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When the defense gets offensive

Responding to the defendant's offensive conduct in employment litigation

Lately, it seems that many defense attorneys are heeding the old adage, "the best defense is a good offense," responding to employment lawsuits with their own lawsuits or threats of lawsuits. By attempting to dramatically increase the cost of litigation and the work to plaintiff's counsel, defense counsel may hope to pressure the plaintiff to enter into an early, unfavorable settlement or to drop his or her lawsuit altogether. Properly handled by plaintiff's counsel, however, this aggressive tactic can backfire on the defendant, raising the ultimate value of the plaintiff's case and the ultimate cost to the defendant. This article addresses some of the common ways in which defendants try to take the offensive in employment litigation and methods by which plaintiff's counsel can effectively respond.

The cross-complaint: they sued us, so let's sue them

In a knee-jerk reaction to the employee's lawsuit, the employer may file its own action, hoping to put pressure on the plaintiff and increase leverage for settlement. When faced with a cross-complaint, plaintiff's counsel should first determine whether the cross-complaint qualifies as a SLAPP suit under Code of Civil Procedure section 425.16. A SLAPP suit is one brought, not to vindicate a legal right, but to prevent citizens from exercising their political rights or punishing those who have done so. (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 815 [33 Cal.Rptr.2d 446, 449] *overruled on other grounds in Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal. 4th 53, 68 [124 Cal.Rptr.2d 507, 519].) "SLAPP" is an acronym for "strategic lawsuit against public participation." (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732 [3 Cal.Rptr.3d 636, 637].)

Section 425.16 was enacted to protect the exercise of a person's First Amendment rights of free speech and petition. (Code Civ. Proc., § 425.16.) The Legislature's intent in enacting section 425.16 is set forth in the statute itself:

> (a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(Code Civ. Proc., §425.16 (a).)

In enacting section 425.16, the Legislature created a procedural mechanism by which SLAPP suits can quickly be dismissed – a special motion to strike. (Code Civ. Proc., § 425.16(b)(1).) Such a motion must be filed within 60 days of service of the complaint. (Code Civ. Proc., § 425.16(f).)

Cross-complaints may be subject to special motions to strike under section 425.16. (*Wilcox, supra,* 27 Cal.App.4th at 813.) The types of claims subject to special motions to strike vary, but may include some of the more common causes of action raised in employer's cross complaints, such as defamation, trade libel and interference with prospective economic advantage. (See *Computer Express, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1014 [113 Cal.Rptr.2d 625, 643-644] (causes of action for trade libel and interference with prospective economic advantage held subject to special motion to strike); *Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26, 31 n. 2 [1 Cal.Rptr.3d 390, 392 n. 2] (the concept of the SLAPP suit arose in response to the use of traditional torts to chill free speech – "usually defamation and intentional interference with somebody else's business in all its permutations").)

In ruling on an anti-SLAPP motion, the court engages in a two-step process. First, the court must decide whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. (*Equilon, supra,* 29 Cal.4th at 67.) If the court finds that such a showing has been made, it must then determine whether the plaintiff has met its burden of demonstrating a probability of prevailing on the claim. (*Ibid.*) Note that as used in section 425.16, the term "defendant" includes a cross-defendant, and the term "plaintiff" includes a cross-complainant. (Code Civ. Proc., § 425.16(h).)

The fact that an employer responds with a cross-complaint alleging defamation or other similar claim does not automatically mean that the cross-complaint is a SLAPP. In order to fall under the protections of the anti-SLAPP statute, the acts alleged must be "in furtherance of the person's right of petition or free speech." These acts include:

> (1) any written or oral statement or writing made before a legislative, executive or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(Code Civ. Proc., § 425.16(e).)

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Counsel faced with a cross-complaint must carefully analyze the allegations to determine if they encompass acts in furtherance of the employee's right of petition or free speech. For example, does the cross-complaint allege that the employee made defamatory statements about the employer to the Department of Fair Employment and Housing or the Equal Employment Opportunity Commission? If so, such statements would almost certainly qualify as a statement before an official proceeding authorized by law. Similarly, if the cross complaint alleges that the employee made defamatory statements to potential witnesses in the underlying lawsuit, that too, could be protected, so long as the statements were made in connection with the employee's pending or anticipated litigation against the employer. (See, e.g., *Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1270 [73 Cal.Rptr.3d 383, 394].)

