EMPLOYMENT LAW REPORT

Legal Strategies for Curbing Litigation Abuse of Plaintiffs In Employment and Civil Rights Cases

By Justin D. Cummins

INTRODUCTION

Cases that present enormous legal exposure to defendants, such as class or collective actions, and cases involving potentially vulnerable plaintiffs, such as immigrant workers, may prompt some defendants to pursue coercive or other ultra aggressive tactics. In protecting the rights of plaintiffs to pursue their legal claims and to obtain all remedies to which they are entitled, plaintiff counsel should consider a variety of preemptive strategies.

This article focuses on two courses of action that plaintiff counsel may take to protect their clients and the value of their clients' cases: seeking a protective order precluding pre-certification communication with potential class members about a pending case and seeking a protective order enabling plaintiffs to proceed under pseudonyms.

I. PLAINTIFF COUNSEL MAY BE ABLE TO BAR DEFENDANTS AND THEIR COUNSEL FROM CONTACTING PUTATIVE CLASS MEMBERS ABOUT PENDING CLAIMS

The Supreme Court has long established that "[b]ecause of the potential for abuse, a district court has both the duty and broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties."[1] Therefore, courts may prohibit a defendant's direct contacts with possible class members about pending litigation that involves "actual or threatened misconduct of a serious nature."[2]

A. Courts Have Repeatedly Issued Protective Orders Precluding Communications With Potential Class Members When Evidence Of Actual Or Threatened Misconduct Exists

Courts across the country have barred contacts by defendants and their counsel with putative class members – that is, with material witnesses – concerning the substance of pending cases.[3] In prohibiting pre-certification communication with potential class members, a recent ruling explained the rationale adopted by courts across jurisdictions:

> As a practical matter, a court cannot decide the issue of class certification immediately upon the filing of the complaint. Discovery is often required and the preparation and study of briefs is necessary. Thus, certain benefits must be afforded the putative class members in the interim. ***As the tolling of the statute of limitations is needed to further the salutary purposes of class actions, restraints are likewise needed against communications with putative class members until the issue of class certification can be determined.*** If defense counsel or counsel otherwise adverse to their interests is allowed to interview and take statements from often unsophisticated putative class members without the approval of counsel who initiated the action, the benefits of class action litigation could be seriously undermined.[4]

B. Demonstrating Misconduct By Defendants To Obtain The Requisite Protection

Establishing a defendant's involvement in witness tampering or other coercive litigation tactics often turns on whether an agency relationship exists between that defendant and the individuals involved in the misconduct.

A defendant's agents include those individuals that possible plaintiff class members reasonably believe have authority to act on behalf of that defendant.[5] In addition, apparent authority and, thus, agency attach to an individual who a defendant has allowed to act on its behalf or otherwise held out as having such authority.[6]

An agency relationship also exists when a defendant has benefitted from an individual's actions or otherwise knew or should have known of that individual's actions on its behalf. Accordingly, the Eighth Circuit has affirmed that a defendant is liable – regardless of whether the actor in question was an agent – when that defendant ratified the actor's conduct by receiving benefits thereof.[7]

II. PLAINTIFF COUNSEL MAY OBTAIN LEAVE TO ALLOW PLAINTIFFS TO PROSECUTE THEIR EMPLOYMENT OR CIVIL RIGHTS CLAIMS UNDER A PSEUDONYM

The Supreme Court has long permitted plaintiffs to proceed under pseudonyms to protect them from adverse consequences that might result from disclosure of their identities.[8] The Eighth Circuit also has repeatedly permitted plaintiffs to litigate with pseudonyms.[9] In addition, the federal District Court of Minnesota has allowed plaintiffs to pursue claims under a pseudonym.[10]

A. District Courts Have Abused Their Discretion By Denying A Plaintiff's Request To Proceed Under A Pseudonym

Although the Eighth Circuit has not

reached the issue, the majority of Circuits considering the denial of pseudonym usage have held that the district courts abused their discretion in doing so.[11] District courts have been reversed for barring plaintiffs from using pseudonyms in cases involving, for example, highly exploitive work conditions or direct threats of economic or bodily harm.[12]

