Successfully Overcoming Employers' Scorched-earth Defense Tactics

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Introduction[1]

Although plaintiff counsel is accustomed to certain underhanded and hardball tactics used on occasion by defense counsel in employment cases, those tactics are often experienced in greater variety and with more frequency and intensity when the plaintiffs are immigrants. Employers may threaten or call the police or immigration on workers,[2] raise immigration status questions in discovery, trial, and/or settlement,[3] or bring retaliatory civil claims against the workers – all in an attempt to chill workers' exercise of employment rights.

In that sense, immigrant workers are like the proverbial canaries in the coal mine about which Lani Guinier so eloquently wrote in *Lift Every Voice: Turning A Civil Rights Setback Into A New Vision Of Social Justice* (1998). In other words, much of what defense counsel is now doing or attempting to do in cases prosecuted on behalf of immigrants is what defense counsel very well may do or attempt to do going forward in employment cases in general – whether the plaintiffs are immigrants or not.

Under these circumstances, plaintiff counsel face a dilemma between taking a preemptive or a reactive approach. The preemptive approach offers the benefit of potentially stopping litigation abuse and costly sideshows before they start; however this approach also risks appearing "premature" to an increasingly skeptical judiciary. The reactive approach offers the benefit of accumulating further evidence of employer misdeeds that will support motions for protective orders as well as additional retaliation, emotional distress and punitive damages claims; however this approach also risks exposing likely vulnerable people to unnecessary abuse and related adverse consequences for their cases.

There is no easy solution to the dilemma. Plaintiff counsel needs to consider the benefits and costs of each approach in each case. Regardless of the path chosen, there are a number of legal strategies and litigation tactics that plaintiff counsel should be ready to pursue – not only to respond effectively to litigation abuse, but also to turn any such employer overreaching into further evidence of liability and a larger damages recovery. The discussion below highlights a number of those strategies and tactics.

I. Affirmative Approaches to Ensuring Aggrieved Employees Assert Their Rights Before Litigation Ensues

Although substantial discussion below concerns strategies and tactics preempting or swiftly neutralizing scorched-earth tactics when representing immigrants, the underlying analysis applies to plaintiffs in general to the extent employers seek to exploit perceived vulnerabilities of plaintiffs as part of their defense strategy.

A. Temporary Restraining Orders And Injunctions

In instances of ongoing irreparable harm being inflicted upon victims of discrimination, it may not be appropriate to file only a charge of discrimination. Investigations can take months if not years before the Equal Employment Opportunity Commission ("EEOC") issues a "Right to Sue," a prerequisite to filing a complaint in federal court. Under these circumstances, plaintiffs should contact the EEOC Regional Attorney to ask EEOC to seek preliminary relief. Before filing for a temporary restraining order (TRO) or an injunction, EEOC will likely send a "cease and desist" letter to the employer. Congress provided EEOC with authority to seek injunctive relief at any step in an investigation or litigation, pursuant to Section 706(f)(2) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(2).[4]

Protecting immigrant workers and eliminating barriers to the legal system are top priorities for EEOC. EEOC approved a strategic enforcement plan[5] in December of 2012 for fiscal years 2013–2016. The plan lists six top national priorities, of which one is "Protecting Immigrant, Migrant, and Other Vulnerable Workers." Specifically, EEOC will "target disparate pay, job segregation, harassment, trafficking and discriminatory policies affecting vulnerable workers who may be unaware of their rights under the equal employment laws, or reluctant or unable to exercise them."

"Preserving Access to the Legal System" is another of the six top priorities listed in the strategic enforcement plan. To preserve this access, EEOC is committing to "target policies and practices that discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or that impede the EEOC's investigative or enforcement efforts." This includes the pursuit of preliminary relief such as a TRO or an injunction.

It is imperative that issues regarding the immigration status of an employee be brought to the attention of the Regional Attorney, ***not*** EEOC investigative staff. EEOC can argue that conversations between an advocate or a discrimination victim and the legal unit of the EEOC in anticipation of filing for an injunction are privileged. However, conversations with enforcement employees, such as investigators are ***never*** privileged unless the discussion is about conciliation (pre-litigation settlement).[6] EEOC will never consider immigration status, if uncovered, when evaluating the merits of a charge of discrimination.