Once the employee is able to establish that the challenged causes of action fall within the scope of section 425.16, the burden shifts to the cross-complainant to present admissible evidence establishing a probability that it will prevail on its claims. (*Macias v. Hartwell* (1997) 55 Cal.App.4th 669, 675 [64 Cal.Rptr.2d 222, 226].) This aspect of the special motion to strike will require a detailed discussion of the legal and factual merits of the causes of action contained in the cross-complaint. Whether or not the special motion to strike is ultimately granted, forcing the employer to memorialize in declarations or through other evidence the merits of its claims can be very valuable as the case proceeds, since witnesses will be hard-pressed to change their version of the facts already contained in declarations under oath and will provide the plaintiff with valuable information normally only gleaned through the time-consuming and often gamesmanship-driven discovery process.

Another upshot of the special motion to strike is that if it is successful, the moving party is entitled to attorney's fees and costs. (Code Civ. Proc., §425.16(c).) This fee award is mandatory. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131 [104 Cal.Rptr.2d 377, 383].) If the special motion to strike is denied, the moving party will only be assessed attorney's fees and costs if the court finds that the motion was frivolous or solely intended to cause unnecessary delay. (Code Civ. Proc., § 425.16(c).)

Winning an anti-SLAPP motion and having the employer assessed attorneys' fees and costs early on in the litigation could take the wind out of the employer's sails and possibly motivate settlement discussions at an earlier stage than might otherwise normally occur.

In addition to examining the applicability of the anti-SLAPP statute, plaintiff's counsel whose client is faced with a cross-complaint should determine whether the filing of the cross-complaint could be considered a further act of retaliation in violation of the Fair Employment and Housing Act ("FEHA").

The anti-retaliation provision of the FEHA provides that it is unlawful:

> For any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against *any person* because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.

(Gov. Code, §12940(h) (emphasis added).)

The anti-retaliation provision of the FEHA does not prohibit retaliation only against current employees. Rather, it prohibits retaliation against "any person." Moreover, both the Ninth Circuit and the United States Supreme Court have held that former employees may sue a former employer for post-employment retaliation. These federal cases are instructive in state claims brought under the FEHA. Because the objectives of the California Fair Employment and Housing Act and Title VII of the Civil Rights Act of 1964 are identical, California courts frequently rely upon federal law to interpret analogous provisions of the state statute. (See, e.g., *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 475-476 [4 Cal.Rptr.2d 522, 528] ("Lawsuits claiming retaliatory employment termination in violation of CFEHA are analogous to federal Title VII claims, and are evaluated under federal law interpreting Title VII cases.").)

In *Robinson v. Shell Oil Co.* (1997) 519 U.S. 337, 339 [117 S.Ct. 843, 845], the United States Supreme Court held that former employees are included within the class of persons against whom retaliation for opposing discrimination is prohibited. (*Ibid.*) The Court reasoned that excluding former employees from the protection of the anti-retaliation provisions would undermine the effectiveness of the civil rights statutes by allowing the threat of post-employment retaliation to deter victims of discrimination from filing complaints with the appropriate administrative agencies. (*Id.* at 346; See also, *O'Brien v. Sky Chefs, Inc.* (9th Cir. 1982) 670 F. 2d 864, 869, *overruled on other grounds in Atonio v. Wards Cove Packing Co.* (9th Cir. 1987) 810 F. 2d 1477 (allegations of former employees that their former employer refused to rehire them and gave them bad recommendations because they filed complaints of discrimination with the EEOC were held to sufficiently assert retaliation claims).)

Moreover, many courts have found a civil complaint against a former employee to constitute actionable retaliation. For example, in *Hudson v. Moore Business Forms, Inc.* (9th Cir. 1987) 836 F.2d 1156, 1162, the court found that the defendants' motive in bringing a cross complaint against the plaintiff in a sexual discrimination action was to harass the plaintiff and to deter similar actions from being brought. Similarly, in *EEOC v. Outback Steakhouse of Florida, Inc.* (N.D. Ohio 1999) 75 F. Supp. 2d 756, a former employee of Outback Steakhouse sued Outback for sexual harassment under Title VII of the Civil Rights Act of 1964. Outback filed a counterclaim against the former employee, Julie Inman. After that case was resolved, the EEOC filed a complaint alleging that Outback's filing of a counterclaim against Ms. Inman constituted unlawful retaliation. Outback contended that there could be no retaliation claim because Ms. Inman was a former employee at the time the counterclaim was filed, the counterclaim had no effect on Ms. Inman's employment or prospective employment, and thus there

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was no adverse employment action. The court disagreed. Citing the Supreme Court's decision in *Robinson v. Shell Oil Co.* and the plain language of the statute, the court held that Title VII's anti-retaliation statute does not require that the retaliatory act be employment related in order to be actionable. (*Outback, supra,* 75 F. Supp. 2d at 758, 760.) (See also, *EEOC v. Virginia Carolina Veneer Corp.* (W.D. Va. 1980) 495 F. Supp. 775, 778 (defamation counterclaim filed by defendant against a plaintiff who had a filed a charge of discrimination with the EEOC was "unquestionably retaliatory in nature").)

