# 09-2054-cv

*To Be Argued By* :
DOUGLAS P. MORABITO

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# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 09-2054-cv**

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ALFRED LAVOIE,
*Plaintiff-Appellant,*

-vs-

UNITED STATES OF AMERICA,
*Defendant-Appellee.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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NORA R. DANNEHY
*United States Attorney*
*District of Connecticut*

DOUGLAS P. MORABITO
WILLIAM J. NARDINI *(of counsel)*
*Assistant United States Attorneys*

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PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

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## STATEMENT OF JURISDICTION

The district court (Peter C. Dorsey, 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. On May 4, 2009, the district court granted the United States' motion for summary judgment, *see* Joint Appendix ("JA") at 294-311. On May 11, 2009, the plaintiff filed a timely notice of appeal within the 60 days authorized by Fed. R. App. P. 4(a). *See* JA at 313. 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. Did the district court properly grant summary judgment for the government on the plaintiff's claim of negligent infliction of emotional distress, on the grounds that the government's processing of the plaintiff's application for benefits was reasonable and thus, did not create an unreasonable risk of causing the plaintiff emotional distress?

II. Did the district court properly grant summary judgment for the government on the plaintiff's claim of intentional infliction of emotional distress, on the grounds that the government's conduct in processing the plaintiff's application for benefits was not extreme and outrageous?

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## BRIEF FOR UNITED STATES OF AMERICA

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This case involves whether the district court correctly granted summary judgment for the government in a Federal Tort Claims Act suit, rejecting claims brought by Alfred Lavoie of intentional and negligent infliction of emotional distress as a result of governmental delays in processing his benefits claims. Lavoie had been employed at Pratt & Whitney's Connecticut Aircraft Nuclear Engine Laboratory from 1958 to 1966. In 2001, he filed a claim for benefits under federal law, alleging that he had contracted Hodgkin's disease as a result of that employment. In 2007, he sued the government, arguing

that their failure to adjudicate his claim resulted in the negligent and intentional infliction of emotional distress. The district court (Dorsey, J.) held that both of those claims failed as a matter of law, because the government's conduct in processing Lavoie's benefits application was reasonable, did not create a risk of causing emotional distress, and did not rise to the level of extreme and outrageous conduct. Because the undisputed record defeated all of Lavoie'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 (Peter C. Dorsey, J.). The district court dismissed claims of emotional distress against the defendant-appellee United States of America. JA at 294-311.

On September 18, 2007, Lavoie filed a complaint against the United States, alleging claims for negligent infliction of emotional distress and intentional infliction of emotional distress. JA at 7-11. He brought the action under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*, against the United States of America. This action arises from the processing of Lavoie's claim for benefits under Part B of the Energy Employees Occupational Illness Compensation Program Act ("EEOICA"), 42 U.S.C. § 7384 *et seq.* Lavoie alleges that he suffered emotional distress due to the length of time taken to adjudicate his claim. JA at 7-11.

On May 4, 2009, the district court issued a written decision granting the United States' motion for summary judgment, and entered judgment the next day. JA at 294-311; 312. Lavoie filed a timely notice of appeal on May 11, 2009. JA at 313.

## Statement of Facts and Proceedings Relevant to This Appeal

### A. General background

The plaintiff-appellant, Alfred Lavoie, brought this action pursuant to the FTCA, seeking damages arising out of the United States alleged delay in processing his claim for benefits under Part B of the EEOICA. JA at 62-68.

On July 31, 2001, Part B of the EEOICA went into effect. The EEOICA is codified at 42 U.S.C. §§ 7384*l* - 7384w. Pursuant to Part B of the EEOICA, "covered"[1] employees or their eligible survivors, can receive a lump sum payment of $150,000 and medical benefits for certain illnesses due to their exposure to radiation, beryllium, or silicas in the performance of a Department of Energy ("DOE") duty. 42 U.S.C. §§ 7384*l* - 7384w. JA at 62-68.

