

Have I defamed a former employee? The Bullet Point: Volume 1, Issue 14

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McGlinchey's Commercial Law Bulletin is a biweekly update of recent, unique, and impactful cases in state and federal courts in the area of commercial litigation.

Hetmanski v. Doe, et. al., 11th Dist. Trumbull No. 2016-T-0123, 2017-Ohio-7220.

This was an appeal of a trial court decision to grant summary judgment on a tortious interference with an employment relationship claim. The appellant was a social worker at a hospital who tried to facilitate an adoption for a new mother. Instead of following the usual, normal channels for adoption, the appellant attempted to set up a private adoption that ended up not being completed. During this process, the hospital and the appellee, a colleague of the appellant, became aware that hospital protocols for adoption placement were not followed. The appellant was eventually fired for not following hospital policy. She then sued a number of individuals, including her former colleague.

On appeal, the Eleventh Appellate District upheld the decision of the trial court's against the appellant on her tortious interference with an employment relationship claim. In so ruling, the Eleventh Appellate District found that appellant failed to establish that her former colleague acted with malice or that the purported malice actually caused her firing as required to prevail on a claim for tortious interference with an employment relationship.

The Bullet Point: Tortious interference with an employment relationship "occurs when one party to the relationship is induced to terminate the relationship by the malicious acts of a third person who is not a party to the relationship at issue." Tortious interference with employment requires evidence of wanton or malicious conduct. Malice can either be "behavior characterized by hatred, ill will, or a spirit of revenge" or "extremely reckless behavior revealing a conscious disregard for a great and obvious harm." Moreover, the malice must be the "proximate cause" of the termination of the employment relationship. In other words, even if a party acts spiteful, a claim for tortious interference with an employment relationship will not exist unless it actually was the cause of the termination.

In today's competitive business environment, businesses must be aware of the risks when trying to encourage

customers to leave one vendor for another or employees to leave one employer for another. The social worker's application of tortious interference law to her situation was unique. However, such claims often come up when employees are recruited away from one employer to another. In addition, claims can be asserted under tortious interference theories when one party interferes in another party's contract or business relationship. The torts of interference with business relationships and contract rights generally occur when a purposely causes a third person not to enter into or continue a business relation with another, or not to perform a contract with another.

Ream v. Graffiti Foods, Ltd., 10th Dist. Franklin No. 17AP-179, 2017-Ohio-7190.

This was an appeal of a dismissal of a defamation lawsuit. The appellant was a chef at Graffiti Foods and was ultimately fired. Upon being fired, the company CEO sent an email to various persons in the food industry that the appellant found to be defamatory. The email advised people of the appellant's firing and also indicated that his behavior did not meet company standards. He filed suit and the trial court ultimately dismissed the lawsuit, finding that the email was not defamatory.

The Tenth Appellate District disagreed on appeal. In so ruling, the court found that in the email appellant "was accused of being fired for failing to conduct himself within the expected standards for behavior, conduct, and accountability. Although the allegations in the email are not specific, they could be construed as alleging that [appellant] was a bad employee at least—guilty of egregious misconduct at worst." The court found that this was sufficient to state a claim for defamation.

The Bullet Point: Libel and slander are considered forms of defamation because they can injure a person's reputation. The main difference between libel and slander is that libelous information is printed or broadcast, while slanderous information is spoken. Individuals can defame others if publish (libel) or say (slander) something about someone that isn't true and that person suffers harm as a result.

If a private individual is involved, that person would have to be able to prove: 1) that someone made a statement, reported as fact, to another person; 2) that the statement was false; 3) that the statement caused damage to that person; and 4) that the person was negligent in making that statement. If you defame a public figure (such as a celebrity or member of government, for example), that person will have to prove: 1) that some made a statement to another person, reported as fact; 2) that the statement was false and caused damage; and 3) that statement was made the statement with actual malice—that is, with knowledge that the statement was false or with reckless disregard as to whether the statement was false or not.

This case is a perfect example of why employers must be careful when making statements about former employees. Here, as the defamation claim does not involve a public figure, the standard was whether the alleged statement included any false statements that harmed the individual in his trade, business, or profession. A lost employment opportunity can be such a harm from a defamatory statement.

