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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

SHAWN VAN ASDALE, an individual,)	3:04-CV-703-RAM
and LENA VAN ASDALE, an individual)	
)	<u>ORDER</u>
Plaintiffs,)	
)	
vs.)	
)	
INTERNATIONAL GAME,)	
TECHNOLOGY a Nevada corporation,)	
)	
Defendants.)	

Before the court is a Motion For Summary Judgment by Defendant International Game Technology (Doc. #173).¹ Plaintiffs have opposed (Doc. #177), and Defendant has replied (Doc. #183). After a thorough review, the court finds that the motion should be granted in part and denied in part.

I. BACKGROUND

Plaintiffs Shawn and Lena Van Asdale² are former corporate counsel for Defendant, International Game Technology (IGT). (Pls.’ Compl. 4 (Doc. #3).) Plaintiffs bring this action against Defendant for their dismissals, which they allege were done in retaliation for Plaintiffs’ protected activity of reporting suspected IGT shareholder fraud to federal authorities. (*Id.* at 3.) Plaintiffs’ complaint alleges that Defendants are liable to them under the Sarbanes-Oxley Act (SOX) and for the Nevada state torts of tortious discharge, intentional interference with contractual relations, and intentional infliction of emotional distress. (*Id.* at 14-20.) Plaintiff

¹ Refers to the court’s docket number.

² The court will refer to the Van Asdales collectively as Plaintiffs and individually by their first names.

1 Lena Van Asdale also alleges that Defendant is liable to her for retaliation. (*Id.* at 19.)

2 Defendant is a Nevada corporation with its principal place of business in Reno, Nevada.
3 (*Id.* at 3.) Defendant specializes in the design, development, manufacturing, distribution and
4 sales of computerized gaming machines and systems products. (Def.'s Mot. for Summ. J. 2
5 (Doc. #173).) Defendant hired both Shawn and Lena Van Asdale in January 2001 to work as
6 in-house intellectual property attorneys. (*Id.*) Both Plaintiffs are attorneys licensed in Illinois.
7 (Def.'s Mot. for Summ. J., Campbell Dec., Ex. 1 at 13, Ex. 2 at 13-14.) Neither is licensed in any
8 other jurisdiction, including Nevada. (*Id.*) The alleged events giving rise to this action took
9 place in Nevada. (Pls.' Compl. 3.)

10 The court derives jurisdiction in this case from the federal question at issue under the
11 Sarbanes-Oxley statute. (Pls.' Compl. 3.) On June 13, 2007, this court entered an order
12 granting Defendant's motion for summary judgment as to Plaintiffs' federal claim under the
13 Sarbanes-Oxley Act and dismissing Plaintiffs' state law claims without prejudice. (Doc. #197.)
14 On appeal, the Ninth Circuit reversed the grant of summary judgment as to Plaintiffs' federal
15 claim, vacated the dismissal of the state law claims, and remanded for this court to address, in
16 the first instance, Defendant's motion for summary judgment as to the state law claims. *Van*
17 *Asdale v. Int'l Game Tech.*, 577 F.3d 989, 1005 (9th Cir. 2009).

18 In 2001, IGT began merger negotiations with Anchor Gaming (Anchor). (Pls.' Compl.
19 4). Plaintiffs allege that top management at Anchor stood to make millions of dollars,
20 personally, if IGT acquired Anchor by merger. (*Id.* at 1). Plaintiffs allege that the merger was
21 "based primarily on Anchor's 'Wheel of Gold' patents" (the Wheel patents). (*Id.*) After the
22 merger, IGT acquired a third Wheel patent, the '000 patent. (*Id.* at 2.) IGT planned to litigate
23 against Bally Gaming as soon as the '000 patent issued. (*Id.*) According to Plaintiffs, Anchor
24 withheld vital information about the Wheel patents from IGT and from IGT's Intellectual
25 Property department. (*Id.*) Specifically, Plaintiffs allege that Anchor withheld information
26 about the "Australian Flyer," a document that would have apparently showed the Wheel
27 patents to be worthless. (*Id.* at 2-3.) Plaintiffs claim that when the Australian Flyer was
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1 eventually revealed by Anchor's former patent counsel, IGT terminated its litigation against
2 Bally Gaming because the flyer revealed the invalidity of the '000 patent. (*Id.* at 3.) Plaintiffs
3 allege that they both met with Dave Johnson, General Counsel for IGT, to express their view
4 on the invalidity of the '000 patent and to express concern that fraud had occurred. (*Id.* at 10.)
5 Plaintiff Shawn Van Asdale alleges that he also engaged in other protected whistleblowing
6 activity when he discussed this same issue with Sara Beth Brown, the former General Counsel
7 for IGT, and Richard Pennington, another IGT executive. (*Id.* at 9.) Both Plaintiffs were
8 subsequently terminated, allegedly in retaliation for their whistleblowing activities. (*Id.* at 11-
9 12.)

