

# BLACKLISTING: 2011

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and Duty of Loyalty Subcommittee

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**"The horror, the horror!"**  
**Joseph Conrad, *Heart of Darkness***

### **BLACKLISTING: 2011**

What fate awaits those who attempt to blacklist employees? From non-competition agreements between competitors to sinister attempts at retaliation; can it ever be done legally? What are the issues? What are the claims? Drop in on this stimulating analysis as we cruise toward the employer heart of darkness.

### **COMMON LAW BLACKLISTING**

#### **The Use of Tortious Interference Claims to Oppose Blacklisting Conduct**

While statutory “blacklisting” claims frequently appear in plaintiffs’ pleadings, the common law equivalent is notably absent. Yet not all states provide a statutory mechanism for recovery against a defendant who has allegedly engaged in blacklisting conduct. Creative plaintiffs have instead crafted their common law “blacklisting” claims as common law torts, most often under the title of tortious interference with a prospective employment relationship.

#### **A. The Lack of *Per Se* “Blacklisting” Claims in Common Law**

Common law claims specifically identified as “blacklisting” claims are nearly non-existent. A rare exception can be found in the case of *Estate of Dr. Beatrice Braude v. United States*, 38 Fed. Ct. 476, 477-78 (Fed. Cl. 1997).

For nearly thirty years following her dismissal in 1953 from a position with the United States Information Agency, Dr. Beatrice Braude was allegedly subjected to one of the most

widely recognized forms of blacklisting. Unable to secure another position with the federal government, Dr. Braude claimed that she had been dismissed due to unfounded claims of “disloyalty” during the McCarthy era and had been subsequently placed “on the black list.” After her death, the United States Court of Federal Claims adopted, with minimal discussion, a Hearing Officer’s finding that the federal government was responsible for an equitable claim of “blacklisting” raised by Dr. Braude’s estate. *Estate of Dr. Beatrice Braude*, 38 Fed. Ct. at 477-78.

The dissent’s thorough analysis, however, underscores the rarity of such a common law claim. Despite the compelling story of Dr. Braude, the dissent accurately pointed out that common law claims of “blacklisting” are not recognized in state law, but instead are analyzed under the umbrella of related torts. *Id.* at 482. As the dissenting panel member articulated:

The source of the hearing officer’s (and defendant’s) definition of “blacklisting” as an equitable claim is not stated and has not been found by this panel member in the common law of any state. Several states have recognized somewhat similar torts. However, all of these jurisdictions have required proof of malice or falsity (as well as causation) as an element of the claim. Even proposals for establishing such a tort have required malice, or falsity, and have exempted dissemination for business purposes, e.g., between agencies, as privileged.

*Id.* (internal citations omitted); *see, e.g., Austin v. The Torrington Co.*, 810 F.2d 417 (4th Cir. 1987) (holding that blacklisting *per se* is not a tort in South Carolina but instead requires a finding of willful or malicious use of a blacklist).

## **B. Tortious Interference Claims in the Blacklisting Context**

Although the *Estate of Braude* case presents a rare exception to the general rule that “blacklisting” does not constitute a common law claim in and of itself, the underlying conduct of blacklisting has not gone unaddressed in those states lacking specific statutory prohibitions.

Instead, plaintiffs have recovered against employers engaging in blacklisting by pursuing common law claims such as defamation, slander, invasion of privacy, intentional infliction of emotional distress, and tortious interference with an employment relationship. The latter claim is perhaps the most prevalent common law claim stemming from blacklisting conduct. Depending upon the circumstances presented, such a claim can be characterized as tortious interference with a business or employment relationship, tortious interference with contract, or tortious interference with a prospective economic advantage (collectively referenced hereafter as “tortious interference”).<sup>1</sup>

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<sup>1</sup> Blacklisting has also been addressed by the courts through common law claims such as defamation, slander, invasion of privacy, and intentional infliction of emotional distress. Defamation and slander typically involve the publication to a third party of false and defamatory information. *See, e.g., Brummett v. Taylor*, 569 F.3d 890, 892 (8th Cir. 2009). Truth of the published information is usually an absolute defense. *See, e.g., Masson v. New Yorker Magazine*, 501 U.S. 496, 516 (1991). Employers may also be able to assert a qualified privilege when sharing information with other employers for legitimate business purposes, requiring a showing of malice for the defamation claim to succeed. *See, e.g., Mawaldi v. St. Elizabeth Health Ctr.*, 381 F.Supp.2d 675, 688-89 (N.D. Ohio 2005).

An interesting variation on the common law defamation claim in this context is a claim against a government employer for deprivation of the plaintiff’s liberty interest in pursuing the occupation of his choice. Some public employees have argued “that dismissal to the accompaniment of serious public charges of misconduct may prevent the employee from obtaining other employment of comparable responsibility – may, in a word, operate to blacklist him from such employment, thereby depriving him of his occupational liberty.” *Hall v. Ford*, 856 F.2d 255, 266 (D.C. Cir. 1988); *Jungels v. Pierce*, 825 F.2d 1127, 1131 (7th Cir. 1987). “However, the stigmatizing statements must rise to the level that makes it ‘virtually impossible’ for the employee to obtain employment in his chosen field.” *Zellner v. Herrick*, 2009 U.S. Dist. LEXIS 8123, \*57 (E.D. Wis. 2009).

Another common law tort under which the conduct of blacklisting sometimes falls is that of invasion of privacy. Similar to a defamation claim, invasion of privacy involves the publication of false information that would be highly offensive to a reasonable person *or* the publication of true information involving highly personal details, such as disclosure regarding an employee’s personal relationships, financial condition, or medical condition. There must be a reasonable expectation of privacy on the part of the plaintiff and a serious invasion of the privacy by the defendant’s actions. *See, e.g., Landon v. Northwest Airlines*, 72 F.3d 620, 626 (8th Cir. 1995); *Chapman v. Journal Concepts, Inc.*, 528 F.Supp.2d 1081, 1099 (D.Haw. 2007).

Finally, blacklisting conduct can also be opposed through the common law tort of intentional infliction of emotional distress. The standard for this claim is typically quite high; conduct underlying such a claim typically must be “egregious,” such as disclosure of false information that is well beyond the boundaries of socially acceptable behavior, or, as one court described it: conduct “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as

“The basic principle of a ‘tortious interference’ action is that one, who without privilege, induces or purposely causes a third party to discontinue a business relationship with another is liable to the other for the harm caused thereby.” *Fitzgerald v. Roadway Express, Inc.*, 262 F.Supp.2d 849, 859-60 (N.D. Ohio 2003). Although the components of a *prima facie* claim of tortious interference vary among jurisdictions, there are typically four primary elements in the blacklisting context: (1) the existence of a valid business relationship or expectancy between the plaintiff and a third party; (2) the defendant’s knowledge of the business relationship or expectancy; (3) the defendant’s intentional and wrongful interference with the business relationship or expectancy; and (4) damages to the plaintiff as a result of the defendant’s interference. *See, e.g., James v. Int’l Hotels Group Res., Inc.*, 2010 U.S. Dist. LEXIS 11593 (D.Ill. 2010) (listing elements of claim of tortious interference with prospective economic advantage or business relationship under Illinois law); *Kirk v. Shaw Envtl. Inc.*, 2010 U.S. Dist. LEXIS 31759, 20-21 (D. Ohio 2010) (listing elements of claim of tortious interference with a business relationship under Ohio law); *Lindner v. Int’l Bus. Machines Corp.* 2010 U.S. Dist. LEXIS 6499, 12-13 (D.N.Y. 2010) (listing elements of claim of tortious interference with business relations under New York law).

To successfully recover for blacklisting conduct under the title of “tortious interference,” a plaintiff must prove each of these elements. Rather than a blanket prohibition against blacklisting *per se*, a common law tortious interference claim involves proof of conduct that transcends a simple negative job reference.

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atrocious and utterly intolerable in a civilized community.” *McNemar v. Disney Store*, 91 F.3d 610, 622-23 (3rd Cir. 1996).

***1. The Existence of a Business Relationship or Expectancy Between the Plaintiff and a Third Party***

The first two elements necessary to a tortious interference claim involve proof of the existence of a valid business relationship or expectancy between the plaintiff and a third party, a relationship of which the defendant must be aware. Blacklisting arises less often in the context of an existing employment relationship between the plaintiff and a third-party employer than it does when a business expectancy is at stake. A valid business expectancy for purposes of a tortious interference claim involves a prospective business relationship that would be of pecuniary value to the plaintiff, including “the prospect of obtaining employment.” *Restatement (Second) of Torts* § 766(b), cmt c (1979). An individual who experiences the rescission of a job offer due to blacklisting can likely demonstrate the existence of a valid business expectancy, as can an individual who has been informed that he will receive a job offer that never materializes because of blacklisting conduct. *See, e.g., Keeley v. Cisco Sys.*, 2003 U.S. Dist. LEXIS 13944 (N.D.Tex. Aug. 8, 2003); *Barker v. Int’l Paper Co.*, 993 F.Supp. 10, 13, 18-19 (D.Me. 1998).

The circumstances are less clear where an individual applies for a position but is not even interviewed. Arguably, the requisite relationship is not present where the “prospect of obtaining employment” is so tenuous, as the plaintiff typically must demonstrate a “reasonable probability” that he would have obtained the position. *See Alston v. Aetna Life Ins. Co.*, 1994 U.S. Dist. LEXIS 6739, \*27-28 (N.D.Cal. Feb. 14, 1994). The courts, however, sometimes address this particular issue under the final element of the *prima facie* case – causation -- rather than closely examining the existence of a valid business expectancy. Where there is little proof that the individual was seriously considered for the position at issue, the causal link is also typically absent. *See, e.g., Culver v. Clyde*, 1992 Ohio App. LEXIS 4145, \*9 (Ohio Ct. App. Aug. 11,

1992) (analyzing the fact that the plaintiff was not a serious candidate for the position at issue as a failure of proof of causation, rather than a failure of proof of a valid business expectancy). At the very least, however, the plaintiff must identify a commercially reasonable expectation that goes beyond “[v]ague references to a promising future career.” *Kwang Dong Pharmacy Co. v. Han*, 205 F.Supp.2d 489, 497 (D.Md. 2002) (holding that the failure to “point to one specific employment prospect” defeated the plaintiff’s tortious interference claim).

In addition, not all employment relationships or expectancies are subject to a tortious interference claim. In most jurisdictions, a tortious interference claim can only be brought against a third party to the business relationship or expectancy. In other words, this claim would not encompass internal blacklisting. If an employee sought to transfer to another division within his company but was blacklisted by his current supervisor, a claim for tortious interference would not apply. “At its core, a claim of tortious interference requires that an ‘outsider’ to the employment relationship interfere with the relationship for the claim to be cognizable.” *Kirk v. Shaw Env’tl. Inc.*, 2010 U.S. Dist. LEXIS 31759, \*22 (D.Ohio 2010); *see also Cross v. Arkansas Livestock & Poultry Comm’n*, 943 S.W.2d 230, 234 (Ark. 1997) (noting that it is illogical to hold the other party to the business relationship or expectancy liable for “tortious interference” with its own relationship or contract); *Marinaccio v. Boardman*, 2007 U.S. Dist. LEXIS 16088, \*15-16 (N.D.N.Y. March 7, 2007).

The third party requirement often extends to the relationship between parent companies and subsidiary companies, as parent companies are deemed to stand in the shoes of their subsidiaries. *See, e.g., Kirk*, 2010 U.S. Dist. LEXIS 31759, \*22; *Servo Kinetics, Inc. v. Tokyo Precision Instruments Co.*, 475 F.3d 783, 801-02 (6th Cir. 2007). If an individual sought

employment with a company and was blacklisted by the parent company of that entity, the requisite third party relationship would typically not be present.

## ***2. Intentional and Wrongful Interference***

The second element of a *prima facie* case of tortious interference stemming from blacklisting conduct is perhaps the most critical from the perspective of employers weighing the risks of providing job references. In order for a plaintiff to recover against an employer for blacklisting conduct under the title of tortious interference, there must be an element of fundamental unfairness to the blacklisting. Interference with the employment relationship or expectancy must be “intentional and wrongful.” *See, e.g., James v. Int’l Hotels Group Res., Inc.*, 2010 U.S. Dist. LEXIS, 11593 (D.Ill. 2010). As some jurisdictions have held, “the plaintiff must prove that it was harmed by the defendant’s conduct that was either independently tortious or unlawful.” *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3rd 711, 713 (Tex. 2001).

A former employer sharing with a third party its truthful evaluation of the plaintiff’s job performance is not enough, standing alone, to create liability for tortious interference. “It is not unreasonable for a prospective employer to seek information about plaintiff’s work habits and performance from his former company. In the absence of proof that the defendant provided said references with intent to harm the plaintiff, a tortious interference with prospective employment claim cannot stand.” *Bandhan v. Lab. Corp. of America*, 2002 U.S. Dist. LEXIS 25972, \*24 (S.D.N.Y. March 27, 2002). “The law surely permits a former employer to give an honest negative reference regarding a former employee to a new prospective employer. However, there can be tortious interference liability if the former employer acts for the sole purpose of harming the employee or uses ‘dishonest, unfair, or improper means.’” *Raedle v. Credit Agricole Indosuez*, 2008 U.S. Dist. LEXIS 70837, \*16 (S.D.N.Y. Sept. 18, 2008), *quoting Purgess v.*

*Sharrock*, 33 F.3d 134, 141 (2d Cir. 1994). “A general intent to interfere or knowledge that the conduct will injure the plaintiff’s business dealings is insufficient to impose liability. . . . Conduct must be more egregious, for example, it must involve libel, slander, physical coercion, fraud, misrepresentation, or disparagement.” *Sheppard v. Dickstein, Shapiro, Morin & Oshinsky*, 59 F.Supp.2d 27, 34 (D.D.C. 1999) (internal quotation marks and citation omitted); see *Barker v. Int’l Paper Co.*, 993 F.Supp. 10, 18 (D.Me. 1998) (requiring that tortious interference involve “fraud or intimidation”).

