Jiujitsu Techniques In Employment Matters: Using Litigation Overreach By Companies To The Advantage of Employees

By Justin D. Cummins

INTRODUCTION

Jiujitsu is a Japanese martial art typically performed by using an attacker's force against the attacker through redirection of that attacker's energy.[1] If faced with a company claim or counterclaim for purported defamation, tortious interference, or similar alleged conduct, targeted employees should consider using Jiujitsu techniques.

When the supposedly actionable conduct is directed in some way at a public agency, a public official, or even a quasi-judicial or judicial body, Minnesota's anti-SLAPP statute[2] may provide one of the best vehicles for applying Jiujitsu concepts to litigation brought by companies.[3] In addition, Minnesota's Norris-LaGuardia Act ("MNLA"),[4] and its Federal analog,[5] can help employees use a company's aggressive litigation tactics against that company.

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I. EFFECTIVELY USING MINNESOTA'S ANTI-SLAPP STATUTE IN RESPONSE TO RETALIATORY CLAIMS OR COUNTERCLAIMS ALLEGING DEFAMATION, TORTIOUS INTERFERENCE, OR SIMILAR CONDUCT

Consistent with the progressive tradition of this State, the Minnesota Legislature has taken an emphatic stand concerning strategic litigation against public participation – that is, SLAPP claims and counterclaims.[6] The Minnesota Legislature enacted the anti-SLAPP statute in 1994 to "protect[] citizens and organizations from civil lawsuits for exercising their rights of public participation in government."[7]

A. Key Legal Provisions That Underlie The Jiujitsu Approach

The Minnesota Legislature underscored the importance of protecting individuals from retaliatory legal action by inserting several extraordinary measures into the governing statutory scheme. Those terms do the following:

(1) Establish "the ***[company]* has the burden of proof**" to persuade the court that their claims do not amount to SLAPP litigation;
(2) Elevate the standard of proof such that "the ***court shall grant the motion and dismiss*** the judicial claim ***unless*** the court finds that the [company] has produced ***clear and convincing evidence***" – based only on the substance of the company's Complaint – that the alleged unlawful conduct occurred;
(3) "***Suspend[] discovery pending the final disposition*** of the motion [to dismiss], ***including any appeal***" regarding the potential SLAPP litigation; and
(4) Codify "the ***court shall award*** [to employees who successfully move for dismissal] ***reasonable attorney fees and costs*** associated with" seeking dismissal of the SLAPP litigation as well as permitting the recovery of "***damages***" against the parties pursuing SLAPP litigation.[8]

The anti-SLAPP statute also invites the Attorney General and other relevant authorities to intervene, defend, and otherwise assist parties targeted by the potential SLAPP litigation.[9]

To trigger applicability of the anti-SLAPP statute, according the Minnesota Supreme Court, employees sued by a company need only satisfy a "***minimal burden***" consisting of showing "the acts that are 'materially' related to the [company's] claim are themselves public participation, i.e., 'speech or lawful conduct that is genuinely ***aimed in whole or in part at procuring favorable government action***.'"[10] Accordingly, the anti-SLAPP statute protects conduct outside of official government hearings and meetings – and even when the primary motive for the conduct is not to seek governmental redress.[11]

Significantly, companies opposing motions to dismiss potential SLAPP litigation only satisfy the "clear and convincing evidence" requirement they have if

they prove – based on their respective Complaints – that it is "highly probable" the employees violated the law as alleged.[12] In other words, as the Minnesota Court of Appeals recently reaffirmed, parties pursuing potential SLAPP litigation cannot introduce evidence beyond what is set forth in their initial pleading to meet the heightened burden imposed by the Minnesota Legislature:

> The question is not whether [the company] will ultimately prove defamation; the question is whether [the company] produced clear and convincing evidence of defamation in light of the Rule 12 standard for granting judgment on the pleadings.[13]

In sum, companies face an uphill battle when attempting to carry their heavy evidentiary burden under the anti-SLAPP statute. Moreover, and upon dismissal of SLAPP litigation, companies must pay attorney's fees and litigation costs as well as a possible award of damages to the employees. Using a company's litigation weapons against it in this fashion exemplifies the Jiujitsu approach.