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[1] A covered employee with cancer is generally eligible for compensation if he or she: (1) is a member of the Special Exposure Cohort and has a specified cancer, 42 U.S.C. § 7384*l*(9)(A); or (2) sustained the cancer in the performance of duty at a covered facility. 42 U.S.C. § 7384*l*(9)(B); *see also* 42 U.S.C. § 7384n(b).

The Office of Compensation Analysis and Support ("OCAS"), which is within the National Institute for Occupational Safety and Health ("NIOSH"), and ultimately within the Department of Health and Human Services ("HHS"), oversees a portion of the adjudication of claims under Part B of the EEOICA. OCAS is responsible for "developing scientific guidelines for determining whether a worker's cancer is related to his/her occupational exposure to radiation; developing methods to estimate worker exposure to radiation; developing estimates of radiation dose for workers who have applied for compensation; and establishing a process by which classes of workers can be considered for inclusion in a Special Exposure Cohort ('SEC')."[2] To determine whether an applicant is covered under the EEOICA, NIOSH may have to conduct a dose reconstruction. JA at 62-68; 82-84.

In October 2001, OCAS began adjudicating compensation claims for EEOICA, and from October 2001 through July 2008, OCAS received over 27,600 claims. To resolve the largest number of claims in the shortest period of time, OCAS prioritizes claims. *Id.* Some factors it considers when deciding the order to review a claim include the availability of radiation dose information and

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[2] *See* 42 U.S.C. § 7384l(17); 20 C.F.R. § 30.5(ff).

the number of claimants for a specific site.[3] JA at 62-68; 82-84.

On July 31, 2001, Lavoie filed a claim on Form EE-1 seeking compensation under the EEOICA. Lavoie's claim stated that he had been an employee of Pratt & Whitney, at the Connecticut Aircraft Nuclear Engine Laboratory ("CANEL"), from 1958 to 1966. Lavoie further claimed that on March 1, 1988, he was diagnosed with emphysema and a form of cancer known as Hodgkin's disease, and he believed he was entitled to benefits under the EEOICA. JA at 62-68.

In September 2001, NIOSH acknowledged receipt of Lavoie's claim and provided him with a NIOSH tracking number. NIOSH also informed Lavoie that "it may take several months to obtain the information required to complete the dose reconstruction for [his] claim . . . . [and] [o]nce [it] ha[d] gathered the available information needed to complete the dose reconstruction" he would be notified. Then, by letter dated October 22, 2001, Lavoie was asked to submit additional evidence to support his claim. Between 2002 and 2007, Lavoie's claim remained under review by OCAS, due to the backlog of claims filed under the EEOICA, and because of the lack of available information in his case. JA at 62-68; 82-84.

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[3] The prioritizing of claims has allowed OCAS to complete a dose reconstruction for approximately 88% of submitted claims (or 24,482 claims). Additionally, approximately 17,416 claims have received recommended or final decisions from DOL. JA at 83.

The government kept Lavoie apprised of these ongoing delays throughout this period. For example, Lavoie received letters regarding his claim from the government on October 14, 2003, JA at 211, January 2004, JA at 222-226, March 26 2004, JA at 231-32, April 2004, JA at 243-47, July 2004, JA at 249-53, October 2004, JA at 255-59, January 2005, JA at 261-65, April 18, 2005, JA at 267-70, July 9, 2005 at 272, January 14, 2006, JA at 274-76, and July 2006, JA at 278-280. These letters were sent to Lavoie in an effort to keep him reasonably apprised of the status of his claim, which was delayed as a result of the backlog.

In a declaration, Larry J. Elliott, Director of OCAS, explained that, to ensure efficiency, claims were not always processed by NIOSH in the order they were filed. The declaration explained that "[a]lthough NIOSH has made eliminating this backlog a priority . . . [t]his is in many cases due to circumstances beyond NIOSH's control, . . . and in no way based upon any intention to maliciously or otherwise delay resolution of a claim or claims." JA at 82-84.