Aladdin's Lights Inc. v. Eye Lighting International, 9th Dist. Summit No. 28182, 2017-Ohio-7229.

This was an appeal of a trial court decision to grant Eye Lighting on several antitrust claims related to the sale of plant lights. Aladdin's Lights is a retailer and distributor of plant lights. Eye Lighting designs and manufactures some types of these lights. Eye Lighting implemented a retail price maintenance (RPM) for one of its lights that governed how much retailers, like Aladdin's Lights, should sell the light for. Aladdin's Lights refused to participate in the RPM and Eye Lighting then refused to provide it with the lamps.

Aladdin's Lights then sued under Ohio's Valentine Act, arguing that the RPM adversely affects competition because it artificially inflates the cost of the lamps. The trial court ultimately granted judgment in favor of Eye Lighting and Aladdin's Light appealed. The Ninth Appellate District affirmed the trial court decision on appeal.

In so ruling, the court noted that to establish a restraint of trade claim under Ohio's Valentine Act, "a plaintiff must show that there is a combination of effort by two or more actors that unreasonably restrains trade in a relevant market." The court further noted that under well-settled Supreme Court precedent, an indirect purchaser of goods or services is prohibited from bringing a private action under the Ohio Valentine Act. Here, the court found that Aladdin's Lights was an indirect purchaser and that it therefore lacked the ability to sue Eye Lighting for violating Ohio's Valentine Act.

The Bullet Point: Another Ohio Valentine Act case! In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the United States Supreme Court held that an indirect purchaser of goods or services is prohibited from bringing a private action against a seller engaged in allegedly monopolistic practices in the sale of those goods or services. This rule, known as the "Illinois Brick rule" or the "direct purchaser requirement," has been accepted and applied by Ohio courts to claims under Ohio's Valentine Act and limits who can bring an antitrust claim to that of "the injured party – the retailer who contracted directly with the manufacturer and paid the overcharge."

B&H Resources, LLC v. 28925 Lorain Inc., 8th Dist. Cuyahoga No. 105323, 2017-Ohio-7248.

This was a cross-appeal related to the purchase of real property whose value was impacted by a dispute between the seller and board of revisions on delinquent taxes owed on the property.

B&H resources believed that the delinquent tax issues had been resolved prior to purchasing the property. Unbeknownst to B&H, the higher property valuation had not yet been reflected on the tax duplicates used at the time of closing by its title company, Resource National.

After receiving a sizable tax bill, B&H sued Resource National for breach of contract, negligence, and breach of fiduciary duty. Resource National filed counterclaims for indemnification because it claimed B&H agreed to hold it harmless for any loss or damage resulting from its services. Eventually, the trial court granted Resource

National summary judgment on B&H's complaint and B&H summary judgment on the counterclaims. Both parties appealed.

The Eighth Appellate District affirmed the trial court decision on appeal. Regarding B&H's negligence claim, the court found it was barred by the "economic loss" doctrine which precludes recovery in a tort action for purely economic damages.

The Bullet Point: The economic-loss doctrine precludes recovery in a tort action for purely economic damages. Tort law "is not intended to compensate parties for monetary losses suffered as a result of duties that are owed to them simply as a result of the contract." In other words, when the only damage suffered is a monetary loss for failing to comply with the terms of a contract, the economic-loss doctrine will preclude recovery under a tort theory.

Businesses should be cognizant of the economic-loss doctrine, as it limits the damages they can seek in almost any situation governed by contract. Tort law should not compensate parties for losses suffered as a result of a breach of duties assumed only by agreement. Economic losses are intangible losses that do not arise from tangible harm to persons or property such as wages, salaries, or other compensation lost as a result of an injury or loss to person or property or any other expenses as a result of an injury or loss (other than attorney's fees). So, when only economic losses are at issue, damages can only be recovered in contract; recovery for negligence is not allowed. Thus when contracts exist, Court still find that commercial or professional negligence cases can stand. Accordingly, all businesses must understand the economic loss doctrine and its application to commercial and professional liability claims.

Cordova v. Emergency Professional Servs., Inc., 8th Dist. Cuyahoga No. 105061, 2017-Ohio-7245.

