Defeating Employer Defamation Claims Against Employees

JUSTIN D. CUMMINS, Justin D. Cummins, of Cummins & Cummins, LLP, prosecutes employment, civil rights, and consumer protection cases. Justin is an MSBA Board Certified Labor & Employment Law Specialist. He is also past Chair of the Minnesota Stat Bar Association's Labor & Employment Law Section and a past Officer of the National Employment Lawyers Association's Eighth Circuit and Minnesota Boards. In addition, Justin has taught employment law and civil rights at the University of Minnesota Law School and Mitchell Hamline School of Law. Justin is consistently recognized as a Super Lawyer, and *Minnesota Lawyer* has identified him as one of the top attorneys in Minnesota.

Introduction

In an effort to gain tactical advantage in litigation, some employers have filed defamation claims against plaintiffs who asserted employment or civil rights claims against those employers. When faced with such employer tactics, employees typically assert for the first time or bolster existing retaliation claims against those employers. A less well know response, but one that plaintiff counsel should always seriously consider, involves the assertion of various defenses and related motion practice based on Federal labor law. As explained more fully below, such a response can be highly effective in fending off defamation claims even when the workplace is not unionized and the employees are not otherwise represented by a union.

I. The Traditional Response To Employer Defamation Claims: Filing Or Supplementing An Employee Retaliation Claim

Experienced plaintiff counsel know that retaliation claims receive comparatively better treatment by the courts than many other types of employment and civil rights claims receive.[1] Thus, plaintiffs typically pursue retaliation claims in the first instance if they have the evidence to support such claims. When an employer files a defamation counterclaim in response to a plaintiff's court action, then, plaintiff counsel ordinarily will supplement the pleadings to incorporate the filing of the counterclaim as further adverse action and evidence of retaliatory intent. Indeed, an employer's defamation counterclaim is normally a textbook example of retaliation against an employee because an employer counterclaim self-evidently "might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"[2]

In this context, plaintiff counsel should continue to emphasize that "but for" causation for purposes of a retaliation claim does not mean the sole cause of the adverse action nor anything close to the sole cause. In a case emanating from the Eighth Circuit, *Burrage v. United States*, the United States Supreme Court directly addressed the meaning of "but for" causation when discussing the leading employment case on causation in retaliation cases, *Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 570 U.S. 338 (2013).[3] In that regard, the United States Supreme Court quoted legal authority describing "but for" causation as "the ***minimum concept of cause***."[4]

The unanimous opinion in *Burrage* – which Justice Antonin Scalia authored – ultimately framed the analysis of "but for" causation through a number of metaphorical examples.[5] Perhaps the most helpful metaphor for plaintiffs

is the following: "[if] the predicate act combines with other factors to produce the result, so long as the other factors alone would not have done so – if, so to speak, ***it was the straw that broke the camel's back.***"[6] Accordingly, the United States Supreme Court confirmed that the evidentiary standard governing retaliation claims is not onerous and, in fact, continues to be the lowest threshold for establishing a causal connection.[7] Not surprisingly, the Eighth Circuit has held that a jury may infer causation in retaliation cases simply from the evidence that the employer's rationale for adverse action was pretext for retaliation.[8]

II. A "New" Response To Employer Defamation Claims: Invoking Defenses Under Labor Law

Federal labor law applies to workplaces whether or not they are unionized because of the extremely broad way the National Labor Relations Act ("NLRA")[9] defines a labor dispute. Specifically, a labor dispute is "***any controversy concerning*** terms, tenure 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, regardless of whether the disputants stand in proximate relation of employer and employee.***"[10]

Federal labor law, the NLRA in particular, offers 3 main defenses to employer defamation claims: (1) the claims are barred by preemption; (2) the claims concern non-actionable expression of opinion about a labor dispute; and (3) the claims do not satisfy the heightened pleading and proof standards that govern a labor dispute. These defenses can be the basis for successful dispositive motions by employees under Fed. R. Civ. P. 12 and/or Fed. R. Civ. P. 56 and, if necessary, for prevailing at trial.

A. Federal Labor Law Preemption Ordinarily Precludes An Employer's State Law Claims

Federal labor law preempts State law claims when those claims relate to conduct that is arguably protected by the NLRA or arguably prohibited by the NLRA – whether or not a collective bargaining agreement applies to the employer.[11] This type of preemption, typically called *Garmon* preemption, originates from the Supremacy Clause of the United States Constitution.[12]

The United States Supreme Court adopted *Garmon* preemption pursuant to the NLRA and, ultimately, the Constitution to ensure uniformity in the development and application of Federal labor law through the National Labor Relations Board ("NLRB").[13] Thus, the Eighth Circuit has long held that *Garmon* preemption generally bars State law tort claims.[14]

The Minnesota Supreme Court also has explicitly recognized and applied *Garmon* preemption to reverse a lower court's decision not to dismiss State law tort claims.[15]

B. Binding Precedent Bars Employer Defamation Claims That Turn On Non-Actionable Expression Of Opinion

The United States Supreme Court and the Minnesota Supreme Court both have held that expressions of opinion do not support a valid defamation even when *Garmon* preemption does not preclude a defamation claim.[16] Indeed, the United States Supreme Court and the Eighth Circuit have consistently recognized that statements made in the context of a labor dispute involve core interests protected by the First Amendment to the United States Constitution: "***[T]he dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution.*** *** Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society."[17] Therefore, the opinion defense to employer defamation claims continues to be robust for employees.

