct does not qualify as extreme or outrageous.

As this Court has noted, "Connecticut recognizes that emotional distress claims may be precluded by legal imperatives attendant to the workplace." *Malik*, 202 F.3d

at 106. When Pepe and Spinola were asked by the Director of Practice to indicate whether Jordan was technically or otherwise qualified to practice as an enrolled agent, they indicated that he was not. Given that Jordan *had* been late in filing his taxes, and *had* received notice of unsatisfactory job performance, it was reasonable for Jordan's supervisors to respond in this manner in light of his apparent misstatements.

Pepe was also warranted in making a referral concerning Jordan to the Office of Professional Responsibility in September 2003. Given Jordan's admission that on occasion, he did act as an enrolled agent during the period when he was not eligible, Pepe's referral was prudent and reasonable.

As Jordan's supervisors, Pepe and Spinola were obligated to respond truthfully to the Director's inquiry, and were not required to turn a blind eye to Jordan's practice violations. Their conduct does not constitute "conduct exceeding all bounds usually tolerated by decent society, *Wilson*, 98 Conn. App. at 160.

In addition, Pepe and Spinola did not have "reason to know of facts creating a high degree of risk of physical harm" to Jordan, and then act or fail to act "in conscious disregard or indifference to that risk." *Poe,* 282 F.3d at 140 n. 14. The challenged conduct may have upset Jordan, but it did not create a high risk of physical harm to him. As noted, *supra,* "'[r]eckless conduct tends to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where

a high degree of danger is apparent . . . ." *Craig*, 699 Conn. App. at 721; *see also Pouliot v. Paul Arpin Van Lines*, 367 F. Supp. 2d 267, 275 (D. Conn. 2005) (citing *Craig*, noting that "[s]uch conduct 'must be more than any mere mistake resulting from inexperience, excitement, or confusion, and more than mere thoughtlessness or inadvertence, or simply inattention'") Jordan has not shown that by responding to the Director's inquiry and making the OPR referral, Pepe and Spinola should have known that they would be placing Jordan in a high degree of risk of physical harm or danger. The facts simply do not support this conclusion. *Id.* at 275 (observing that "[p]roviding an individual with a defective vehicle with which to transport an 800-pound piece of equipment may be considered reckless behavior, undertaken with a wanton disregard for the possibility of injury to that individual, in a situation where danger is apparent").

Accordingly, Jordan has not met his burdens as to any claim of reckless behavior by the IRS in this case. Summary judgment was appropriate as to Counts III in *Jordan I* and *Jordan II*.

III. Summary judgment was also proper on the alternate grounds raised below that the district court lacked subject matter jurisdiction as to the claims in *Jordan II*

A. Governing law

The Federal Tort Claims Act (FTCA) is a limited waiver of sovereign immunity providing a remedy against

the federal government for "claims of property damage or personal injury caused by the negligent or wrongful act or omission of its employees under circumstances where the United States, if private person, would be liable to a claimant in accordance with the law of place where the act or omission occurred." 28 U.S.C. § 1346(b). The FTCA contains exceptions to this waiver of sovereign immunity, set forth at 28 U.S.C. § 2680. Relevant to this case, section 2680(a) excludes suits arising out of discretionary functions.

The discretionary function exception provides, in pertinent part, that Congress's waiver of sovereign immunity shall not apply to "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a . . . federal agency or employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a); *see Coulthurst v. United States*, 214 F.3d 106, 108 (2d Cir. 2000).

The Supreme Court has established a two-part test for determining whether the exemption from liability provided by the FTCA's discretionary function exception applies. *Coulthurst*, 214 F.3d at 108 (citing *Berkovitz v. United States,* 486 U.S. 531 (1988), and *United States v. Gaubert*, 499 U.S. 315 (1991)). First, the alleged negligent action must involve an element of judgment or choice, not compelled by statute or regulation; second, the judgment or choice must be grounded in "considerations of public policy." *Coulthurst*, 214 F.3d at 109 (citing *Gaubert*, 499

U.S. at 322-23, and *Berkovitz*, 486 U.S. at 536-37). As the Supreme Court has further explained:

> When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion. For a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime. The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.

Gaubert, 499 U.S. at 324-25; *see also Salafia v. United States*, No. 3:07-CV-312 (JBA), 2008 WL 4368940, at *3-4 (D. Conn. Sept. 26, 2008)*; Sicignano v. United States*, 127 F. Supp. 2d. 325, 329 (D. Conn. 2001).

31 U.S.C. § 330 relates to the authority of the Secretary of the Treasury and his designees to decide whether and how to discipline practitioners before the IRS. The statute provides, in pertinent part, that:

> (a) Subject to section 500 of title 5, the Secretary of the Treasury *may*—

> (1) regulate the practice of representatives of persons before the Department of the Treasury; and
>
> (2) before admitting a representative to practice, require that the representative demonstrate –
>
> (A) good character;
> (B) good reputation;
> (C) necessary qualifications to enable the representative to provide to persons valuable service; and
> (D) competency to advise and assist persons in presenting their cases.
>
> (b) After notice and opportunity for a proceeding, the Secretary may suspend or disbar from practice before the Department, a representative who –
>
> (1) is incompetent;
> (2) is disreputable;
> (3) violates regulations prescribed under this section; or
> (4) with intent to defraud, willfully and knowingly misleads or threatens the person being represented or a prospective person to be represented.