10 **II. LEGAL STANDARD**

11 The purpose of summary judgment is to avoid unnecessary trials when there is no
12 dispute over the facts before the court. *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d
13 1468, 1471 (9th Cir. 1994). All reasonable inferences are drawn in favor of the non-moving
14 party. *In re Slatkin*, 525 F.3d 805, 810 (9th Cir. 2008) (citing *Anderson v. Liberty Lobby, Inc.*,
15 477 U.S. 242, 244 (1986)). Summary judgment is appropriate if "the pleadings, the discovery
16 and disclosure materials on file, and any affidavits show that there is no genuine issue as to any
17 material fact and that the movant is entitled to judgment as a matter of law." *Id.* (citing
18 Fed.R.Civ.P. 56©). Where reasonable minds could differ on the material facts at issue,
19 however, summary judgment is not appropriate. *Warren v. City of Carlsbad*, 58 F.3d 439, 441
20 (9th Cir. 1995), *cert. denied*, 516 U.S. 1171 (1996). In deciding whether to grant summary
21 judgment, the court must view all evidence and any inferences arising from the evidence in the
22 light most favorable to the nonmoving party. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir.
23 1996).

24 The moving party bears the burden of informing the court of the basis for its motion,
25 together with evidence demonstrating the absence of any genuine issue of material fact.
26 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its burden,
27 the party opposing the motion may not rest upon mere allegations or denials of the pleadings,
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1 but must set forth specific facts showing there is a genuine issue for trial. *Anderson*, 477 U.S.
2 at 248. Although the parties may submit evidence in an inadmissible form, only evidence
3 which might be admissible at trial may be considered by a trial court in ruling on a motion for
4 summary judgment. Fed. R. Civ. P. 56©.

5 In evaluating the appropriateness of summary judgment, three steps are necessary: (1)
6 determining whether a fact is material; (2) determining whether there is a genuine issue for the
7 trier of fact, as determined by the documents submitted to the court; and (3) considering that
8 evidence in light of the appropriate standard of proof. *Anderson*, 477 U.S. at 248. As to
9 materiality, only disputes over facts that might affect the outcome of the suit under the
10 governing law will properly preclude the entry of summary judgment; factual disputes which
11 are irrelevant or unnecessary will not be considered. *Id.* Where there is a complete failure of
12 proof concerning an essential element of the nonmoving party's case, all other facts are
13 rendered immaterial, and the moving party is entitled to judgment as a matter of law. *Celotex*,
14 477 U.S. at 323.

15 III. DISCUSSION

16 **A. ISSUES DECIDED BY THE NINTH CIRCUIT**

17 On appeal, the Ninth Circuit addressed Defendant's arguments that (1) Plaintiffs are
18 prohibited from maintaining this action under their ethical obligations as Illinois-licensed
19 attorneys and (2) notwithstanding the particular requirements of Illinois law, Plaintiffs' case
20 should not go forward because they cannot establish their claim without using attorney-client
21 privileged information. *Van Asdale*, 577 F.3d at 994. The Ninth Circuit rejected both
22 arguments, concluding that dismissal of Plaintiffs' claims on either ground was not warranted.
23 *Id.* at 994-96.

24 **B. TORTIOUS DISCHARGE CLAIMS**

25 Plaintiffs' assert they were wrongfully discharged by Defendant for internally reporting
26 and refusing to participate in alleged illegal conduct. (Pls.' Compl. 15-17.) Defendant argues
27 that it is entitled to summary judgment on Plaintiffs' tortious discharge claims because
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1 Plaintiffs failed to externally report the alleged illegal activity as required by Nevada law.
2 (Def.'s Mot. for Summ. J. 23.) Because the claims for tortious discharge for Shawn and Lena
3 are based on nearly identical facts, the court will address both Plaintiffs' claims together.