Falsity is the most obvious form of “wrongful” sharing of information in this context. If a former employer intentionally provides a negative reference that is not based in fact, the act of doing so can satisfy the wrongfulness element. Courts are split on the issue of “whether tortious interference claims accomplished through defamatory statements are actionable in their own right or subsumed within the category of defamation,” but most jurisdictions address tortious interference involving falsity as a separate claim. *Richardson v. Selective Ins. Group, Inc.*, 2007 U.S. Dist. LEXIS 40811, \*19 n.6 (D.Md. May 31, 2007); *Wilkerson v. Carlo*, 300 N.W.2d 658, 660 n.3 (Mich. Ct. App. 1980).

Unlike defamation, the case law demonstrates that even truthful negative information about a former employee can be shared in a manner that leads to potential liability for tortious interference. A sampling of such conduct can be seen in the case of *Raedle v. Credit Agricole Indosuez*, in which the plaintiff claimed that his former supervisor shared with a prospective employer information of “a more personal nature about [Plaintiff] himself, not about his skill set.” *Raedle*, 2008 U.S. Dist. LEXIS 70837, \*10-11 (S.D.N.Y. Sept. 18, 2008). The plaintiff alleged that his former supervisor’s negative reference constituted retaliation because the

plaintiff had informed the company from which he had just been dismissed of the supervisor's intent to leave and take business with him. *Id.* at \*13. In addition, the plaintiff asserted that his supervisor acted in violation of the company's policy concerning requests for references, as the policy provided that only Human Resource employees would give references and that information provided in response to reference requests would be limited to dates of employment and positions held at the company. *Id.* at \*12. The allegations in *Raedle* demonstrate three subcategories of potentially "wrongful" references: (1) comments that cross the boundary between work-related assessments and non-work-related criticisms of a highly personal nature, such as sharing private medical information that does not pertain to job performance; (2) improper motivation for providing the reference, such as retaliation against the employee; and (3) willful failure to follow an established company policy regarding the provision of references. Of course, the requisite level of "egregiousness" would need to be proven to establish liability stemming from any of these allegations.

Even seemingly innocuous, true statements could lead to potential liability for tortious interference if advanced for the wrong purpose. For example, one court declined to dismiss a tortious interference claim on summary judgment where the plaintiff claimed that his former supervisor had sabotaged an employment opportunity by commenting to the prospective employer that there were "a lot of fish in the sea." *Keeley v. Cisco Systems*, 2003 U.S. Dist. LEXIS 13944, \*7, 34-35 (N.D.Tex. Aug. 8, 2003). The court rejected the defendant employer's argument that the tortious interference claim should fail on the basis that the "fish in the sea" comment was "truthful and factual," noting that there was a question of fact as to whether the "truthful and factual" comment was motivated by retaliation against the plaintiff for having complained of racial discrimination by his supervisor. *Id.* at \* 35 n.19.

Similarly, an employer's truthful communication to a third party that a former employee was dismissed and is ineligible for rehire can lead to liability for tortious interference if the former employer cannot demonstrate that it had a good faith basis for the employee's dismissal. *Campbell-Thomson v. Cox Communications*, 2010 U.S. Dist. LEXIS 43977, \*36 (D.Ariz. May 5, 2010). The "falsity" or "malice" in such circumstances stems from the underlying dismissal, rather than the subsequent basic communication that the employee had been dismissed.

A combination of these elements can occur if the employee is dismissed for improper reasons, complains of the dismissal, and then receives a negative reference from the former employer. As an illustration of this point, one court allowed a tortious interference claim to proceed where the plaintiff claimed he had been dismissed by the defendant employer for advocating for his disabled wife. *Barker v. Int'l Paper Co.*, 993 F.Supp. 10, 12-13 (D.Me. 1998). The plaintiff filed a charge of discrimination against his former employer, and the former employer subsequently provided a negative reference to a third party prospective employer. *Id.* A job reference provided under these circumstances may meet the element of "wrongfulness" due to both the retaliatory nature of the reference and the lack of a good faith basis for the prior termination. The court noted that the job reference "may have involved false information about Plaintiff" regarding the basis for his dismissal from his prior position if the true reason for termination was improper. *Id.* at 19.

Without the added wrongful conduct of falsity, malice, improper motive, or other "unfair" behavior associated with a job reference, however, a claim of tortious interference based upon alleged blacklisting cannot succeed. For example, one court dismissed a plaintiff's tortious interference claim against a former employer whose comment that she had been an "average"

employee allegedly led to the rescission of a job offer from a third party. *Jacobs v. Continuum Health Partners, Inc.*, 7 A.D.3d 312, 313 (N.Y. App. Div. 2004). The court held:

To state a cause of action for tortious interference with prospective business advantage, it must be alleged that the conduct by defendant that allegedly interfered with plaintiff's prospects either was undertaken for the sole purpose of harming plaintiff, or that such conduct was wrongful or improper independent of the interference allegedly caused thereby. The instant complaint fails to plead sufficient nonconclusory allegations to meet this standard. Plaintiff neither alleges specific facts that could support an inference that defendants were motivated solely by a desire to harm her, nor does she allege specific facts that, if proven, would show that the communicated evaluation of plaintiff as an "average" employee was objectively false or otherwise independently wrongful. Accordingly, the cause of action for tortious interference with prospective business advantage should have been dismissed.

*Id.* (internal citations omitted).

Similarly, a plaintiff who claimed a prospective employer received a "bad review" from the plaintiff's former employer could not survive summary judgment where his performance record with the prior employer "included poor work evaluations and documented many missed pick-ups and delivery." *Bandhan v. Lab. Corp. of America*, 2002 U.S. Dist. LEXIS 25972, \*24-25 (S.D.N.Y. March 27, 2002). There was no evidence that the "bad review" was inaccurate, dishonest, or made for a nefarious reason. Thus, the magistrate judge noted: "the fact that a former employer may have provided a negative job reference to a prospective employer is not enough by itself to show that the defendant acted with the sole purpose of harming the plaintiff."

*Id.* (internal quotation marks and citation omitted).

In addition, some jurisdictions have extended a qualified privilege to employers facing tortious interference claims as the result of having provided a negative reference to a prospective employer. "[A]n employer should hold some privilege against tortious interference suits for

limited statements in response to a direct request.” *Delloma v. Consol. Coal Co.*, 996 F.2d 168, 171-72 (7th Cir. 1993) (holding that “an employer may invoke a conditional privilege to respond to direct inquiries by prospective employers”); *Mawaldi v. St. Elizabeth Health Ctr.*, 381 F.Supp.2d 675, 689-90 (N.D. Ohio 2005) (holding that a tortious interference claim “based on statements that are qualifiedly privileged under defamation law” is also subject to qualified privilege). This type of qualified privilege flows from the rationale that employers should be unrestricted in their ability to communicate on issues involving a common interest or shared duty. *Mawaldi*, 381 F.Supp.2d at 689.

The qualified privilege can serve to bar tortious interference claims based upon even the most negative of references. In *Mawaldi v. St. Elizabeth Medical Center*, the court barred the plaintiff’s tortious interference claim against a defendant who responded to his requests for job references by notifying prospective employers that he was “dangerous [as] an independent practitioner” and “unable to function” in that role. *Id.* at 688-90. The court noted that the defendant shared with the prospective employers the important interest of ensuring public health and safety, an interest potentially affected by the physician plaintiff’s level of competence, and that the plaintiff had solicited the defendant’s comments. Thus, the defendant was permitted to invoke a qualified privilege as to the tortious interference claim. *Id.*

Under circumstances where the defendant can invoke a qualified privilege, the plaintiff must prove actual malice, involving “acting with knowledge that the statements were false or acting with reckless disregard as to their truth or falsity.” *Id.* at 689. Therefore, even though the plaintiff in *Mawaldi* alleged that the statements made about him were false, his tortious interference claim was barred by his inability to demonstrate that they were communicated maliciously. *Id.* at 688-90.

### *3. Damages Resulting from the Interference*

Finally, even if an employer shared false information or otherwise wrongfully conveyed information to a prospective employer about the plaintiff, the plaintiff must still meet the final element to succeed on his or her claim for tortious interference based upon blacklisting conduct. The individual must be able to demonstrate that the alleged blacklisting caused actual damages, such as the loss of a job opportunity.

An individual who has lost a job opportunity must still demonstrate that the loss was attributable to the defendant's conduct. Clearly, where a plaintiff cannot prove that his former employer had any contact with the prospective employer at issue, the plaintiff's claim must fail. *See Lindner v. Int'l Bus. Machines Corp.*, 2010 U.S. Dist. LEXIS 6499, \*13 (S.D.N.Y. Jan. 21, 2010).

Even where contact occurred, however, the required causal connection may be absent. A good example of this point can be found in the case of *Culver v. Clyde*, in which the plaintiff failed to demonstrate a causal link between a negative review and his failure to secure a particular position. *Culver v. Clyde*, 1992 Ohio App. LEXIS 4145, \*9 (Ohio Ct. App. Aug. 11, 1992). The plaintiff applied for an attorney position with the Legal Aid Society of Cincinnati, but was not offered an interview after Legal Aid contacted his prior employer. *Id.* at \*1-2. The former employer provided "a mixed employment reference, describing [the plaintiff] as an excellent writer and researcher but stating that he had weaker skills in terms of effective dealing with staff and clients." *Id.* at \*2. The hiring decision maker with Cincinnati Legal Aid testified in an affidavit "that he was concerned with the appellant's employment history, his 22 page resume which included a cartoon in the attachments *and the mixed employment reference from the appellee.*" *Id.* at \*9 (emphasis added). Despite the fact that the former employer's lukewarm

reference factored to some extent into the prospective employer's consideration of whether to offer an interview to the plaintiff, the court held that the plaintiff failed to demonstrate the requisite causal connection between the reference and his failure to obtain the position. *Id.* As the court articulated:

The appellant's resume, background information, experience and qualifications fail to show any likelihood of the appellant's receiving the job. The appellant frequently failed to receive jobs for which he had applied. Cincinnati Legal Aid was not impressed by the appellant even in the absence of the appellee's reference. In fact, Jerry Lawson testified that the appellant's resume and job history were "major impediments" to his employment. A reasonable jury could not have found that it was reasonably likely that the appellant would have received the job with Cincinnati Legal Aid but for the appellee's reference.

*Id.* (internal citations omitted).

### **C. Conclusion**

Employers in states lacking a blacklisting statute must still be cautious in providing references to prospective employers. Although common law claims of "blacklisting" *per se* are rare, "blacklisting" claims raised under a different name are markedly abundant. A job reference involving improper methods or means, such as false information or a retaliatory purpose, could result in liability for tortious interference if it results in the loss of an employment opportunity.<sup>2</sup>

### **STATE STATUTORY PROHIBITIONS AGAINST BLACKLISTING**

There are four main types of state statutes prohibiting blacklisting of employees: (1) Restraint of Trade statutes; (2) Restrictive Covenant statutes; (3) Blacklisting statutes; and (4)

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<sup>2</sup> Other common law torts, such as defamation, invasion of privacy, or intentional infliction of emotional distress, could also apply to such circumstances.

Reference statutes. This section will consider each of these types of statutes, and how they have been applied by the courts.

### **A. Restrictive Covenant and Restraint of Trade Statutes**

Thirty-five states have some sort of restrictive covenant or restraint of trade statute.<sup>3</sup> As discussed in greater detail herein, while these statutes do not directly address “no-hire” agreements, they have been applied by courts that have considered the legality of such agreements. Accordingly, in such cases, the courts have analyzed “no-hire” agreements using the same test that they use when reviewing more typical restrictive covenants.

For example, in *Heyde Cos., Inc. v. Dove Healthcare, LLC*, 654 N.W.2d 830, 831 (Wis. 2002), the Supreme Court of Wisconsin found unenforceable a “no-hire” provision that was contained in a service contract whereby Heyde Cos., Inc., d/b/a Greenbriar Rehabilitation (“Greenbriar”) provided leased and/or temporary physical therapists to Dove Healthcare, LLC (“Dove”), a nursing-home operator. The “no-hire” provision, which is typical of provisions contained in many temporary-staffing agreements, stated that:

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<sup>3</sup> Alabama (Ala. Rules of Prof. Conduct Rule 5.6); Arizona (Ariz. Rev. Stat. Ann. §§ 23-494 and §44-1402); California (Cal. Bus. & Prof. Code § 16600); Colorado (Col. Rev. Stat. §8-2-113); Connecticut (Conn. Gen. Stat. §§ 31-50a and 31-50b); Delaware (De. Code Ann. tit. 6 § 2707); Florida (Fla. Stat. §§ 542.18, 542.33, and 542.335); Georgia (Ga. Stat. §§ 10-1-663, 13-8-2, 13-8-2.1, 13-8-50 - 13-8-58); Hawaii (Haw. Stat. § 480-4); Idaho (Idaho Stat. §§ 39-6109, 39-6109A, 44-2701 -44-2704); Illinois (820 Ill. Comp. Stat. Ann. 17/10); Indiana (Ind. Code. Ann. 24-1-2-1); Iowa (Iowa Code § 553.4); Kansas (Kan. Stat. Ann. § 50-112); Louisiana (La. Rev. Stat. Ann. 23:921); Maine (Me. Rev. Stat. Ann. tit. 26 § 599) (broadcasting industry only); Maryland (Md. Commercial Law Code Ann. § 11-204); Massachusetts (Mass. Gen. Law ch. 149, § 186); Michigan (Mich. Comp. Laws Ann. Stat. § 445.774a); Minnesota (Minn. Stat. Ann. § 325D.51); Missouri (Mo. Rev. Stat. § 416.031); Montana (Mont. Code Ann. 28-2-703 – 28-2-705); New Hampshire (N.H. Stat. § 357-C:3); New York (N.Y. C.L.S. Gen. Bus. § 340, N.Y. C.L.S. Lab. § 202-k (broadcast industry only)); North Carolina (N.C. Stat. § 75-4); North Dakota (N.D. Cent. Code § 9-08-06); Oklahoma (Okla. Stat. Ann. Tit. 15 § 219A); Oregon (Or. Rev. Stat. § 653.295); South Carolina (S.C. Code Ann. § 39-8-30); South Dakota (S.D. Codified Laws §§ 53-9-8 – 53-9-12); Tennessee (Tenn. Code Ann. §§ 63-1-148 and 63-6-204 (healthcare industry only)); Texas (Texas Bus. & Comm. Code §§ 15.05, 15.50 – 15.52); Washington (Wash. Rev. Code Ann. § 49.44190); West Virginia (W. Va. Code Ann. § 17A-6A-10); Wisconsin (Wis. Stat. Ann. § 103.465).

