EMPLOYMENT LAW REPORT

Successfully Prosecuting Employment and Civil Rights Cases on Behalf of Immigrants

By Justin D. Cummins

INTRODUCTION

Prosecuting employment and civil rights cases when the plaintiffs are immigrants pose a number of strategic issues and tactical challenges. In order to navigate the tricky waters that these substantively compelling cases often travel, plaintiff counsel must have a clear understanding of the role played by such plaintiffs, the substantive rights at stake, and the protection that can be obtained from courts.

I. PLAINTIFFS SERVE AS PRIVATE ATTORNEYS GENERAL IN EMPLOYMENT AND CIVIL RIGHTS CASES

People who prosecute claims under employment and civil rights statutes play a pivotal role in protecting fundamental rights and in promoting the rule of law in the United States.

The Supreme Court has long recognized that "Congress has cast the [employment and civil rights] plaintiff in the role of a 'private attorney general,' vindicating a policy 'of the highest priority.'"[1] In fact, a plaintiff "not only redresses his own injury but also vindicate[s] the important congressional policy against discriminatory employment practices."[2]

In furtherance of the private attorney general principle, the highly conservative Supreme Court recently reaffirmed that the anti-retaliation provisions of employment and civil rights statutes must be interpreted even more broadly than other portions of those statutes.[3] The Supreme Court so ruled because "[each employment and civil rights statute] depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses."[4] The Supreme Court further reasoned as follows:

> "Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances." Interpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act's primary objective depends. For these reasons, we conclude that Title VII's substantive provision and its anti-retaliation provision are not coterminous. The scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm.[5]

To encourage people to come forward, the anti-retaliation provisions of employment and civil rights statutes apply when a person makes a good-faith complaint or otherwise exercises rights under those statutes – regardless of whether the complaint has any merit.[6] Accordingly, a retaliation claim should survive summary judgment when a claimant shows "that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well ***might have*** "dissuaded a reasonable worker from making or supporting a charge of discrimination.'"'[7] In adopting this exceptionally broad standard for private attorneys general, the Supreme Court explained as follows:

> We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. ***Context matters***. "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed."[8]

II. CONSTITUTIONAL AND STATUTORY PROTECTIONS APPLY TO IMMIGRANTS REGARDLESS OF IMMIGRATION STATUS

Immigrants possess an array of substantive rights whether or not immigrants possess legal status in the United States. By their express terms, both the United States Constitution and federal employment and civil rights statutes apply to all people – not just citizens or others with legal status.

The Fourteenth Amendment to the United States Constitution, for example, provides as follows:

> [N]or shall any State deprive ***any person*** of life, liberty, or property, without due process of law; nor deny to ***any person*** within its jurisdiction the equal protection of the laws.[9]

Employment and civil rights statutes possess a parallel scope. For example, Title VII provides that statutory protection applies to all employees whether or not they are documented:

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge ***any individual***, or otherwise to discriminate against ***any individual*** with respect to his compensation, terms, conditions or privileges of employment, because of such indivdual's race, color, religion, sex, or national origin.[10]

The Fair Labor Standards Act also applies to all employees regardless of whether they are documented.[11]

Section 1981, which guarantees equality of contracting, similarly applies to everyone in the United States, not just citizens:

> ***All persons*** within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . .[12]

Like other civil rights statutes, the Fair Housing Act prohibits discrimination against anyone, including people without legal status:

> [I]t shall be unlawful [t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to ***any person*** because of race, color, religion, sex, familial status, or national origin.[13]

III. THE GOVERNING LAW PROHIBITS DISCOVERY INTO PLAINTIFFS' IMMIGRATION STATUS

Although the governing Constitutional and statutory provisions plainly establish that a plaintiff's immigration status is irrelevant to his or her legal claims, defendants nonetheless may seek to conduct discovery into a plaintiff's immigration status in an attempt to gain tactical advantage in litigation.