This was an appeal in a medical malpractice action for the trial court's failure to excuse juror #3, a primary care physician, for cause, forcing the plaintiffs to utilize one of their preemptory challenges to remove the juror. The plaintiff wanted the Eighth Appellate District to adopt a position that any potential juror who has specialized experience, education, or knowledge about a field of study at issue in a case must be excused for cause even if that prospective juror states that he or she will be fair, impartial, and will follow the law.

The court declined to accept this position and affirmed the trial court's position finding that there was not sufficient evidence to establish that juror #3 would not follow the law or to establish bias on her part.

The Bullet Point: There are a number of reasons to strike a juror "for cause." One of those reasons is that the juror indicates he or she cannot be fair or impartial and cannot follow the law. To meet this standard, there must be some evidence that the juror acknowledges he or she cannot follow the law.

Similarly, in order to excuse a juror for bias, a credibility determination must be undertaken by the trial court.

The trial court has wide latitude to excuse a juror for bias and appellate courts will typically defer to the trial court's decision.

Turner v. Robinson, 4th Dist. Highland No. 16CA21, 2017-Ohio-7228.

This was an appeal of a judgment awarding the defendant adverse possession to several lots of land. Turner claimed he was entitled to all lots contained in what is known as the "Gist Settlement." The Robinsons, in turn, argued that through adverse possession they were entitled to lots 21 and 22. The trial court agreed and awarded lots 21 and 22 to the Robinsons, and Turner appealed.

The Fourth Appellate District affirmed the trial court's decision on appeal. In so ruling, the court noted that the clear and convincing evidence established that the Robinsons had possessed the two lots open and notoriously for more than 21 years.

The Bullet Point: "Adverse possession is a means of acquiring title to property and its ultimate effect results in the ripening of hostile possession, under certain circumstances, into title by lapse of time."

"To acquire title by adverse possession, a party must prove, by clear and convincing evidence, exclusive possession and open, notorious, continuous, and adverse use for a period of twenty-one years."

Regarding the 21-year requirement, it is not necessary that the same party use the property for the entire 21-year period. Rather he or she can "add to his own term of adverse use any period of adverse use by prior succeeding owners in privity with one another." This concept is known as "tacking."

Case Previews

Epic Systems Corp. v. Lewis, No. 16-285 (cert granted Jan. 13, 2017).

Epic Systems Corp. (Epic) entered into an arbitration agreement with its employee, Jacob Lewis, under which (1) individual arbitration would solve any employment dispute, and (2) Mr. Lewis waived his right to benefit from or participate in any representative, class, or collective proceeding. Subsequently, Mr. Lewis sued Epic on behalf of other employees, alleging a violation under the Fair Labor Standards Act (FLSA) because Epic failed to pay the employees overtime wages.

While Epic moved to dismiss the action in light of the arbitration clause, the district court denied the motion, holding that the provision was unenforceable because it precluded the employees from entering into "concerted activities" under section 7 of the National Labor Relations Act (NLRA). The Seventh Circuit affirmed, adding that the provision was also unenforceable under the savings clause of the Federal Arbitration Act (FAA). Specifically,

because the waiver of representative proceedings was void under the NLRA, the arbitration agreement was not enforceable under the FAA.

The Preview Point: Does the NLRA nullify an arbitration agreement requiring individual arbitration to solve employee disputes under the FAA?

Leidos, Inc. v. Ind. Pub. Ret. Sys., No. 16-581 (cert granted Mar. 27, 2017).

The Indiana Public Retirement System (IPRS) sued Leidos Holdings, Inc. (Leidos) alleging a violation of section 10(b) of the Securities Exchange Act. The IPRS alleged that Leidos failed to disclose potential liability and, therefore, the failure to disclose is fraudulent under section 10(b).

Below, the district court dismissed the investors claims, denied their motion from relief from judgment, and denied their second amended complaint because it would be futile. The Second Circuit, however, held that the lower court improperly denied the motion to amend the complaint and that a corporation can be liable under section 10(b) for the omission of information, even if that information is unnecessary to make a statement not misleading.

The Preview Point: Does item 303 of Securities and Exchange Commission Regulation S-K create a duty to disclose that is actionable under section 10(b) of the Securities Exchange Act of 1934 and Security and Exchange Commission Rule 10b-5?