B. Courts Undertake A Flexible Analysis And Consider "All The Circumstances Of A Given Case" In Determining Whether A Party May Use a Pseudonym

"Neither the Supreme Court, nor the Eighth Circuit Court of Appeals, has provided instruction" as to a precise test for permitting the use of pseudonyms.[13] Therefore, the early cases considering the use of pseudonyms focused on the following: (1) whether a party challenged governmental conduct, (2) whether the case involved disclosure of intimate information, and (3) whether the litigation compelled the admission of unlawful intent.[14]

As the doctrine has developed, however, courts have held that the three factors set forth in the early cases are neither exhaustive nor dispositive:

> [The three initial factors were] not intended as a "rigid, three-step test for the propriety of party anonymity." The mere presence of one factor was not meant to be dispositive, but rather, these factors were "highlighted merely as factors deserving consideration." Instead, a court must "carefully ***review all the circumstances of a given case*** and then decide whether the customary practice of disclosing the plaintiff's identity should yield to the plaintiff's privacy concerns."[15]

The factors considered in employment and civil rights cases these days now include the following:

(1) the severity of the physical or economic harm threatened;

(2) a party's vulnerability;

(3) the reasonableness of a party's fear;

(4) whether use of a pseudonym would be unfair to the opposing party; and

(5) the public's interest in knowing a party's name.[16]

C. The "Flexible Analysis" Applied In Employment And Civil Rights Cases

Courts have allowed plaintiffs to proceed with pseudonyms when those plaintiffs have been threatened with severe physical injury or economic harm.[17] In issuing protective orders, courts also have relied on plaintiffs' status as immigrants or as otherwise having difficulty in protecting themselves from retaliation.[18]

The leading case in the nation on the ability to prosecute employment claims under pseudonyms concisely states the proper inquiry into whether the fear of a plaintiff warrants the use of pseudonyms:

> plaintiffs are not required to prove that the defendants intend to carry out the threatened retaliation. What is relevant is that plaintiffs were threatened, and that a reasonable person would believe that the ***threat might actually be carried out.***[19]

Although unfairness to a defendant may be considered in evaluating the propriety of pseudonyms, district courts have been reversed for emphasizing that factor.[20] In short, plaintiff anonymity would be unfair to a defendant only if it will unduly obstruct the ability to conduct necessary discovery.[21]

In rejecting the argument that pseudonyms unfairly impede discovery and preclude

continued on page 44

***JUSTIN CUMMINS**, of Miller-O'Brien-Cummins, is Chair of the MSBA's Labor & Employment Section and an Officer of the National Employment Lawyers Association's Eighth Circuit Board. Justin teaches courses on civil rights and employment law at the University of Minnesota Law School and William Mitchell College of Law, and he spearheaded the development of the Workers' Rights Clinic at the University of Minnesota Law School.*

effective assertion of defenses, courts have reasoned as follows:

> Although the district court's protective order limited the scope of discovery as to other persons beyond Defendants' counsel of record, it placed no limitation on defense counsel's scope of discovery.[22]

While expressing doubt that pseudonym usage will hamper discovery, another court reminded the defendant that a clear remedy exists should the continued use of pseudonyms by the plaintiffs unduly obstruct discovery or the assertion of a defense in the case:

> Plaintiffs have stated their willingness to appear at depositions to speak with opposing counsel, and to otherwise exchange information, provided their anonymity is protected. If [defendant], at the appropriate time, believes that plaintiffs' anonymity unduly hampers the defense of his case, he may file a motion to protect his rights accordingly.[23]

Significantly, a civil rights plaintiff "not only redresses his [or her] own injury but also vindicate[s] the important congressional policy against discriminatory employment practices."[24] Similarly, "[a]n employee, exercising his [or her] rights under [wage-and-hour laws], exercises them, not only for his [or her] own benefit, but also for the benefit of the general public."[25]

In sum, "permitting plaintiffs to use pseudonyms will serve the public's interest in [employment litigation] by enabling it to go forward."[26] In any case, "[p]arty anonymity does not obstruct the public's view of the issues joined or the court's performance in resolving them."[27]

CONCLUSION

High-stakes litigation requires effective protection of plaintiffs from possibly coercive tactics by overly aggressive defendants. In the class and collective action context, plaintiff counsel should explore the propriety of restricting a defendants' communications with potential class members – even before a class has been certified. Although pseudonym usage also is an extraordinary remedy, it should be sought and permitted in the kinds of cases discussed in this article.