Importantly, courts around the nation have repeatedly ruled that the immigration status of employment and civil rights plaintiffs is irrelevant as a matter of law.[14] Courts in the Eighth Circuit have ruled similarly.[15]

To minimize the ability of defense counsel to make a plaintiff's immigration status an issue in litigation, plaintiff counsel should be clear in pleadings and otherwise that a plaintiff's back pay claim concerns only compensation for work actually performed. That distinction should ensure that the *Hoffman Plastic* rationale (adopted only under the National Labor Relations Act) will not come into play.[16] Notably, the *Hoffman Plastic* precedent does not preclude the recovery of liquidated damages by undocumented workers under the National Labor Relations Act.[17] In any case, plaintiff counsel should be ready to move swiftly for a protective order barring discovery into immigration status.

A. Plaintiffs' Tax Records Generally Are Not Discoverable

Even with a protective order in place that prohibits discovery into immigration status, an aggressive employer may seek to compel tax records of a plaintiff in an effort to discover immigration status through the back door or otherwise to intimidate that plaintiff and other material witnesses.

Minnesota's Federal District Court recently established a two-part burden shifting test that looks first to relevancy and then to whether the information contained in the tax returns can be obtained elsewhere.[18] If a defendant shows that the tax records are relevant, a plaintiff must demonstrate that the information sought through tax returns is "more readily obtainable elsewhere."[19]

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Federal courts have repeatedly rejected defendants' efforts to compel tax records as, among other things, improperly seeking immigration-status-related data.[20] Indeed, such discovery should generally be off limits regarding all plaintiffs, not just immigrants. Federal courts have long disfavored the production of tax records by

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litigants.[21] The presumption against production has been reinforced by the robust development of privacy protections under common law across jurisdictions.[22]

B. Plaintiffs' Medical Records Usually Are Not Discoverable

Medical records often contain irrelevant and highly sensitive data above and beyond the medical history of a plaintiff. This information typically appears in the "social history" section or similar portions of the medical record. Such sections may have information about the immigration status of a plaintiff or his or her family and – worse – that information may not be accurate. Thus, plaintiff counsel should not let defense counsel embark on a fishing expedition through a plaintiff's medical records.

Plaintiff counsel can sharply limit, if not preclude outright, the production of medical records by pleading and seeking emotional distress damages that are "garden variety."[23] Significantly, precluding discovery of medical records in cases involving "garden variety" emotional distress advances the compelling public policy codified by both Congress and the Minnesota Legislature.[24]

C. Social Security "No-Match" Notices And Tax Identification "No-Match" Notices Have Little Legal Import

For years, the Social Security Administration and the Internal Revenue Service have sent notices to employers informing them that an employee's name does not match with the social-security or tax-identification number in government databases. Such a notice does not mean the employee is unauthorized to work or is otherwise undocumented. Instead, the letter simply means that employee may not be receiving social security or other financial benefits to which he or she is entitled.

A no-match issue occurs for a myriad of reasons unrelated to immigration status, including name changes due to marriage or divorce, typographical errors, and the increasingly common use of two surnames. The Inspector General estimates that 70% of the nearly 20 million no-match problems concern United States citizens. Therefore, "no-match" notices state "this letter makes no statement about your employee's immigration status."

Given that "no-match" letters have nothing to do with employees' immigration status, employers should not take adverse action against employees that are the subject of such notices. Terminating, demoting,

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disciplining, or even attempting to reverify the immigration status of an employee that is the subject of a "no-match" letter may constitute national origin or race discrimination. Depending on the timing of an employer's adverse action, the employer could also be liable for retaliation under Title VII, the Fair Labor Standards Act, and similar employment or civil rights statutes or – even in the absence of a unionized workforce and a union-organizing effort – violations of the National Labor Relations Act.[25]

IV. THE SUPREME COURT, THE EIGHTH CIRCUIT, AND MINNESOTA'S FEDERAL DISTRICT COURT PERMIT PLAINTIFFS TO PROSECUTE CLAIMS UNDER A PSEUDONYM

The Supreme Court has long allowed plaintiffs to proceed under pseudonyms to protect them from adverse consequences that might result from disclosure of their identities.[26] The Eighth Circuit also has repeatedly permitted plaintiffs to proceed with pseudonyms.[27] In addition, Minnesota's Federal District Court has allowed plaintiffs to pursue claims under a pseudonym.[28]

