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Employment Lawsuits Against Individuals

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Plaintiffs in employment law cases frequently name individual employees as defendants. Sometimes, they sue co-workers. More frequently, they name supervisors or managers, and even high-level executives up to the CEO.

Suing an individual is legally justified in some circumstances. However, there are occasions when plaintiffs are motivated by other considerations. For example, naming a local resident as an individual defendant may destroy diversity jurisdiction in federal court, precluding removal of the case from state court. Plaintiffs' counsel may use this strategy if they perceive advantages to remaining in state court.

In other instances, plaintiffs and their lawyers name high-level executives for an "in terrorem" effect. In other words, supervisors are named as defendants as an intimidation tactic or to gain attention. What kind of attention? Well, naming a high-profile CEO as an individual defendant, for example, may attract press coverage. Executives also may feel pressure to rid themselves of the distractions of litigation by settling a case early or on more favorable terms than they might otherwise agree to.

A lawsuit against a corporation may be just business. Being named as an individual defendant is personal. Employees in that situation may be particularly disturbed when they have not acted improperly, or had nothing to do with the incidents at issue. Employees personally named as defendants may fear job loss, worry about how to pay for counsel, and wonder how an adverse judgment may affect their savings, relation-

ship with family members, background reports, etc. In most instances, employees are statutorily indemnified by employers for legal representation and personal judgments are rare. But personal liability remains a possibility.

Employees named in a lawsuit without a legal basis may be interested in their recourse. However, most do not have the resources or time to pursue claims against the plaintiff. A recent decision by the California Supreme Court addressed a malicious prosecution claim asserted against a former employee by the former CEO who was named in an employment action.

"Malicious Prosecution" Claims

Malicious prosecution actions are available to persons who believe they have been sued without any basis. While filing such an action may be an attractive first thought when faced with a frivolous lawsuit, it is difficult to establish the elements of a malicious prosecution claim. In fact, malicious prosecution actions traditionally have been disfavored out of concern they can chill the filing of legitimate lawsuits and deter individuals from reporting crimes.

To prevail in a malicious prosecution action, a plaintiff must prove the lawsuit being challenged was: (1) initiated by or at the direction of the defendant and legally terminated in the plaintiff's favor; (2) filed without probable cause; and (3) initiated with malice. Malicious prosecution actions may be brought not only against the person who sued in the initial action, but also against that person's attorneys.

Siebel v. Mittlesteadt

The California Supreme Court recently addressed the elements of a malicious prosecution claim in *Siebel v. Mittlesteadt*. In that case, the Court opened the door a bit for malicious prosecution actions and recognized that maliciously commencing any lawsuit causes harm to persons individually named and clogs the court system.

Thomas M. Siebel was CEO of Siebel Systems, Inc. ("SSI"). Debra Christoffers was hired by SSI as a Sales Director. After SSI terminated Christoffers' employment, she sued Siebel and SSI claiming: (1) SSI and Siebel had fraudulently induced her to leave her former employment; (2) she had been fired by SSI so the company could avoid paying her commissions and lucrative stock options; and (3) she had been discriminated against because of her gender.

Christoffers alleged eight causes of action against Siebel individually. On demurrer, the trial court dismissed five of the claims because they were not legally viable. One other claim was voluntarily dismissed by Christoffers and her lawyers. Many of the claims originally included in the complaint against Siebel (including those for wrongful termination and discrimination in violation of California's Fair Employment and Housing Act) may not be asserted against individual managers as a matter of settled law and never should have been pled. However, Christoffers prevailed on an unpaid commission claim against SSI.

Siebel won at trial on the remaining claims asserted against him individually. He then sued Christoffers' attorneys, E. Rick Buell

II and Carol L. Mittlesteadt, for malicious prosecution. Siebel alleged in his complaint that: (1) Buell had advised Mittlesteadt and Christoffers that the sex discrimination claims were unfounded and should be dropped; (2) despite acknowledging that the discrimination claims were baseless, Buell remained as counsel in the case and pursued the claims solely to force a settlement; (3) Mittlesteadt knew the claims were fabricated to extract a settlement using SSI's pending initial public offering as leverage; and (4) Mittlesteadt sued Siebel personally to coerce him into a prompt settlement rather than risk creating an unfavorable reputation in the industry and impair SSI's ability to recruit talented female employees.

The trial court dismissed Siebel's malicious prosecution case because the parties had reached a settlement during the appeal after a trial. The court concluded this barred Siebel from making the essential showing he had prevailed on the initial lawsuit. This decision did not deal with the core question of whether the lawyers had acted maliciously when filing the initial claims against Siebel, but rather whether the settlement precluded Siebel from establishing the initial case was terminated in his favor (one of the essential elements of a malicious prosecution action, as discussed above). The Court of Appeal reversed, holding that the settlement did not preclude Siebel from arguing he received a "favorable judgment" in the underlying case.

The case then went to the Supreme Court, which unanimously agreed with the Court of Appeal. Siebel's malicious prosecution claim was viable even though the underlying case was settled.

Which Claims May Be Brought Against Individual Employees?

Certain claims cannot be asserted against individuals as a matter of law. For example, the courts have held that claims of wrongful termination and discrimination may not be brought against individual employees. The "termination" of employment involves the relationship between the employer and the employee. Individual supervisors, even the CEO, are not considered the "employer." With respect to discrimination claims, this rule is in place to avoid chilling a supervisor's ability to make day-to-day personnel decisions – including hiring, firing, demoting, transferring and reprimanding – without constant fear of legal exposure.

The courts also have held that a supervisor who fails to take action to prevent sexual harassment may not be held personally liable. However, the courts have not expressed the same sentiment with respect to supervisors who actually engage in harassment. Courts instead have definitively held that supervisors who harass employees may be sued individually. Supervisors also may be held personally liable for retaliating against employees who engage in activities protected by the law, such as the Fair Employment and Housing Act. For example, individuals may be liable for retaliation against those workers who complain of harassment or discrimination, or who participate in any investigation of a harassment or discrimination complaint. Individuals also may be named when a statute authorizes personal liability, such as for fraud.

With respect to wage and hour claims, such actions typically may be asserted only

against the employer. Therefore, individuals generally may not be held personally liable in a civil action for failing to pay wages or overtime pay. However, controlling directors and shareholders potentially may be held personally liable for wage claims under an "alter ego" legal theory.

The IWC wage orders provide that an "employer" is "any person . . . who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person." This definition is very broad, and the Division of Labor Standards Enforcement may rely upon it to determine who (including any individuals) may be named as defendants in administrative proceedings. In addition, the California Labor Code authorizes civil penalties against any employer "or other person" who causes overtime violations to occur, or who fails to pay overtime wages.

Conclusion

The Court's decision in *Mittlesteadt* does not change the general wisdom that filing a malicious prosecution action is an expensive "get even" tool that may not be worth the effort and expense it requires. The decision also does not change the fact that most malicious prosecution actions are unsuccessful because of the difficulty in proving the initial claims were brought with "malice" and without any legitimate basis. However, employees will certainly benefit from the Court's message to plaintiffs and their counsel that only legally viable claims should be pled against individuals.

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