1. Ongoing sexual assaults

EEOC can seek and has sought preliminary relief when confronted with ongoing sexual assaults. In *EEOC v. Iowa AG, LLC and DeCoster Farms of Iowa*, No. C01-3070 (N.D. Iowa 2002), female employees were repeatedly raped by supervisors and coworkers. EEOC moved for a preliminary injunction, arguing that rapes had occurred as recently as five months prior to the filing of the motion, and that at least one rape had occurred at knife-point. In its motion, EEOC alleged that the rapes inflicted irreparable injury.

The court granted the preliminary injunction after the defendants agreed not to challenge the motion. As part of the court order, the defendants were required to distribute an anti-harassment policy in English and Spanish to all employees. The policy explained that if someone had a complaint, they could call EEOC and provided EEOC's contact information. The case eventually settled for $1.5 million and many victims were given deferred status.[7] Eventually, six of the eleven participating victims were granted permanent status and work authorization. The other five women elected to return to their home countries.

2. Threats to deport and other forms of retaliation

In *DeCoster Farms*, the employer also threatened termination, deportation, and bodily harm to individuals who cooperated with the EEOC. In fact, deportation proceedings had already been initiated against some of the victims. In its motion for preliminary injunction, EEOC argued that the chilling effect of the retaliatory actions provide an additional justification for the injunction because discrimination victims were unwilling to cooperate with EEOC's investigation. Without evidence from victims of sexual assault and retaliation, EEOC could not properly investigate the charge filed against defendants.

Similarly, in *EEOC v. Aerotek*, EEOC filed for a preliminary injunction after it learned that Aerotek allegedly told some of its employees not to speak with an EEOC investigator unless one of Aerotek's attorneys was present. Aerotek alleged that the employees were supervisors, an allegation EEOC disputed. In its motion, EEOC argued that the communication not to independently speak with EEOC created a chilling effect that discouraged employees from coming forward with complaints of discrimination and from freely communicating with EEOC regarding its pending investigation of charges of discrimination. The parties settled the motion for an injunction. As part of the resolution, Aerotek sent a corrective communication to non-supervisory employees advising them that they were free to communicate with EEOC and agreed to identify to EEOC which employees were purportedly supervisors.[8]

B. Availability Of U Visas And/Or T Visas

Attorneys should also consider whether the discrimination victim who filed a charge with EEOC is eligible for a U or T visa. In 2007, the Citizenship and Immigration Services explicitly included the EEOC as an agency that can certify for U visas.

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To be eligible for consideration for a U visa, the individual must be a victim of a crime who suffered mental or physical abuse. The crime victim must have information regarding the activity and be willing to assist government officials in the investigation of the activity. The criminal activity in EEOC cases typically involves sexual assault, extortion, witness tampering, false imprisonment, or obstruction of justice.

When acting as a certifier, EEOC must confirm that the victim is helping with the investigation or prosecution of criminal activity. EEOC must also certify that the victim is credible. The Commission does not have final say with respect to whether a U visa is granted; that authority lies with the U.S. Citizenship and Immigration Services.

T visas are given to people willing to cooperate with reasonable requests from law enforcement when they are victims of a severe form of human trafficking in persons.[9] Although government certification is not required to apply, EEOC recommendations have been given significant weight in United States Citizenship & Immigration Services adjudication.

Defendants often seek to obtain evidence of the U or T visa petition, alleging that the applications may provide an opportunity to challenge the victim's credibility. However, courts have granted protective orders, holding that the potential for harm is greatly outweighed by any potential relevancy.[10]

C. Proceeding Under Pseudonyms

To reduce the target on the backs of aggrieved employees, especially in a multi-plaintiff or class case, litigation under pseudonyms should be considered. 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.[11]

The majority of jurisdictions considering the denial of pseudonym usage have held that the district courts abused their discretion in doing so.[12] The courts have specifically allowed for the use of pseudonyms by immigrants to pursue their employment and civil rights claims to protect the plaintiffs from retaliation and other intimidation tactics.[13]

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.[14]

Although unfairness to a defendant may be considered in evaluating the propriety of pseudonyms, district courts have been reversed for emphasizing that factor.[15] In short, plaintiff anonymity would be unfair to a defendant only if it will unduly obstruct the ability to conduct necessary discovery.[16]

II. Pleading Considerations to Minimize the Use of Immigration Status in Litigation

Again, the discussion below focuses on issues that often come up when representing immigrants. Nonetheless, the analysis is instructive for representing plaintiffs in general because it illustrates the types of strategies available to avoid time-consuming and costly litigation about the litigation.