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C. Heightened Pleading And Proof Standards Governing Any Defamation Claim Related To A Labor Dispute Defeat Employer Claims

To have a viable defamation claim, an employer must provide adequate factual support to show ***clearly and convincingly*** (1) that the employee made the statements at issue with malice – that is, with actual knowledge of the statements' falsity or with reckless disregard for the truth and (2) that the employee caused actual injury to the employer.[18]

Binding precedent has repeatedly reaffirmed that Federal labor law protects extreme statements that could be perceived as potentially defamatory outside the context of a labor dispute because such statements do not involve the requisite malice.[19] Consequently, "'***you people at Beverly are all criminals***' is reasonably understood as ***a vigorous and hyperbolic rebuke, not a specific allegation of criminal wrongdoing.***"[20] In addition, the following statements have been held not to be defamatory because they did not involve even reckless disregard for the truth: "Why the ***concentration camp pressure by [the manager]*** and his pet stooges *** Could it be that [the manager] fears the facts that [employees] are about to free themselves of the ***company Gestapo tactics*** *** [The manger] is using the 'Big lie' tactics of Hitler. . . . *** [The manager] and other ***Company officials have*** discriminated, intimidated, ***bribed***, and coerced [employees]..."[21]

Apart from establishing cognizable malice exercised by an employee, an employer must also show that the plaintiff(s) suffered actual injury because of the statements at issue.[21] No actual harm and, therefore, no defamation occurred even when those accused of defamation were ***"lawless, marauding, disingenuous, character assassins who deserve their comeuppance"*** for declaring, among other things, that the employer's owner was a ***"bloodsucking, plantation-minded boss."***[23] Nor did an employer suffer actual harm to support a defamation claim when management were described as ***"part of that World War II generation that danced on the graves of Jews."***[24]

CONCLUSION

Given the sweeping definition of labor dispute, Federal labor law provides several potentially dispositive defenses to employees facing employer defamation claims – even when no union represents the employees. These defenses can be the basis of successful motions to dismiss and for summary judgment regarding an employer's defamation claims and can otherwise enhance plaintiffs' position when litigating employees' underlying employment and civil rights claims.

[1] *Dep't of Homeland Security v. McClean*, 135 S.Ct. 913, 920-24 (2015) (in an opinion authored by Chief Justice John Roberts, ruling that the whistleblowing at issue was protected activity even though it violated a federal regulation); *Kasten v. Saint-Gobain Perform. Plastics Corp.*, 563 U.S. 1, 4-5 (2011) (holding that the anti-retaliation provision of the Fair Labor Standards Act protects employees who only make an oral complaint, rejecting the trend under state law that increasingly requires formal and/or written reports to compel protection); *Thompson v. North Amer. Stainless, LP*, 562 U.S. 170, 173-75 (2011) (in a unanimous opinion announced by Justice Antonin Scalia, concluding that adverse action against a third party can support a retaliation claim); *Crawford v. Metropolitan Government of Nashville*, 555 U.S. 271, 273-74 (2009) (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 violation); *Gomez-Perez v. Potter*, 553 U.S. 474, 478-79 (2008) (in an opinion authored by Justice Samuel Alito, basically reading an anti-retaliation provision into the Age Discrimination in Employment Act); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 445 (2008) (holding that Section 1981 protects individuals who have complained about potential violations concerning a third party).

[2] *Burlington North and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006).

[3] 134 S.Ct. 881, 887-88 (2014).

[4] *Id.* at 888 (emphasis added).

[5] *Id.*

[6] *Id.* (emphasis added).

[7] *Id.*

[8] *Bennett v. Riceland Foods, Inc.*, 721 F.3d 546, 551-52 (8th Cir. 2013).

[9] 29 U.S.C. §§ 151, *et seq.*

[10] 29 U.S.C. § 152(9) (emphasis added); *see also Brady v. NFL*,

644 F.3d 661, 671 (8th Cir. 2011) (same); Minn. Stat. § 179.01, Subd. 7 (same); Minn. Stat. § 185.18, Subd. 4 (same).

[11]*Wisconsin Dept. of Indus. Labor and Human Rel. v. Gould, Inc.*, 475 U.S. 282, 286, 291 (1986) (ruling that the Federal labor law preempted the State law claims because the NLRA prevents States from providing their own regulatory or judicial remedies for conduct arguably protected by the NLRA or arguably prohibited by the NLRA); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959) (reversing the lower court and ruling that Federal labor law preempted the State law claims – even though the National Labor Relations Board ("NLRB") declined jurisdiction over those claims – because "[i]t is essential to the administration of the [NLRA] that these determinations [about whether conduct is protected by the NLRA or prohibited by the NLRA] be left in the first instance to the [NLRB]. What is outside the scope of this Court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the [NLRB].") (citing United States Supreme Court precedent).