Dove acknowledge[d] and agree[d] that it w[ould] not, directly or indirectly, solicit, engage, permit to be engaged, or hire any Greenbriar therapist or therapist assistants to provide services for Dove independently, as an employee of Dove, or as an employee of a service provider other than Greenbriar or otherwise during the term of th[e] Agreement...and for a period of one (1) year thereafter without the prior written consent of Greenbriar. If, after prior written consent by Greenbriar, any Greenbriar therapist or therapist assistants are hired or utilized by Dove, Dove shall pay Greenbriar a fee of 50% of the subject Greenbriar employee's annual salary.

The Supreme Court of Wisconsin affirmed the decision of the Wisconsin Court of Appeals, and held that the “no-hire” provision was unenforceable pursuant to Wisconsin Statute Section 103.465, titled Restrictive Covenants In Employment Contracts. The Court found that the explicit purpose of that statute was to invalidate unreasonable restraints on employment, and that Greenbriar's attempts to restrict its employees via a “no-hire” agreement—rather than by restrictive covenants with its employees—still implicated the statute since the effect of the “no-hire” provision was to restrict the employment of Greenbriar's employees.

In analyzing the “no-hire” provision, the Court employed the standard five-factor reasonableness test that Wisconsin uses to determine whether a restrictive covenant is valid; namely, the agreement must be (1) be necessary to protect the employer; (2) provide a reasonable time limit; (3) provide a reasonable territorial limit; (4) not be harsh or oppressive to the employee; and (5) not be contrary to public policy.<sup>4</sup> While the Court agreed that some kind of

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<sup>4</sup> The test employed by Wisconsin is similar to the reasonableness test employed by many jurisdictions when analyzing restrictive covenants.

restriction on Greenbriar’s employees may have been needed, it found that the “no-hire” provision was not necessary to protect the employer since it could have adequately protected itself through restrictive covenants directly with its employees. The Court further found that the territorial limit was unreasonable because it restricted all employees—even those who were not providing services at Dove. Finally, and perhaps most importantly, the Court found that the “no-hire” provision was harsh and oppressive to Greenbriar’s employees and contrary to public policy because the employees had no knowledge of the provision, did not consent to the provision, and were provided no consideration in exchange for the provision.

Similarly, in *Communication Technical Systems (“CTS”) v. Densmore*, 583 N.W.2d 125 (S.D. 1998), the Supreme Court of South Dakota found that a “no-hire” agreement between CTS and Gateway was not valid pursuant to South Dakota Codified Law Section 53-9-8, titled Contracts in Restraint of Trade Unlawful.<sup>5</sup> CTS provided programming services for Gateway. Densmore was an employee of CTS who was assigned to Gateway to work on Gateway’s accounts. CTS and Gateway had an agreement whereby Gateway agreed to not hire, solicit, or recruit any CTS employee during the time that CTS was providing services to Gateway and for one year following the termination of that business relationship. Gateway terminated its contract with CTS, and Densmore started working for Gateway shortly thereafter. CTS sued Densmore and Gateway claiming breach of the “no-hire” agreement. The trial court granted summary judgment for Densmore and Gateway, holding that the no-hire agreement was prohibited by Section 53-9-8. On appeal, the Supreme Court of South Dakota affirmed the judgment for

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<sup>5</sup> When considering the decisions in *Communication Technical Systems, VL Systems, Inc.*, and in *Silguero* (Infra.), keep in mind that South Dakota and California (as well as several other states) have statutes that generally prohibit contracts in restraint of trade. Accordingly, these decisions do not analyze the reasonableness of the restrictive covenants.

Densmore and Gateway, finding that the exceptions to Section 53-9-8—which in limited cases permit contracts in restraint of trade—should be strictly construed, and that none applied.

In *VL Systems, Inc. v. Unisen, Inc.*, 152 Cal. App. 4th 708 (2007), the California Court of Appeal found that a “no-hire” provision in a business-to-business computer consulting agreement violated California Business and Professions Code Section 16600 because it was overbroad and against public policy. VL Systems, Inc. (“VLS”) and Star Trac Strength (“Star Trac”) had entered into a short-term consulting contract that provided that Star Trac would not hire any VLS employee for 12 months after the contract’s termination. The contract also contained a liquidated damages provision. During the 12-month period, Star Trac hired a VLS employee who had never performed any work for Star Trac, and who was not employed by VLS at the time that the Star Trac contract was performed. VLS sued Star Trac for liquidated damages. The Court held that the “no-hire” provision was prohibited by California Business and Professions Code Section 16600 and unenforceable as a matter of law. The Court found that the “no-hire” provision was similar to other forms of restrictive covenants, and, as was the case in *Heyde Co., Inc. v. Dove Healthcare, LLC*, the “no-hire” provision went “far beyond what is necessary to protect VLS’s legitimate interests and results in a situation where the opportunities of employees are restricted without their knowledge and consent.

“No-hire” agreements may be found to be invalid under the restrictive covenant and restraint of trade statutes even where there is simply “understanding” between two employers, rather than a formal agreement. For example, in *Silguero v. Creteguard, Inc.*, 187 Cal. App. 4th 60 (Cal. App. 2d Dist. 2010), the Court held unenforceable an “understanding” between Creteguard and Floor Seal Technology, Inc. (“FST”), whereby Creteguard agreed to honor FST’s noncompetition agreement with its former employee, Silguero. In that case, after FST found out

that Silguero had gone to work for Creteguard, FST informed Creteguard about Silguero's non-compete. Creteguard then terminated Silguero because "[a]lthough [Creteguard] believe[d] that non-compete clauses are not legally enforceable here in California, [it] would like to keep the same respect and understanding with colleagues in the same industry." *Id.* at 65. Silguero then sued Creteguard for wrongful termination. The Court held that the understanding was unenforceable because it was tantamount to a "no-hire" agreement, and all such agreements are prohibited by California Business and Professions Code Section 16600.

In the somewhat unusual case of *AMX International, Inc. ("AMX") v. Battelle Energy Alliance, LLC*, No. 09 Civ. 210, 2010 U.S. Dist. LEXIS 108056 (D. Idaho, Oct. 7, 2010), the Court rejected AMX's creative attempt to enforce a "no-hire" provision that it typically included in its temporary staffing agreements, but which was not included in its contract with Battelle because Battelle had a policy of refusing to include such provisions in its agreements. Even though, upon Battelle's request, AMX had not included the "no-hire" provision in its agreement with Battelle, it was undisputed that Battelle was aware that AMX had non-compete agreements with each of its employees that prohibited them from "[d]irectly or indirectly working as or for an Active Client" for a period of 12 months following employment with AMX. Several former AMX employees were hired by Battelle. AMX then sued Battelle for tortious interference with AMX's non-compete agreements with its employees. In its defense, Battelle argued that AMX's tortious interference claims should fail as a matter of law because AMX's employee non-compete agreements were void and unenforceable. The Court considered Idaho case law interpreting restrictive covenants, as well as Idaho Code 44-2704, titled Restrict Of Direct Competition—Rebuttable Presumptions, and found that the employee non-compete agreements were unreasonable and unenforceable as a matter of law. In particular, the Court found that the

restrictive covenants were overly broad because AMX did not limit the covenants to only those clients with whom its employees had prior contact, did not define the types of “work” its employees were prohibited from performing, and failed to restrict the geographic area to those areas where the AMX employee provided services or had a significant presence or influence.

The above cases, however, should not be taken to mean that “no-hire” agreements will never be enforceable under restrictive covenant and restraint of trade statutes. In some circumstances, “no-hire” agreements have been found to have been narrowly tailored such that they reasonably protected a legitimate protectable interest. Accordingly, courts reviewing such provisions have rejected challenges to their validity.

For example, in *Ex parte Howell Eng'g & Surveying, Inc.*, 981 So. 2d 413 (Ala. 2006)<sup>6</sup>, Crown contracted with Howell for surveyor services. The contract included a no-solicitation/no-hire provision. An employee of Howell began moonlighting, doing work for Crown on her own behalf while continuing working for Howell. Howell terminated the employee as soon as it found out about the moonlighting, and subsequently sued both Crown and the employee. At trial, Howell prevailed. The Court of Appeals, however, held that the “no-hire” provision was void under Code of Alabama Section 8-1-1 because Howell did not have a similar noncompetition agreement with the employee. The Supreme Court of Alabama, overruling the Court of

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<sup>6</sup> *Ex parte Howell Eng'g and Surveying, Inc.*, 981 So. 2d 413 (Ala. 2006) overruled the Supreme Court of Alabama’s decision in *Dyson Conveyor Maintenance, Inc. v. Young & Vann Supply Co.*, 529 So. 2d 212 (Ala. 1988).

In *Dyson Conveyor Maintenance, Inc. v. Young & Vann Supply Co.*, 529 So. 2d 212 (Ala. 1988) two competitors entered into negotiations for the purchase of the other, pursuant to which they entered into a six-month no-hire agreement as part of the confidentiality agreement. Negotiations fell apart and no acquisition was consummated. During the six month period, Dyson sought to employ a former employee of Young & Vann. Young & Vann sued Dyson. Dyson argued that the restraint violated Code of Alabama Section 8-1-1. The court found that the no-hire agreement was *per se* void because it violated Section 8-1-1. The court said in dicta that if there had been a valid agreement between the employee and the Young & Vann, that agreement may have been enforceable based upon the exception in Section 8-1-1 allowing for employer/employee noncompetition and nonsolicitation agreements.

Appeals, held that because the employee could always work for another surveying firm—just not Crown—the “no-hire” provision in the agreement between Howell and Crown was only a partial restraint of trade that was not void under Section 8-1-1, even where there was not a corollary noncompetition agreement with the employee.

The above discussion is limited to cases analyzing “no-hire” agreements pursuant to restrictive covenant and restraint of trade statutes. These statutes, however, where they exist, tend to codify the common-law reasonability test. Accordingly, for a complete picture as to how courts analyze the reasonableness of “no-hire” agreements, one should also consider the discussion herein of cases analyzing “no-hire” agreements pursuant to the common-law.

## **B. Blacklisting Statutes**

State blacklisting statutes, today, are closely related to state statutes prohibiting defamation. An employer’s actions, post-termination, to prevent the former employee from obtaining new employment, are colloquially referred to as “blacklisting”. Blacklists became popular during the 19<sup>th</sup> century when employers, in an attempt to secure information about job applicants and to discourage union activity, began to circulate to other employers “blacklists” containing the names of former employees who were pro-union, so that other employers would not hire those pro-union employees. As a result of popular backlash, thirty states have enacted blacklisting statutes which, while varied in their scope and application, establish prohibitions against the blacklisting of employees.<sup>7</sup>

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<sup>7</sup> Alabama (Ala. Code § 13-A-11-123); Arizona (Ariz. Rev. Stat. Ann. §§ 23-1361 - 23-1362); Arkansas (Ark. Code Ann. § 11-3-202); California (Cal. Lab. Code §§ 1050 – 1053); Colorado (Col. Rev. Stat. §§ 8-2-110 – 8-2-114); Connecticut (Conn. Gen. Stat. Ann. § 31-51); Florida (Fla. Stat. Ann. § 448.045); Hawaii (Haw. Rev. Stat. § 377-6(11)); Idaho (Idaho Code § 44-201); Indiana (Ind. Code Ann. § 22-5-3-1); Iowa (Iowa Code §§ 730.1 – 730.3); Kansas (Kan. Stat. Ann. §§ 44-117 – 44-119); Maine (Me. Rev. Stat. Ann. tit. 17, § 401); Massachusetts (Mass. Gen. Laws ch. 149 § 19); Minnesota (Minn. Stat. Ann. § 179.60); Montana (Mont. Code Ann. §§ 39-2-801 – 39-2-804); Nevada (Nev. Rev. Stat. Ann. § 613.210); New Mexico (N.M. Stat. Ann. § 30-13-3); New York (N. Y. C.L.S. Labor § 704(2) and (9));

Blacklisting laws generally fell into disuse with the passage of the NLRA in 1935, which preempts most claims arising from employer resistance to union organizing. Blacklisting laws, however, may still apply to employer conduct that is not within the purview of the NLRA, such as defamation-type situations.<sup>8</sup> While many former employees could state a claim for both defamation and blacklisting, it is often easier to prevail when suing under a blacklisting statute because stating a blacklisting claim does not require that the former employee prove that he or she was harmed.

Blacklisting conduct may also serve as evidence of other types of violations.<sup>9</sup> While we have not found any cases in which blacklisting statutes have been used to challenge “no-hire”

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North Carolina (N.C. Gen. Stat. § 14-355); North Dakota (N.D. Cent. Code § 34-01-06); Oklahoma (Okla. Stat. Ann. tit. 40, § 172); Oregon (Or. Rev. Stat. § 659.805); Rhode Island (R. I. Gen. Laws § 28-7-13(2)); Texas (Tex. Lab. Code Ann. § 52.031); Utah (Utah Code Ann. §§ 34-24-1 – 34-24-2; Utah Const. Art. 12, § 19; Utah Const. Art. 16, § 4); Virginia (Va. Code Ann. § 40.1-27); Washington (Wash. Rev. Code Ann. § 49.44.010); and Wisconsin (Wis. Stat. Ann. § 134.020).

<sup>8</sup> See, e.g., *Leach v. UPS Ground Freight, Inc.*, No. 07 Civ. 268, 2008 U.S. Dist. LEXIS 43594, at \*4 (N.D. Ind. June 3, 2008) (former UPS driver found to have actionable claim against UPS under Indiana blacklisting statute, which provides that employers are prohibited from attempting “by any...means” to prevent discharged employee from obtaining new employment, after he was turned down for new employment as a result of UPS having released results of a positive drug test that the driver alleges was improperly administered under federal regulations to the potential new employer). *But see Baker v. Tremco, Inc.*, 890 N.E. 2d 73 (Ind. Ct. App. 2008) (former employee could not maintain claim for violation of the Indiana blacklisting statute against former employer seeking to enforce non-compete agreement against him after his resignation and launching of a business that competed with the former employer’s subsidiary, because the statute’s plain language prohibited the employer from attempting to prevent former employees from obtaining employment, and former employee alleges merely that he lost potential business transactions for his new business), *aff’d*, 917 N.E.2d 650 (2009); *French v. Foods, Inc.*, 495 N.W.2d 768 (Iowa 1993) (Iowa blacklisting statute provided no basis for suit by employee alleging that coercive interview by employer’s investigator led to his discharge for alleged theft).