31 U.S.C. § 330 (2004) (emphasis added). Federal regulation also defines this delegated authority:

> The Secretary of the Treasury, or his or her delegate, after notice and an opportunity for a proceeding, *may* censure, suspend or disbar any practitioner from practice before the Internal Revenue Service if the practitioner is shown to be incompetent or disreputable, fails to comply with any regulation in this part, or with intent to defraud, willfully and knowingly misleads or threatens a client or prospective client. Censure is a public reprimand.

31 C.F.R. § 10.50(a) (2004) (emphasis added). Similarly, the Director of the Practice (n/k/a the Director of the Office of Professional Responsibility), the Secretary's designee, *see* 31 C.F.R. § 10.1 (2004), has discretionary authority to discipline people practicing before the IRS. Disreputable conduct for which a practitioner may be censured, suspended or disbarred from practice includes:

> Knowingly aiding and abetting another person to practice before the Internal Revenue Service during a period of suspension, disbarment, or ineligibility of such other person.

31 C.F.R. § 10.51(j) (2004).

Regulations also provide that whenever the Director has determined that a practitioner violated a provision of the laws governing practice before the IRS or its regulations, the Director may reprimand the practitioner or institute a proceeding for censure, suspension or

disbarment of the practitioner. 31 C.F.R. § 10.60(a) (2004). Further,

> The Director of Practice *may* confer with a practitioner or an appraiser concerning allegations of misconduct irrespective of whether a proceeding for censure, suspension, disbarment, or disqualification has been instituted against the practitioner or appraiser.

31 C.F.R. § 10.61(a) (2004) (emphasis added).

B. Discussion

The discretionary function exception applies to the decision of the Secretary of the Treasury or his delegate in this case to contact the tax practitioners and notify them of possible discipline. That decision was based on the Secretary's discretion and was grounded in public policy. Therefore the claims in *Jordan II* must fail for lack of subject matter jurisdiction.

According to the letters sent by the Secretary to the CPAs in question, the notices were given pursuant to 31 C.F.R. § 10.60. This section provides that the Director of Practice "may" reprimand a practitioner. *See* GA at 228, 231, 234.

The conduct alleged in this case is similar to that in *Sicignano, supra*, where the district court found the complaint to be barred under the discretionary function exception. In *Sicignano*, the plaintiff brought suit under the FTCA for terminating his right to represent taxpayers

before the IRS based on allegations of retaliation for representing his clients aggressively before the Service. Reviewing 31 U.S.C. § 330 and the pertinent regulations, the district court concluded that these laws conferred discretion upon the Secretary that triggered the discretionary function exception:

> [T]he discretion afforded the Secretary and the ODP[8] covers all of the allegedly wrongful conduct described in Sicignano's complaint, including: the letter from the Director of Practice questioning Sicignano's eligibility to practice before the IRS; the telephone call by an ODP employee discussing suspension of the plaintiff for one year from representing clients before the IRS; and the ODP's filing of a complaint seeking to terminate Sicignano's rights to represent clients before the IRS. The challenged actions involve an element of judgment or choice and are not controlled by mandatory statutes or regulations. Accordingly, the first step of the discretionary function analysis is met.

Sicignano, 127 F. Supp. 2d. at 331.

In the present case, those same statutes and regulations confer discretion on the Secretary of the Treasury and Director to discipline practitioners. Those laws specifically use the word "may" with respect to the use of this authority, indicating that the Director's decision to

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[8] *See supra* n. 1.

notify practitioners of Jordan's ineligibility to practice as an enrolled agent was not mandatory. As such, the first step of the two-step analysis set forth in *Gaubert* and implemented in *Sicignano* has been satisfied. *See, e.g. Montez ex rel. Estate of Hearlson v. United States,* 359 F.3d 392, 397 (6th Cir. 2004) (use of the word "may" in BOP regulations supports finding of discretionary function); *Attallah v. United States,* 955 F.2d 776, 784 (1st Cir. 1992) (same, as to U.S. Customs regulations).

The challenged actions also meet the second prong of the discretionary function analysis because they were grounded in policy considerations. As noted by the court in *Sicignano,* "Congress provided the Department of Treasury with broad authority to adopt the rules and regulations necessary to ensure the integrity and quality of practice before the IRS." *Sicignano*, 127 F. Supp. 2d at 331 (citing 31 U.S.C. § 330 and H.R.Rep. No. 2518, 82d Cong., 2d Sess. 13 (1953)). Further,

> the Treasury Department's rules and regulations governing practice before the IRS are aimed at protecting the integrity of a tax system that depends upon voluntary compliance. Courts have found that such efforts by an administrative agency implicate public policy considerations.