A. Whether To Plead Backpay Or Reinstatement

Putting backpay at issue or seeking reinstatement opens the door for employers to argue that they have the right to discover an aggrieved employee's legal authorization to work.

[1]A version of this article was originally published in the program materials for "United We Stand: Effectively Representing Immigrants In Employment Cases" and is reprinted with permission by the National Employment Lawyers Association and The Employee Rights Advocacy Institute For Law & Policy. All rights reserved. The views expressed in Ms. Feldman's contributions herein are those of Ms. Feldman only. The author's remarks have not been reviewed, vetted or approved by the EEOC. They do not necessarily reflect the views of EEOC, or any official of the EEOC, and they do not in any respect constitute an official or authorized statement of EEOC policy or practice. Ms. Feldman's contributions to this paper build on two papers previously prepared for NELA: "Immigration Status, Threats to Deport and Employment Discrimination: The EEOC's Approach in Litigation" (July 2010), written by William R. Tamayo, Regional Attorney of the San Francisco District Office of the EEOC, and "The Effects of Immigration Status on Employment Litigation after Hoffman Plastics Compound" (December 2012), written by Alejandro Caffarelli of Caffarelli & Siegel Ltd., Cynthia Rice of California Rural Legal Assistance, and Bill Tamayo of EEOC.

[2]*See, e.g.*, National Employment Law Project ("NELP"), et.al., "ICED Out: How Immigration Enforcement has Interfered with Workers Rights," http://www.nelp.org/page/-/Justice/ICED_OUT.pdf?nocdn=1 (documenting how employers have cooperated with immigration enforcement agencies and local police to retaliate against workers involved in litigation as well as democratic participation); National Immigration Law Center, "And Injustice for All," http://www.nilc.org/disaster_assistance/workersreport_2006-7-17.pdf (documenting retaliation against workers who sought individual compensation and better enforcement by the U.S. Department of Labor in the aftermath of Hurricane Katrina).

[3]*See, e.g., Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004), *cert. denied* 544 U.S. 905 (2005) (National Employment Law Project as amicus defending protective order in Title VII litigation); *Salas v. Hi-Tech Erectors*, 168 Wash. 2d 664 (Wash. 2010) (NELP as amicus in ruling holding immigration status inadmissible in tort litigation); *Bollinger Shipyards, Inc. v. Director, Office of Worker's Compensation Programs*, 604 F.3d 864 (5th Cir. 2010) (NELP as amicus in ruling holding immigration status irrelevant to workers compensation claim).

[4]Section 706(f)(2) provides as follows: "Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases

It also provides defendants with more ammunition to seek employment history, tax information, and other personal information. EEOC may elect not to seek backpay for work not performed and not to seek reinstatement for people who are undocumented. This practice makes it easier to prevail on motions for protective order and on motions to quash.

B. Whether Threats To Deport Are Actionable Retaliation

Defendants may claim that, if a plaintiff argues as part of a discrimination claim that s/he was threatened with deportation for complaining of discrimination, the plaintiff is putting his or her immigration status at issue. This argument defies logic – are threats to deport only offensive, discriminatory, harassing, or retaliatory if the government has authority to deport the discrimination victim? According to the Southern District of Mississippi, the answer is "no."[17]

III. Reducing the Potential for Intimidation During the Initial Discover Phase

By examining the scorched-earth tactics used by employers in cases pursued by immigrants, plaintiff can identify key procedural and substantive approaches to litigation on behalf of plaintiffs in general that can lessen the ability of employers to retaliate and otherwise interfere meaningfully with the exercise of employment rights.