<sup>9</sup> For example, in the whistleblower context, if the former employer takes post-termination steps to prevent the whistleblower from obtaining employment with other employers, such conduct could be seen as post-termination retaliation. While this theory has not yet been successful, such a determination would not be precluded, especially in light of *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405 (2006) (in Title VII context, specifically rejecting the more restrictive standards of proof required for a finding of retaliation that were used by several Circuits, and finding that “[a]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by

agreements, as discussed in greater detail below, employees have alleged violations of the blacklisting statutes in restrictive covenant cases.

In a very unique case, *Bridgestone/Firestone, Inc. v. Lockhart*, 5 F. Supp. 2d 667, 680 (S.D. Ind. 1997), which the court called “a textbook example of how not to resign and leave a company gracefully”, a former employee made a successful counterclaim under the blacklisting laws.<sup>10</sup> In that case, after an extended and convoluted employment relationship with Bridgestone/Firestone, Inc. (“Bridgestone”), Lockhart considered accepting employment with GAF Materials Corp. (“GAF”), and he discussed his thoughts about potential employment with GAF with several of his colleagues. When these discussions got back to Lockhart’s boss, Lockhart was called into the office and told that Bridgestone would be treating those discussions as a verbal resignation, and that accordingly, Lockhart was terminated. Lockhart then became employed by GAF. Bridgestone sued both Lockhart and GAF, alleging a number of claims

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causing him harm *outside* the workplace”). *Cf. Vodicka v. Dobi Medical*, ALJ No. 2005-SOX-111, 2005 DOLSOX LEXIS 101, at \*27 (ALJ Dec. 23, 2005)(where employer filed a lawsuit against a former member of its Board of Directors seeking an injunction preventing the former board member from breaching his confidentiality agreement; the ALJ found that the filing of the lawsuit was not actionable because, in contrast with “blacklisting,” the complainant failed to show “how this lawsuit could affect his ability to obtain future employment or the terms or conditions of such employment”); *Pittman v. Siemens AG*, ALJ No. 2007-SOX-15, 2007 DOLSOX LEXIS 48 (ALJ July 26, 2007)(respondent’s slanderous statements about complainant and anti-SLAPP claim against complainant relating to defamation suit, both occurring more than one and half years after the termination of complainant’s employment, but shortly after complainant filed his third OSHA claim against respondents, were not adverse employment actions because the acts did not constitute blacklisting or interference with employment and complainant was not employed by respondents at the time that the slanderous statements were made or the anti-SLAPP claim was filed).

<sup>10</sup> It should be noted that, since *Bridgestone/Firestone, Inc. v. Lockhart, et al*, similar arguments have been unsuccessfully made in two other cases. See *Burk v. Heritage Food Service Equip., Inc.*, 737 N.E.2d 803 (Ind. App. 2000) (blacklisting law inapplicable); *Glen v. Diabetes Treatment Centers of America, Inc.*, 116 F. Supp. 2d 1098 (S.D. Iowa 2000) (refusal to release employee to allow her to work for another did not violate state blacklisting law). We are not aware of any other cases in which a Bridgestone-style counterclaim has been successful.

related to Lockhart's alleged breach of his noncompetition agreement. Lockhart counterclaimed under the Indiana blacklisting statute, Ind. Code § 22-5-3-2, which provides that:

If any railway company or any other company, partnership, limited liability company, or corporation in this state shall authorize, allow or permit any of its or their agents to black-list any discharged employees, or attempt by words or writing, or any other means whatever, to prevent such discharged employee, or any employee who may have voluntarily left said company's service, from obtaining employment with any other person, or company, said company shall be liable to such employee in such sum as will fully compensate him, to which may be added exemplary damages.

While the statute was originally enacted to deal with blacklisting in the railroad context, it has been found not to be limited to railroads.

After a bench trial, the court first considered whether Bridgestone had alleged meritorious claims against Lockhart and GAF. The court found that GAF (which sold commercial and residential roofing materials) was not in meaningful competition with Bridgestone (which, as one of its businesses, sold some sorts of roofing materials), and that Bridgestone presented no evidence that it lost any customers or sales to GAF following Lockhart's departure, let alone as a result of his departure. After analyzing the non-compete provisions in Lockhart's non-competition agreement, the court found that each of the provisions was unreasonably broad and unenforceable.

The court then went on to analyze Lockhart's first-of-its-kind counterclaim pursuant to the Indiana blacklisting statute. Lockhart relied on the statute's language which makes it unlawful for employers to "attempt by words or writing, or any other means whatever, to prevent . . . any employee who may have voluntarily left said company's service, from obtaining employment with any other person, or company. . ." and contended that the language was applicable to Bridgestone's effort to obtain an injunction prohibiting his employment by GAF. The court found that the plain language of the blacklisting statute was clearly applicable, since "it requires no creative interpretation or stretch of language to treat an unsuccessful lawsuit seeking an injunction against employment as an "attempt by words or writing, or any other means whatever" to prevent Lockhart, an "employee who may have voluntarily left said company's service," from "obtaining employment with any other person, or company." The court also found that the broad purpose of the blacklisting statute was satisfied, because:

the statute provides a means for balancing the power of the former employer and the employee. Apart from the effect of the blacklisting statute, a former employer who sues to stop a departing employee from going to work for a competitor faces no serious adverse consequences from the lawsuit, apart from its own attorneys' fees. In addition, an employer may draft an unreasonably broad and burdensome noncompetition agreement and take advantage of the in terrorem effect. The departing employee at the very least is likely to need to hire a lawyer to obtain advice that the contract probably will not be enforceable. On the other side of the power equation, even the mere threat of a lawsuit can be enough to discourage the departing employee from going to work for a competitor. And if the employee is

not discouraged, the prospective new employer may be. A new employer may be pleased by the prospect that a new employee will be joining up, but its ardor can be dampened considerably by the threat of substantial litigation costs. When the threat becomes reality, there is often a real possibility that the new employer may abandon the employee and look for someone else whose employment will not cause such costs and distractions.

*Bridgestone/Firestone, Inc.*, 5 F. Supp. 2d at 688. Finding that Lockhart had successfully shown a violation of the blacklisting statute, the court awarded him compensatory damages (his attorneys' fees), as provided for by the statute, but chose not to award exemplary damages since the statutory violation was simply the bringing of an unsuccessful lawsuit.

### **C. Defamation And The Job Reference Immunity Statutes**

Closely related to state statutes prohibiting blacklisting and defamation are the state statutes that grant immunity to employers that give job references concerning current or former employees to those employees' prospective employers. These statutes were enacted in the 1990s and 2000s after a rise in high-profile defamation lawsuits in the 1980s that were brought by current and former employees who believed that their job prospects were thwarted by their employer providing a bad reference.

Today, thirty-five states statutorily grant immunity to employers that give job references.<sup>11</sup> Some of these statutes are part of that state's laws prohibiting blacklisting. The job

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<sup>11</sup> Alaska (Alaska Stat. § 09.65.160); Arizona (Ariz. Rev. Stat. Ann. § 23-1361); Arkansas (Ark. Code Ann. 11-3-204); California (Cal. Civil Code § 47); Colorado (Colo. Rev. Stat. Ann. § 8-2-114); Delaware (Del. Code tit. 19 § 709); Florida (Fla. Stat. Ann. § 768.095); Georgia (Ga. Code Ann. § 34-1-4); Hawaii (Haw. Rev. Stat. § 663-1.95); Idaho (Idaho Code § 44-201); Illinois (745 Ill. Comp. Stat. Ann.

reference immunity statutes generally provide employers who give references a qualified immunity from liability. Typically, the statutes establish a rebuttable presumption that an employer who provides a job reference acts in good faith. The statutes also typically set forth:

- (a) the types of information that the employer may provide while still retaining its statutory immunity;
- (b) who may request the employment reference (the employee; the prospective employer; a third-party at the request of the employer; a third-party at the request of the employee); and
- (c) whether the employer must provide the employee with notice that he or she was the subject of a reference request.

Most reference statutes do not specify penalties for violations.

The job reference immunity statutes are frequently invoked by employers as a defense to a defamation lawsuit.<sup>12</sup> While the job reference immunity statutes do not appear to have been

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46/10); Indiana (Ind. Code Ann. § 22-5-3-1); Iowa (Iowa Code § 91B.2); Kansas (Kan. Stat. Ann. § 44-119a); Louisiana (La. Rev. Stat. Ann. 23:291A); Maine (Me. Rev. Stat. Ann. tit. 26 § 598); Maryland (Md. Code Ann., Cts. & Jud. Proc. § 5-423); Michigan (Mich. Comp. Laws Ann. Stat. § 423.452); Missouri (Mo. Rev. Stat. § 290.152); Nevada (Nev. Rev. Stat. Ann. § 41.755); New Mexico (N.M. Stat. Ann. § 50-12-1); North Carolina (N.C. Stat. § 1-539.12); North Dakota (N.D. Cent. Code § 34-02-18); Ohio (Ohio Rev. Code § 4113.71); Oklahoma (Okla. Stat. Ann. tit. 40 § 61.A); Oregon (Or. Rev. Stat. § 30.178); Rhode Island (RI Gen. Laws § 28-6/4-1); South Carolina (S.C. Code Ann. § 41-1-65); South Dakota (S.D. Codified Laws § 60-4-12); Tennessee (Tenn. Code Ann. § 50-1-105); Texas (Tex. Lab. Code Ann. §§ 103.001 – 103.005); Utah (Utah Code Ann. 34-42-1); Virginia (Va. Code Ann. § 8.01-46.1A); Wisconsin (Wis. Stat. Ann. § 895.487(2)); Wyoming (Wyo. Stat. Ann. § 27-1-113).

<sup>12</sup> See, e.g., *Graham v. Rosban Construction, Inc.*, No. 03-07-00317, 2009 Tex. App. LEXIS 8037 (Tex. App. Oct 14, 2009)(affirming grant of summary judgment in favor of employer because employer

invoked in the context of “no-hire” agreements so far, employers have invoked the statutes in analogous contexts.

For example, in *Delloma v. Consolidation Coal Co.*, 996 F.2d 168 (7th Cir. 1993), Delloma, a former employee who was discharged because of allegations of sexual harassment, sued his former employer, Consolidation Coal, and its president, for tortious interference with prospective business relationship because the potential new employer chose not to hire him after speaking with Consolidation Coal’s president. The potential new employer had contacted Consolidation Coal’s president to ask why the employee had been discharged, and the president truthfully responded to the effect that “there were some record-keeping irregularities that may have been involved.” The potential new employer then conducted his own investigation and asked others in the industry about Delloma, whereby he was informed that Delloma was a “womanizer” and “boozehound”. Based upon this information, the potential new employer decided not to hire Delloma, who then brought his suit against Consolidation Coal and its president. The Court of Appeals affirmed the District Court’s grant of summary judgment in favor of Consolidation Coal and its president because Consolidation Coal was permitted to respond to direct inquiries by the prospective employer, even though it owed no legal duty to the prospective employer. Accordingly, in some circumstances, the job reference immunity statutes

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had statutory immunity to disclose information about the employee’s job performance pursuant to the Texas job reference immunity statute; employee alleged that his former employer defamed him by informing a prospective employer that the employee quit after he was told that he would have to take a drug test); *Lowery v. Smithsburg Emergency Med. Serv.*, 920 A.2d 546 (Md. Ct. Spec. App. 2007) (affirming judgment in favor of employer, finding that poor job reference given during background check was not a grounds for defamation claim because employee did not offer sufficient evidence of actual malice to overcome the statutory conditional privilege contained in Maryland’s job reference immunity statute); *Kevorkian v. Glass*, 913 A.2d 1043 (R.I. 2007) (affirming grant of summary judgment in favor of employer’s director; director had qualified privilege under Rhode Island’s job reference immunity statute to make allegedly defamatory statement that the former employee had “unacceptable work practice habits” when supplying job reference where statement was presumed to be in good faith and former employee did not prove specific facts showing malice).

may provide a defense to employers who have been sued by former employees who are aggrieved by a “no-hire” agreement.

## NLRA UNION BLACKLISTING

### **A. Historical Background**

In the summer of 1892, Henry Clay Frick was determined to reduce labor costs at Carnegie’s steel mill in Homestead, Pa.<sup>13</sup> While he was able to get the Amalgamated Association of Iron and Steel Workers to concede on almost all of his financial demands, they would not agree to forgo collective bargaining.<sup>14</sup> After the negotiations reached a stalemate and the workers took over the mill, Frick sent in a private army.<sup>15</sup> Violence and bloodletting ensued.<sup>16</sup> When Frick eventually regained control of the mill with the help of the state militia, he reopened the mill with non-union replacement employees and blacklisted the union organizers.<sup>17</sup> As a result, they were unable to find jobs in the steel mills, deterring other workers from attempting to unionize.

It was largely legal for employers to discriminate against union members until the Wagner Act in 1935. Prior to that time, Congress attempted to ban discrimination against union members in the railroads with the Erdman Act in 1898,<sup>18</sup> but it was declared unconstitutional by

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<sup>13</sup> PBS American Experience: The Homestead Strike, <http://www.pbs.org/wgbh/amex/carnegie/peopleevents/pande04.html> (last visited Oct. 22, 2010).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Ch. 370, §10, 30 Stat. 424 (1898).

the Supreme Court in *Adair v. United States* as a Due Process violation.<sup>19</sup> It was commonplace for employers to require employees to sign “yellow dog” contracts, which prohibited them from joining unions. The Supreme Court upheld the validity of the contracts<sup>20</sup> and even struck down a Kansas statute that made the use of such contracts a criminal offense.<sup>21</sup> These cases were overruled by the enactment of the NLRA.<sup>22</sup>

## **B. NLRA Framework**

The Wagner Act of 1935 enacted what became the National Labor Relations Act (“NLRA”) that we know today. Under Section 7 of the NLRA,

Employees shall 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, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Violations of Section 7 – defined by the Act as “unfair labor practices” are enumerated in Section 8. Section 8(a) sets forth prohibited unfair labor practices by employers, and Section 8(b) sets forth prohibited unfair labor practices by unions. If either an employer or union commits an unfair labor practice under Section 8, the employee’s Section 7 rights are violated.