---

[1] Gulf Oil v. Bernard, 452 U.S. 89, 100 (1981).

[2] Great Rivers Coop. v. Farmland Industries, Inc., 59 F.3d 764, 766 (8th Cir. 1995) (citation omitted).

[3] See, e.g., In Re Currency Conversion Fee Antitrust Litigation, 361 F.Supp.2d 237, 253 (S.D.N.Y. 2005) (ruling that the defendants' pre-certification communications with potential class members about the subject matter of litigation were improper); Dondore v. NGK Metals, 152 F.Supp.2d 662, 666 (E.D.Pa. 2001) (prohibiting the defendant's agents from interviewing potential class members before the case had been certified as a class); Bublitz v. E.I. du Pont de Nemours & Co., 196 F.R.D. 545, 549 (S.D.Iowa 2000) (denying the defendant's motion for leave to pursue direct contacts with potential class members about the substance of the pending case); Abdallah v. Coca Cola Co., 186 F.R.D. 672, 679 (N.D.Ga. 1999) (granting the plaintiffs' pre-certification motion to restrict the defendants' ability to have direct communication with potential class members); Loatman v. Summit Bank, 174 F.R.D. 592, 602 (D.N.J. 1997) (sanctioning the defendant for pre-certification contacts with potential class members regarding the litigation);

continued on next page

Hampton Hardware, Inc. v. Cotter & Co., Inc., 156 F.R.D. 630, 634 (N.D.Tex. 1994) (barring direct contacts by defendant despite the absence of actual harm to the potential plaintiff class); see also Kleiner v. First National Bank, 751 F.2d 1193, 1207 (11th Cir. 1985) (reiterating that defendants' agents "have an ethical duty to refrain from discussing the litigation with members of the class as of the date of class certification, if not sooner. . . . ."); Davis v. Eastman Kodak Co., File No. 04-6098, pp. 9-10, JWF, Order (W.D.N.Y. 2007) (restricting the defendant's communications with potential class members before certification); Mevorah v. Wells Fargo Home Mortg., Inc., 2005 WL 4813532, *5-*6 (N.D.Cal. 2005) (precluding pre-certification contacts with potential plaintiff class members about the case).

[4] Dondore, 152 F.Supp.2d at 666 ; see also Kahan v. Rosensteil, 424 F.2d 161, 169 (3rd Cir. 1970), cert. denied 398 U.S. 950 (1970) (citations omitted) (reaffirming that "a suit brought as a class action should be treated as such for purposes of dismissal or compromise, until there is a full determination that the class action is not proper."); AM. B. ASS'N. MODEL RULE 4.2; MINN.R.PROF.CONDUCT. 4.2.

[5] Trs. Of the Graphic Commun. Int'l Union v. Bjorkedal, 516 F.3d 719, 728 (8th Cir. 2008) (applying Minnesota law); RESTATEMENT (THIRD) OF AGENCY §2.03 (2006).

[6] McGee v. Breezy Point Estates, 166 N.W.2d 81, 89 (Minn. 1969) (affirming that an agency relationship existed because "the scope of apparent authority is determined not only by what the principal knows and acquiesces in, but also by what the principal should, in the exercise of ordinary care and prudence, know his agent is doing."); Sauber v. Northland Ins. Co., 87 N.W.2d 591, 598 (Minn. 1958) (affirming that the person answering the business telephone of the defendant acted with apparent authority); Powell v. MVE Holdings, Inc., 626 N.W.2d 451, 457-58 (Minn.App. 2001) (affirming that the employee in question had apparent authority). In other words, an agency relationship does not require the agent to possess actual authority. Id.; Hornblower & Weeks-Hemphill Noyes v. Lazere, 222 N.W.2d 799, 805 (Minn. 1974) (ruling that the employee at issue acted with apparent authority).