Notably, Minnesota's Federal District Court recently joined other federal courts in allowing immigrants to pursue their employment and civil rights claims under pseudonyms to protect the plaintiffs from retaliation and other intimidation tactics.[29]

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.[30]

A. Federal Courts Undertake A Flexible Analysis And Consider "All The Circumstances Of A Given Case" In Determining Whether A Party Should 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.[31] Therefore, the early cases considering the use of pseudonyms focused on whether a party challenged governmental conduct, whether the case involved disclosure of intimate information, or whether the litigation compelled the admission of unlawful intent.[32]

As the doctrine has developed, however, federal courts have held – and continue to rule – that the three factors set forth in Stegall and similar 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."[33]

The factors considered in cases like the one before the Court 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.[34]

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

> [P]laintiffs 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.[35]

Although unfairness to a defendant may be considered in evaluating the propriety of pseudonyms, district courts have been reversed for emphasizing that factor.[36] In short, plaintiff anonymity would be unfair to a defendant only if it will unduly obstruct the ability to conduct necessary discovery.[37]

While rejecting the defense argument that pseudonyms unduly obstruct necessary discovery and preclude effective assertion of defenses, one Court of Appeals 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.[38]

In a recent wage-and-hour case brought by immigrant employees, another federal 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

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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.[39]

In sum, "[p]arty anonymity does not obstruct the public's view of the issues joined or the court's performance in resolving them."[40]

B. An Agency Relationship Sufficient To Establish The Need To Proceed With Pseudonyms Exists When Unlawful Actors Have Actual Or Apparent Authority Or When A Defendant Has Constructive Knowledge Of The Conduct Pursued On His/Her/Its Behalf

Obtaining leave to proceed with pseudonyms often requires reliance on agency principles. A defendant's agents include those individuals that plaintiffs reasonably believe have authority to act on behalf of a defendant.[41] In addition, agency attaches to an individual who a defendant has allowed to act on his/her/its behalf or otherwise held out as having such authority.[42] In other words, an agency relationship does not require the agent to possess actual authority.[43]

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 his/her/its behalf. For example, the Eighth Circuit has affirmed the judgment of Minnesota's Federal District Court that a defendant is liable – regardless of whether the actor in question was an agent – when a defendant ratifies the actor's conduct by receiving benefits thereof.[44]

V. SETTLED LAW PROHIBITS DIRECT CONTACTS BY DEFENDANTS AND THEIR COUNSEL WITH PLAINTIFFS AND PLAINTIFF CLASS MEMBERS

Aggressive defendant may seek to contact plaintiffs directly about the substance of litigation in an effort to coerce those plaintiffs into dropping their case or otherwise compromising their claims. That dynamic becomes especially prevalent in class cases. "Because 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."[45] Accordingly, courts may prohibit a defendant's direct contacts with plaintiff class members about pending litigation that involves "actual or threatened misconduct of a serious nature."[46]

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Notably, federal courts have repeatedly barred direct communication by defendants with putative class members – that is, with material witnesses even before a class has been certified.[47] In prohibiting pre-certification communication between the defendant's agents and potential class members, one federal court 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.[48]

CONCLUSION

In furtherance of the private-attorney-general principle, plaintiff counsel should be prepared to move quickly and decisively to protect plaintiffs from the discovery abuse and other litigation tactics that undermine the rule of law. As outlined above, plaintiffs have settled precedent and powerful arguments to advance their cause, both procedurally and substantively. Appropriate use of these tools will maximize the likelihood of success on the merits in cases involving immigrants.

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[1] *N. Y. Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63 (1980) (quoting *Christiansburg Garment Co. v. E.E.O.C*, 434 U.S. 412, 416-17 (1978)); *see also* Minn. Stat. § 363A.02, Subd. 1(a)-(b) ("[D]iscrimination threatens the rights and privileges of the inhabitants of this state and menaces the institutions and foundations of democracy.").

[2] *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); *see also Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1073 (9th Cir. 2000) (citation omitted) ("An employee, exercising his rights under [wage-and-hour laws], exercises them, not only for his own benefit, but also for the benefit of the general public.").

[3] *Burlington North and Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

[4] *White*, 548 U.S. at 67.