Section 8(a)(3) of the NLRA makes it unlawful for an employer “by discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor

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<sup>19</sup> 208 U.S. 161 (1908).

<sup>20</sup> *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917).

<sup>21</sup> *Coppage v. Kansas*, 236 U.S. 1 (1915).

<sup>22</sup> *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

organization.” This prohibits blacklisting and discrimination against workers for their union affiliation or sympathies, and organizing activities.<sup>23</sup>

Section 8(a)(3) has an exception: an employer and union may enter into a union shop agreement, which would require an employer to retain only employees who maintain membership in the union. The employer, however, is obligated under the section to refrain from enforcing a union shop agreement if it “has reasonable grounds for believing ... that membership [in the union] was not available to the employee on the same terms and conditions generally applicable to other members,” or if it “has reasonable grounds for believing that membership [in the union] was denied or terminated for reasons other than failure... to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining [union] membership.”

Unions are also prohibited from blacklisting. Under Section 8(b)(2) of the NLRA, it shall be an unfair labor practice for a union to cause or attempt to cause an employer to discriminate under Section 8(a)(3) against an employee with respect to whom membership in the union has been denied or terminated on any ground other than failure to tender the periodic dues and initiation fees required of all workers as a condition of membership.

Thus, the NLRA effectively prohibits the blacklisting of any employee who falls within its protection for participation or membership in a union.

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<sup>23</sup> See e.g. *Int'l Ass'n of Machinists Peninsula Lodge No. 1414 v. NLRB*, 2000 U.S. App. LEXIS 23401 at \*5 (9th Cir. 2000) (Blacklisting of employees for participation in union activities found to be a Section 8(a)(3) violation).

## C. Relevant Case Law

### Blacklisting by Employers

In *Phelps Dodge Corp. v. NLRB*, the U.S. Supreme Court ruled that an employer violated Section 8(a)(3) by refusing to hire job applicants who were union members.<sup>24</sup> Further, the Court held in *NLRB v. Town & Country Electric* that paid union organizers who take jobs with the employer to organize the employer's workers (known as "salts") are protected as employees under Section 8(a)(3).<sup>25</sup> Thus, employers cannot refuse to hire from blacklists of union members or union organizers.

In *Green Team of San Jose*, the NLRB ruled that the employer had discriminated under Section 8(a)(3) by discharging an employee whose termination the union demanded.<sup>26</sup> While it is not discrimination for an employer to discharge an employee per the union's request under a union security agreement, the employer in this case knew that the employee had paid his dues through a dues check-off program.<sup>27</sup> Thus, the employer had "reasonable grounds for believing that membership was denied or terminated for reasons other than failure [to pay his union dues]"<sup>28</sup> the employer violated Section 8(a)(3) by discharging him.<sup>29</sup> It is thus an unfair labor practice for an employer to respect a union's blacklisting policy except to enforce union security agreements.

In *International Association of Machinists Peninsula Lodge No. 1414 v. NLRB*, not only did the employer refuse to rehire a union sympathizer, when a potential new employer called to

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<sup>24</sup> 313 U.S. 177 (1941).

<sup>25</sup> 516 U.S. 85 (1995).

<sup>26</sup> 320 NLRB 999 (1996).

<sup>27</sup> *Id.*

<sup>28</sup> NLRA §8(a)(3).

<sup>29</sup> *Green Team*, 516 NLRB 999.

conduct a reference check, the employer said that the employee was "a strong union person" and "would do whatever the union said."<sup>30</sup> The court found this blacklisting to be an unfair labor practice under Section 8(a)(3).<sup>31</sup>

An exceptional situation where the NLRA actually encourages blacklisting is in the case of multiemployer bargaining groups. This most often occurs in the case of professional sports leagues, where all the teams in the league will have a contract with the players' union. For example, in *Caldwell v. American Basketball Ass'n*, the player-plaintiff sued the American Basketball Association ("ABA") for blacklisting him from playing for other teams following his suspension from the Spirits of St. Louis.<sup>32</sup> The court ruled that employers are allowed to act jointly when they have a collective bargaining relationship with a common union.<sup>33</sup> As this made the union Caldwell's exclusive bargaining representative with the ABA (rather than just the Spirits), Caldwell's individual power to bargain with the ABA and all individual ABA teams was extinguished.<sup>34</sup> Thus, blacklisting Caldwell from other ABA teams was legal.

#### Blacklisting of Employees by the Union

In *Radio Officers v. NLRB*, the Supreme Court ruled that the union violated Section 8(b)(2) by inducing the employer to discharge an employee for reasons other than failure to pay union dues or fees as authorized by the union shop proviso to Section 8(a)(3).<sup>35</sup> Thus, not only did the union cause the employer to commit an unfair labor practice, but it committed one itself. The Court stressed that the policy of the NLRA is to safeguard the right of employees to "freely

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<sup>30</sup> 2000 U.S. App. LEXIS 23401, at \*5 (9th Cir. 2000).

<sup>31</sup> *Id.*

<sup>32</sup> *Caldwell v. American Basketball Ass'n*, 66 F.3d 523, 526 (2d Cir. 1995).

<sup>33</sup> *Id.* at 528.

<sup>34</sup> *Id.* (citing *NLRB v. Allis-Chalmers Mfg. Co.*, 288 U.S. 175, 180 (1967)).

<sup>35</sup> 347 U.S. 17 (1954).

exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood.”<sup>36</sup> Thus, it is an unfair labor practice for a union to enforce a blacklist of employees with whom the employer is not supposed to do business other than for the purposes of enforcing a union shop.

Also, it is an unfair labor practice under Section 8(b)(2) for a union to retaliate against an employee for criticizing the union. For example, in *General Motors Corp.*, the NLRB held that the union unlawfully caused the employer to change an employee’s starting time because of that employee’s opposition to a new absenteeism program that was supported by the union.<sup>37</sup>

Affirming this finding on appeal, the Sixth Circuit enumerated that a union violates Sections 8(b)(1)(A) and 8(b)(2) by attempting to cause an employer to discriminate in order to “retaliate against that employee for protesting the union’s policies, questioning the official conduct of union agents, or incurring the personal hostility of a union official.”<sup>38</sup> Also, the Third Circuit has held that a union’s refusal to refer members for employment because of their intra-union activities violated Section 8(b)(2).<sup>39</sup> This protection extends to employees who oppose the union leadership in a union election,<sup>40</sup> support a rival union,<sup>41</sup> or file a decertification petition against the union.<sup>42</sup>

The union can be in violation of Section 8(b)(2) even if it for wrongful reasons induces an employer to take action against an employee that would not violate Section 8(a)(3) if done at

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<sup>36</sup> *Id.* at 40.

<sup>37</sup> 272 NLRB 705 (1984) (*enforced sub nom. Auto Workers’ Local 594 v. NLRB*, 776 F.2d, 1310 (6<sup>th</sup> Cir. 1985)).

<sup>38</sup> *Auto Workers’ Local 594*, 776 F.2d at 1314.

<sup>39</sup> *Heavy & Highway Constr. Workers’ Local 158*, 280 NLRB 1100 (1986) (*enforced* 865 F.2d 251 (3d Cir. 1988)).

<sup>40</sup> *See e.g. Carpenters’ Local 1016*, 272 NLRB 1176 (1994)

<sup>41</sup> *See e.g. Town & Country Supermks.*, 340 NLRB No. 172 (2004).

<sup>42</sup> *See e.g. Service Employees Local 1-J*, 273 NLRB 929 (1984).

the employer's own initiative.<sup>43</sup> This is because the employees will see the union's exercise of power over them and feel unfairly coerced to bend to the union's will in the future.<sup>44</sup>

Blacklisting, at its core, is an exercise of power over an employee.<sup>45</sup> Thus, the NLRA's statutory scheme is designed to limit the ability of both employers and unions to exercise this type of power over an employee to frustrate the purposes of the Act.

#### **D. Non-Union Situations**

Section 7 of the NLRA protects all "concerted activities [by employees]...for mutual aid or protection," regardless of whether these activities are union oriented. Generally, any activity engaged in by two or more employees for mutual aid or protection is deemed a concerted activity protected by Section 7. For example, if two or more employees approach a supervisor and ask the company to implement a more generous leave policy, they are engaging in protected concerted activity because their request is not just for the benefit of one employee. But if one employee asks a co-employee to accompany him to a disciplinary meeting, they are not protected (unless a unionized employee is seeking the help of his union representative) because they are only acting for the benefit of the employee who is being disciplined, and their actions are thus not for "mutual aid or protection."<sup>46</sup>

Activities conducted by a single employee can be deemed protected concerted activities if a group of employees designated that individual to act on their behalf.<sup>47</sup> If a group of employees did not intentionally designate that employee to act on their behalf, whether or not his activity is

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<sup>43</sup> *Carpenters' Local 2205*, 229 NLRB 56 (1977).

<sup>44</sup> *NLRB v. Radio Officers*, 347 U.S. 17 (1954).

<sup>45</sup> See e.g. *Veprinsky v. Fluor Daniel, Inc.*, 87 F.3d 881, 890 (7th Cir. 1996).

<sup>46</sup> *IBM Corp.*, 341 NLRB 1288 (2004).

<sup>47</sup> *Fotomat Corp.*, 207 NLRB 461 (1973) (*enforced* 497 F.2d 901 (6<sup>th</sup> Cir. 1974)); *Pacific Electriccord Co.*, 153 NLRB 521 (1965) (*enforced* 361 F.2d 310 (9<sup>th</sup> Cir. 1966)).

concerted turns on the purpose and effect of the employee's actions.<sup>48</sup> It can include the activities of a single employee who is attempting to initiate a group action,<sup>49</sup> actions taken by a single employee to assert his rights under a collective bargaining agreement,<sup>50</sup> but not actions by a single employee to assert his statutory rights.<sup>51</sup> An action by a single employee can be concerted if it is a logical outgrowth of a group activity.<sup>52</sup> Unprotected concerted activities include activities that are unlawful,<sup>53</sup> violent,<sup>54</sup> in breach of contract,<sup>55</sup> or indefensibly injurious to employer interests.<sup>56</sup> The general principle is to balance the right of employees to engage in concerted activity with the legitimate interests of employers.<sup>57</sup>

The Supreme Court in *Eastex, Inc. v. NLRB* recognized that the “for mutual aid or protection” element of Section 7 is not limited to concerted activities that promote unionization, grievance settlement, and collective bargaining.<sup>58</sup> It protects employees when they self-advocate through administrative and judicial forums and through appeals to legislators.<sup>59</sup> This can include advocacy on issues of general interest to workers not specific to the employer. For example, the distribution of a newsletter that urged employees to oppose the inclusion of a right-to-work provision in the state constitution and criticized a Presidential veto of a minimum wage increase was found to be a protected activity.<sup>60</sup> In *NLRB v. Jasper Seating Co.*, the Seventh Circuit found

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<sup>48</sup> *NLRB v. Caval Tool Div., Chromalloy Gas Turbine Corp.*, 262 F.3d 184, 168 (2d Cir. 2001).

<sup>49</sup> *Id.*

<sup>50</sup> *NLRB v. City Disposal Sys.*, 465 U.S. 822 (1984).

<sup>51</sup> *Meyers Indus. (II)*, 281 NLRB 882 (1986).

<sup>52</sup> *Salisbury Hotel*, 283 NLRB 685 (1987).

<sup>53</sup> *Southern S.S. Co. v. NLRB*, 316 U.S. 31 (1942).

<sup>54</sup> *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939).

<sup>55</sup> *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939).

<sup>56</sup> *NLRB v. Electrical Workers' Local 1229*, 346 U.S. 464 (1953).

<sup>57</sup> *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

<sup>58</sup> 437 U.S. 556, 565 (1978).

<sup>59</sup> *Id.* at 566.

<sup>60</sup> *Id.* at 567-568.

that two workers who walked off the job to protest their work area being too cold were acting “for mutual aid or protection” even though the majority of their coworkers had complained that the workspace was too hot, because it was directed towards a continuing dispute over working conditions.<sup>61</sup>

Since employees can have rights under Section 7 even if they are not unionized, Sections 8(a)(1) and 8(b)(1), which make it an unfair labor practice for an employer or union, respectively, “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7” can apply to employees who are not unionized. Because blacklisting is a form of coercion,<sup>62</sup> it is reasonable to read Sections 8(a)(1) and 8(b)(1) as making it an unfair labor practice for an employer or union to blacklist an employee in retaliation for engaging in concerted activities for the purpose of mutual aid or protection under Section 7, regardless of whether the employee is unionized.

## **BLACKLISTING AND ITS INTERPLAY WITH TITLE VII, ADEA & THE ADA**

### **I. INTRODUCTION**

Blacklisting under Title VII, the Age Discrimination in Employment Act (“ADEA”), and the Americans with Disabilities Act (“ADA”) is largely undefined by the federal courts. In the labor context, the term historically connoted, on the one hand, management’s attempts to “discipline the work force and to combat union organizing,” and on the other hand, the unions’ “refusal to allow their members to work for ‘unfair’ employers.”<sup>63</sup> In the general workplace,

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<sup>61</sup> 857 F.2d 419 (7<sup>th</sup> Cir. 1988).

<sup>62</sup> See e.g. *Veprinsky v. Fluor Daniel, Inc.*, 87 F.3d 881, 890 (7<sup>th</sup> Cir. 1996).

<sup>63</sup> ERIC ARNESEN, *ENCYCLOPEDIA OF U.S. LABOR AND WORKING-CLASS HISTORY*, 162-63 (Routledge 2006).

however, blacklisting may take the form of various types of retaliatory actions against an employee for engaging in protected activity. And in the post-employment context—where blacklisting appears to be most pervasive—what constitutes this type of activity is slightly more nebulous.