A. Federal Rule of Civil Procedure 16 And 26(f) Conferences

Interrogatories

There are dozens of questions an employer can ask at depositions that could lead to the discovery of immigration status. An innocuous question such as why someone was not hired could reveal this. To seize control and avoid surprise, it is prudent as part of a Rule 26(f) Conference to negotiate answering some of these questions in the form of narrowly tailored (and perhaps agreed-upon) interrogatories. As a compromise, the plaintiff could agree that the defendant will be permitted to issue more interrogatories than would otherwise be permitted. If no reasonable agreement can be reached between the parties, the Rule 16 Conference should be used to seek resolution via the Magistrate to minimize time-consuming and costly sideshows down the road.

In *Koch Foods of Mississippi, LLC*, 2012 WL 6161959 at *2, EEOC moved for a protective order barring discovery of immigration status. In its complaint, EEOC argued that the defendants subjected employees to a hostile work environment because of their national origin. Several class members left their employment with the defendants because of the working conditions but later returned when they could not find other work. The defendants sought discovery of employees' work histories, including discovery from third-party employers. The defendants argued that this information could be relevant to their defense that the working conditions were not hostile if they could show that employees returned to work without exploring other options.

The court concluded that discovery through third-party employers was overly broad and unduly burdensome. It also ruled that EEOC did not have to provide work histories of employees before the time they worked for Koch Foods, or after their employment with Koch Foods. To address the defendant's defense, EEOC was required to provide interrogatory responses that explained employees' work histories and job search attempts between their stints with Koch Foods. EEOC only had to provide these interrogatory responses on behalf of employees who returned to work for Koch Foods.

Subpoenas

Federal Rule of Civil Procedure 45 governs subpoenas. The current Fed. R. Civ. P. Rule 45(b)(1) does not require any notice for subpoenas to third-parties. Instead, it

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for hearing at the earliest practicable date and to cause such cases to be in every way expedited." 42 U.S.C. § 2000e-5(f)(2).

[5](http://www.eeoc.gov/eeoc/plan/sep.cfm)

[6]To find out which district office should be contacted, and the name of the Regional Attorney, go to http://www.eeoc.gov/field/index.cfm.

[7]A deferred action is discretionary relief that can be provided by the local USCIS District Director. It is an agreement to defer all or part of the enforcement or removal proceedings in a particular case. It can be indefinite or for a set amount of time. An individual subject to a deferred action will obtain work authorization.

[8]*See EEOC v. Aerotek, Inc.*, No. 09-cv-07740 (N.D. Ill. Jan 19, 2010).

[9]8 U.S.C. § 1101(a)(15)(T).

[10]*See EEOC v. Global Horizons, Inc.*, 2012 WL 5986418 at *6, No. CV-11-3045-EFS (E.D. Wash. Nov. 29, 2012) ("A litigant's immigration status is typically undiscoverable simply for the purpose of challenging the litigant's credibility") (citations omitted).

[11]*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).

[12]*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").

[13]*Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1069-73 (9th Cir. 2000) (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).

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

[15]*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).

[16]*See, e.g., Doe v. Porter*, 370 F.3d 558, 561 (6th Cir. 2004).

only provides that "notice must be provided on each party" before the subpoena is served, but ***only if*** the subpoena "commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial." The amount of notice required is not defined.

As part of the 26(f) Report, parties should agree to a specified time period of notice before the issuance of subpoenas for documents, inspection, or subpoenas to persons for testimony. Again, if the employer insists on being unreasonable, the Rule 16 Conference should be used to establish appropriate ground rules. This will provide plaintiffs with the opportunity to move to quash harassing subpoenas to former or subsequent employers, family members, or friends.

B. Preparing Plaintiffs For Discovery Abuses

Once you have established a solid rapport, it is imperative to review every question an employer may ask at a deposition that could reveal immigration status with the employees you represent. You can explain that you will object to these questions or move for a protective order, but at a minimum, you need to know what questions and answers could reveal immigration status. A victim of discrimination also needs to be reminded that there are no guarantees and that a judge could order him or her to answer these questions on the record.

Discrimination victims also need to be prepared regarding all the ways their employer (if they are still employed) may retaliate against them and what their rights are with respect to I-9 forms, deportation threats, and other retaliatory behavior.

