



## The GSH

# 60-Second Memo

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### Anti-SLAPP Laws Give Employees New Grounds to Assert Retaliation

By Lynn Urkov Thorpe, Esq.

There has been a growing trend in state governments to enact legislation to protect individuals exercising free speech rights from lawsuits intended to threaten or chill the exercise of those rights. These lawsuits, often filed by companies against citizens who criticize them publicly, are referred to as Strategic Lawsuits Against Public Participation, or "SLAPP" suits. Illinois enacted the Citizen Participation Act, 735 ILCS 110/5 *et seq.* (the "Act"), as its "anti-SLAPP" statute, and, because the Act has been broadly construed by Illinois courts to encompass a wide range of activity, it has become yet another tool for employees to assert against employers.

The Act applies where the claim against the moving party (i.e., the person whose free speech rights are allegedly threatened) "is based on, relates to, or is in response to any act or acts of the moving party in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government." The Act places the burden on the party filing the lawsuit to show by "clear and convincing evidence" that the alleged acts of the moving party are not protected by the Act and immunized from suit. The Act also provides for expedited hearings and mandates an award of attorneys' fees and costs to a moving party who successfully dismisses a lawsuit under the Act.

Employees are using these anti-SLAPP laws to assert retaliation claims against their employer. *Hytel Group, Inc. v. Butler*, -- N.E. 2d --, 2010 WL 4214847 (2nd Dist. October 20, 2010), is a recent example. Hytel hired Butler as comptroller. Four months later - and just one week after Hytel's lender filed emergency proceedings to appoint a receiver based on Hytel's alleged default on several

obligations under its loan agreement - Hytel fired Butler. Butler subsequently filed a wage claim against Hytel with the Illinois Department of Labor seeking approximately \$2,300 in final wages. Several months later, Hytel sued Butler for breach of fiduciary duty and fraud.

Hytel's lawsuit alleged two claims against Butler. First, Hytel alleged that Butler owed a duty of loyalty to the company and a duty to disclose all material information to the company, which she allegedly breached by failing to complete any financial statements during her employment, failing to report conversations she had with the lender that were to the "detriment" of Hytel, and arranging with the lender to remain in her position if the lender replaced the rest of Hytel's management, which in turn caused her to stop performing her duties for Hytel. On this count, Hytel sought \$1 million in compensatory damages plus \$3 million in punitive damages, as well as forfeiture and repayment of all wages ever paid to Butler. In the second claim, Hytel alleged Butler was not capable of performing her work and that she committed fraud by knowingly misrepresenting her abilities to the company. For this claim, Hytel sought another \$4 million in damages.

In response to Hytel's complaint, Butler filed two motions to dismiss. One of her motions was based on the Act: Butler asserted that Hytel's lawsuit was in retaliation for her filing her wage claim. As evidence, she submitted an affidavit attesting to her various attempts to obtain her last paycheck, including Hytel's president's statement to her that if she filed a claim with the Department of Labor, he would "sue [her] a--, honey." Hytel denied those statements took place, but the trial court dismissed Hytel's lawsuit pursuant to the Act, and Hytel appealed.

On appeal, Hytel argued that Butler's motion to dismiss should be denied because her wage claim was a "purely private" dispute that was not the sort of public expression encompassed by the Act. The court rejected Hytel's argument, noting that the language of the Act was not limited to situations where the exercise of rights was to advance an issue of public concern and that the Act expressly provided that it is to be liberally construed. Thus, the appellate court "had no difficulty" agreeing with the trial court that Butler's wage claim filed with the Department of Labor was "an exercise of her right to petition for redress of grievances" - a right that was protected even if "selfish[ly] motivate[ed]." The court found that Butler's wage claim was not a purely private matter because a public purpose could be found in ensuring that employees were paid benefits earned so as to avoid decreasing the tax base. Regardless, the court concluded that the Act contained no requirement that an action have a public purpose in order to be protected.

Hytel's argument that Butler's alleged acts (breaches of fiduciary duty and fraud) were not protected from suit by the Act was likewise unavailing. According to the court, the Act allowed a litigant to seek dismissal of claims brought "in response to (i.e., in retaliation for) the protected action." Hytel could only avoid dismissal if it provided the clear and convincing evidence called for by the Act to demonstrate that Butler's wage claim was not immunized because it was not genuinely aimed at obtaining a

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favorable result from the government. This analysis must be done on a case-by-case basis. Here, the court concluded that Hytel's lawsuit against Butler was in response to her wage claim. One of the factors bolstering the court's opinion here was that the damages were "extraordinarily" high - \$8 million total, plus repayment of all wages earned - without supporting facts. This circumstance supported the inference that Hytel's lawsuit against Butler was "intended to strike fear into [Butler] rather than being a good-faith estimate of the extent of the injury sustained." The court affirmed the trial court's decision to dismiss the action. Butler was also awarded attorneys' fees for the time associated with her motion to dismiss.

Employers have long known that retaliation is prohibited under federal, state, and local discrimination laws. Many states, such as Illinois, also prohibit the discharge of an employee in retaliation for conduct that contravenes a clearly mandated public policy (such as discharging an employee in retaliation for filing a workers' compensation claim). With the advent of anti-SLAPP legislation across the country, the list of conduct protected from retaliation is now even broader. However, because the language of anti-SLAPP laws varies by state, the scope of protected conduct may also vary. An employer considering a lawsuit against a current or former employee should factor in the possible application of an anti-SLAPP suit defense when analyzing whether and/or how to proceed.

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