On February 8, 2007, Lavoie filed an administrative claim against DOE, DOL, and HHS, alleging that the agency's intentional or negligent failure to process his claim caused him to suffer emotional distress. JA at 65. On September 18, 2007, Lavoie filed the present action making the same allegations. In response, the district court ordered the government to complete the processing of his claim and report its determinations by June 30, 2008. JA at 65-66. By letter dated May 21, 2008, NIOSH completed

its investigation and issued a dose reconstruction report, informing Lavoie of its findings. JA at 67. By letter dated June 30, 2008, DOL issued a Recommended Decision informing Lavoie that he was not eligible for compensation under EEOICA. Lavoie is currently pursuing an administrative appeal of the Recommended Decision. JA at 67.

### B. The district court grants summary judgment for the government

By ruling dated May 4, 2009, the district court granted the government's motion for summary judgment as to all claims. JA at 294-311. In reaching its conclusion, the court analyzed the elements under Connecticut law for negligent infliction of emotional distress and intentional infliction of emotional distress. As to the negligent infliction of emotional distress claim, the court concluded that, even viewing the evidence in the light most favorable to Lavoie, there was no evidence that the government's conduct in processing his application was unreasonable or that it created an unreasonable risk of causing him emotional distress. JA at 302-07. The court further reasoned that the government's conduct in processing Lavoie's claim did not rise to the level of extreme and outrageous conduct; thus, his intentional infliction of emotional distress claim likewise failed as a matter of law. JA at 307-11.

## Summary of Argument

The district correctly granted the government's motion for summary judgment as to Lavoie's claims under the FTCA because the government's conduct in processing his claim for benefits was reasonable, did not create an unreasonable risk of emotional distress and likewise did not rise to the level of extreme and outrageous conduct. In short, there was no evidence in the record that established these elements, which are required to prove infliction of emotional distress claims. Connecticut law regarding negligent infliction of emotional distress and intentional infliction of emotional distress fully support the court's ruling in granting the government's motion for summary judgment.

As to the negligent infliction of emotional distress claim, the record fully supports the court's ruling on summary judgment because, although it took seven years for a recommended decision on Lavoie's claim, the government's conduct during the claims processing period was entirely reasonable in light of the complexity and size of the new compensation program as well as the fact that Lavoie was provided with notice of his claim's status throughout the processing period. This notice served to mitigate any claim that the government's conduct created a risk of emotional distress. Summary judgment was also proper on Lavoie's intentional infliction claim because he failed to show that the conduct of the government in processing his claim constituted extreme and outrageous behavior. Indeed, Lavoie was apprised many times throughout the pendency of his claim regarding any

progress made on final adjudication of the compensation claim.

## ARGUMENT

### I. The district court correctly held that Lavoie failed as a matter of law to establish a genuine issue of fact necessary to support a claim of infliction of 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. Negligent infliction of emotional distress**

To prevail on a claim of negligent infliction of emotional distress under Connecticut law, a plaintiff must establish that: "'(1) the defendant's conduct created an unreasonable risk of causing the plaintiff emotional distress; (2) the plaintiff's distress was foreseeable; (3) the emotional distress was so severe that it might result in illness or bodily harm; and (4) the defendant's conduct was the cause of the plaintiff's distress.'" *Crocco v.*

*Advance Stores Co.*, 421 F. Supp.2d 485 (D. Conn. 2006) (quoting *Carrol v. Allstate Ins. Co.*, 262 Conn. 433, 444 (2003)).

As the Connecticut Supreme Court has explained, "in order to prevail on a claim of negligent infliction of emotional distress, the plaintiff must prove 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.'" *Scanlon v. Connecticut Light & Power Co.,* 258 Conn. 436, 446 (2001) (quoting *Montinieri v. Southern New England Telephone Company*, 175 Conn. 337, 345 (1978)). The "test essentially requires that the fear or distress experienced by the plaintiffs be reasonable in light of the conduct of the defendants. If such a fear were reasonable in light of the defendants' conduct, the defendants should have realized that their conduct created an unreasonable risk of causing distress, and they, therefore, properly would be held liable. Conversely, if the fear were unreasonable in light of the defendants' conduct, the defendants would not have recognized that their conduct could cause this distress and, therefore, they would not be liable." *Barrett v. Danbury Hospital,* 232 Conn. 242, 261-62 (1995). Connecticut law arguably does not require extreme and outrageous conduct to establish a claim of negligent infliction of emotional distress. *Adams v. Hartford Courant,* No. 3:03-CV-0477(JCH), 2004 WL 1091728, at *6 (D. Conn. May 14, 2004).