4 Employment contracts are presumed to be at-will under Nevada law. *Dillard Dep't*
5 *Stores, Inc. v. Beckwith*, 989 P.2d 882, 884-45 (Nev. 1999). An employer "may discharge an
6 employee for any reason, so long as the reason does not violate public policy." *Id.* at 885.
7 Nevada recognizes the tort of retaliatory discharge in the whistleblowing context when an at-
8 will employee is fired for reporting illegal conduct of his employer because termination for
9 reporting illegality violates an established public policy of the state. *Wiltsie v. Baby Grand*
10 *Corp.*, 774 P.2d 432, 433 (Nev. 1989). In *Wiltsie*, the Nevada Supreme Court upheld the
11 district court's grant of summary judgment where a poker room manager was terminated for
12 reporting alleged illegal activity to his supervisor. *Id.* at 433-34. The court stated that "[s]o
13 long as employees' actions are not merely private or proprietary, but instead seek to further the
14 public good, the decision to expose illegal or unsafe practices should be encouraged." *Id.* at 433
15 (citation and quotation omitted). In finding that the poker room manager did not have a cause
16 of action for retaliatory discharge, the court held that "[b]ecause [he] chose to report the
17 activity to his supervisor rather than the appropriate authorities, he was merely acting in a
18 private or proprietary manner." *Id.* Therefore, an employee must expose an employer's illegal
19 activity to the proper authorities, not merely to a supervisor, to be entitled to protection for
20 whistleblowing.

21 Plaintiffs concede that they did not report wrongdoing to anyone outside of IGT. (Pls.'
22 Opp. to Summ. J. 36 (Doc. #177).) Nevertheless, Plaintiffs argue that they have a viable claim
23 for tortious discharge, even if illegality is only internally reported, where their objection
24 amounts to a refusal to violate public policy. *Id.*

25 A claim for tortious discharge is available "to an employee who was terminated for
26 refusing to engage in conduct that he, in good faith, reasonably believed to be illegal." *Allum*
27 *v. Valley Bank*, 970 P.2d 1062, 1068 (Nev. 1998). However, "mere objection to company
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1 policies is not sufficient to support such a tortious discharge claim.” *Bielser v. Profl Sys.*
2 *Corp.*, 321 F. Supp. 2d 1165, 1171 (D. Nev. 2004). Rather, an employee must take some action
3 amounting to “a refusal to violate the public policy of [Nevada].” *Id.* (quoting *Bigelow v.*
4 *Bullard*, 901 P.2d 630, 634 (Nev. 1995)). In *Bielser*, the court noted the distinction between
5 a cause of action for tortious discharge resulting from whistleblowing activity and a cause of
6 action for tortious discharge resulting from a refusal to violate public policy. *Bielser*, 321.
7 F.Supp. 2d 1171. In the former, an employee “merely discovers that her employer is engaged
8 in illegal conduct and reports it to someone,” while in the latter, “an employee is asked by her
9 employer to participate in conduct violative of public policy.” *Id.* The court in *Bielser*
10 concluded that a general manager’s claim for tortious discharge resulting from her internal
11 reporting of allegedly fraudulent and illegal overcharging of a client was “based on
12 whistleblowing, not a refusal to violate public policy.” *Id.* at 1166, 1171. The court found that
13 the general manager’s behavior in bringing the allegedly fraudulent activity to her employer’s
14 attention and voicing an objection to the conduct did not amount to a refusal to engage in the
15 fraudulent conduct herself. *Id.* at 1171.