[5] *White*, 548 U.S. at 67 (quoting *Mitchell v Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960)).

[6] *Peterson v. Scott County*, 406 F.3d 515, 524, n.3 (8th Cir. 2005) (citation omitted) (reversing summary judgment for the employer because "plaintiffs who reasonably believe that conduct violates [the law] should be protected from retaliation, even if a court ultimately concludes that plaintiff was mistaken in her belief."); *Wentz v. Maryland Casualty Co.*, 869 F.2d 1153, 1155 (8th Cir. 1989) (citations omitted) (same); *Sisco v. J.S. Alberici Construction Co*, 655 F.2d 146, 150 (8th Cir. 1981) (same).

[7] *White*, 548 U.S. at 68 (citations omitted) (emphasis added).

[8] *White*, 548 U.S. at 69 (quoting *Oncale v. Sundowner Offshore Services, Inc*, 523 U.S. 75, 81-82 (1998)) (emphasis added).

[9] U.S. CONST., XIV AMEND. (emphasis added); *see also Plyler v. Doe*, 457 U.S. 202, 215-16 (1982) (reaffirming that the equal-protection rights guaranteed by the Fourteenth Amendment apply to undocumented immigrants).

[10] *See* 42 U.S.C. § 2000e-2(a)(1) (emphasis added); *see also Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95, n.8 (1973) (reiterating that Title VII applies to all individuals living in the United States, not just citizens)

[11] *See* 29 U.S.C. § 203(e)(1).

[12] *See* 42 U.S.C. § 1981.

[13] *See* 42 U.S.C. § 3604(a) (emphasis added).

[14] *See, e.g., Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1072 (9th Cir. 2004), cert. denied 544 U.S.

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905 (2005) (affirming that the immigration status of Title VII plaintiffs is irrelevant); *David v. Signal Int'l, LLC*, 257 F.R.D. 114, 122 (E.D. La. 2009) ("Even if current immigration status were relevant to plaintiffs' race/national origin discrimination, contract and tort claims, discovery of such information would have an intimidating effect on an employee's willingness to assert his workplace rights."); *Montoya v. S.C.C.P. Painting Contractors, Inc.*, 530 F. Supp. 2d 746, 750 (D.Md. 2008) ("To allow the immigration status of a classrepresentative to be investigated-indeed to require a representative to enjoy legal immigration status-would seriously undermine the effectiveness of the [employment statute]."); *E.E.O.C. v. Bice of Chicago*, 229 F.R.D. 581, 583 (N.D. Ill. 2005) ("We find that the immigration status of the Charging Parties is not relevant to the [employment] claims or defenses. . . ."); *E.E O.C. v Tortilleria "La Mejor,"* 758 F.Supp. 585, 590 (E.D. Cal. 1991) ("[T]he protections of Title VII were intended by Congress to run to aliens, whether documented or not. . . .").

[15] *See, e.g., E.E.O.C. v. The Restaurant Company*, 448 F.Supp.2d 1085, 1087 (D.Minn. 2006) (citation omitted) (reversing the order compelling discovery of the plaintiff's immigration status because it "would have an unacceptable chilling effect on the bringing of civil rights actions, which would result in 'countless acts of illegal and reprehensible conduct' going unreported.").

[16] *See, e g., Galaviz-Zamora v Brady Farms*, 230 F.R.D. 499, 501 (W.D.Mich. 2005) (citing *Flores v. Amigon*, 233 F.Supp.2d 462, 463 (E.D.N.Y. 2002)) (reiterating that federal courts only allow discovery into immigration status of plaintiffs "where claims of backpay are made for work 'not performed.'").

[17] *See, e.g., N.L.R.B. v. C & C Roofing Supply, Inc.*, 569 F.3d 1096, 1099 (9th Cir. 2009).

[18] *E.E.O.C. v. Ceridan Corp.*, 610 F.Supp.2d 995, 996 (D.Minn. 2008) (denying the motion to compel employee tax records).

[19] *Ceridan*, 610 F.Supp.2d at 997.