Although the term blacklisting appears to be a legal term of art, one federal court has recently held that it is not.<sup>64</sup> The federal courts agree, however, that blacklisting entails any action by an employer that prevents an individual from obtaining another position or that causes that individual to lose a new job.<sup>65</sup> Such actions include, but are not limited to, providing a negative reference, making retaliatory and negative comments to prospective employers, failing to provide agreed-upon letters of recommendation, and referring to the former employee’s involvement in protected activity.<sup>66</sup> Ultimately, blacklisting a former employee may make an employer not only vulnerable to litigation, but may also have a dire effect on the former employee’s ability to re-enter an already uncertain job market.<sup>67</sup> To ensure employers properly navigate the referral process for past or current employees, this section will address what constitutes blacklisting under Title VII, the ADEA, and the ADA; discuss the seminal case on

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<sup>64</sup> See *Szymanski v. County of Cook*, 468 F.3d 1027, 1029 (7th Cir. 2006).

<sup>65</sup> See *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1532 (11th Cir. 1990) (“The distinction between a blacklisting that prevents a former employee from obtaining a new job and similar conduct that causes him to lose a new job is meaningless.”).

<sup>66</sup> See *Silver v. Mohasco Corp.*, 602 F.2d 1083, 1086 (2d Cir. 1979) (Described blacklisting as “[s]upplying unfavorable references to prospective employers.”); *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1538 n.2 (11th Cir. 1990) (Blacklisting claim can succeed where former employee demonstrates that employer made “retaliatory comments concerning his involvement in activity protected by Title VII.”); *Memnon v. Clifford Chance US, LLP*, 667 F.Supp.2d 334, 336 (S.D.N.Y. 2009) (Plaintiff claimed employer “‘blacklisted’ her by failing to provide an agreed-upon letter of recommendation.”).

<sup>67</sup> *Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 200 (3d Cir. 1994) (“Indeed, post-employment blacklisting is sometimes more damaging than on-the-job discrimination because an employee subject to discrimination on the job will often continue to receive a paycheck while a former employee subject to retaliation may be prevented from obtaining any work in the trade or occupation previously pursued.”).

blacklisting in the post-employment context; and present strategies for employers to manage their potential liability from claims of blacklisting.

## **II. BLACKLISTING AND TITLE VII IN THE POST-EMPLOYMENT CONTEXT**

### **1. Brief Overview of the Standards under Title VII.**

While blacklisting is not directly referenced under Title VII, it is a form of retaliation, which violates Section 704(a) of Title VII.<sup>68</sup> Section 704(a) provides:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under this subchapter.<sup>69</sup>

The first clause of Section 704(a) – the opposition clause – applies to individuals who threaten to file, or do file, an employment discrimination charge against an employer.<sup>70</sup> It also applies to individuals who refuse to obey an order because of a reasonable belief that it is discriminatory.<sup>71</sup> The United States Supreme Court has broadly interpreted this clause, extending its protections in *Crawford v. Metropolitan Gov't of Nashville* to employees who involuntarily speak out against workplace discrimination during internal investigations.<sup>72</sup>

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<sup>68</sup> 42 USC 200e-3(a).

<sup>69</sup> *See id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at Sec. 8-II.B.

<sup>72</sup> 129 S. Ct. 846 (2009).

The second clause – the participation clause – applies to individuals who testify against, assist with or participate in an investigation or proceeding under Title VII.<sup>73</sup> Protection under this clause is also broadly interpreted, and may extend to untimely filed charges, as well as charges that are neither valid nor reasonable.<sup>74</sup>

Regardless of the clause under which the blacklisting or retaliation claim is brought, the order of proof follows the framework set forth in *McDonnell Douglas Corp v. Green*.<sup>75</sup> The plaintiff must demonstrate that (1) she opposed discrimination or participated in a statutory complaint process; (2) there was an adverse action; and (3) there is a causal action between the protected activity and the adverse action.<sup>76</sup> If the claimant makes her *prima facie* case, the employer has the burden of establishing a legitimate non-retaliatory reason for engaging in the challenged adverse action.<sup>77</sup> Legitimate non-retaliatory reasons proffered by employers may include, but are not limited to, “poor job performance; inadequate qualifications for the position sought; violation of work rules or insubordination; and, with regard to negative job references, truthfulness of the information in the reference.”<sup>78</sup>

Even if an employer provides a legitimate non-retaliatory reason, the plaintiff may demonstrate that it is merely a pretext to hide an otherwise retaliatory motive.<sup>79</sup> A plaintiff may provide evidence of pretext by showing that “the [employer] treated [her] differently from similarly situated employees or that the [employer’s] explanation for the adverse action is not

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<sup>73</sup> EEOC Compl. Man., Sec. 8-II.C.

<sup>74</sup> *Id.*

<sup>75</sup> *See* 411 U.S. 792 (1973).

<sup>76</sup> *See id.*; *see also* EEOC Compl. Man., Sec. 8.

<sup>77</sup> *Id.* at Sec. 8-II.E.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

believable.”<sup>80</sup> Pretext can also be established if the employer “subjected the charging party’s work performance to heightened scrutiny after she engaged in protected activity.”<sup>81</sup>

## **2. The *Robinson v. Shell Oil* Supreme Court Decision.**

The Supreme Court has not only broadly interpreted the opposition clause of Section 704(a) to protect individuals who involuntarily testify during internal investigations, as it did in the *Crawford* case, but it has also bestowed broad protections on individuals, who at first glance, do not meet the precise definition of “employee” – specifically, former employees. Under Section 704(a), an employer cannot discriminate against any of its “employees or applicants for employment.” Prior to the Supreme Court decision in *Robinson v. Shell Oil Co.*, the circuit courts struggled with whether Title VII’s anti-retaliation provision applied to current and prospective employers alone, or also encompassed former employees.<sup>82</sup>

A literal reading of this provision would limit remedies under the anti-retaliation provision to current and prospective employees alone. In fact, the Fourth Circuit Court of Appeals concluded that the definition of the term “employee” under Title VII – “an individual employed by an employer” – was unambiguous.<sup>83</sup> The court held that because a former employee cannot suffer an adverse action, the plaintiff cannot satisfy the second element of a retaliation *prima facie* case. The court also held that Section 704(a) entailed “conduct that occurs

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> See *Robinson v. Shell Oil Co.*, 70 F.3d 325 (4th Cir. 1995) (regarding a former employer who provided negative job references to prospective employers). *But cf. Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194 (3d Cir. 1994) (involving school board that retaliated against music instructor by starting proceedings to revoke her tenure); *EEOC v. J.M. Huber Corp.*, 927 F.2d 1322 (5th Cir. 1991) (former employer withheld benefits from former employee); *Rutherford v. American Bank of Commerce*, 565 F.2d 1162 (10th Cir. 1977) (former employer voluntarily disclosed former employee’s Title VII sex discrimination suit to prospective employer).

<sup>83</sup> *Robinson v. Shell Oil Co.*, 70 F.3d 325, 330-31 (4th Cir. 1995).

during the employment relationship,” and excluded former employees from the definition of Title VII.<sup>84</sup> Other circuits disagreed with the Fourth Circuit’s narrow interpretation, holding instead, that the exclusion of former employees from Title VII’s definition would undermine Congress’s purpose in enacting Title VII and lead to “absurd results.”<sup>85</sup> In 1996, the Supreme Court granted certiorari in *Robinson v. Shell Oil Co.*, to resolve the circuit split.<sup>86</sup>

The facts alleged in the *Robinson* case provide a classic example of retaliatory blacklisting. Pursuant to his termination, Charles Robinson, Sr. filed an EEOC charge against his employer, Shell Oil Co., claiming that he was discharged because of his race. During the pendency of the charge, Robinson applied for a position with another company, which contacted Shell Oil for a reference. Robinson claimed that Shell Oil provided the prospective employer with a negative reference and that this was done in retaliation for filing the EEOC charge. He filed suit under Section 704(a) of Title VII.<sup>87</sup> The District Court dismissed Robinson’s claim, citing Fourth Circuit precedent.<sup>88</sup> The Fourth Circuit initially reversed the District Court on appeal, but then reheard the case, vacated the previous decision, and affirmed the District Court’s ruling that former employees cannot bring retaliation claims under Title VII.<sup>89</sup>

In resolving the issue, the Supreme Court assessed whether the word “employee,” as used in Section 704(a), had a plain and unambiguous meaning that only included current employees. As an initial matter, it agreed that the definition facially seemed to apply to those individuals in an existing employment relationship with the respondent employer. The Court determined,

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<sup>84</sup> *Id.* at 331.

<sup>85</sup> Sandra Tafuri, Note, *Title VII’s Antiretaliation Provision: Are Employees Protected After the Employment Relationship Has Ended?*, 71 N.Y.U. L. Rev. 797, 806 (1996).

<sup>86</sup> *See Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

<sup>87</sup> *Id.* at 339.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 340.

however, that such a superficial interpretation could not withstand scrutiny since there is no “temporal qualifier” in Section 704(a).<sup>90</sup> The Court extended the lack of a temporal qualifier to the definition of “employee” under Title VII as a whole, and determined that the word “employed” could mean “is employed” just as easily as it could mean “was employed.”<sup>91</sup> The Court also looked to other provisions within Title VII that used the term “employees” to mean something other than “current employees,” and found that §§706(g)(1) and 717(b) both allowed for the “reinstatement or hiring of employees.” The Court confirmed that since “one does not ‘reinstat[e]’ current employees, that language necessarily refers to former employees.”<sup>92</sup>

The Court concluded its analysis by stating that the term “employees,” as used in Section 704(a), is ambiguous, and that any interpretation that excluded former employees from the anti-retaliation provision’s protection would “undermine the effectiveness of Title VII by allowing the threat of post employment retaliation to deter victims of discrimination from complaining to the EEOC, and would provide a perverse incentive for employers to fire employees who might bring Title VII claims.”<sup>93</sup> The Court reversed the Fourth Circuit’s decision, thereby broadening the universe of individuals who can bring a blacklisting or retaliation claim under Section 704(a).

### **3. Blacklisting Found Under Title VII.**

In light of the Supreme Court’s decision, federal courts have begun to address blacklisting in the context of Title VII’s anti-retaliation provision. As discussed earlier, an employer engages in blacklisting against a former employee when it provides a negative

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<sup>90</sup> *Id.* at 341-42. A “temporal qualifier” signifies any word that would, in this case, inform the reader whether the employee is currently or was formerly employed by the defendant.

<sup>91</sup> *Id.* at 342.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 346.

reference to a prospective employer. For example, in *Smith v. St. Louis Univ.*,<sup>94</sup> a resident anesthesiologist at a university hospital was subjected to repeated derogatory comments by the chair of the department and other male doctors. The plaintiff complained to the Dean of Student Affairs in her final year at the hospital, and, at the end of her residency, filed an action for employment discrimination. In retaliation for complaining to the Dean of Students, the chair of the department allegedly gave negative reviews of the plaintiff to two prospective employers.<sup>95</sup> The plaintiff did not obtain the positions for which she applied. A lower court granted summary judgment to the hospital on the blacklisting claim, holding that too much time – six months – had passed between the plaintiff’s formal complaint and the alleged retaliation to form a causal connection.<sup>96</sup> The Eighth Circuit, reviewing the case on appeal, disagreed. The court refuted the hospital’s statement that “negative references are not adverse job actions,” holding instead that “actions short of termination may constitute adverse actions within the meaning of the statute.”<sup>97</sup> The Eighth Circuit reversed the lower court’s grant of summary judgment, noting that “[i]f [the vice president] provided negative references to [plaintiff]’s potential employers, as she contends, and she demonstrates that he did so because she had complained about his harassment, then a jury could reasonably conclude that the University was liable under Title VII for retaliation.”<sup>98</sup>

Employers may also violate Section 704(a) when they voluntarily disclose their former employee’s protected activity to prospective employers. In *Rutherford v. American Bank of Commerce*,<sup>99</sup> a loan officer trainee resigned her position upon being reassigned to clerical duties.

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<sup>94</sup> 109 F.3d 1261 (8th Cir. 1997)..

<sup>95</sup> *Id.* at 1263.

<sup>96</sup> *Id.* at 1265-66.

<sup>97</sup> *Id.* at 1266 (citing *Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194 (3d Cir. 1994) (“Post-employment blacklisting is sometimes more damaging than on-the-job discrimination . . .”)).

<sup>98</sup> *Id.*

<sup>99</sup> 565 F.2d 1162 (10th Cir. 1977).

Shortly after leaving her position, but before filing a sex discrimination charge against the bank, plaintiff received a glowing recommendation from the bank's vice president. After filing the charge, plaintiff applied for a position with another bank and the prospective employer called the defendant bank's vice president to inquire about plaintiff's employment record. During their discussion, the vice president told the prospective employer that plaintiff had filed a sex discrimination charge. The Tenth Circuit affirmed judgment in favor of the plaintiff, stating that the bank acted in "a spirit of retaliation" because the plaintiff had received a positive reference prior to filing the charge, but decided that he was "not pleased" subsequently.<sup>100</sup> The court also found that the record supported a finding that "advising the Bank was itself acting by way of retaliation."<sup>101</sup>

Blacklisting may also take less common forms, such as choosing not to rehire an employee who has previously engaged in protected activity. In *Carr v. Health Ins. Plan of Greater New York, Inc.*,<sup>102</sup> a physician was discharged for failing to pass a board medical examination. The physician brought suit against his employer under Section 1981. After the suit was filed, the physician entered into discussions with the hospital about returning to his former position. The doctors told him that they would only rehire him if he dropped his suit against them. The physician, however, decided to continue with his lawsuit because "such demands . . . are unlawful retaliation for the exercise of his legal rights."<sup>103</sup> The Second Circuit agreed, holding that the hospital's request constituted an adverse employment action, and held that "an employer who fails to rehire an otherwise-qualified former employee who has brought litigation

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<sup>100</sup> *Id.* at 1164.

<sup>101</sup> *Id.*

<sup>102</sup> 2001 U.S. Dist. LEXIS 6766 (S.D.N.Y. May 23, 2001).