IV. Responding Effectively to Litigration Overreach by Employers and Their Counsel

Even when the best efforts to preempt or neutralize an employer's scorched-earth tactics do not succeed in full, all is not lost. Savvy plaintiff counsel can use an employer's litigation abuses against the employer by developing further evidence of liability and for additional damages recoveries.

A. Invoking The Time-Honored Private Attorney General Principle To Add Retaliation Claims Against An Employer That Engages In Litigation Abuse

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.'"[18] In fact, a plaintiff "not only redresses his own injury but also vindicate[s] the important congressional policy against discriminatory employment practices."[19]

In furtherance of the private attorney general principle, the pro-employer 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.[20] 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."[21] 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

[17] *Maria Cazorla, et al (including EEOC) v. Koch Foods of Mississippi, LLC and Jessie Ickom*, 2012 WL 6161959 at *2, No. 3:10-cv-135-DPJ-FKB (S.D. Miss., Nov. 30, 2012) (rejecting the defendant's position that immigration status was discoverable and dismissing "Koch's position that threats of deportation would not constitute harassment if the objects of those threats were in the country legally").

[18] *N.Y. Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63 (1980) (quoting *Christiansburg Garment Co. v. EEOC*, 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.").

[19] *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.").

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

[21] *Id.* at 67.

[22] *Id.* (quoting *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960)).

[23] *See, e.g., Kasten v. Saint-Gobain Perform. Plastics Corp.*, 131 S.Ct. 1325, 1329 (2011) (establishing that the anti-retaliation section of the Fair Labor Standards Act protects employees who only make an oral complaint); *Thompson v. North Amer. Stainless, LP*, 131 S.Ct. 863, 868 (2011) (in a unanimous opinion announced by Justice Antonin Scalia, holding that adverse action against a third party can support a retaliation claim under Title VII); *Crawford v. Metropolitan Government of Nashville*, 129 S. Ct. 846, 849 (2009) (in an opinion authored by Justice David Souter, ruling that Title VII's anti-retaliation provision protects employees from retaliation when employees merely participate in an employer's internal investigation of a potential Title VII violation); *Gomez-Perez v. Potter*, 553 U.S. 474, 478-79 (2008) (in an opinion authored by Justice Samuel Alito, effectively reading an anti-retaliation provision into the Age Discrimination in Employment Act).

[24] *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960).

[25] *Bill Johnson's Restaurant, Inc. v. NLRB*, 461 U.S. 731, 741 (1983).

[26] *See id.*

[27] *See Lovejo-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 209, 223 (2d Cir. 2001).

[28] *Kreinik v. Showbran Photo, Inc.*, 2003 U.S. Dist. LEXIS 18276 (S.D.N.Y. Oct. 10, 2003).

[29] *See, e.g., Jacques v. DiMarzio, Inc.*, 216 F. Supp. 2d 139 (E.D.N.Y. 2001). For an in depth discussion of the FLSA's legislative history and the importance of employee initiated complaints, see Kate Griffith,

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.[22]

Since that seminal decision, the Supreme Court has rendered a number of pro-employee decisions in retaliation cases under an array of employment statutes – including reading such provisions into statutes when there was no supporting statutory text and expanding the scope of actionable conduct by ruling, among other things, that adverse action against third parties or a person who simply responds to questions about a third party's allegation of discrimination can be the basis for a valid retaliation claim.[23]

Accordingly, immigrant employees subjected to litigation abuse should not hesitate to pursue affirmative retaliation claims against employers. The Fair Labor Standards Act ("FLSA") anti-retaliation provision exemplifies this approach because it is meant "to foster a climate in which compliance with the substantive provisions of [the FLSA] would be enhanced" by protecting employees who come forward with complaints."[24] "By suing an employee who files charges…an employer can place its employees on notice that anyone who engages in such conduct is subjecting himself to the possibility of a burdensome lawsuit."[25]

The chilling effect is even greater when the employees are low-wage workers who have limited means to fund a defense.[26] Retaliatory lawsuits can be so damaging to statutory enforcement of minimum workplace standards that even the threat of a retaliatory lawsuit can constitute retaliation.[27] An employer's counterclaims are presumed to be retaliatory where, as here, the counterclaims "could have been asserted earlier, but were instead asserted only after the [employee] had initiated the action seeking to vindicate his federal rights."[28] Given the strong federal interest in protecting workers from retaliation for bringing FLSA lawsuits, at least one court has *sua sponte* dismissed retaliatory counterclaims and awarded sanctions recognizing the inherent chilling effect of forcing workers to continue litigating the obviously retaliatory claims.[29] FLSA retaliation claims separately offer workers an avenue to recover damages for the retaliatory claims.