[7] Wessels v. Nat'l Medical Waste, 65 F.3d 1427, 1433 (8th Cir. 1995); see also Knaus Truck Lines, Inc. v. Donaldson, 51 N.W.2d 99, 102 (Minn. 1952) (holding that an agency relationship existed because the principal benefitted from the actions at issue); Landin v. Moorhead Nat'l Bank of Commerce, 77 N.W. 35, 36 (Minn. 1898) (affirming that an agency relationship existed, even though the employee had no actual or apparent authority, because the principal benefitted from the conduct in question); Cooney v. Milwaukee Mut. Ins. Co., 397 N.W.2d 352, 355-56 (Minn.App. 1986) (affirming judgment for the plaintiff because "constructive knowledge of [the employee's] acts can be imputed to [the principal].").

[8] Plyler v. Doe, 457 U.S. 202, 206 (1982); Roe v. Wade, 410 U.S. 113, 120, n.4 (1973); Poe v. Ullman, 367 U.S. 497, 498, n.1 (1961).

[9] Doe v. Baxter Health Care, 380 F.3d 399, 401 (8th Cir. 2004); Doe ex rel Doe v. Little Rock School Dist., 380 F.3d 349, 351 (8th Cir. 2004); Doe v. Pulaski Country Special School Dist., 306 F.3d 616, 619 (8th Cir. 2002); see also Doe v. Poelker, 497 F.2d 1063, 1065 (8th Cir. 1974); Doe v. Dep't of Transp., 412 F.2d 674, 675 (8th Cir. 1969).

[10] See, e.g., Doe v. City of Minneapolis, 898 F.2d 612 n.1 (8th Cir. 1990) (affirming that the plaintiff may proceed with a pseudonym "to protect himself from harassment, injury, ridicule, and personal embarrassment").

[11] Roe II v. Aware Woman Center forChoice, 253 F.3d 678, 685-87 (11th Cir. 2001), cert. denied 534 U.S. 1129 (2002) (reversing the district court and granting anonymity due to threats of violence and harassment directed at the plaintiff); Does I thru XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1069-73 (9th Cir. 2000) (reversing the district court and granting anonymity because of threatened economic and physical harm to immigrant workers); James v. Jacobson, 6 F.3d 233, 239-42 (4th Cir. 1993) (reversing the district court and granting anonymity because the district court did not make "a particularized assessment of the equities involved"); see also Doe v. Stegall, 653 F.2d 180, 184 (5th Cir. 1981) (reversing the

continued on next page

district court and granting anonymity because the "[e]vidence on the record indicates that the Does may expect extensive harassment and even violent reprisals if their identities are disclosed").

[12] Does I thru XXIII, 214 F.3d at 1069; see also John Does I-V v. Rodriguez, 2007 WL 684114, *2-*3 (D.Colo. 2007) (ruling that the plaintiffs, who are immigrants, can pursue their wage claims against their employer while using pseudonyms); Gomez v. Buckeye Sugars, 60 F.R.D. 106, 107 (N.D.Ohio 1973) (same).

[13] Heather K. by Anita K. v. City of Mallard, 887 F. Supp. 1249, 1256 (N.D. Iowa 1995) (citations omitted) (ruling that the plaintiff can pursue litigation under a pseudonym).

[14] See, e.g., Stegall, 653 F.2d at 185.

[15] Heather K., 887 F.Supp. at 1256 (citations omitted) (emphasis added).

[16] Doe v. Porter, 370 F.3d 558, 561 (6th Cir. 2004); Roe II, 253 F.3d at 685; Does I thru XXIII, 214 F.3d at 1068-70; James, 6 F. 3d at 240-41.

