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Employers Must Avoid 'Retaliation' If Suing Employees for Defamation

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Employers are vulnerable to being the targets of negative online and social media postings, and sometimes these statements can give rise to defamation claims. However, an employer considering suing a current or former employee for internet defamation must be careful if the (ex-)employee recently engaged in protected activity.

Under Section 7 of the National Labor Relations Act (NLRA), employees “have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”

In other words, the NLRA protects employees from employer retaliation for engaging in certain activity. This might include employees publishing [certain posts on social media](#) or perhaps publishing an [employer review on Glassdoor](#) relating to issues such as wages or working conditions.

Thus, while there are situations in which an employer will have a good faith basis for bringing defamation claims against past or present employees, employers must not file an internet defamation lawsuit if it would be considered impermissible and unlawful retaliation.

As the U.S. [Equal Employment Opportunity Commission](#) (EEOC) states on its website: “[t]he law forbids retaliation when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment.”

In September 2013, the [EEOC filed a lawsuit](#) against a California bakery, alleging its owner had verbally abused an employee, Marcela Ramirez, through use of racial slurs. The EEOC additionally argued that that Peters' Bakery, located in San Jose, retaliated against Ms. Ramirez by bringing a “frivolous defamation suit” against her after the sales clerk filed a discrimination charge with the EEOC.

Two-and-a-half years later, the dispute between the EEOC (on Ramirez's behalf) and the bakery is still ongoing. Earlier this month, the [EEOC petitioned a federal judge](#) to rule that Peters' Bakery's defamation lawsuit constitutes retaliation.

Without diving too deeply into the details of the [Peters' Bakery matter](#), the bakery's owner reportedly admitted in a deposition to filing the defamation lawsuit because of his employee's EEOC complaint. If true, the retaliation argument would likely be a slam dunk for the EEOC.

But state and federal courts have held that employers can file defamation claims to protect their reputations, so long as they are not retaliatory.

For example, the United States District Court for the Middle District of Florida, Orlando Division held that "[a]n employer is not precluded from filing a defamation suit to vindicate his reputation if the suit is brought in good faith." See *Urquiola v. Linen Supermarket*, CASE NO. 94-14-CIV-ORL-19, 1995 U.S. Dist. LEXIS 9902, at *3 (M.D. Fla. Mar. 23, 1995).

More recently, the Supreme Court of Ohio reached a similar conclusion in its attempt to balance the rights of an employee to "seek redress for claims of discrimination without retaliation" against the rights of an employer to "petition the courts for redress after prevailing in the employee's cause of action against him."

In *Greer-Burger v. Temesi* in 2007, Ohio's top court held that an employer is not barred "from filing a well-grounded, objectively based action against an employee who has engaged in protected activity." 2007-Ohio-6442, ¶ 1, 116 Ohio St. 3d 324, 879 N.E.2d 174, 178.

Thus, while false and defamatory statements made on the internet can severely damage the reputations of companies of all sizes—from small businesses to Fortune 500 companies—employers must be mindful of filing a lawsuit for internet defamation that might be considered retaliatory.

In other words, an employer must always ensure that it has a non-discriminatory basis for filing a defamation lawsuit against an (ex-)employee, rather than solely in response to his or her potentially protected activity.

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