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"Discovering 'Employment' Law: The Constitutionality of Subfederal Immigration Regulation at Work," 29 *Yale L. & Pol'y Rev.* 389 (2011).

[30]*See, e.g., Jimenez v. Vanderbilt Landscaping, LLC*, 2012 U.S. Dist. LEXIS 22045 (M.D. Tenn. Feb. 22, 2012), *affirmed by Jimenez v. Vanderbilt Landscaping LLC*, 2012 U.S. Dist. LEXIS 44815 (M.D. Tenn. Mar. 29, 2012).

[31]*Id.*

[32]*See, e.g., Food Service, Inc. v. Trade Street Research, Inc.*, 129 F.R.D. 126, 129 (W.D.N.C. 1990) (finding defendants' motion was meritless, because plaintiffs' counsel 'had no personal interest in the transaction" underlying the litigation when defendants in a contract dispute sought to add plaintiff's counsel as third-party defendants on the grounds that they attempted to extort money from defendants by offering to release them from the lawsuit for a fee.); *Goldberg v. Meridor* 81 F.R.D. 105, 113 (S.D.N.Y. 1979) (denying motion to add law firms representing a party as additional parties because adding the law firms as parties would potentially subject the defendants "to the substantial prejudice of losing their counsel," and as such, required that plaintiffs' justification for seeking such relief be "particularly strong").

[33]For example, anti-SLAPP motions have protected communities speaking out against developers, *Dixon v. Superior Court*, 30 Cal. App. 4th 733 (Ca. Ct. App. 1994), low-wage immigrant workers in the garment industry defending their rights, *Street Beat Sportswear, Inc. v. National Mobilization against Sweatshops*, 698 N.Y.S. 2d 820 (N.Y. 1999) (striking New York manufacturer's claims against workers and supporters pursuant to N.Y. Civ. Rights Law § 70-a et seq.), immigrant rights coalitions defending the accountability of retailers for conditions of worker making their clothes, *Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles*, 117 Cal. App. 4th 1138 (April 21, 2004) (striking California retailer's retaliatory claims by a retailer against a workers' center under Cal. Code Civ. P. 425.16, et seq.), and individuals initiating a recall of an elected official, Evans v. Unknown, 38 Cal. App. 4th 190 (1995).

[34]*See NAACP v. Claiborne*, 485 U.S. 886, 907 (1982) (holding that First

Amendment prohibits liability for lawful protest activity even when the activity has economic consequences for the defendant).

[35]In so doing, the Supreme Court recognized the importance of protecting both access to courts and separate First Amendment rights to speech and association in the context of grassroots civil rights work by groups, like the NAACP, necessary to protect "lawful objectives of equality of treatment by all government, federal, state, and local" for minority groups. *See, e.g., NAACP v. Button*, 371 U.S. 415 (1963) (striking down Virginia's anti-solicitation rule for lawyers as applied to the NAACP and other civil rights groups); *NAACP v. Alabama*, 357 U.S. 449 (1958) (blocking disclosure of membership lists where "disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association" as other more direct prohibitions on action).

[36]*Letter Carriers v. Austin*, 418 U.S. 264, 284 (1974); *Linn v. United Plant Guard Workers of America*, 383 U.S. 53 (1966).

[37]For a history of First Amendment and anti-SLAPP legislation as well as the public policy goals animating state legislatures, *see* Jerome Braun, "Increasing SLAPP Protection: Unburdening the Right of Petition in California," 32 *U.C. Davis L. Rev.* 965 (1999); "Engaging In Direct Action Campaigns Without Getting SLAPP'ed: Take Action Against Wage Theft!," Rebecca Smith (2007), http://nelp.3cdn.net/a1eaf7bc861e8d5ae7_kpm6bf4qn.pdf

[38]*Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

[39]*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

[40]*Iqbal*, 129 S. Ct. at 1949-50 (internal citations omitted).