B. A Case Study: Responding To Defamation Claims And Counterclaims

Employees who complain about discrimination, harassment, retaliation, wage-and-hour violations, or other unlawful conduct by their company may trigger a highly negative reaction. The adverse response by a company could include lawsuits for defamation against complaining employees. In addition, if employee complaints occur in the form of a lawsuit brought by the employees, a company could choose to pursue defamation counterclaims.

Jiujitsu techniques can be activated when employees communicate the complaints to Local, County, State, or Federal officials, to an enforcement agency, or to a State or Federal court. In particular, the anti-SLAPP statute will govern so long as employees satisfy their "minimal burden" of showing the complaints about the company were designed – at least in part – to obtain government assistance in addressing employee concerns.[14]

Importantly, the courts have long held that inflammatory and hyperbolic speech is protected – especially in the context of a "labor dispute" about alleged discrimination, harassment, retaliation, wage-and-hour violations, or other unlawful conduct by a company.[15] Indeed, "to use loose language or undefined slogans . . . is not to falsify facts."[16] Therefore, defamation claims have been dismissed despite the determination that defendants were "lawless, marauding, disingenuous, character assassins who deserve their comeuppance" because no actual damages from the speech could be established.[17]

Even outside the context of a "labor dispute," the United States Supreme Court has long held that coercive and offensive expression is nonetheless protected as long as the communication method is peaceful:

> The claim ***that the expressions were intended to exercise a <u>coercive impact</u> on respondent <u>does not remove</u> them from <u>the reach of the First Amendment</u>***. . . . Petitioners were engaged openly and vigorously in making the public aware of respondent's real estate practices. Those practices were offensive to him, as the views and practices of petitioners are no doubt offensive to others. But ***so long as the means are peaceful, the <u>communication need not meet standards of acceptability</u>***.[18]

Accordingly, and pursuant to the anti-SLAPP statute, employees subject to a defamation claim or counterclaim have

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a solid basis for seeking dismissal of a company's legal action – provided at least some of the expressive conduct was directed at public officials, such as judicial officers, or a public agency, such as the Equal Employment Opportunity Commission, the Department of Labor, the National Labor Relations Board, or the Occupational Health & Safety Administration.

Upon filing a motion to dismiss a company's potential SLAPP litigation, discovery and the concomitant litigation costs should cease until the motion and related appeals have been decided.[19] More to the point, and on employees' minimal showing about their request for government assistance, a company now has to justify its aggressive litigation tactics by "clear and convincing evidence" – based only on the substance of the company's Complaint – that the employees' conduct warranted the company's legal action.[20] Should a company fail to carry its heavy burden of proof, the court "shall" award attorney's fees and litigation costs to the employees and may also award damages.[21]

That companies already have a high standard to satisfy in defamation cases can make using the anti-SLAPP statute an especially effective Jiujitsu technique. As a threshold matter, Minnesota courts impose on defamation claims a heightened pleading standard that the anti-SLAPP statute should make even more difficult to meet.[22] The elevated pleading requirement also pertains to whether the alleged defamation was carried out by an agent such that the employees are liable; in that regard, an agency relationship does not exist without manifest consent by the principal for the agent to act on the principal's behalf and, moreover, actual control over the agent by the principal.[23]

In any case, companies pursuing defamation claims and counterclaims bear the substantial burden of proving the statements at issue are false because true statements and statements of opinion are not actionable.[24] Moreover, "[w]here the question of truth or falsity is a close one, a court should err on the side of nonactionability."[25] Furthermore, matters of public concern that "are not capable of being proven true or false and statements that reasonably cannot be interpreted as stating facts are protected from defamation actions by the First Amendment."[26]

Consequently, "if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable."[27] Moreover, "[s]peech that is properly categorized as ***parody, loosely figurative, or rhetorical*** is ***also constitutionally protected*** to ensure that public debate will not suffer for lack of imaginative expression and because this type of speech cannot be reasonably interpreted as stating actual facts."[28]

In short, the anti-SLAPP statute should increase the already heavy evidentiary burden for companies that pursue defamation claims or counterclaims. Also, the more aggressively companies litigate such claims, the more damage those companies do to themselves – in the form of increased attorney's fees, litigation costs, and damages awards to the employees – when the court dismisses company claims pursuant to the anti-SLAPP statute. While this Jiujitsu technique will not work in every case, it should have a powerful impact on cases with the right facts and could have reverberations across the relevant industry.

