

OREGON LAW UPDATE

Facing a 'SLAPP' Lawsuit? You Have Recourse

case in point...

From the desk of Jeff Eberhard: A Strategic Lawsuit Against Public Participation ("SLAPP") is a lawsuit that is intended to censor, intimidate, and silence critics by burdening them with the cost of a legal defense until they abandon their criticism or opposition. To circumvent these lawsuits, Oregon adopted an "anti-SLAPP" statute to provide a way for a defendant who is sued over certain actions taken in the public arena to have a questionable case dismissed at an early stage.

Claims Pointer: Coming to a quick, efficient and equitable resolution is always the goal of an insurer or defense attorney. When your client or insured is faced with a SLAPP lawsuit, the defendant should consider immediately filing an "anti-SLAPP" special motion to dismiss. In determining whether to grant the anti-SLAPP motion, a trial court will use a standard similar to a summary judgment standard, not weigh the merits of the case. However, the net effect of the court's decision not to weigh the merits of the case makes it more difficult to obtain a quick dismissal.

Young v. Davis, 259 Or. App. 497, 314 P.3d 350 (2013)

Oregon's anti-SLAPP statute, ORS 31.150, was enacted in 2001 to "permit a defendant who is sued over certain actions taken in the public arena to have a questionable case dismissed at an early stage." The statute provides a two step, burden shifting test: first, the court must determine whether the defendant has met its initial burden to show that the claim against which the motion is made "arises out of" one or more protected activities enumerated in the statute; and second, if the defendant meets its burden, then the burden shifts to the plaintiff to establish that there is a probability that the plaintiff will prevail on the claim by presenting evidence to support a *prima facie* case. If successful, a defendant's special motion to strike will be treated as a motion to dismiss and the court will enter a judgment of dismissal without prejudice. If the plaintiff meets its burden, the motion to strike will be denied and the court will enter a limited judgment denying the motion.

The plaintiff in this case, Young, worked with the defendant, Davis, at a Veterans Administration (VA) facility in White City, Oregon. During 2009, Davis made numerous reports to her supervisor alleging sexual harassment by Young, which led to two administrative workplace investigations, including formal administrative proceedings and efforts to seek a stalking protective order. In October 2010, Young filed an action against Davis in circuit court alleging claims of defamation and wrongful use of civil proceedings. On December 23, 2010, Davis filed a special motion to strike Young's claims under the anti-SLAPP statute. The trial court granted the

motion and concluded that Young was not likely to prevail. Young appealed.

The Court of Appeals only addressed the second step of the analysis, whether Young met the burden of establishing the probability of prevailing at trial on her claims by presenting substantial evidence to support a *prima facie* case. The court performed a statutory analysis and determined that once a plaintiff presents substantial evidence to support a *prima facie* case, that evidence, in and of itself, is sufficient to establish a probability that the plaintiff will prevail as special motion to strike. The court noted that whether it is "likely" that the plaintiff will prevail is irrelevant in determining whether plaintiff has met its burden. Rather the court is to accept as true all evidence favorable to the plaintiff and should consider the defendant's evidence only to determine if it defeats the plaintiff's submission as a matter of law.

The court reiterated that the goal of the special motion to strike procedure is to weed out meritless claims meant to harass or intimidate so as to prevent the exercise of constitutional free speech rights, not to require that a plaintiff prove its case before being allowed to proceed further. The court stated that this low bar befits the pretrial nature of the special motion to strike, similar to that of summary judgment. The Court of Appeals remanded the case back to the trial court to allow the trial court to apply the correct legal standard.



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