**3. Intentional infliction of emotional distress**

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 v. Ellis*, 200 Conn. 243, 253 (1986) (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 "the intent to cause injury . . . is the gravamen of the tort." *Ancona v. Manafort Bros.*, 56 Conn. App. 701, 708 (2000) (internal quotation marks omitted); *see also Wilson v. Jefferson*, 98 Conn. App. 147, 160 (2006). 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 v. Signode Corp.*, 652 F. Supp. 129, 137 (D. Conn. 1986)).

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*, 421 F. Supp. 2d at 503 (citing *Appleton*, 254 Conn. at 210). It is only "where reasonable minds disagree" that it becomes an issue for the jury. *Storm v. ITW Insert Molded Prods.,* 470 F. Supp. 2d 117, 123 (D. Conn. 2007) (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 (2003) (internal quotation marks omitted)). 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)).

**B. Discussion**

**1. The district court correctly concluded that Lavoie failed to establish a claim for negligent infliction of emotional distress because there is no evidence that the government's conduct was unreasonable or that it created a risk of causing Lavoie emotional distress**

Lavoie argues that the government repeatedly promised him that his claim would be processed expeditiously, that he was eligible for benefits, and that the burden was not on him to prove entitlement to benefits under the EEOICPA The undisputed evidence reflects that the government acted reasonably in processing Lavoie's claim for benefits under Part B of the EEOICA. The undisputed evidence further shows that the government's conduct did not create a risk of causing Lavoie emotional distress. The district

court thus correctly entered summary judgment on this basis as to Lavoie's negligent infliction of emotional distress claim.

The record shows that, although it took seven years for a recommended decision on Lavoie's claim, the government's conduct during the claims processing period was reasonable in light of the complexity and size of the new compensation program. JA at 304. As the director of OCAS explained in his declaration, OCAS's primary responsibilities include "developing scientific guidelines for determining whether a worker's cancer is related to his/her occupational exposure to radiation; developing methods to estimate worker exposure to radiation; developing estimates of radiation dose for workers who have applied for compensation; and establishing a process by which classes of workers can be considered for inclusion in a Special Exposure Cohort (SEC)." JA at 57-58.

Moreover, because of limited resources and the size of the program, the government's prioritization of EEOICPA claims was reasonable. JA at 58. Indeed, the government has received over 27,600 claims since October 2001. *Id.* The government reasonably prioritized claims in order to resolve the largest number of claims from a specific site in light of these limited resources and also based on the complexity of obtaining decades old radiation dose information. JA at 58. As the director of OCAS explained, "[t]his means that claims are not always processed in the order they are filed. For instance, of the first 5000 claims filed under EEOICPA and referred to

NIOSH for dose reconstruction, 31 are still outstanding." JA at 58-59. There is no evidence in the record to show that other reasonable alternatives exist to resolve pending EEOICPA claims. To the contrary, the record establishes and the district court was correct in concluding that there was nothing improper regarding the government's prioritization of claims based on available information and limited resources. In light of the complexity and size of the compensation program, the government's conduct was reasonable. *Barrett*, 232 Conn. at 261-62.

The district court also correctly concluded that the government's conduct in processing Lavoie's claim did not create an unreasonable risk of emotional distress. That is, the record shows that, throughout the processing period, the government provided Lavoie with notices and updates regarding the status of his claim. JA at 95-96; 209; 211-212; 214-220; 222-228; 228-229; 231-232; 243-247; 249-249-253; 255-259; 261-265; 267-270; 272; 274-276; 278-280; and 304. Notably, the record establishes that Lavoie received over 17 communications (excluding those made on his behalf by Senator Dodd or after the initiation of this lawsuit) from a myriad of government officials concerning the processing of his claim. *Id.* In addition to providing Lavoie with updates regarding his claim, those notices also advised Lavoie of the complexity and enormity of the EEOICPA program. *Id.* Indeed, many of the updates actually contained a section that outlined the number of claims received along with other information relating to the processing of EEOICPA claims. JA at 214-220; 222-226; 243-247; 249-253; 255-259; 261-265.