II. EFFECTIVELY USING MINNESOTA'S NORRIS-LAGUARDIA ACT AND ITS FEDERAL ANALOG IN RESPONDING TO CLAIMS AND COUNTERCLAIMS AS WELL AS TO MOTIONS FOR TEMPORARY RESTRAINING ORDERS, INJUNCTIONS, AND CONTEMPT SANCTIONS

Especially aggressive companies may seek to obtain temporary restraining

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orders (TROs), injunctions, and even contempt sanctions for alleged violations of TROs or injunctions. If unchecked, such company tactics can impose enormous legal costs on employees and impinge on constitutionally and statutorily protected activity perhaps as much as the underlying litigation.

In recognition of this problem, the Minnesota Legislature enacted the MNLA.[29] As the Minnesota Supreme Court has observed, the Minnesota Legislature modeled the MNLA after the MNLA's Federal analog, the Federal Norris-LaGuardia Act ("NLA").[30] In fact, provisions and underlying language of the MNLA and the NLA are virtually identical.[31]

As a threshold matter, the statutory scheme precludes liability of one employee for the conduct of another employee in a "labor dispute" unless a company provides "***clear proof*** of actual participation in, or actual authorization of," the allegedly unlawful conduct forming the basis of the company's claim or counterclaim.[32] Even when employees are not seeking dismissal of litigation brought by a company, however, these statutes contain other remarkable measures that provide mechanisms to use Jiujitsu techniques. Such provisions do as follows:

(1) Divest Federal and State courts of jurisdiction to impose TROs and injunctions regarding aiding participants in, or publicizing the nature of, a "labor dispute" or lawfully assembling or urging others to participate in or publicize a "labor dispute";

(2) Otherwise limit court jurisdiction only to when a company satisfies the following procedural requirements under a rigorous analysis that replaces the more company-friendly approach under Dahlberg Bros., Inc. v. Ford Motor Co., 137 N.W.2d 314 (Minn. 1965):
   a. A hearing occurs during which all witnesses on which the company relies can be cross examined by employee counsel and employees can produce additional testimony and exhibits in opposition to the company's motion for a TRO or an injunction; if a TRO has been issued, moreover, the hearing on a motion for an injunction is held within 10 days after issuance of the TRO;
   b. Through the hearing, the company proves that "***unlawful acts*** have been threatened and ***will be committed***" absent the TRO or injunction;
   c. Through the hearing, the company proves that "***substantial and irreparable injury*** to [the company's] property ***will follow***" absent the TRO or injunction;
   d. Through the hearing, the company proves as to each item of relief sought that the harm to the company will be greater absent the TRO or injunction than the harm to the employees if the TRO or injunction is imposed;
   e. Through the hearing, the company proves that the company has no adequate legal remedy;
   f. Through the hearing, the company proves that law enforcement authorities have failed to provide adequate protection to the company; in that regard, the company provides personal notice to the chief law enforcement officer for the county and the city where the alleged unlawful conduct occurred so that those officers may testify at the hearing; ***and***
   g. The company files security with the relevant court sufficient to compensate the employees for "***all reasonable costs, together with a reasonable attorney's fee***" incurred in successfully defeating the motion for a TRO or an injunction.