<sup>103</sup> *Id.* at \*5.

against the employer may be guilty of retaliation if that litigation is a reason for not rehiring the employee.”<sup>104</sup>

#### **4. Blacklisting Not Found Under Title VII.**

Although some courts have found blacklisting to be actionable under Title VII’s anti-retaliation provision, other courts have found circumstances where an employer’s actions do not rise to the level of retaliation. For example, a former employee cannot prevail on a blacklisting claim where no evidence exists that the former employer either made negative statements to a prospective employer or failed to provide a reference letter. In *Memnon v. Clifford Chance US, LLP*,<sup>105</sup> plaintiff, a woman of Haitian descent, resigned her position with the defendant law firm because of perceived discriminatory practices. Upon leaving her position, plaintiff entered into a settlement agreement with the firm, whereby she would receive a letter of recommendation, a lump sum payment, and other benefits. From 2003 to 2007, plaintiff applied for legal positions with other firms. Plaintiff was surprised that her efforts did not materialize into a full time position, in light of how well she performed during her interviews. Plaintiff believed that during this process, the defendant provided “negative and confidential” information to prospective employers so as to deny her any future employment opportunities.<sup>106</sup> By late 2006, a prospective employer, the law firm S & W, offered plaintiff a position. Within seven weeks, however, she was terminated for poor performance. Plaintiff argued that the defendant continued to interfere with her employment by sending negative communications to S & W. As with her previous allegations, however, the plaintiff had no proof of any wrongdoing.

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<sup>104</sup> *Id.* at \*8.

<sup>105</sup> 667 F.Supp.2d 334, 337 (S.D.N.Y. 2009).

<sup>106</sup> *Id.* at 337-38.

The court held that while plaintiff met some of the elements of her *prima facie* case, she did not demonstrate that there was an adverse employment action because she did not provide evidence to support her claim that the defendant disseminated negative information concerning her employment. The court described an adverse employment action as one that is likely to be “harmful to the point that [it is] likely to dissuade a reasonable employee from making or supporting a charge of discrimination.”<sup>107</sup> Where a former employee, however, cannot provide evidence that the former employer provided a negative reference or that any statement caused or contributed to the prospective employer’s decision to deny the application, the former employee has failed to present a *prima facie* case.

In addition, plaintiff’s claim that defendant blacklisted her by refusing to provide a reference letter also failed because the defendant demonstrated that it had a legitimate non-retaliatory reason for not providing one. Namely, the form and letter had not been agreed to by the parties prior to the execution of the settlement agreement, and the person who was charged with authoring the letter was not familiar with plaintiff’s work.<sup>108</sup> The court found these reasons to be sufficient, and granted summary judgment because the plaintiff could not provide evidence of pretext.

To bring a successful blacklisting claim, employees need to demonstrate that negative comments to prospective employers were made by the former employer and not by a third party. In *Rockefeller v. Abraham*,<sup>109</sup> an environmental scientist claimed that his attempts to secure future employment were thwarted by the United States Department of Energy (“DOE”). The plaintiff worked for the DOE as an environmental specialist, but was terminated for poor

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<sup>107</sup> *Id.* at 342.

<sup>108</sup> *Id.* at 345.

<sup>109</sup> 2003 U.S. App. LEXIS 2046 (10th Cir. Feb. 5, 2003).

performance. Plaintiff brought a Title VII claim against the DOE for terminating him because he made public statements about alleged safety violations. The plaintiff also claimed that the DOE harassed and blacklisted him from other employment with the federal government by making telephone calls to prospective employers.

The court determined that summary judgment was appropriate on the Title VII claims because plaintiff provided no evidence that the DOE was involved in either blacklisting or harassing phone calls. Moreover, the court determined that even if plaintiff could link the phone calls to the DOE, the calls did not rise to the level of an adverse action since “the callers never identified themselves or said anything about Rockefeller’s activities vis-à-vis the Department.”<sup>110</sup>

Lastly, a court may be unlikely to find in favor of a plaintiff who contends that her current employer blacklisted her because of ongoing litigation with a previous employer, if her current employer had no knowledge of the pending lawsuit. In *Murray v. Kaiser Permanente*,<sup>111</sup> a former member service representative filed suit against Kaiser Permanente for religious discrimination and retaliation under Title VII. Under her retaliation claim, plaintiff alleged that Kaiser blacklisted her because it knew she had brought suit against her former employer, Target. Plaintiff could not demonstrate that there was a causal connection, however, between the protected activity and her eventual termination, since Kaiser learned of the litigation only after it had fired plaintiff for her excessive absences. Ultimately, employers must be mindful of the information it conveys to prospective employers about its former employees. A strict policy that employers and its agents only provide limited information, such as date of employment, rank, and rate of pay, may keep any potential litigation for blacklisting at bay.

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<sup>110</sup> *Id.* at \*4.

<sup>111</sup> 2002 U.S. App. LEXIS 25488 (6th Cir., Dec. 10, 2002).

### **III. BLACKLISTING IN THE EMPLOYMENT CONTEXT UNDER THE ADEA AND ADA**

#### **1. Blacklisting under the Age Discrimination in Employment Act<sup>112</sup>**

Similar to Title VII, the ADEA also has an anti-retaliation provision that is nearly identical to Title VII's anti-retaliation provision.<sup>113</sup> The ADEA's provision specifically provides the following:

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation. It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act.<sup>114</sup>

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<sup>112</sup> See 29 U.S.C. § 623 *et seq.*

<sup>113</sup> See 29 U.S.C. § 623(d); *see also e.g. Wanamaker v. Columbian Rope Co.*, 108 F.3d 462, 465 (2d Cir. 1997) (noting that Title VII and ADEA use the McDonnell Douglas burden-shifting framework for analyzing retaliations claims).

<sup>114</sup> *See Id.*

Plaintiffs have used this provision, just as they have used Title VII's anti-retaliation provision, to make novel arguments concerning blacklisting. For example, in *Kelley v. Sun Microsystems, Inc.*,<sup>115</sup> the court held that sufficient evidence existed to deny summary judgment to an employer who wrongfully refused to recommend and intentionally hindered the plaintiff from possibly obtaining another position within the company after she was notified that she was being terminated in her current position. Here, plaintiff began her employment with defendant as a sales representative. The defendant claimed that shortly after the plaintiff began her employment, she had performance issues. As a result, the plaintiff was ranked by district managers in the bottom half of her peers. The defendant had a difficult business year, and decided to terminate several individuals in a reduction in force. In July 2001, the plaintiff was notified that she was selected for termination. However, her termination was not immediate, and she would be given until November 2001 to find a new position with the employer. Otherwise, at that time, she would be terminated.

Shortly after the plaintiff was informed that she was selected for termination, she complained to human resources and her manager about unfair treatment, a "good ol' boys" atmosphere, and bias toward young men, to name a few. The plaintiff claimed, in part, that she was retaliated against because her manager refused to recommend her for another position with the defendant, and intentionally hindered her efforts to obtain another position with the defendant. The defendant filed summary judgment arguing, in part, that even if such conduct occurred, the plaintiff could not sustain her claim for retaliation because such conduct occurred after she was notified of her termination. The court disagreed and held that a plaintiff may state a claim for retaliation even when the plaintiff is no longer employed with the defendant, if, for

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<sup>115</sup> See *Kelley v. Sun Microsystems, Inc.*, 520 F.Supp.2d 388, 405 (D. Conn. 2007).

example, the employer blacklists the former employee, wrongfully refuses to write a recommendation to prospective employers, or sullies the plaintiff's reputation, to name a few.<sup>116</sup>

Although plaintiffs have argued that besmirching their reputation and wrongfully refusing to provide adequate recommendations for positions after their termination support theories that they were blacklisted, and consequently harm their ability to gain future employment, some courts have held that plaintiffs who are barred from their office and office telephone to conduct a job hunt presents a minor stumbling block to securing future employment, and is not actionable as an adverse action. For example, in *Wanamaker v. Columbian Rope Co.*,<sup>117</sup> the plaintiff was terminated as the General Counsel for the defendant. The plaintiff was notified in October 1986 that he was being terminated in June 1987. Shortly after, the plaintiff informed the board of directors that he felt compelled to sue for age discrimination. In response, the board paid plaintiff's full salary until June 1987 and 70% of his salary for three additional months. However, the board also refused to allow the plaintiff to use his company office, secretary or telephone to conduct job hunting. The plaintiff claimed the board's actions were done in retaliation for engaging in protected activity, and also harmed his reputation and hindered his ability to seek new employment. The defendants (board members and company) filed summary judgment, arguing that its actions did not rise to the level of being adverse. The trial court agreed, and the decision was upheld by the appellate court. The appellate court held that the company's actions did not blacklist or besmirch the plaintiff's reputation. Rather, the court held

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<sup>116</sup> *Id.* at 402-05 (“Generally, the ADEA, like Title VII, protects individuals from actions injurious to current employment or the ability to secure future employment. The terminated employee . . . may have tangible future employment objectives, for which [s]he must maintain a wholesome reputation. Thus, plaintiffs may be able to state a claim for retaliation, even though they are no longer employed by the defendant company, if, for example, the company blacklists the former employee, . . . wrongfully refuses to write a recommendation to prospective employers, . . . or sullies the plaintiff's reputation . . .”) (internal citations omitted).

<sup>117</sup> *See Wanamaker v. Columbian Rope Co.*, 108 F.3d 462 (2d Cir. 1997).

that the company's actions were a minor, ministerial stumbling block; that someone in the plaintiff's position (General Counsel) would not be overly harmed by the board's decision to prohibit him from searching for employment while on the company's payrolls; and, there was no evidence that the loss of the office and phone had an injurious effect on the plaintiff's reputation in the legal community.<sup>118</sup>

## **2. Blacklisting under the Americans' with Disabilities Act<sup>119</sup>**

Similar to Title VII and the ADEA, the ADA also has an anti-retaliation provision. The provision specifically provides the following:

- (a) Retaliation. No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.
- (b) Interference, coercion, or intimidation. It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual

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<sup>118</sup> See *Id.* at 465-67; see also *e.g. Connell v. Bank of Boston*, 924 F.2d 1169, 1179-80 (1st Cir. 1991) (After plaintiff was notified he was terminated he hired an attorney to advance his ADEA claims. With two weeks left until plaintiff's termination, the employer evicted him from his office. Plaintiff claimed the actions were retaliatory. The court disagreed, and held that since plaintiff was being paid everything due up until his termination, the only potential adverse action was that plaintiff could not contact prospective employers from his office.).

<sup>119</sup> 42 U.S.C. § 12101 *et seq.*

in the exercise or enjoyment of, any right granted or protected by this Act.<sup>120</sup>

When analyzing a retaliation claim brought under the ADA, courts have routinely analyzed such claims using the same framework employed in Title VII cases.<sup>121</sup> To this end, plaintiffs may also use similar blacklisting arguments to advance theories of recovery under the ADA as well. For example, in *Fulton v. Johnson & Johnson Pharmaceutical Research & Development, LLC*,<sup>122</sup> the plaintiff claimed, in part, that she was blacklisted because the company continually rejected her for all the positions she applied to after she complained that the company was not accommodating her disability. Without any real analysis, the court granted the defendant's summary judgment because the plaintiff failed to produce any evidence that she was "blacklisted," nor did she cite to any specific facts (i.e. who made the decisions) to support her claim other than conclusory statements.<sup>123</sup>

Although the *Fulton* court does not conduct an in-depth analysis concerning the plaintiff's "blacklisting" claims, the court does implicitly hold that if the plaintiff would have provided more concrete facts, the summary judgment might have been denied. Consequently, defense attorneys and employers should be aware that plaintiffs may use the ADA to advance their blacklisting theories under the ADA's anti-retaliation provision.

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<sup>120</sup> 42 U.S.C. § 12203(a)-(b).

<sup>121</sup> See *Lovejoy-Wilson v. Noco Motor Fuel, Inc.*, 263 F.3d 208, 223 (2d Cir. 2001) (applying McDonnell Douglas burden-shifting test); *Diaz v. Transatlantic Bank*, 2010 U.S. App. LEXIS 3884, at \*11 (11th Cir. Feb. 24, 2010) (same); *Stouch v. Township of Irvington*, 2009 U.S. App. LEXIS 25784, at \* 14 (3d Cir. Nov. 24, 2009) (same);

<sup>122</sup> See *Fulton v. Johnson & Johnson Pharmaceutical Research & Development, LLC*, 2008 U.S. Dist. LEXIS 14163 (D. N.J. Feb. 26, 2008).

<sup>123</sup> See *Id.* at \*62-64.

#### IV. DAMAGES FOR BLACKLISTING CURRENT AND FORMER EMPLOYEES.

If a plaintiff can establish that his or her employer engaged in some form of blacklisting as retaliation, the plaintiff may be entitled to an array of damages depending on whether he or she brings a claim under Title VII, the ADEA or ADA.

Under Title VII, a plaintiff may be entitled to back pay, front pay, compensatory damages, punitive damages, injunctive relief, and attorneys' fees and costs, to name a few. However, statutory caps have limited the amount of money a plaintiff may receive for compensatory and punitive damages.<sup>124</sup> Compensatory damages may include items such as "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses."<sup>125</sup> Punitive damages may also be awarded. However, the statutory caps do not apply to some areas such as past pecuniary costs<sup>126</sup> and front pay.<sup>127</sup>

Under the ADEA, a plaintiff may be entitled to liquidated damages for willful violations and recover twice the actual damages as a result of the employer's unlawful actions.<sup>128</sup> A vast number of courts have also held that front pay is not included in the calculation of liquidated

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<sup>124</sup> See 42 U.S.C. § 1981a *et seq.* (statutory caps depend on the number of employees who work for the employer, and range from \$50,000 to \$300,000).

<sup>125</sup> See 42 U.S.C. § 1981a(b)(3).

<sup>126</sup> See *e.g. Schroer v. Billington*, 2009 U.S. Dist. LEXIS 43903 (D. D.C. Apr. 28, 2009) (awarding plaintiff past pecuniary losses such as reimbursement for therapy sessions and dental expenses as a result of stress-induced grinding of plaintiff's teeth).

<sup>127</sup> See *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001) (holding that front pay is not subject to Title VII statutory caps).

<sup>128</sup> See 29 U.S.C. § 626(b).

damages.<sup>129</sup> Although there is no provision that currently provides compensatory or punitive damages for claims brought under the ADEA, they may still be recoverable under state law in certain circumstances.<sup>130</sup>

Unlike the ADEA, the ADA has adopted Title VII's remedies.<sup>131</sup> However, there is currently a split as to whether compensatory and punitive damages are available when violations of the anti-retaliation provision are established.<sup>132</sup> Consequently, employers and defense attorneys must be aware of the specific holding in the particular district where the case is filed.

