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Litigation Privilege in Iowa Employment Cases

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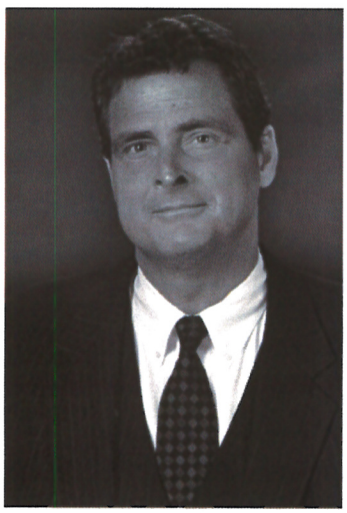

Frank Harty

"I firmly believe that any man's finest hour, the greatest fulfillment of all that he holds dear, is that moment when he has worked his heart out in a good cause and lies exhausted on the field of battle – victorious."

-Vince Lombardi

"The advocate has a duty to use legal procedure for the fullest benefit of the client's cause . . . "

-Comment to Rule 32:3.1, Iowa Rules of Professional Conduct

Coach Vince Lombardi knew the meaning of "zealous." Trial practice is not for the faint-hearted. Trial lawyers do not become successful and respected by doing "just enough." Success comes from approaching each case like life depends upon it. Sometimes this vigor and conviction may appear to conflict in the abstract with state and federal anti-retaliation laws.

INTRODUCTION

Virtually every anti-discrimination law contains a statutory or common law prohibition on retaliation. The Supreme Court has defined retaliation to include anything that might cause a reasonable individual to refrain from asserting their civil rights.

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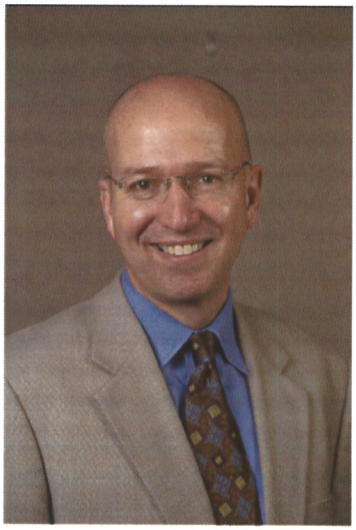

James P. Craig
IDCA President

I am proud to be an Iowa lawyer. We have well-qualified judges who are not required to campaign for election. We have many excellent and talented lawyers who work hard, are creative, and know you can be civil while zealously representing a client. Finally, we have reasonable jurors, who are willing to listen, are not easily enflamed, and are willing to follow the laws of our State as provided to them by the Judge. As I attend meetings around the country, I frequently receive compliments about Iowa's Bar and Courts. Those compliments should remind us all to occasionally step back, take stock of our respective practices, and appreciate the many positive aspects of our court system we take for granted as Iowa lawyers.

Recently, the Iowa Defense Counsel Association hosted a reception at the DRI Annual Meeting in Chicago for DRI leaders to congratulate Mike Weston on becoming President of DRI. Recognizing an opportunity to promote Iowa a little, we researched and shared details of the rich history of Iowa's judicial system. Perhaps you will be surprised by what we found.

Did you know in the case of *In Re the Matter of Ralph, 1839,* the Iowa Supreme Court rejected slavery by concluding that a slave named Ralph became free when he stepped onto Iowa soil, 26 years before the end of the American Civil War? This was in fact the Iowa Supreme Court's first written decision.

But there is more!

In the 1868 case of *Clark v. The Board of School Directors*, Alexander Clark sued his city's school board for refusing to admit his African-American daughter into the public schools. The Iowa Supreme Court held that racially "separate but equal" schools violated the Iowa Constitution. Our Iowa Supreme Court made this decision 85 years before the U.S. Supreme Court reached the same conclusion in *Brown v. Board of Education*! Subsequently, in 1879, Alexander Clark's son, Alexander Clark, Jr., became the University of Iowa College of Law's first African-American law student and graduate, decades before many law schools in the country enrolled non-white students.

In 1869, Iowa became the first state in the union to admit women to the practice of law with the Iowa Supreme Court ruling that Iowa may not deny women the right to participate in law in Iowa. Not only was Arabella Mansfield the first woman to have the right to practice law in Iowa, but in the nation!