(3) In the context of a motion for contempt sanctions, authorize the employees to demand and receive a speedy trial by jury and, moreover, to compel recusal of the presiding judge if the alleged contempt arises from criticism of that judge in the case.[33]

Whether the MNLA and the NLA govern a case depends on if the conduct at issue in the claim or counterclaim relates to a "labor dispute." Fortunately for employees, "labor dispute" is defined in extremely broad and identical terms by the MNLA and the NLA.

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> ***[A]ny controversy concerning terms or conditions of employment***, or concerning association or representation of persons in negotiating, fixing, maintaining, changing, ***or seeking to arrange terms or conditions of employment***, regardless of whether or not the disputants stand in the proximate relation of employer and employee.[34]

Notably, the Eighth Circuit recently reversed the Federal district court in Minnesota for narrowly construing the definition of "labor dispute" in the highly publicized litigation over the National Football League lockout. In overruling the district court, the Eighth Circuit emphatically declared that "Congress's definition of 'labor dispute' is expansive *** 'Congress made the definition broad because it wanted it to be broad.'"[35]

The United States Supreme Court has described the manifest legislative intent underlying the statutory scheme even more bluntly: "Congress was intent upon taking the federal courts out of the labor injunction business except in the very limited circumstances left open for federal jurisdiction under the Norris-La Guardia Act."[36] Indeed, the United States Supreme Court, like the Minnesota Supreme Court, has long recognized that "labor dispute" includes even controversies other than those between employers and employees.[37]

Given the expansive definition of "labor dispute," both according to the plain meaning of the express statutory language and under settled Supreme Court precedent, it should not be difficult to show that employee complaints about discrimination, harassment, retaliation, wage-and-hour violations, and other unlawful conduct by the company trigger coverage by the MNLA and the NLA.

Pursuant to these statutes, employees can dramatically shrink the universe that a court even has jurisdiction to impose a TRO or an injunction. Even within the small universe of permissible court intervention, furthermore, the company now has a much higher burden of proof to establish entitlement to a TRO, an injunction, or contempt sanctions. For example, a company's failure to provide affirmative proof that law enforcement cannot provide sufficient protection is, standing alone, enough to defeat a motion for a TRO or an injunction.[38] In addition, as discussed above in Part I.B., the settled Supreme Court precedent that vigorously prohibits the prior restraint of expressive conduct means companies will have a difficult time proving the balance-of-harms analysis works in their favor.[39]

The elevated evidentiary and procedural burdens on companies under the MNLA and the NLA acquire added importance because companies failing to meet those heavy burdens in every respect will be liable for attorney's fees and litigation costs incurred by employees during the requisite jury trial on company motions. As with the anti-SLAPP statute, the MNLA and the NLA will not facilitate a jiujitsu strategy in each case, but those statutes contain powerful tools when applicable.

CONCLUSION

Minnesota's anti-SLAPP statute, along with the MNLA and the NLA, provide employee counsel with creative and possibly dispositive mechanisms to use overreaching litigation tactics by companies to the advantage of employees. When invoked appropriately, these statutes can alter the dynamics in litigation – if not end the litigation all together – and could set a more constructive tone in the industryy going forward.

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1 See generally Mol Serge, Classical Fighting Arts of Japan: A Complete Guide to Koryu Jujutsu (2001).
2 Minn. Stat. §§ 554.01, et seq.
3 When retaliatory adverse action includes a demotion, discharge, or similar employment-related measures, anti-retaliation provisions found in, for example, Minnesota's Human Rights Act, Minn. Stat. §§ 363A.01, et seq., and Minnesota's Whistleblower Act, Minn. Stat. §§ 181.932, et seq., may also provide

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relief. As the explained in this article, however, the anti-SLAPP statute provides broader coverage and affirmatively changes litigation dynamics in unique and substantial ways.

4 Minn. Stat. §§ 185.01, et seq.
5 29 U.S.C. §§ 101, et seq.
6 Minn. Stat. §§ 554.01, et seq.
7 Middle-Snake-Tamarac Watershed Dist. v. Stengrim, 784 N.W.2d 834, 839 (Minn. 2010) (citing Act of May 5, 1994, ch. 566, 1994 Minn. Laws 895, 895).