Sicignano, 127 F. Supp. 2d at 331 (citing *Goldsmith v. U.S. Board of Tax Appeals*, 270 U.S. 117, 121 (1926)) Board of Contract Appeals prescribed rules and standards before IRS), and *Touche Ross & Co. v. SEC*, 609 F.2d

570, 582 (2d Cir. 1979) (SEC disciplines accountants and attorneys who practice before it). The court concluded:

> Here the ODP employees' decisions whether and how to pursue disciplinary proceedings against those practicing before the IRS implicate the same policy concerns expressed in *Goldsmith* and *Touche Ross*. Judicial intervention in those decisions, through a private tort suit, would require the court to "'second-guess' the political, social, and economic judgments of an agency exercising its regulatory function." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines),* 467 U.S. 797, 798-99, 820, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984). The conduct challenged by Sicignano's complaint involves discretionary decisions grounded in policy, *see, e.g., Gaubert* 499 U.S. at 324-25, 111 S.Ct. 1267, and, accordingly, the second step of the discretionary function analysis is satisfied.

Sicignano, 127 F. Supp. 2d at 332.

In the present case, the IRS exercised its discretion in contacting the practitioners to notify them of possible discipline, and that decision was grounded in public policy. Therefore, the conduct was the type which Congress intended to protect. The claims in *Jordan II* are barred in their entirety by the discretionary function exception, 28 U.S.C. § 2680(a).

CONCLUSION

For the foregoing reasons, the judgment of the district court for the defendant-appellee United States of America, Department of Treasury, should be affirmed.

Dated: November 5, 2008

Respectfully submitted,

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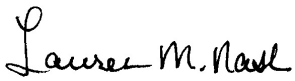

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CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 12,144 words, exclusive of the Table of Contents, the Table of Authorities, and this Certification.

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ADDENDUM

28 U.S.C. § 2680 Exceptions.

The provisions of this chapter and section 1346(b) of this title shall not apply to--

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

. . .

31 U.S.C. § 330 (2004) Practice before the Department.

(a) Subject to section 500 of title 5, the Secretary of the Treasury may –

(1) regulate the practice of representatives of persons before the Department of the Treasury; and

(2) before admitting a representative to practice, require that the representative demonstrate –

(A) good character;
(B) good reputation;
(C) necessary qualifications to enable the representative to provide to persons valuable service; and
(D) competency to advise and assist persons in presenting their cases.

(b) After notice and opportunity for a proceeding, the Secretary may suspend or disbar from practice before the Department a representative who –

(1) is incompetent;
(2) is disreputable;
(3) violates regulations prescribed under this section; or
(4) with intent to defraud, willfully and knowingly misleads or threatens the person being represented or a prospective person to be represented.

. . .

31 C.F.R. § 10.1 (2004) Director of Practice.

(a) Establishment of office. The Office of Director of Practice is established in the Office of the Secretary of the Treasury. The Director of Practice is appointed by the Secretary of the Treasury, or his or her designate.

. . .

31 C.F.R. § 10.50 (2004) Sanctions.

(a) Authority to censure, suspend, or disbar. The Secretary of the Treasury, or his or her delegate, after notice and an opportunity for a proceeding, may censure, suspend or disbar any practitioner from practice before the Internal Revenue Service if the practitioner is shown to be incompetent or disreputable, fails to comply with any regulation in this part, or with intent to defraud, willfully and knowingly misleads or threatens a client or prospective client. Censure is a public reprimand.

. . .

31 C.F.R. § 10.51 (2004) Incompetence and disreputable conduct.

Incompetence and disreputable conduct for which a practitioner may be censured, suspended or disbarred from practice before the Internal Revenue Service includes, but is not limited to –

. . .

(j) Knowingly aiding and abetting another person to practice before the Internal Revenue Service during a period of suspension, disbarment, or ineligibility of such other person.

. . .

31 C.F.R. § 10.60 (2004) Institution of proceeding.

(a) Whenever the Director of Practice determines that a practitioner violated any provision of the laws governing practice before the Internal Revenue Service or the regulations in this part, the Director of Practice may reprimand the practitioner or, in accordance with § 10.62, institute a proceeding for censure, suspension, or disbarment of the practitioner. . . .

31 C.F.R. § 10.61 (2004) Conferences.

(a) In general. The Director of Practice may confer with a practitioner or an appraiser concerning allegations of misconduct irrespective of whether a proceeding for censure, suspension, disbarment, or disqualification has been instituted against the practitioner or appraiser. If the conference results in a stipulation in connection with an ongoing proceeding in which the practitioner or appraiser is the respondent, the stipulation may be entered in the record by either party to the proceeding.

. . .

ANTI-VIRUS CERTIFICATION

Case Name: Jordan v. Dep't of Treasury

Docket Number: 08-2551-cv

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **civilcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 11/5/2008) and found to be VIRUS FREE.

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