16 Here, Plaintiffs’ actions closely resemble the actions taken by the general manager in
17 *Bielser*. Plaintiffs met with Dave Johnson to discuss and explain to him their views on the
18 invalidity of the ‘000 patent on November 24, 2003. (Def.’s Mot. for Summ. J., Campbell Dec.,
19 Ex. 1 at 84-86, Ex. 2 at 286-91.) Plaintiffs told Johnson about the “suspicious circumstances”
20 surrounding the discovery of the documents containing the “Australian Flyer” that appeared
21 to indicate that the documents may have been withheld prior to the merger between Anchor
22 and IGT. (*Id.*) Shawn told Johnson he believed an investigation for potential fraud was
23 necessary. (*Id.*) According to Plaintiffs, Johnson responded that he would think about the
24 situation and that he thought it was unbelievable that Mark Hettinger, the head of Anchor’s IP
25 Department before the merger, had not received nor looked at the documents. *Id.* Following
26 the November 24 meeting, Shawn again met with Johnson and asked how the board had
27 responded to the news of the previously undisclosed documents and the potential invalidity of
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1 the Wheel patents. (Def.'s Mot. for Summ. J., Campbell Dec., Ex. 2 at 291.) Shawn alleges that
2 Johnson responded that he did not tell the board about the news because the board did not
3 need to know or be concerned about it. (*Id.* at 292.) In early January 2004, Shawn reiterated
4 to Johnson his belief that an investigation was warranted. (Pls.' Opp. to Summ. J., Ex. C at
5 302.)

6 Plaintiffs allege that they refused to cooperate in Johnson's cover-up and pressed for an
7 investigation. (Pls.' Opp. to Summ. J. 36.) Despite Plaintiffs' efforts to cast their actions as a
8 refusal to violate public policy, like the plaintiff in *Bielser*, their behavior constitutes
9 whistleblowing. Nothing in the record indicates that Plaintiffs received a directive from
10 Johnson that they refused to follow. Rather, Plaintiffs simply brought their concerns regarding
11 allegedly illegal activity to Johnson's attention. As noted above, because Plaintiffs only
12 reported alleged illegality internally, and not externally to authorities, they cannot maintain
13 a cause of action for tortious discharge resulting from whistleblowing. Plaintiffs argue that if
14 the Nevada Supreme Court were presented with the proper case today, there is little reason to
15 believe that it would not overrule *Wiltsie*. (*Id.* at 37.) However, this court is obligated to apply
16 the law of Nevada's highest court, and the law under *Wiltsie* is clear – external reporting is
17 required to sustain a cause of action for tortious discharge resulting from whistleblowing.
18 *Bielser*, 321 F.Supp. at 1172. Thus, Defendant is entitled to summary judgment on Plaintiffs'
19 second and third claims for relief.

20 **C. INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS CLAIMS**

21 Plaintiffs both assert that Defendant intentionally interfered with employment contracts
22 they entered into after their terminations. (Pls.' Compl. 18-19.) To establish a claim for
23 intentional interference with contractual relations, a plaintiff must show: (1) a valid and
24 existing contract; (2) the defendant's knowledge of the contract; (3) intentional acts intended
25 or designed to disrupt the contractual relationship; (4) actual disruption of the contract; and
26 (5) resulting damage. *Sutherland v. Gross*, 772 P.2d 1287, 1290 (Nev. 1989).

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1 When a statement is hearsay within hearsay, or double hearsay, each statement must qualify
2 under some exemption or exception to the hearsay rule. *United States v. Arteaga*, 117 F.3d
3 388, 396 n.12 (9th Cir. 1997).

4 Shawn's deposition testimony pertaining to Matthewson contacting Moody is hearsay
5 within hearsay. Shawn argues that the statement from Matthewson to Moody is admissible
6 under Fed. R. Evid. 801(d)(2) as a statement made by a representative of Defendant and
7 offered against Defendant. (Pls.' Opp. to Summ. J. 38.) Even if Matthewson's statement to
8 Moody is within Fed. R. Evid. 801(d)(2), Shawn's testimony recounting what Moody said to
9 him is also hearsay. Shawn fails to point to any exemption or exception to the hearsay rule that
10 renders Moody's statement to him admissible. Defendant correctly asserts that Shawn is
11 unable to produce admissible evidence to show a genuine issue of material fact to support a
12 claim of intentional interference with contractual relations.

13 Moreover, Shawn fails to show he suffered any actual damages because of the changes
14 Moody made to the terms of the employment agreement. Even if Shawn could show that IGT
15 contacted Moody and as a result Moody included a "no-fault termination" provision in the
16 employment agreement, Shawn could still have undertaken employment at Action Gaming.
17 Moody did not rescind Shawn's future employment, nor did he terminate Shawn without cause.
18 Rather, Shawn himself decided not to accept employment and is unable to show he suffered
19 actual damages. Therefore, Defendant is entitled to summary judgment on Plaintiffs' fourth
20 claim for relief.