[17] Does I thru XXIII, 214 F.3d at 1070 (reversing the district court and granting anonymity because of the physical and economic threats directed at the plaintiff class, which consists of immigrants pursuing wage claims against the employer); Stegall, 653 F.2d at 185 (reversing the district court and granting anonymity because the physical harm to the plaintiffs threatened by community members); John Does I-V, 2007 WL 684114, *2-*3 (permitting the plaintiffs, who are immigrants bringing wage claims against their employer, to use pseudonyms to guard against physical and economic harm by the employer); Gomez, 60 F.R.D. at 107 (same).

[18] Does I thru XXIII, 214 F.3d at 1072 (reversing the district court and allowing the use of pseudonyms, in part, because the plaintiff class representatives are immigrants); Stegall, 653 F.2d at186) (reversing the district court and granting anonymity to the plaintiffs, in part, because of their comparative difficulty in protecting themselves from retaliation); John Does I-V, 2007 WL 684114, *2-*3 (permitting immigrant employees of the defendant to continue under pseudonyms due to the threats directed at them); Gomez, 60 F.R.D. at 107 (allowing the plaintiffs, who are immigrants, to proceed with pseudonyms because of their vulnerability to retaliation); see also Brennan v. Engineered Products, Inc., 506 F.2d 299, 302 (8th Cir. 1974) (citation omitted) (vacating the dismissal of the action and granting anonymity because " enforcement of the [wage-and-hour laws] is highly dependent on the cooperation of, and statements given by, employees.").

[19] Does I thru XXIII, 214 F.3d at 1071 (emphasis added).

[20] See, e.g., Jame, 6 F.3d at 240-41 (rejecting the defendant's argument that the use of pseudonyms impeded the ability to impeach the plaintiff and conveyed the impression that the court believed the plaintiff's legal claims had merit).

[21] See, e.g., Porter, 370 F.3d at 561.

[22] Porter, 370 F.3d at 561; see also Does I thru XXIII, 214 F.3d at 1065, n. 7 (ruling that it was proper to restrict knowledge of the plaintiff class representatives' identities to the court and opposing counsel); James, 6 F.3d at 240-41 (same); Gomez, 60 F.R.D. at 106-07 (same).

[23] John Does I-V, 2007 WL 684114, *2-*3 (granting the plaintiffs' motion to continue with pseudonyms); see also Gomez, 60 F.R.D. at 107 (same).

[24] Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); see also McKennon v. Nashville Banner Publishing Co., 513 U.S. 352, 358 (1995) (citing Alexander with approval).

[25] Does I thru XXIII, 214 F.3d at 1073 (citation omitted).

[26] Id.; see also Burlington North and Santa Fe Ry. Co. v. White, 126 S.Ct. 2405, 2416 (2006) (quoting Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960)) "Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances.")

[27] Stegall, 653 F.2d at 185; see also generally Doe v. Iron R-1 School Dist., 498 F.3d 878 (8th Cir. 2007).

■

Practice Pointers - Cont

a result of these widespread myths about tort reform, juries are very reluctant to award fair and just compensation. The next time you hear someone passing along a tort deform myth, tell them "I used to believe that stuff too until I got injured" and then explain your experience.

You may even want to provide your clients with copies of AAJ publications debunking these myths.

Politics. In a related area, you may even want to address politics in your client communications. This is obviously a very touchy area and should be handled cautiously. Frank, common sense factual advice should be well accepted:

> Your elected officials have a major effect on the laws governing your case. Although there are some excellent pro-consumer Republicans, most Republicans tend to be pro-business and most Democrats tend to be pro-consumer. BE AWARE of your representative's attitudes toward "tort deform," especially during election season.

Methods of Communication. Most of these types of communications started off as supplement or attachments to standard client letters. This is probably still the most commonly used method of client communication, and it is efficient and cost effective.

However, many lawyers are now using e-mails, web sites and legal network-blogging sites such as www.injuryboard.com to disseminate these messages. Many of them can also be translated into effective advertising.

Take advantage of your Bully Pulpit and spread the word on issues important to your clients, our profession, the civil justice system and society.

■