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8 Minn. Stat. § 554.02 (emphasis added); Minn. Stat. § 554.04 (emphasis added).
9 Minn. Stat. § 554.02, Subd. 2(4).
10 Middle-Snake-Tamarac, 784 N.W.2d at 841 (quoting Minn. Stat. § 554.01, Subd. 6) (emphasis added).
11 See, e.g., Special Force Ministries v. WCCO Tele., Henn. Cty. Dist Ct. No. MC 97-5062, slip op., at 14 (Nov. 4, 1997), aff'd as modified, 584 N.W.2d 789 (Minn. Ct. App. 1998) ("Even if WCCO's primary motivation for airing the story was to boost its ratings, there was evidence in the record indicative of an intent on WCCO's part to generate a response from state regulators.").
12 Nexus v. Swift, 785 N.W.2d 771, 781 (Minn. Ct. 2010) (citing State v. Kennedy, 585 N.W.2d 385, 389 (Minn. 1998)).
13 Nexus, 785 N.W.2d at 781 (citations omitted) (emphasis in original).
14 Middle-Snake-Tamarac, 784 N.W.2d at 841 (quoting Minn. Stat. § 554.01, Subd. 6.) (emphasis added).
15 See, e.g., Old Dominion Branch No. 496 v. Austin, 418 U.S. 264, 285-86 (1974) (holding that "rhetorical hyperbole" and "lusty and imaginative expression of the contempt felt" to be non-actionable).
16 Beverly Hills Foodland, Inc. v. UFCW Local 655, 39 F.3d 191, 196 (8th Cir. 1994) (dismissing the defamation claims); see also Beverly Enter. v. Trump, 182 F.3d 183, 188 (3d Cir. 1999) ("'[Y]ou people at Beverly are all criminals' is reasonably understood as a vigorous and hyperbolic rebuke, not a specific allegation of criminal wrongdoing.").
17 Intercity Maint. Co. v. SEIU Local 254, 241 F.3d 82, 89 (1st Cir. 2001).
18 Org. for a Better Austin, et al. v. Keefe, 402 U.S. 415, 419 (1971) (emphasis added); see also NAACP v. Claiborne, 458 U.S. 886, 910 (1982) ("Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action.").
19 Minn. Stat. § 554.02, Subd. 2(1).
20 Minn. Stat. § 554.02, Subd. 2(2)-(3).
21 Minn. Stat. § 554.04.
22 Pope v. ESA Servs., Inc., 406 F.3d 1001, 1011 (8th Cir. 2005) (applying Minnesota law), abrogated on other grounds, Torgenson v. ESA Servs., Inc., __ F.3d__, 2011 WL 2135636 (8th Cir. 2011); see also Moreno v. Crookston Times Printing Co., 610 N.W.2d 321, 326 (Minn. 2000) (requiring "defamatory matter to be set out verbatim" and to be specifically articulated in the Complaint); Schibursky v. Int'l Bus. Machines Co., 820 F. Supp. 1169, 1181 (D. Minn. 1993) (citations omitted) ("[A] claim for defamation must be pled with a certain degree of specificity."); Pinto v. Internationale Set, Inc., 650 F. Supp. 306, 309 (D. Minn. 1986) (citation omitted) ("A claim for defamation must be pleaded with specificity. Plaintiffs have failed to allege who made the allegedly libelous statements, to whom they were made, and where.") (citation omitted); Minn. Stat. § 554.02, Subd. 2(2)-(3).
23 A. Gay Jensen Farms Co. v. Cargill, Inc., 309 N.W.2d 285, 290 (Minn. 1981); Lundman v. McKown, 530 N.W.2d 807, 824–25 (Minn. Ct. App. 1995); see also Claiborne, 458 U.S. at 931 ("[G]uilt by association is a philosophy alien to the traditions of a free society.").
24 Jadwin v. Minneapolis Star and Trib. Co., 390 N.W.2d 437, 441 (Minn. Ct. App. 1986); see also Diesen v. Hessberg, 455 N.W.2d 446, 450 (Minn. 1980) (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974)) ("To further safeguard speech, the [United States] Supreme Court has held expressions of opinion are not actionable statements for defamation purposes and are protected by the First Amendment.").
25 Liberty Lobby, Inc. v. Dow Jones & Co., Inc., 838 F.2d 1287, 1292 (D.C. Cir. 1988) (cited with approval in Hunter v. Hartman, 545 N.W.2d 699, 705 (Minn. Ct. App. 1996)).
26 Fox Sports Net North, L.L.C. v. Minn. Twins P'ship, 319 F.3d 329, 336-37 (8th Cir. 2003) (citing McGrath v. TCF Bank Sav., FSB, 502 N.W.2d 801, 808 (Minn. Ct. App. 1993)) (applying Minnesota law); see also Harman v. Heartland Food Co., 614 N.W. 2d 236, 240 (Minn. Ct. App. 2000) (internal quotation and citation omitted) ("In deciding whether words bear a non-actionable meaning, the words must be construed as a whole