In 1873, in the case of *Coger v. North Western Union Packet Co.*, the Iowa Supreme Court ruled against racial discrimination in public accommodations, 91 years before the U.S. Supreme Court reached the same decision in Bell v. State of Maryland.

We are all familiar with the more recent landmark decision of the Iowa Supreme Court in *Varnum v. Brien*, rendered in 2009. But did you know *Varnum* followed such a long line of courageous decisions that were likely as equally unpopular in their time? As the five-year anniversary of the *Varnum* decision passes, it is important to note Iowa's judicial history positively reflects on good people, good lawyers, and good judges working together to address tough questions and to make good law. It should be no surprise, then, that a key mission of the Iowa Defense Counsel Association has been, and continues to be, to protect the integrity, the quality, the balance, and the independence of Iowa's judicial system. For these many reasons, I am proud to be a member of the Iowa Bar and the Iowa Defense Counsel Association. I hope you are too! *

Thank you for your membership.

James P. Craig

*By the way, the *Defense Update* is always on the lookout for articles to publish to inform and educate our members. We encourage our membership to write and submit articles. This is a great way to let your fellow defense counsel members know your areas of expertise and practice. Members can contact any of the members of the Board of Editors for details on how to turn an idea for an article or a case note into a published work!

These concepts might collide during the course of litigation. This is where the "litigation privilege" concept was developed. The premise is simple: a lawyer is a champion – a fighter. He should be free to do everything within the bounds of the Code of Ethics that serves the interest of his clients. And he should not have to worry about drawing a retaliation charge by a litigant or related party.

Iowa courts have adopted this privilege. However, to make it more clear – the Iowa trial bar, the courts, and the legislature should formally recognize the privilege as it applies in employment discrimination litigation. This article discusses the privilege and lays out a simple approach for formalizing the privilege.

LITIGATION PRIVILEGE

In *Earl v. Electro-Coatings of Iowa, Inc.*, No. C02 – 0042, 2002 WL 32172298 (N.D. Iowa Oct. 29, 2002), the United States District Court for the Northern District of Iowa recognized and applied the litigation privilege. There, the plaintiff sued for age discrimination under the Age Discrimination in Employment Act (ADEA). Id. at *1. The defendant counterclaimed, alleging a breach of fiduciary duty by the plaintiff based on his conduct while acting as an officer and director of the company. Id. In response to this counterclaim, the plaintiff sought to amend his complaint to allege that the filing of the counterclaim amounted to actionable retaliation. Id.

The court, reasoning that the litigation privilege applied, denied the plaintiff's motion for leave to amend. Id. at *2. The court explained that litigation privilege "precludes actions taken in litigation which are otherwise redressable through court processes from supporting further litigation." Id. (citing *Steffes v. Stepan Co.*, 144 F.3d 1070, 1075 (7th Cir. 1998)). The court held, "[a]lthough many different post-termination actions may constitute retaliation, . . . ordinarily, a counterclaim may not." *Earl*, 2002 WL 32172298, at *2. It is only "in the rare case [when] conduct that occurs within the scope of litigation [will] amount to retaliation." Id. (citing Steffes, 144 F.3d at 1075); see also *McFarland v. McFarland*, Nos. C08 – 4047 – MWB, C09 – 4047 – MWB, 2010 WL 2899013, at *7 (N.D. Iowa July 26, 2010) ("Iowa recognizes an absolute privilege from liability for communications which takes place in a judicial proceeding."); *Spencer v. Spencer*, 479 N.W.2d 293, 295 (Iowa 1991) (recognizing Iowa's absolute privilege from liability for defamation which takes place in a judicial proceeding, and noting "[t]he purpose of the absolute privilege is to encourage the open resolution of disputes by removing the cloud of later civil suits from statements made in judicial proceedings.") (citation omitted)). The *Earl* court further noted that companies "'have a constitutional right to file lawsuits, tempered by the requirement that the suits have an arguable basis.'" *Earl*, 2002 WL 32172298, at *3 (quoting *Scrivner v. Socorro Indep. Sch. Dist.*, 169 F.3d 969, 972 (5th Cir. 1999)). The court therefore found the litigation privilege protected the defendant from the plaintiff's claim of retaliation. *Id.* at *3.