21 2. Lena Van Asdale

22 Plaintiff Lena Van Asdale alleges that Defendant knew of her contractual arrangement
23 with Walker Digital and intentionally interfered with that arrangement. (Pls.' Compl. 19.)
24 Defendant argues that Lena is unable to establish IGT's knowledge of her contract with Walker
25 Digital, IGT's intent to interfere, IGT's actual disruption of the contract, or resulting damage.
26 (Def.'s Mot. for Summ. J. 24.)

27 Following her termination from IGT in March 2004, Lena obtained employment with
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1 Walker Digital in September 2004. (Pls.' Compl. 12-13.) On October 12, 2004, IGT sent a
2 letter to the President and COO of Walker Digital. (Pls.' Compl. Ex. A.) The stated purpose of
3 the letter was "to inform [Walker Digital] of IGT's relationship with Lena Van Asdale and to
4 inquire as to her relationship with Walker Digital." (*Id.*) The letter describes Lena's duration
5 of employment at IGT, the nature of her employment, and her access to sensitive information
6 IGT believed she was precluded from disclosing. (*Id.*) IGT asked for confirmation of whether
7 Walker Digital had any relationship with Lena, a description of that relationship if it existed,
8 and any other information Walker Digital was willing to provide regarding its dealings with
9 Lena. (*Id.*) On October 12, 2004, IGT also sent a letter to Lena informing her of its concern
10 that she was employed by Walker Digital and its belief that her employment created a conflict.
11 (Pls.' Compl. Ex. A.) With its letter to Lena, IGT enclosed, among other things, a copy of the
12 letter sent to Walker Digital's President and COO. (*Id.*)

13 In her complaint, Lena alleges that Defendant engaged in retaliatory conduct by sending
14 the letter to Walker Digital and demanding that she not be allowed to work for Walker Digital.
15 (*Id.* at 19.) In her opposition to summary judgment, however, Lena asserts that her
16 termination was also a result of Defendant's involvement with Walker Digital. (Pls.' Opp. to
17 Summ. J. 37.) In February 2006, Defendant acquired an equity interest in a company that
18 holds, develops, and licenses Walker Digital's intellectual property identified for gambling use.
19 (*Id.*, Ex. K.) After this development, Lena asserts that she was initially reassigned to work in
20 the lottery area of Walker Digital, but that as Defendant's involvement with the company
21 increased, she was eventually terminated in September 2006 due to the lack of gaming-
22 industry related work available to her at Walker Digital. (*Id.*) Although Lena has not moved
23 to amend her complaint so that it contains the additional allegation she raises in her opposition
24 to summary judgment, the court will consider it in its summary judgment analysis.

25 Defendant argues that Lena's claim suffers from multiple deficiencies, primarily, the lack
26 of evidence showing IGT caused actual disruption of her contractual relationship or that she
27 suffered resulting damage. (Def.'s Mot. for Summ. J. 24-26; Def.'s Reply 17 (Doc. #183).) With
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1 regard to the letter, Defendant argues that Lena admits that after Walker Digital received the
2 letter from IGT, she was not terminated, her pay was not reduced, she did not receive a lesser
3 bonus, and she was not monetarily damaged by IGT's actions. (Def.'s Mot. For Summ. J. 25-
4 26.) Defendant contends that Lena cannot identify any actual interference with her contract
5 or any damage she suffered from IGT's alleged interference by sending the letter to Walker
6 Digital. (*Id.* at 26.) After thoroughly reviewing the evidence, the court agrees. (*See* Def.'s Mot.
7 For Summ. J., Campbell Decl., Ex. 1 at 129-30.)

8 With regard to IGT's acquisition of an equity interest in the company associated with
9 Walker Digital, Defendant argues that Lena presents no evidence that it was involved in the
10 decision to reassign her to work in the lottery area or that it was involved in her termination.
11 (Def.'s Reply 17.) Defendant contends that, in fact, Lena admits that Walker Digital had a
12 legitimate business reason for terminating her: the lack of gaming-industry related work
13 available to her at Walker Digital. (*Id.*) Lena, however, argues that Walker Digital terminated
14 her employment directly as a result of IGT's involvement with Walker Digital. (Pls.' Opp. to
15 Summ. J. 37.) Lena relies on her declaration in support of her position. (*Id.*, Ex. K.) Although
16 Lena contends that IGT's increased role with the company associated with Walker Digital led
17 to her termination, she fails to provide evidence, in her declaration or otherwise, showing that
18 IGT took specific actions directly leading to her termination. Because Lena is unable to
19 produce evidence showing that Defendant actually disrupted her contractual relationship with
20 Walker Digital, Defendant is entitled to summary judgment on Plaintiffs' sixth claim for relief.