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without taking any word of phrase out of context, or placing undue emphasis on any one part.").
27 Marchant Invest. v. St. Anthony W., 694 N.W.2d. 92, 96 (Minn. Ct. App. 2005) (internal quotation and citations omitted).
28 Id. (citing Milkovich v. Lorain Journal Co., 497 U.S. 1, 16-17 (1990)).
29 Minn. Stat. § 185.08 ("[A] worker shall be free from the interference, restraint, or coercion of employers . . . in [] concerted activities for the purpose of . . . mutual aid or protection. . . .").
30 Bd. of Educ. of City of Minneapolis v. Pub. Sch. Employees Local 63, 45 N.W. 2d 797, 799-801 (Minn. 1951).
31 Compare Minn. Stat. § 185.18 with 29 U.S.C. § 113 and Minn. Stat. § 185.10 with 29 U.S.C. § 104; see also Pub. Sch. Employees Local 63, 45 N.W. 2d at 799-801.
32 See, e.g., Minn. Stat. § 185.12 (emphasis added).
33 See, e.g., Minn. Stat. § 185.10; 185.13(a) (emphasis added); Minn. Stat. § 185.13(b) (emphasis added); Minn. Stat. § 185.16; Minn. Stat. § 185.17.
34 Compare Minn. Stat. § 185.18, Subd. 4 (emphasis added) with 29 U.S.C. § 113.
35 Brady v. Nat. Football League, 640 F.3d 785, 790 (8th Cir. 2011) (citations omitted); see also Brady v. Nat. Football League, __ F.3d __, 2011 WL 2652323, *8 (8th Cir. July 8, 2011) (emphasis added) (further discussing the definition of "labor dispute" and reiterating that "the [United States Supreme] Court has observed that '***the statutory definition itself is extremely broad***.'").
36 Marine Cooks & Stewards v. Panama SS. Co., 362 U.S. 365, 369 (1960).
37 New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552, 560-61 (1938); see also generally Starr v. Cooks, Waiters, Waitresses and Helpers Union Local 458, 70 N.W.2d 873 (Minn. 1955).
38 See, e.g., Rochester Tele. Corp. v. Comm'n Workers of Am., 456 F.2d 1057, 1058 (2nd Cir. 1972) (quoting 29 U.S.C. § 107(e)) (ruling that the injunction was issued erroneously "because there was no allegation, proof or finding that '. . . the public officers charged with the duty to protect [the company's] property are unable or unwilling to furnish adequate protection.'"); Cimarron Coal Corp. v. Dist. No. 23, 416 F.2d 844, 846 (6th Cir. 1969) (vacating the injunction and reasoning "[w]e think this record indicates only pro forma requests by plaintiff-appellee for protection and that it fails to demonstrate either inability or unwillingness of state law enforcement to respond.").
39 See, e.g., Keefe, 402 U.S. at 419 (emphasis added) ("Respondent thus carries a ***heavy burden*** of showing justification for the imposition of such a restraint. *** No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices . . . warrants use of the injunctive power of the court.").

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