[41]*See Fritz v. Charter Township of Comstock*, 592 F.3d 718, 722 (6th Cir. 2010) (finding conclusory statements insufficient); *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987) (reiterating that while a court may not "grant a Rule 12(b)(6) motion based on disbelief of a complaint's factual allegations", the court "need not accept as true legal conclusions or unwarranted factual inferences").

[42]*See New York Times v. Sullivan*, 376 U.S. 274, 280 (1964); *Linn v. United Plant Guard Workers*, 383 U.S. 53, 58 (1966); *National Association of Letter Carriers v. Austin*, 418 U.S. 264 (1974) (comparing a supervisor and his crew to a slave driver and chain gang did not constitute malice); *Davis Co. v. United Furniture Workers*, 674 F.2d 557 (6th Cir. 1982).

[43]29 U.S.C. § 113(c).

[44]*Order of Railroad Telegraphers v. Chicago & N.W. Ry. Co.*, 362 U.S. 330, 335-336 (1960); *Bhd. of R.R. Carmen of Am., Local No. 429 v. Chicago & N.W. Ry. Co.*, 354 F.2d 786, 801 fn. 4 (8th Cir. 1965); *Bowater S. S. Co. v. Patterson*, 303 F.2d 369, 372 (2d Cir. 1962); *Corporate Printing Co., v. New York Typographical Union No. 6, Int'l Typographical Union*, 555 F.2d 18, 20 (2d Cir. 1977).

[45]*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

B. Opposing An Employer's Motion To Amend Its Answer To Add Retaliatory Claims

Depending on the procedural posture of the case, the addition of retaliatory counterclaims may also be opposed on basic civil procedure grounds in a motion opposing a defendant employer's motion to amend.[30] In *Jimenez*, the district court denied the employers' motion to add tort claims against a workers' center and organizer on the general basis that, the "[P]roposed amendment would be unduly prejudicial to Plaintiffs and that Defendants have unduly delayed in attempting to amend the counterclaims."[31]

The *Jimenez* court relied in part on *Derringer v. Chapel*, Civ. No. 03-804 WJ/RHS, Slip Op. (D.N.M. Aug. 14, 2003). In *Derringer*, the plaintiff's counsel moved for sanctions and disqualification of the defendants' counsel based on an alleged conflict of interest. The Derringer court held that, "Plaintiff's Motion for Sanctions is nothing more than a disingenuous attempt to disqualify counsel for [Defendants] because Plaintiff sued the [Defendants] attorneys. If one party to a lawsuit could disrupt an opposing party's relationship with an attorney simply by naming that attorney in a lawsuit, litigation would become nothing but gamesmanship."[32]

C. Invoking State Anti-SLAPP Laws To Strike an Employer's Retaliatory Claims

Legislatures and courts have long recognized civil litigation filed against employees in response to the employee asserting statutory workplace rights is actionable retaliation which should result in striking the retaliatory claims and sanctions.

Many states have responded by enacting statutes prohibiting strategic lawsuits against political participation or "SLAPP" lawsuits – that is, a lawsuit aimed at discouraging the exercise of speech and petition rights and silencing critics of the labor practices. The strength and breadth of the state statutes varies.

Anti-SLAPP statutes protect the First Amendment rights of individuals where allowing litigation to proceed against them would deter those individuals and others from reporting information to federal, state, or local agencies. When retaliatory civil claims chill a worker's speech and petition rights or effectively punish him/her for exercising constitutional rights to speak and petition the government for redress of grievances, state anti-SLAPP statutes give courts the power to strike these claims as a preliminary matter.[33]