21 **D. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM**

22 Plaintiffs claim that during the time surrounding their terminations, Defendant
23 intentionally caused Plaintiffs to suffer emotional distress. (Pls.' Compl. 20-21.) Defendant
24 moves for summary judgment arguing that Plaintiffs are unable to establish any of the three
25 elements necessary for a claim of intentional infliction of emotional distress. (Def.'s Mot. for
26 Summ. J. 27.)

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1 To establish a claim for intentional infliction of emotions distress, a plaintiff must show:
2 “(1) extreme and outrageous conduct with either the intention of, of reckless disregard for,
3 causing emotional distress, (2) the plaintiff’s having suffered severe or extreme emotional
4 distress and (3) actual or proximate causation.” *Barmettler v. Reno Air, Inc.*, 956 P.2d 1382,
5 1386 (Nev. 1998).

6 On December 17, 2003, Shawn was diagnosed with cancer, and on December 19, 2003,
7 he underwent surgery to remove a malignant tumor. (Pls.’ Opp. to Summ. J., Ex. K at 2.)
8 According to Shawn, in early January 2004, he informed Dave Johnson that although he was
9 still recovering, he would still have to go through radiation therapy. (*Id.*) Shawn alleges that
10 Johnson encouraged him “to take a couple of weeks off and rest,” in part because of his recent
11 surgery, but also because Shawn believed Johnson “wanted him out of the office.” (Pls.’ Opp.
12 to Summ. J., Ex. C at 302-3.) In Shawn’s view, Johnson suggested Shawn take time out of the
13 office so that Johnson could conceal a meeting he was trying to set up with Barry Irwin, IGT’s
14 outside litigation counsel. (*Id.*) Shawn alleges that Johnson used the meeting with Irwin to
15 attempt to amass pretextual reasons for terminating Shawn. (Pls.’ Opp. to Summ. J. 39.)
16 According to Shawn, Johnson falsely represented to him that his superiors were dissatisfied
17 with his performance, and that he might have to find another job within the company. (Pls.’
18 Compl. 20.) Shawn alleges that although Johnson informed him on January 21, 2004, that he
19 would be terminated, Johnson waited until February 11, 2004, the day Shawn was scheduled
20 to begin radiation therapy, to terminate him. (Pls.’ Opp. to Summ. J. 39.)

21 Shawn contends that Johnson used Shawn’s health as a weapon in severance
22 negotiations by suggesting that Shawn would lose his health insurance unless he accepted the
23 severance. (*Id.* at 39-40.) After their terminations, Shawn and Lena allege that IGT imposed
24 a “gag order” on all IGT employees, which included virtually all of the Van Asdales’s friends.
25 (*Id.* at 39.) As further evidence of IGT’s behavior, the Van Asdales point to an email from
26 Johnson to IGT’s Human Resources Director in which Johnson (1) suggested that the Van
27 Asdales had circulated a rumor that Shawn had terminal cancer, (2) stated that he didn’t “really
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1 care, unless Shawn really is terminal,” and (3) suggested that IGT give the Van Asdales a
2 severance proposal and give them the weekend to accept or reject it. (Pls.’ Opp. to Summ. J.,
3 Ex. N, Ex. 36.) On March 16, 2004, IGT’s Human Resources Director emailed the Van Asdales
4 IGT’s severance offers and told the Van Asdales to “[t]ake it and run.” (Pls.’ Opp. to Summ. J.,
5 Ex. M.)