PRIVILEGE RATIONALE

In applying the litigation privilege, the *Earl* court relied on the reasoning of the Seventh Circuit in *Steffes* . 144 F.3d at 1070. There, the plaintiff and her employer failed to reach an agreement as to the terms of the plaintiff's employment in light of some of her medical conditions. *Id.* at 1071-72. This discord caused the employer to fire the plaintiff, which gave rise to her lawsuit. *Id.* In response to an interrogatory during the pending litigation, the plaintiff informed her former employer that she had found a new job. *Id.* at 1073. The former employer then told her new employer about the plaintiff's medical restrictions and discrimination suit. *Id.* Consequently, the new employer told the plaintiff's temporary employment agency to stop sending her to work until her medical conditions were clarified. Id. at 1073-74.

The plaintiff then instituted a second action against her former employer, alleging the dissemination of information regarding her medical condition and lawsuit amounted to retaliation. *Id.* at 1074. The district court dismissed the retaliation claim, holding Illinois recognizes an "absolute litigation privilege" which protects any communicative acts that fall within the scope of litigation. Id. On appeal, the Seventh Circuit stated that while an absolute litigation privilege is too broad of an approach, it will still be the "rare case in which conduct occurring within the scope of litigation constitutes retaliation prohibited by these statutes." *Id.* at 1075. "'[A]n attempt to obstruct the litigation of the underlying discrimination complaint . . . is inseparable from the litigation of the claim. Accordingly, it is a matter to be resolved pursuant to court rules.'" *Id.* at 1076 (quoting *McKenzie v. Ill. Dep't of Transp.*, 92 F.3d 473, 486 (7th Cir. 1996)). The court went on to articulate the rationale for applying the litigation privilege:

> The primary reason for granting attorneys absolute immunity is that their unique function as advocates requires that they be able to present their client's case at trial without intimidation or harassment . . . Conducting discovery under the rules of civil procedure falls within the unique duties of an advocate and such activities are conducted in the adversarial arena where opposing counsel and the trial court can quickly put the brakes on unethical or unlawful behavior.

Steffes, 144 F.3d at 1076 (citation omitted). Thus, the court found the litigation privilege protected the defendant from the plaintiff's retaliation claim, as the defendant's conduct arose out in the context of the discovery process. *Id.*

California courts have also recognized the litigation privilege. In *Gallanis-Politis v. Medina*, a county employee sued her county and a county official, asserting state and federal discrimination claims.

152 Cal. App. 4th 600, 604 (Cal. App. 2d Dist. 2007). In an amended complaint, the employee also brought retaliation claims against her two supervisors, alleging they obstructed her efforts to obtain bonus pay by conducting a pretextual investigation and preparing a false report about her. *Id.*

The court held the litigation privilege barred this employee's retaliation action against her supervisors. *Id.* at 615. The court stated that the primary purpose of the privilege is "to afford litigants and witnesses . . . the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions." *Id.* at 616 (citation omitted). Further, recognition of the privilege "encourage[s] open channels of communication and zealous advocacy, to promote complete and truthful testimony, to give finality to judgments, and to avoid unending litigation." *Id.* at 616 n.12 (citation omitted). The court did qualify its recognition of the privilege, however, in noting that "[t]he litigation privilege protects only publications and communications; it does not protect noncommunicative conduct." *Id.* at 616. While this limitation may seem to eliminate many litigation-related acts from the privilege's protection, the court recited some of the acts which have been deemed communicative, including "attorney prelitigation solicitations of potential clients and subsequent filing of pleadings in the litigation, and testimonial use of the contents of illegally overheard conversation." *Id.* at 616 n.13. Thus, although California, like the Seventh Circuit and the Northern District of Iowa, refused to apply an absolute litigation privilege, it still recognized that many acts occurring within the scope of litigation cannot constitute retaliation.

CREATING A SAFE HARBOR

While the law seems clear, plaintiffs and plaintiffs' counsel routinely threaten charges of retaliation against defendants and defendants' counsel in response to lawful, ethical litigation tactics. It is for that reason the trial bar and courts should urge the legislature to adopt a successful and clear litigation privilege.

The following model language would suffice:

"Any licensed attorney shall be privileged to engage in any conduct within the scope of the Iowa Rules of Professional Conduct that advances the interests of his/her client."

CONCLUSION

Good Iowa lawyers are renowned for polite and professional advocacy. They are also known for tenacity. The two are compatible and a litigation privilege would serve to advance the professional reputation of the Iowa Bar.