[12]*See* U.S. Const., Art. IV, Cl. 2; *Livadas v. Bradshaw*, 512 U.S. 107, 120 (1994) (reversing the lower court and ruling that Federal labor law preempted the State law claims).

[13]*Amalgamated Ass'n of Motor Coach Emp. of Am. v. Lockridge*, 403 U.S. 274, 286, 288-89 (1971) (reversing the lower court and ruling that Federal labor law preempted the State law claims).

[14]*Beverly Hills Foodland, Inc. v. UFCW Local 655*, 39 F.3d 191, 194 (8th Cir. 1994) (affirming that Federal labor law preempted the defamation claims because); *see also Intercity Maint. Co. v. SEIU Local 254*, 241 F.3d 82, 89 (1st Cir. 2001), *cert. denied* 534 U.S. 818 (2001) (affirming judgment for the defendants regarding the State defamation claims and reiterating that "State tort claims are generally preempted by the [NLRA].") (citing United States Supreme Court precedent).

[15]*Midwest Pipe Insulation, Inc. v. MD Mech., Inc.*, 771 N.W.2d 28, 31-32 (Minn. 2009) (reversing the judgment for the plaintiff because ***"state jurisdiction is preempted in favor of the NLRB"*** when the conduct is arguably protected by the NLRA or arguably prohibited by the NLRA) (citing United States Supreme Court precedent) (emphasis added); *see also Wright Elec., Inc. v. Ouellette*, 686 N.W.2d 313, 322-23 (Minn. Ct. App. 2004), *rev. denied* (Dec. 14, 2004), *cert. denied* 545 U.S. 1128 (2005) (reversing the judgment for the plaintiff and reiterating that "both state and federal courts must defer to the exclusive competence of the NLRB to avoid the danger of state interference with national policy.") (citing Minnesota precedent).

[16]*Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 285-86 (1974) (reversing judgment for the plaintiffs because, "[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.") (citing United States Supreme court precedent.); *Diesen v. Hessberg*, 455 N.W.2d 446, 450 (Minn. 1980) (reversing judgment for the plaintiff because "expressions of opinion are not actionable statements for defamation purposes and are protected by the First Amendment.") (citing United States Supreme Court precedent); *see also Ruzicka Elec. and Sons, Inc. v. Int'l Broth. of Elec. Workers*, 427 F.3d 511, 523, *rhrg. and rhrg. en banc denied* (8th Cir. 2005) (affirming that the plaintiffs' defamation claims were non-actionable expressions of opinion "uttered in the midst of the labor dispute...").

[17]*Thomas v. Collins*, 323 U.S. 516, 532 (1945) (citing United States Supreme Court precedent) (emphasis added); *see also NLRB v. Fruit Packers*, 377 U.S. 58, 78 (1964) (same); *AFSCME v. Woodward*, 406 F.2d 137, 140 (8th Cir. 1969) (same).

[18]*Austin*, 418 U.S. at 283; *Linn v. Plant Guard Workers*, 383 U.S. 53, 55, 65 (1966) (ruling that Federal labor law preempts defamation claims related to a labor dispute unless the plaintiff(s) prove cognizable malice exercised by the defendant(s) and actual injury suffered by the plaintiff(s)) (citing United States Supreme Court precedent); *see also Gertz v. Robert Welch*, Inc., 418 U.S. 323, 331 (1974) (confirming that the "failure to investigate, without more, cannot establish reckless disregard for the truth. Rather, the publisher must act with a 'high degree of awareness of...probable falsity.'") (citing United States Supreme Court precedent).

[19]*Austin*, 418 U.S. at 285-86 (reversing judgment for the plaintiffs and reiterating that Federal labor law preempts defamation claims concerning "rhetorical hyperbole" or "imaginative expression" in the context of a labor dispute); *Beverly Hills Foodland*, 39 F.3d at 196 (affirming that Federal labor law preempted the plaintiff's defamation claims and stating that, in the context of a labor dispute, ***"to use loose language*** or undefined slogans...***is not to falsify facts."***) (citing United States Supreme Court precedent) (emphasis added).

[20]*Beverly Enter. v. Trump*, 182 F.3d 183, 188 (3d Cir. 1999), *cert. denied* 528 U.S. 1078 (2000) (emphasis added).

[21]*Blum v. Int'l Ass'n of Machinists*, 201 A.2d 46, 47-48 (N.J. 1964) (emphasis added).

[22]*Linn*, 383 U.S. at 55, 65.

[23]*Intercity Maint.*, 241 F.3d at 89-90 (emphasis added).

[24]*Beverly Enter.*, 182 F.3d at 188 (emphasis added).