6 Plaintiffs assert that viewing the facts in the light most favorable to them gives rise to
7 the inference that IGT’s actions were outrageous, intentional, and caused damages. (Pls.’ Opp.
8 to Summ. J. 40.) Plaintiffs contend that because the level of outrage was high, Plaintiffs need
9 not show that the resultant emotional distress they suffered gave rise to physical injury. (*Id.*)
10 Defendant argues that termination, by itself, is not extreme and outrageous behavior, and that
11 Plaintiffs fail to show that IGT engaged in any extreme and outrageous conduct. (Def.’s Reply
12 19.) Defendant asserts that the Plaintiffs claims of depression without physical injury are
13 insufficient to constitute severe emotional distress, and that Plaintiffs cannot demonstrate that
14 IGT’s actions were the cause of any emotional distress they suffered. (Def.’s Mot. for Summ.
15 J. 27-29; Def.’s Reply 19-20.)

16 To satisfy the first element of a claim for intentional infliction of emotional distress, a
17 plaintiff must show that the defendant engaged in extreme and outrageous conduct.
18 *Barmettler*, 956 P.2d at 1386. “[T]ermination of employees ... does not in itself amount to
19 extreme and outrageous conduct actionable under an intentional infliction of emotional
20 distress theory.” *Alam v. Reno Hilton Corp.*, 819 F. Supp. 905, 911 (D. Nev. 1993). Liability
21 results only in “extreme cases where the actions of the defendant goes beyond all possible
22 bounds of decency [and] is atrocious and utterly intolerable.” *Id.* Whether a defendant’s
23 conduct may reasonably be regarded as so extreme and outrageous as to permit recovery is a
24 question for the court. *Id.* In this case, Defendant’s actions and behavior surrounding
25 Plaintiffs’ terminations fall well short of the necessary extreme behavior. Plaintiffs’
26 termination alone does not rise to the level of outrageous and extreme. Viewing the evidence
27 in the light most favorable to the Van Asdales, the Court cannot find that either Johnson’s
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1 actions and comments or the HR Director's actions and comments were so extreme and so
2 outrageous as to warrant a claim for infliction of emotional distress.

3 To satisfy the second element of a claim for intentional infliction of emotional distress,
4 a plaintiff must show he or she suffered severe emotional distress. *Barmettler*, 956 P.2d at
5 1386. "[T]he stress must be so severe and of such intensity that no reasonable person could be
6 expected to endure it." *Hirschhorn v. Sizzler Restaurants Int'l*, 913 F. Supp. 1393, 1401 (D.
7 Nev. 1995). Additionally, the less extreme the outrage, the more important it is to require
8 evidence of physical injury or illness from emotional distress. *Id.* "[G]eneral physical or
9 emotional discomfort are insufficient to satisfy the physical impact requirement." *Chowdhry*
10 *v. NLVH, Inc.*, 109 Nev. 478, 483 (Nev. 1993). Here, as discussed above, Defendant's conduct
11 fails to reach the level of extreme and outrageous, thus, Plaintiffs must show evidence of
12 physical injury or illness from emotional distress. Shawn's doctor diagnosed him as having "an
13 adjustment disorder with features of anxiety and depression." (Def.'s Mot. for Summ. J.,
14 Campbell Decl., Ex. 8 at 17.) Lena's doctor diagnosed her as having "borderline clinical
15 depression." (*Id.*, Ex. 7 at 19-20.) Plaintiffs have failed to produce evidence showing they
16 suffered physical injury or illness from emotional distress. Consequently, the court, while
17 sympathetic to the Plaintiffs, cannot find that their diagnoses amounts to severe emotional
18 distress. Because Plaintiffs fail to produce evidence to meet the first or second element to
19 support a claim for intentional infliction of emotional distress, Defendant is entitled to
20 summary judgment on Plaintiffs sixth claim for relief.

21 **E. AFTER-ACQUIRED EVIDENCE**

22 Defendant argues that Shawn's damages should be limited by the after-acquired
23 evidence doctrine for any claim that proceeds to trial. (Def.'s Mot. for Summ. J. 29.) Shawn
24 contends that the after-acquired evidence doctrine is inapplicable under the facts of this case.
25 (Pls.' Opp. to Summ. J. 41-42.)