The preemptive lawsuit

Sometimes, an extremely aggressive former employer decides to take the offensive and file a preemptive lawsuit against the employee. The employer may want to try to establish venue or may simply want to take the offensive and try to dissuade the employee from continuing to pursue his or her claims. The preemptive filing of a complaint against a former employee who has not yet sued can also constitute actionable retaliation. For example, in *Cozzi v. Pepsi-Cola General Bottlers, Inc.* (N.D. Ill. 1997) 1997 WL 312048, a former employee who was discharged filed a complaint of discrimination with the EEOC. One month later, the company filed a lawsuit against the former employee charging her with fraud. The terminated employee filed a lawsuit against her former employer alleging that its lawsuit against her was filed in retaliation for her charge of discrimination, and constituted unlawful retaliation in violation of Title VII. The employer moved to dismiss the retaliation claim, on the grounds that its lawsuit, brought seven months after the plaintiff was discharged, could not constitute an adverse employment action. The court disagreed, finding that the filing of a lawsuit, not in good faith and instead motivated by retaliation, can be a basis for a retaliation claim under the civil rights statutes, even if filed after the employee had been terminated. (*Ibid.*)

Practice Tip: Remember to amend the administrative claim

When faced with a cross complaint or a preemptive complaint by the employer that is arguably in retaliation for the employee's pursuit of discrimination or harassment claims, plaintiff's counsel should be sure to amend the administrative charge of discrimination with the DFEH or other applicable administrative agency to include a charge of retaliation, and should either amend the civil complaint to add the new retaliatory acts or file a new complaint based on the new acts of retaliation. As with any retaliation claim under FEHA, if the employee is successful in convincing the jury that the claims against her were part of a campaign of unlawful retaliation, the plaintiff will be entitled to recover attorneys' fees pursuant to Government Code section 12965(b).

Practice Tip: Orienting your law practice to anticipate cross-complaints

The possibility of a cross-complaint always exists when a lawsuit is filed. While in many cases, these cross-complaints lack merit and are merely part of an aggressive defense to the underlying lawsuit, they still require a response and add extra work to the lawsuit. Plaintiff's counsel must account for this in his or her retainer agreement by addressing how cross-complaints will be treated. Is the defense of the cross-complaint included in the general services covered by the contingency agreement, or will the employee be required to pay the attorney on an hourly or other basis to defend the cross-complaint?

One factor to consider is whether the claims in the cross-complaint allow the prevailing party to recover attorney's fees. If so, it is important that the fee structure between the attorney and client not provide an argument by the cross-complainant that the client did not incur any additional fees as a result of the cross-complaint and that the employee, even if successful in defending it, should be precluded from recovering attorney's fees.

The employer threatens to sue the plaintiff if company documents are not returned

All too often, clients who believe they were wronged may take documents from their workplace which they believe will help them prove their case. In other instances, clients simply have documents they accumulated while employed, either because they worked on projects at home or retained work-related e-mails. When the employee responds to a request for production of documents and produces such documents during the ordinary course of litigation, the employer is alerted to the fact that the employee has possession of company documents. The employer may demand their immediate return and threaten to file a lawsuit if they are not returned. Plaintiff's counsel must tread carefully.

If the company has written policies regarding the confidentiality of documents, plaintiff's counsel should carefully review the policies and determine whether any of the documents in the client's possession fall within its scope. Even without such a policy, if there are documents which could be considered confidential, proprietary or privileged, counsel should carefully consider whether these need to be returned.

There are published California cases condemning "self help" discovery by terminated employees. For example, in *Pillsbury, Madison & Sutro v. Schectman* (1997) 55 Cal.App.4th 1279 [64 Cal.Rptr.2d 698], current and former employees of Pillsbury, Madison & Sutro (hereinafter "Pillsbury") were in possession of confidential personnel documents removed from Pillsbury's offices without its consent. Pillsbury commenced an action to compel the return of the documents. The trial court found that the documents were intended to be confidential and ordered the plaintiffs and their counsel to turn over the originals and all copies of the documents to the court for return to Pillsbury. The plaintiffs appealed. The Court of Appeal affirmed, condemning "self help" discovery outside the legal avenues of discovery provided by the Discovery Act. (*Id.* at 1289; See also, *Conn v. Superior Court* (1987) 196 Cal.App.3d 774 [242 Cal.Rptr. 148].)