The district court also correctly recognized that the language and contents of the communications to Lavoie were professional, informative and intended to provide claimants such as Lavoie with useful information regarding a claim for compensation under the EEOICPA. JA at 214-220; 222-226; 243-247; 249-253; 255-259; 261-265. Notably, the notices provided by the government explained to Lavoie that dose reconstructions are complex and very time consuming especially for facilities, such as where he worked, in the late 1950's and early 1960's, that were no longer in existence. JA at 214-220; 222-226; 243-247; 249-253; 255-259; 261-265. The notices sent to Lavoie coherently explained that such dose reconstructions vary depending on the availability of information and the amount of time needed to gather information from a number of sources. *Id.* There is simply no evidence in the record showing that the government should have realized that its conduct in processing Lavoie's claim was unreasonable in light of the fact that such notices provided to Lavoie served as an attempt by the government to ameliorate his concern over the lengthy period of time for processing such claims. *Scanlon*, 258 Conn. at 446 (requiring evidence that a defendant must realize that its conduct creates a risk of emotional distress).

Finally, Lavoie argues that government representatives, including Cabinet level representatives, caused him to believe that he was eligible for benefits and that they would be awarded without undue delay. Pl. Br. at 23. The record does not support such a claim. To the contrary, the record shows that any reliance on such conduct (assuming that it occurred) was not reasonable in light of the many

notices received by him throughout the claims processing period. These notices mitigated any purported risk of distress since he was continually apprised of the status of his claim and of the fact that it would be a lengthy process due to the size and complexity of the compensation program. JA at 214-220; 222-226; 243-247; 249-253; 255-259; 261-265. Moreover, these notices succinctly detailed the eligibility requirements for an award of compensation. In sum, these notices also served to counteract any purported informal assurances that Lavoie claims to have received regarding his eligibility for benefits and the expedition with which his claim would be processed. *Id.*

In sum, although it is unfortunate how long the processing period is for EEOICPA claims particularly for claimants from smaller facilities that closed many years ago, the district court correctly concluded that the government acted reasonably throughout the claim processing period in light of the time consuming and highly complex task at hand by providing informative updates to Lavoie in an effort to alleviate any potential concern over the length of time needed to adjudicate his claim for compensation under the EEOICPA.

**2. The district court correctly concluded that Lavoie failed to establish a claim for reckless or intentional infliction of emotional distress as a matter of law because the government's conduct was not extreme and outrageous**

In his brief, Lavoie claims that the government's conduct in processing his claim for compensation was extreme and outrageous and thus sufficient to support a finding of liability for reckless or intentional infliction of emotional distress. Lavoie, however, concedes in his opening brief to this Court that the government did not intend to inflict suffering on him or act with actual malice. Pl. Br. at 24. Instead, he claims that the government acted recklessly in processing his claim for compensation under the EEOICPA. *Id.* Thus, he is not really arguing that the government intentionally inflicted emotional distress, but rather limiting himself to a recklessness theory.

As an initial matter, it is unclear whether under Connecticut law a cause of action for reckless infliction of emotional distress on a non-bystander exists. *Compare Montanaro v. Baron*, No. CV065006991, 2008 WL 1798528, at *5 (Conn. Super. Ct. Mar. 28, 2008) ("Connecticut . . . does not recognize a distinct cause of action for reckless infliction of emotional distress . . . .") *with Votre v. County Obstetrics & Gynecology Group, P.C.*, No. CV065005430S, 2007 WL1675929, at *2-4 (Conn. Super. Ct. May 24, 2007) (analyzing intentional and reckless infliction of emotional distress together, separately from negligent inflection of emotional distress);

*see also Myslow v. New Milford School Dist.*, No. 3:03-CV-496 (MRK), 2006 WL 473735, at *17 (D. Conn. Feb. 28, 2006). Even assuming that such a cause of action exists under Connecticut law, Lavoie's claim fails because, as discussed above, his allegations do not amount to negligent infliction of emotional distress, which is easier to establish than a claim for reckless or intentional infliction of emotional distress. *See Craig v. Driscoll*, 781 A.2d 440, 453 (Conn. App. 2001) ("Recklessness is . . . more than negligence, more than gross negligence.") (internal quotation marks and citation omitted).