State anti-SLAPP statutes build on decades of Supreme Court and Circuit case law applying constitutional constraints to defamation and other claims used to deter protected First Amendment activity – specifically civil rights and labor boycotts and organizing. For example, the Supreme Court relied on the First Amendment to strike down injunctive relief and damages awarded by the Mississippi Supreme Court against individuals and organizations involved in a seven year boycott "seeking racial equality and integration," emphasizing, "the Black citizens named as defendants in this action banded together and collectively expressed their dissatisfaction with a social structure that had denied them rights to equal treatment and respect."[34] Recognizing that, "by collective effort individuals can make their views known, when, individually their voices would be faint or lost," the Supreme Court cited *NAACP v. Alabama ex. rel Patterson*, 357 U.S. 449, 460 (1958), and reaffirmed that "effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."[35]

Likewise, recognizing the importance of protection for robust speech by employees in labor disputes, the Supreme Court requires employers to show "actual malice" before defamation is actionable.[36] The Supreme Court recognized that, in the context of labor dispute, the appropriate test for ensuring a balance between the rights of employers and workers is to dismiss allegations of defamation that do not rise to the standard of malice enunciated by the Supreme Court in New *York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

The Sixth Circuit has emphatically endorsed the high standard required. In *Davis Company v. United Furniture Workers of America*, 674 F.2d 557 (6th Cir. 1982), the court recognized that in the context of a labor dispute, the Constitution mandates broad protection of collective speech and action:

> [I]t has been stated that the "most repulsive" speech enjoys immunity if it does not meet the test of actual malice. Moreover, expressions of opinion, though false, and couched in very strong language, are not to be treated as falsifications of facts. Likewise, the use of hyperbole which would not be treated by a hearer or reader as intended to be literally believed is not actionable. This court has held highly offensive language protected by the [National Labor Relations Act], where it is clearly used in a rhetorical rather than a literal way.

These cases recognize the role of courts in limiting the coercive and deterrent impact of retaliatory claims which chill First Amendment Activity, particularly on behalf of groups whose voices are critical to democratic speech and debate.

A SLAPP defense may be raised in a variety of procedural postures, depending on the stage of the retaliatory action and the state statute. Employers may move to add counterclaims in the same litigation or may file a separate lawsuit with retaliatory civil claims in the same or a different forum. A SLAPP defense may be possible in each procedural scenario.[37]

D. Traditional Motions To Dismiss An Employer's Retaliatory Claims

An employer's retaliatory claims may be subject to dismissal based on inadequate pleading under the Fed. R. Civ. P. 12(b)(6) standard. As with any other claim, for purposes of a motion to dismiss, the court must take all of the factual allegations related to the retaliatory claim as true. However, the "[f]actual allegations must be enough to raise a right to relief above the speculative level"; they must "state a claim to relief that is plausible on its face."[39] Moreover, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but has not show[n] – that the pleader is entitled to relief."[40] Mere legal conclusions, couched as factual allegations, do not suffice to avoid a Fed. R. Civ. P. 12(b)(6) dismissal.[41]

For example, if the employer's retaliatory claims include alleged defamatory statements in the context of the labor dispute, the employer must plead sufficient facts to show that the content of purportedly defamatory statements were made with actual malice in order to prevail.[42] Labor law generally recognizes that labor disputes can take place between employers and unionized employees or employees outside of unions. The Norris-La Guardia Act defines a "labor dispute" as including "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment..."[43] The Supreme Court has noted that courts have defined the term "labor dispute" broadly.[44]

Recognizing the importance of the actual malice standard in labor disputes, the Supreme Court confirmed that, "Labor disputes are ordinarily heated affairs. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language." Importantly, an employer may also be subject to the actual malice standard as a public contractor or other type of limited public figure.[45] Regardless, the high legal standard that governs means that an employer's retaliatory claims are vulnerable to dismissal.

Conclusion

Whether taking a more preemptive or a more reactive approach, plaintiff counsel should consider pursuing an array of legal strategies and litigation tactics to lessen the ability of employers to retaliate and, when employers still do, to use such conduct against the employers in a quintessential *jiujitsu* maneuver. How employers often defend employment cases brought by immigrants highlights many of the underhanded tactics that some employers will use as part of a scorched-earth defense strategy. Thus, plaintiff counsel would be wise to draw on such experience when developing and executing the litigation plan in each case, regardless of whether the plaintiffs are immigrants.