[20] *See, e.g., Galaviz-Zamora*, 230 F.R.D. at 502-03 (barring discovery into the plaintiffs' tax returns and tax forms); *E.E.O.C. v. First Wireless Group, Inc.*, 225 F.R.D. 404, 407 (E.D.N.Y. 2004) (holding that the employer could not gain access to tax returns); *see also Ponce v. Tim's Time*, 2006 WL 941963, *1 (N.D.Ill. 2006) (precluding the solicitation or use of any evidence related to the plaintiffs' tax returns, including whether they filed returns).

[21] *See, e.g.*, 26 U.S.C. § 6103 (codifying the policy that federal income tax returns are treated as confidential communications between a taxpayer and the government).

[22] *See generally Lake v. Walmart Stores, Inc.*, 582 N.W.2d 231 (Minn. 1998).

[23] *See, e.g., Jaffee v. Redmond*, 518 U.S. 1, 15-18 (1996) (holding that, pursuant to Fed.R.Evid. 501, the disclosure of medical data could not be compelled because "[m]aking the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege."); *Newton v. Kemna*, 354 F.3d 776, 785 (8th Cir. 2004) (agreeing that the district court properly prohibited discovery of medical records); *Dochniak v. Dominium Management Services*, 240 F.R.D. 451, 453 (D.Minn. 2006) (ruling that a plaintiff's claim for "garden variety" emotional distress damages is "insufficient to place her mental condition in controversy."); *see also In re Sims*, 534 F.3d 117, 120, 141-142 (2nd Cir. 2008) (holding that the district court abused its discretion in ruling that the plaintiff waived the privilege applicable to medical records by seeking "garden variety" emotional distress damages); *Fitzgerald v. Cassil*, 216 F.R.D. 632, 633 (N.D.Cal. 2003) (ruling medical records were not discoverable because the case involved "garden variety" emotional distress claims); *Fritsch v. City of Chula Vista*, 187 F.R.D. 614, 632 (C.D.Cal. 1999) (same); *Hucko v City of Oak Forest*, 185 F.R.D. 526, 530 (N.D.Ill. 1999) (same); *Burrell v. Crown Cent. Petroleum, Inc.*, 177 F.R.D. 376, 384 (E.D.Tex. 1997) (same); *Vanderbilt v. Town of Chilmark*, 174 F.R.D. 225, 230 (D.Mass. 1997) (same).

[24] *See, e.g.*, 42 U.S.C. § 1320d-2(d) (requiring the adoption of security standards and safeguards to protect the confidentiality of medical records);

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Minn.Stat. 595.02, Subd. 1(d) (prohibiting medical providers from disclosing records without the patient's formal consent).

[25] *See* 29 U.S.C. § 157.

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

[27] *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).

[28] *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").

[29] *Doe I, et al. v. Mulcahy, Inc., et al.*, File No.: 08-306, Order, (D.Minn. June 13, 2008) (DWF/SRN); see also Does I thru XXIII, 214 F.3d at 1069-73 (ruling that the plaintiffs, who are immigrants, can pursue their wage claims against their employer while using pseudonyms); *John Does I-V v. Rodriguez*, 2007 WL 684114, *2-*3 (D.Colo. 2007) (same); *Gomez v Buckeye Sugars*, 60 F.R.D. 106, 107 (N.D.Ohio 1973) (same).

[30] *Roe II v Aware Woman Center for Choice*, 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*, 214 F.3d at 1069-73 (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 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").

[31] *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).

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

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

[34] *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.

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

[36] *See, e.g., James*, 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).

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

[38] *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).

[39] *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).

[40] *Stegall*, 653 F.2d at 185; *see also generally Doe v. Iron R-1 School Dist.*, 49 8 F.3d 878 (8th Cir. 2007); *see also Does I thru XXIII*, 214 F.3d at 1073 ("Thus, permitting plaintiffs to use pseudonyms will serve the public's interest in [employment litigation] by enabling it to go forward.").

[41] *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).

[42] *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).

[43] *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).

[44] *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].").

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

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

[47] *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 communica-tions 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) (sanction-ing the defendant for pre-certification contacts with potential class members regarding the litigation); *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).

[48] 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. SS'N. MODEL RULE 4.2; MINN.R.PROF.CONDUCT. 4.2.

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