Even assuming that Connecticut recognizes the tort of reckless infliction of emotional distress as a subset of the tort of intentional infliction of emotional distress, any such claim would fail because Lavoie has failed to produce any evidence that the government's conduct in processing his application for benefits was extreme and outrageous. JA at 134-35, 228-29, 283-84.

The undisputed facts establish that the conduct described by Lavoie as "extreme and outrageous" is far from it. Lavoie contends that the government's conduct was extreme and outrageous based on essentially the same grounds as his negligent infliction claim except that he places greater reliance on the fact that high level government officials had knowledge of the delays in adjudicating his claim. Pl. Br. at 24, 26; JA at 307. In particular Lavoie alleges that his situation was "brought directly to the attention of officials at the highest levels by a senior United States Senator, on multiple occasions." Pl. Br. at 24. The record shows that government officials

corresponded with Senator Dodd's office three times on December 12, 2003, January 21, 2004, and October 6, 2006 regarding the status of Lavoie's claim. JA at 134-35; 228-29; 283-84. The letters plainly advised Senator Dodd of the complexity of the EEOICPA program (including the dose reconstruction process), the large number of claims received, and the lengthy process involved in adjudicating such claims. *Id.* The letters further served to assure Senator Dodd that the government was committed to expeditiously, fairly and consistently processing all claims under the EEOICPA, not just Lavoie's claim for compensation. *Id.* Even crediting Lavoie's claims that Senator Dodd's correspondence with high level government officials reflected personal knowledge by them of the delays associated with processing Lavoie's claim, those delays still 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).

As the district court correctly concluded, conduct does not become "extreme and outrageous" simply because high level government officials were aware of the status of Lavoie's claim during the processing period. JA at 308-311. Indeed, the undisputed evidence establishes that Lavoie was advised that the process would be slow and that the amount of effort required to complete a dose reconstruction varies with the quality and completeness of available information. Additionally, the district court noted that there was an absence of evidence showing that

the government acted in any manner intended to delay or hinder the processing of Lavoie's claim under the EEOICPA. *Id.* In fact, the undisputed record leads to one conclusion: that high level government officials took the time and effort to respond to Lavoie's inquiries and to further respond directly to Senator Dodd regarding the status of Lavoie's claim. JA at 134-35; 228-29; and 283-84.

In sum, Lavoie has not established that the government engaged in extreme and outrageous conduct by the manner in which his claim for compensation was processed. Lavoie has also not met his burdens as to any claim of reckless behavior by the government in this case. Accordingly, his claim of intentional infliction of emotional distress must fail.

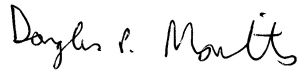
## CONCLUSION

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

Dated: September 4, 2009

Respectfully submitted,

NORA R. DANNEHY
UNITED STATES ATTORNEY



DOUGLAS P. MORABITO
ASSISTANT U.S. ATTORNEY

WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

**ANTI-VIRUS CERTIFICATION**

Case Name: Lavoie v. U.S.

Docket Number: 09-2054-cv

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **agencycases@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 9/4/2009) and found to be VIRUS FREE.

Louis Bracco
*Record Press, Inc.*

Dated: September 4, 2009

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John R. Williams, Esq.
John R. Williams & Associates LLC
51 Elm Street
New Haven, CT 06510

Attorneys for Plaintiff-Appellant

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SAMANTHA COLLINS
Record Press, Inc.
229 West 36th Street, 8th Floor
New York, New York 10018
(212) 619-4949