## **V. FIVE QUICK AND SIMPLE WAYS EMPLOYERS CAN DECREASE THEIR LIABILITY.**

In an effort to minimize liability related to claims of employment discrimination blacklisting, employers may consider implementing the following strategies:

1. Develop an internal employee reference policy that sets forth strict guidelines for providing information about former employees to prospective employers.
2. Instruct employees to direct all requests for references about the terminated employee to a designated company representative. Inform them that, unless

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<sup>129</sup> See e.g. *Olitsky v. Spencer Gifts, Inc.*, 964 F.2d 1471 (5th Cir. 1992) (agreeing with six other circuits, the court held that front pay is not included in liquidated damages).

<sup>130</sup> See e.g. *Ridenour v. Montgomery Ward & Co.*, 786 F.2d 867 (8th Cir. 1986) (plaintiff bringing suit under the ADEA and under state law, the court upheld an award for emotional distress under the Iowa Civil Rights Act).

<sup>131</sup> See 42 U.S.C. § 12117(a) (incorporating the remedy provisions from Title VII).

<sup>132</sup> See e.g. *Sink v. Wal-Mart Stores, Inc.*, 147 F.Supp.2d 1085 (D. Kan. 2001) (rejecting punitive and compensatory damages as recoverable under ADA anti-retaliation provision); *Kramer v. Banc of Am. Sec., LLC*, 355 F.3d 961 (7th Cir. 2004) (same); *Alvarado v. Cajun Operating Co.*, 588 F.3d 1261 (9th Cir. 2009) (same); *Johnson v. Ed Bozarth #1 Park Meadows Chevrolet, Inc.*, 297 F.Supp.2d 1286 (D. Colo. 2004) (same); *Miles-Hickman v. David Powers Homes, Inc.*, 613 F.Supp.2d 872 (S.D. Tex. 2009) (same).

authorized, supervisors and managers should not directly provide references and, doing so, without authority, may result in discipline up to and including termination of employment.

3. Limit the information provided to prospective employees to factual and objective data such as (1) job title, (2) dates of employment, and (3) salary.
4. If references are provided, ensure that the information is truthful, accurate, clearly communicated and done in a good faith manner.
5. Refrain from providing “off-the-record” references.

### **ANTI-TRUST LAW AND BLACKLISTING**

In order to understand how agreements that operate to preclude employees from working competitively in an industry for a period of time may violate the antitrust laws, one must first have a basic understanding of what antitrust law is.<sup>133</sup> Congress enacted the Sherman Antitrust Act (the "Sherman Act"), later amended by the Clayton Act, to protect free market competition and prevent illegal restraints of trade. 15 U.S.C. ' ' 1-7 (2000 & Supp. 2004). Section 1 of the Sherman Act, states in pertinent part, that A[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal.@15 U.S.C. ' ' 1.

1. If successful, a plaintiff can recover treble damages, including costs and reasonable attorney's fees. 15 U.S.C. ' ' 15(a).

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<sup>133</sup> Most states have their own versions of an Antitrust Act but this paper cannot begin to address their individual differences and similarities. Practitioners are advised to consult the applicable statutory and case law if it is thought that a violation may exist.

Two different tests have been applied to determine whether a restraint violates section 1; the "*per se*" invalidity test and the Rule of Reason test. In order to prevail on either the *per se* or the Rule of Reason tests, a plaintiff must prove three elements: "(1) the existence of a contract, combination, or conspiracy among two or more separate entities that (2) unreasonably restrains trade and (3) affects interstate or foreign commerce." *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1033 (9th Cir. 2005).

The *per se* test is reserved for agreements and restraints that are "plainly anticompetitive," and so often lack . . . any redeeming virtue, that they are conclusively presumed illegal." *Broadcast Music, Inc., v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 8 (1979). The *per se* test will not be used unless a court can determine, absent any factual investigation, that the restraint has a "pernicious effect on competition." *Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). The *per se* rule is useful because it allows the court to bypass the "complicated and prolonged economic investigation" that generally accompanies antitrust litigation. *Broadcast Music, Inc., v. Columbia Broadcasting System, Inc.*, 441 U.S. at 8 n.11 (quoting *N. Pac. Ry. Co.*, 356 U.S. at 5).

The Rule of Reason analysis is applied in situations "where the economic impact of the challenged practice is not obvious." *Jack Russell Terrier Network*, 407 F.3d at 1033 n.13. Not all restraints of trade are necessarily invalid, and the Rule of Reason test is used to determine if the restraint at issue does in fact unreasonably restrain trade. In determining whether a restraint is unreasonable, courts consider either: (1) the nature or character of the contracts, or (2) [the] surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 103 (1984). Under either (1) or (2), the ultimate inquiry is the restraint's effect on "competitive

conditions." *Id.*, 468 U.S. at 103. Once plaintiffs' prima facie claim has been established, the burden shifts to the defendant to prove that the harm demonstrated in plaintiffs' claim is outweighed by the pro-competitive effects produced by the agreement. Even upon such a showing by the defendant, plaintiffs may still prove the restraint is unreasonable by demonstrating that the same effects could have been achieved via a "less restrictive alternative."

Regardless of which test the court uses, *per se* or Rule of Reason, the focus of a Section 1 claim is always the restraint and its impact on interstate competition. *Id.*, 468 U.S. at 104.

*Yellow Pages Cost Consultants Inc. v. GTE Directories Corporation*, 951 F.2d 1158 (9<sup>th</sup> Cir., 1991) involved a question of who has standing to assert antitrust claims. Defendants were the publishers of Yellow Pages phone directories and thereby controlled a large market share of the advertising market. Its salespeople gave free advice to customers and sold them advertising. Plaintiffs were independent consulting firms that gave advice to customers on how to best advertise in the Yellow Pages and they also placed advertisements for their customers in the Yellow Pages. When Defendants changed their policy, and decided not to allow the Plaintiffs to place advertising for their customers, Plaintiffs sued.

Plaintiffs alleged that the refusal to deal with the independent consultants constituted a restraint of trade and that since the placing of advertising required use of Defendants' in house consultants that too was anti-competitive. The District Court granted summary judgment to Defendants holding that since Defendants' consultants were not independent of Defendants the Plaintiffs could not be competitive with them and therefore there was no antitrust injury or standing. On appeal the Ninth Circuit held that the lower court erred and that the Plaintiffs did compete with Defendants' consultants. It also pointed out that the field of competitors included

those who had the ability to deprive others of significant amounts of business. Plaintiffs were found to have suffered damages and to have standing.

In *Williams v. I.B. Nevada*, 794 F. Supp. 1026 (D. Nev., 1992) the court considered whether an agreement by a franchisor and franchisee of Jack-in-the-Box restaurants, which provided that franchisees were not to hire managers who left another Jack-in-the-Box restaurant for six months from his/her leaving, violated the Sherman Act. The purpose of the provision was to prevent raiding which would allow the hiring restaurant to benefit from the training given by the prior employer restaurant.

The court first looked to see whether there was a conspiracy, or could be a conspiracy, between the franchisor and the franchisee. It found that both defendants were engaged in a common enterprise presenting their brand for sale to the public in competition with other like brands. As such, they "lack the ability to compete." (*Id.* at 1034) and therefore could not conspire.

*Five Smiths, Inc. v. National Football League Players Association*, 788 F.Supp. 1042 (D.Minn., 1992) was a case in which the teams alleged that the agents and players' association were conspiring to fix the compensation paid to players. The players moved to dismiss under the *per se* rule saying that the facts alleged were too vague or that the conspiracy alleged did not constitute an antitrust violation. They also moved under the Rule of Reason test because no injury to competition was alleged and no relevant market was identified.

The court found that the draft system itself reduced competition thereby making any information exchange irrelevant to inter-player competition. It also found Plaintiffs' allegations

to be too vague to support a price fixing claim. A Rule of Reason claim requires the alleging of a relevant market beyond the Plaintiffs that has been adversely impacted. No such allegation was made here. It further found a failure to allege the kind of price information exchange that constitutes a violation of the Rule of Reason; namely an agreement between competitors to restrain price.

*Caldwell v. American Basketball Association, Inc.*, 825 F.Supp. 558 (S.D.N.Y., 1993) concerned a player's suspension and whether that constituted a "concerted refusal to deal" or a "group boycott" in violation of the Sherman Act. Plaintiff alleged that he was blacklisted. To prove that he had to demonstrate "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *Id.* at 566.

Plaintiff was unable to prove that he was placed on a list that forbade his hire by other teams or that if he was, that the list continued after his contract expired, or that his failure to be hired by other teams was because he was on such a list. A failure to be hired over time does not give rise to an inference of a conspiracy not to hire where defendants offered evidence of bonafide reasons for Plaintiff's failure to be hired.

In *Levine v. Central Florida Medical Affiliates, Inc.*, 864 F.Supp. 1175 (M.D.Fla., 1994) a physician who was suspended from practice by a hospital and denied panel status as a physician provider by a Preferred Provider Organization was found to lack standing to assert antitrust claims. Specifically, his injury was primarily personal and nothing prevented him from being able to continue to practice medicine in the area.

In *Pierson v. Orlando Regional Healthcare Systems, Inc.*, 619 F.Supp2<sup>nd</sup> 1260 (M.D.Fla., 2009) Plaintiff orthopedic surgeon challenged his suspension from emergency and trauma call and consulting privileges at two hospitals operated by defendants. He contended that Defendants blacklisted and excluded him from practicing medicine in violation of the Sherman Act. The court focused on standing which for antitrust cases contemplates both an antitrust injury and the plaintiff being "an efficient enforcer of the antitrust laws." *Id.* at 1275.

Antitrust injury is defined as: injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be the type of loss that the claimed violations ... would be likely to cause. *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1449 (11th Cir.1991)(quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977). *Id.* at 1275, 1276.

This Plaintiff was complaining of his personal loss of income and it was undisputed that he could practice in the area and at other hospitals. For these reasons he did not have an antitrust injury and lacked standing. He was also found to lack standing because he was not an efficient enforcer. He was not advocating an adverse impact on patients being served in the area or on pricing due to a lack of competition. Furthermore, Plaintiff's claim failed under the *per se*

analysis because he could show no anticompetitive effect on the market; as distinct from on competitors.

More recently, the District of Hawaii explained that antitrust law is not generally available to terminated employees

In cases involving employee plaintiffs who sue a former employer for an alleged antitrust violation, the Ninth Circuit Court of Appeals has held that a plaintiff employee has standing only in very limited circumstances. In *Vinci v. Waste Management, Inc.*, 80 F.3d 1372 (9th Cir.1996), the plaintiff, a terminated employee of the defendant company, brought an unfair competition claim against his former employer under Section 4 of the Clayton Act, alleging that he was terminated for refusing to participate in his employer's anticompetitive scheme to drive a competitor out of business. *Id.* at 1373-74. The court acknowledged the general rule that a terminated employee may not sue his corporate employer under the Clayton Act because termination of employment is not an antitrust injury. The exception to this rule is in circumstances where: (1) the former employee is an "essential participant" in an anticompetitive scheme; (2) the employee's termination is a "necessary means" to accomplish the scheme; and (3) "the employee has the greatest incentive to challenge the antitrust violation." *Id.* at 1376-77 (emphasis added). *Davis v. Four Seasons Hotel Ltd.*, Slip Copy, 2010 WL 3946428 (D.Hawaii, 2010).

In *Total Renal Care, Inc. v. Western Nephrology and Metabolic Bone Disease, P.C.* Slip Copy, 2009 WL 2596493 (D.Colo., 2009), Defendant counterclaimed saying that Plaintiff dialysis company violated antitrust laws by locking up its employees in noncompete and nonsolicit agreements and by locking vendors into exclusive contracts thereby impeding Defendant's ability to compete. Defendant's failure to identify the particular market as to which Plaintiff was seeking monopolization led to the dismissal of those antitrust counts. Defendant's allegations as to the shortage of trained personnel, and their being locked up by Plaintiff, were sufficient as a matter of pleading to allege a barrier to entry into the market. The court then

considered whether predatory hiring had occurred and if so, whether it was a violation of the antitrust laws. It found that where an employer seeks to lock up its workforce to protect itself from the shortages of qualified personnel in the area, as opposed to locking up personnel to harm a competitor, there is no antitrust violation.

*Haines v. Verimed Healthcare Network, LLC*, No. 08 Civ. 791, 2009 U.S. Dist. LEXIS 23247 (E.D. Mo. Mar. 24, 2009) offered a plaintiff doctor who worked as a freelance medical writer and editor. She worked for both Verimed and for one of its clients. The client terminated her based upon a "no-hire" provision in the client's contract with Verimed. The doctor sued Verimed, alleging that the "no-hire" provision violated federal and state antitrust laws, as well as alleging various other torts. The court dismissed her antitrust claims, but allowed her tort-based claims to continue. In doing so, the court found that the provision at issue was not a "no-hire" agreement, but rather was a noncompetition provision, whose intended purpose was not to constrain competition between the company and its clients, but to prevent the company's workers from working directly for the clients. Federal antitrust law could not redress the doctor's injury because it did not arise from an unlawful market restraint, it arose from her own lack of knowledge of the non-hire provision and from the company's failure to disclose to her that material information. The failure of the federal antitrust claim was, in turn, fatal to the doctor's state antitrust claims.

Antitrust theories in the employment context do not seem to provide an easy course of action for individual plaintiffs. The same is not true, however, for the U.S. Department of Justice when fighting to promote competition. Lucasfilm, Ltd., Pixar, Apple, Google, Intel, and Adobe Systems, Inc. allegedly entered into agreements to not cold-call competitors' employees, to notify each other when making an offer to an employee of the other company, and to not

counteroffer with compensation above the initial offer when offering a position to the other company's employee. Law 360, *Lucasfilm Settles DOJ Probe Into Pixar Hiring Pact*, 12/22/2010, [http://www.law360.com/print\\_article/216762?section=employment](http://www.law360.com/print_article/216762?section=employment).

The agreements in question limited competition by impairing an employee's ability to compete for jobs and to negotiate salaries. Had a competitive company advanced this claim it might have been found to lack standing because it was not an efficient enforcer - it would be seeking to protect its competitive position. However, none of these companies wanted to take on the Department of Justice once they received service of a formal complaint.

### **CONCLUSION**

Blacklisting in the employment context, in all forms, appears to be gaining increased attention from the courts and administrative regulators. Wise counsel will consider this issue any time employer conduct presents questions of dark intent.