Where a client appears at counsel's office with documents improperly removed from the employer's premises,

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the prudent course of action may be to make a list of the documents, return the originals and all copies to the employer, and then request in discovery those documents deemed relevant to the prosecution of the case. (See, e.g., Order Granting In Part And Denying In Part Defendant's Request For Return Of Documents From Plaintiff issued in *Bedwell v. Fish & Richardson,* U.S.D.C. Case No. 07-CV-0065-WQH (JMA) (S.D. Cal. December 3, 2007).)

The employer threatens to sue the employee or his or her new or prospective employer, claiming breach of a non-compete agreement

On occasion, an employer will try to prevent a former employee from accepting a job with a competitor, claiming that the employee is bound by an agreement not to compete. The employer may threaten to sue the former employee or even the new or prospective employer.

California has a strong public policy in favor of allowing employees to work. This public policy is expressed in California Business & Professions Code section 16600 which provides, "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade or business of any kind is to that extent void." (Cal. Bus. & Prof. Code, § 16600.) This provision has been consistently declared by California courts to be "an expression of public policy to ensure that every citizen shall retain the right to pursue any lawful employment and enterprise of their choice." (*Metro Traffic Control, Inc. v. Shadow Traffic Network* (1994) 22 Cal.App.4th 853, 859 [27 Cal.Rptr.2d 573].)

There are some limited exceptions to the general rule that non-compete agreements are unenforceable. For example, agreements designed to protect an employer's proprietary or trade secret information are enforceable. (*Moss, Adams & Co. v. Shilling* (1986) 179 Cal.App.3d 124, 130 [224 Cal.Rptr. 456, 460].) Non-compete agreements may also be valid where a person sells the good will of, or substantial ownership interest in, a business or agrees not to compete upon dissolution of a partnership. (Bus. & Prof. Code, §§ 16601, 16602 & 16602.5; See also, *Thompson v. Impaxx, Inc.* (2003) 113 Cal.App.4th 1425, 1428 [7 Cal.Rptr.3d 427, 429].)

Absent one of the statutory exceptions or the implication of trade secret information, an employer may not enforce a non-compete agreement to prevent an employee from obtaining employment with a competitor. That doesn't mean some employers won't try. An employer's threats – even if not legally supportable – could cause a prospective employer to withdraw its offer of employment in order to avoid the hassles and legal costs associated with a lawsuit. If that occurs, the employee may have recourse against the former employer. This issue was addressed by the California Supreme Court in *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937 [81 Cal.Rptr.3d 282].

In *Edwards*, the employee had been employed by Arthur Andersen and had signed a non-compete agreement. Edwards' practice group was sold and he was offered employment by the new entity. However, before his employment could take effect, the new entity required that Edwards obtain a release from Arthur Andersen of its non-compete agreement. Arthur Andersen would not agree to terminate the non-compete agreement unless Edwards signed a release of all his claims against Arthur Andersen. Edwards did not sign Arthur Andersen's broad release. Arthur Andersen therefore refused to terminate the non-compete agreement and the new entity withdrew its offer of employment to Edwards. Edwards sued Arthur Andersen for intentional interference with prospective economic advantage.

In order to state a claim for intentional interference with prospective economic advantage, a plaintiff is required to prove the following elements: an economic relationship between the plaintiff and a third party, with the probability of future economic benefit to the plaintiff; the defendant's knowledge of the relationship; an intentional act by the defendant, designed to disrupt the relationship; actual disruption of the relationship; and economic harm to the plaintiff proximately caused by the defendant's wrongful act, including an intentional act by the defendant that is designed to disrupt the relationship between the plaintiff and a third party. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1153-1154 [131 Cal.Rptr.2d 29, 44-45].) For the third element, a plaintiff must establish that the defendant's conduct was not only an intentional act designed to disrupt the relationship, but also that it was wrongful. (*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 392-393 [45 Cal.Rptr.2d 436, 447].) At issue in the *Edwards* opinion was whether Arthur Andersen's refusal to release the non-compete agreement without consideration was a wrongful act sufficient to support a cause of action for intentional interference with prospective economic advantage. The Court held that it was. (*Edwards, supra,* 44 Cal.4th at 955.)

Thus, where an employer's conduct causes an employee to lose employment based on the employer's threat to enforce a non-compete agreement, the employee may have legal recourse against the employer in the form of an action for intentional interference with prospective economic advantage.

Conclusion

Although the employer may try to take the offensive in litigation by itself suing the employee or threatening suit, in many cases such tactics can backfire on the employer and give the employee even more ammunition in its fight for justice.

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