26 "The after-acquired evidence doctrine precludes or limits an employee from receiving
27 remedies for wrongful discharge if the employer later discovers evidence of wrongdoing that
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1 would have led to the employee's termination had the employer known of the misconduct."
2 *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1070-71 (9th Cir. 2004)(internal quotations omitted).
3 For the doctrine to apply, an employer must prove by a preponderance of the evidence that it
4 would have terminated the employee for the misconduct. *Id.* The burden is on the employer
5 to "establish not only that it *could* have fired an employee for the later-discovered misconduct,
6 but that it *would* in fact have done so." *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d
7 756, 759 (9th Cir. 1996)(citations omitted)(emphasis in original). The employer's actual
8 employment practices, not just the standards established in its employee manuals, are the focus
9 of the inquiry. *Id.* Application of the after-acquired evidence doctrine "generally limits an
10 employee's remedy in three significant ways": (1) the employer does not have to offer
11 reinstatement, (2) the employer does not have to provide front pay, and (3) the employer only
12 has to provide back pay "from the date of the unlawful discharge to the date the new
13 information was discovered." *O'Day*, 79 F.3d at 759 (citations omitted).

14 During Shawn's deposition, Defendant learned that Shawn had secretly recorded four
15 of his conversations with IGT executives. (Def.'s Mot. for Summ. J., Johnson Decl., ¶ 4.)
16 According to Shawn, on January 16, 2004, Richard Pennington told him that if he continued
17 pressing for an investigation into the nondisclosure of documents he would be fired. (Pls.' Opp.
18 to Summ. J., Ex. C at 315-16.) This conversation prompted Shawn to record his conversation
19 with Pennington on January 19, 2004. (*Id.*) Additionally, Shawn states that because of the
20 "prolonged stonewalling" he perceived from Dave Johnson and because Johnson had "lied to
21 [him] on a number of occasions," he decided to record his conversations with Johnson on
22 January 21, 2004, and February 11, 2004. (*Id.* at 265, 315.) Shawn also recorded a
23 conversation he had with Bob Bittman in January 2004. (*Id.* at 265.) Shawn did not disclose
24 to any of these individuals that he was recording their conversations and no other IGT
25 employees were aware that he was recording conversations. (Defs.' Mot. for Summ. J.,
26 Campbell Decl., Ex. 2 at 266, 281.) Shawn states that he recorded the four conversations in
27 furtherance of his own investigation into the nondisclosure of documents. (Pls.' Opp. to Summ.

1 J., Ex. E at 3.) Shawn asserts that undertook his own investigation because he felt it “was [his]
2 duty to IGT to investigate the wrongdoing that IGT’s officers – all former Anchor officers –
3 refused to investigate.” (*Id.* at 4.)

4 Defendant argues that it would have terminated Shawn for secretly recording his
5 conversations with Pennington, Johnson, and Bittman. (Def.’s Mot. for Summ. J. 30.)
6 Defendant contends that Shawn breached his ethical duties as IGT’s attorney and that it would
7 have terminated his employment on this ground alone had it discovered them during his
8 employment. (*Id.*) Defendant submits the declaration of Dave Johnson in support of its
9 position that IGT would have ended Shawn’s employment based entirely on his secret
10 recording of four conversations. (Def.’s Mot. for Summ. J., Johnson Decl., ¶ 4.) However, this
11 lone piece of evidence does not amount to a preponderance of the evidence justifying
12 application of the after-acquired evidence doctrine. In contrast to Defendant’s position,
13 Shawn’s deposition testimony indicates that he may have recorded the conversations in
14 furtherance, not in violation, of his ethical duties as IGT’s attorney. Johnson’s declaration
15 supports the conclusion that Shawn breached an ethical duty to IGT, while Shawn’s declaration
16 indicates he acted because of his ethical duty. With the evidence pointing in opposite
17 directions, it becomes critical that it is Defendant’s burden to show that the after-acquired
18 evidence doctrine should apply. Although Defendant adamantly asserts that Shawn’s
19 recordings would have resulted in immediate termination, it fails to adequately substantiate
20 by a preponderance of the evidence that his actions were of such severity. The court finds that
21 Defendant has failed to show by a preponderance of the evidence that it would have fired
22 Shawn for secretly recording conversations. Thus, the after-acquired evidence doctrine is
23 inapplicable.

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III. CONCLUSION

IT IS HEREBY ORDERED that Defendant's Motion For Summary Judgment (Doc. #173) is **GRANTED** in part and **DENIED** in part as follows:

- 1) Summary judgment on Claims II-VI is **GRANTED**.
- 2) Summary judgment on application of the after-acquired evidence doctrine is **DENIED**.

DATED: December 8, 2009.



UNITED STATES MAGISTRATE JUDGE

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