

EMPLOYMENT

Expert Analysis

Employment-Related Defamation Claims: A New Spin on an Old Tort

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In his management how-to book, "Winning," former General Electric CEO Jack Welch extols the benefits of providing candid and rigorous performance feedback to employees. He explains that candid assessments benefit the employees by letting them know where they stand in the organization and by identifying the improvements they must make to advance in their careers.

At the same time, the organization itself benefits when its personnel have clear direction about the expectations that have been placed upon them. "You simply cannot manage people to better performance if you do not give candid, consistent feedback through a system that is loaded with integrity," Welch says in the book.

CAN FEEDBACK BE TOO CANDID?

Welch would argue not, but a number of recent cases have created a risk for employers that a harsh assessment of an employee may trigger a defamation lawsuit. To prevail on a defamation claim, the employee must prove that the company disseminated a false statement of fact that tends to expose the employee to public scorn, contempt or ridicule, thereby discouraging others from having a good opinion of, or associating with, the employee.

Under the common law of most states, derogatory comments about a person's job performance and qualifications constitute defamation per se, and as a result, the employee is not required to prove that the offending statements caused specific injuries.

In defamation cases, the jury is permitted to award damages for harm to the plaintiff's reputation, emotional distress, loss of employment income and other injuries.

Punitive damages may also be awarded if the jury concludes that the false statements were made knowingly or with reckless disregard for their truth or falsity. The jury has broad discretion to fashion an award of damages, and judgments can be substantial even where the plaintiff has suffered no economic losses.

Defamation claims against employers typically arise in one of two contexts:

- Employees who are fired or demoted following a negative performance review will very likely include a defamation claim in their complaints if they are otherwise inclined to sue.

To get to a jury, the employee must persuade the court that the disputed statements involve matters of fact, not opinion.

- Employees who believe the employer has badmouthed them after their termination may bring a defamation claim.

To get to a jury, the employee must persuade the court that the disputed statements involve matters of fact rather than opinion and that the employer's dissemination of the statements constitutes "publication." In cases that proceed to trial, the jury typically decides whether the challenged statements are true and, if they are not, whether the employer is nevertheless protected by a qualified privilege.

FACT OR OPINION

In theory, a defamation claim must be based on false statements of *fact* about the plaintiff, rather than expressions of opinion. Whether a statement is a fact or an opinion is a question of law that the court can resolve based on the pleadings. Thus, an employer can secure an early victory by persuading the court that an allegedly defamatory comment is merely a subjective opinion.

The difference between a fact and an opinion is easy enough to explain. A fact is something that can be proven false, whereas an opinion is something that is relative, depending on the speaker's viewpoint, and cannot be proven false. In practice, however, courts have struggled to differentiate facts from opinions.

In ruling on a dispositive motion, the court will take each statement in turn and decide whether the statement, as a whole, is a fact or an opinion. If a remark that is otherwise an opinion contains one factual assertion, the entire remark can be grist for a defamation claim.

In a recent Virginia case, for example, the plaintiff complained about several statements in her performance evaluation, one of which described her as "frequently verbose and vocal in her opinions, to a degree that others stop participating in open dialogue."

Whether someone is "frequently verbose and vocal" depends on the speaker's viewpoint and arguably is a pure expression of opinion. But the trial court held that the entire remark was actionable because the plaintiff could potentially prove that her behavior did not cause others to stop participating in open dialogue.

In another recent example, a former executive won a \$6 million verdict based on statements by the employer that he had, among other things, "mismanaged the company and cost [it] a tremendous amount of money." See *Gov't Micro Res. v. Jackson*, 624 S.E.2d 63, 67 (Va. 2006) (internal quotation marks omitted).

Although mismanagement might be a matter of opinion, the Virginia Supreme Court held that whether the plaintiff caused a significant loss was provably false, and it upheld the judgment.

JUDICIAL APPROACH TO EMPLOYER STATEMENTS

Courts will generally treat a statement as factual in nature if it at least has factual connotations. For example, the 4th U.S. Circuit Court of Appeals reinstated the defamation claim of an employee whom the employer described as "not a good organizer" following his termination, reasoning that the comment could be understood as implying that the plaintiff failed to perform his job duties. *Murray v. United Food & Commercial Workers Int'l Union*, 289 F.3d 297, 305-06 (4th Cir. 2002) (applying Maryland law).

In many jurisdictions, a statement that an employee was dismissed for performance reasons, although seemingly a statement of opinion, will nonetheless be actionable in a defamation suit. *See, e.g., Samuels v. Tschechtelin*, 763 A.2d 209, 242 (Md. Ct. Spec. App. 2000) (reinstating defamation claim based on statement that employee was fired for “poor performance”); *Keenan v. Computer Assocs. Int’l*, 13 F.3d 1266, 1268, 1272 (8th Cir. 1994) (applying Minnesota law) (upholding \$100,000 jury verdict based on statement that employee was fired for “poor performance”).

In New York, the rule is different. *See Sandler v. Marconi Circuit Tech. Corp.*, 814 F. Supp. 263, 268 (E.D.N.Y. 1993) (applying New York law) (statement that plaintiff and others “screwed up the company and we had to let them go” not actionable) (internal quotation marks omitted).

The blurred distinction between facts and opinions in many jurisdictions requires that employers exercise caution when explaining their reasons for an adverse employment action. Merely prefacing a negative statement with the words “in my opinion” does not insulate the statement from challenge in a defamation suit. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-19 (1990).

Although it is the plaintiff’s burden in a defamation suit to prove that a statement is false, the safest course for employers is to ensure that all critical remarks in a performance evaluation or termination letter can be supported with facts. For instance, if a performance evaluation states that an employee exhibits a negative attitude, the employer should be prepared to cite specific examples.

If the employer holds a manager responsible for the loss of an account or a drop in revenues, it should be prepared to rule out other causes of the problem. Contemporaneous documents attributing the problem to some cause other than the manager will obviously leave the employer in a precarious position in a defamation suit.

PUBLICATION

A defamation plaintiff must prove that the offending statements were disseminated to at least one person other than the plaintiff, in other words, that they were published. This requirement is easy to satisfy if the allegedly defamatory comments are quoted in a newspaper, posted on a website or circulated to a prospective employer that calls for a reference about the plaintiff.

By contrast, it may be impossible to satisfy the publication requirement if the only recipients of the statements were other company personnel. Many states have applied the intra-corporate immunity doctrine in defamation cases. *See Gray v. AT&T Corp.*, 357 F.3d 763, 765-66 (8th Cir. 2004) (recognizing that, under Missouri law, communications between corporate officers or between different offices of the same company do not constitute “publication”); *Thornton v. Holdenville Gen. Hosp.*, 36 P.3d 456, 460 (Okla. Civ. App. 2001) (“Communication inside a corporation between its officers, employees, and agents, is never a publication for the purposes of actions for defamation.”).

Other states, however, have squarely rejected the intra-corporate immunity doctrine in the defamation context. *See Popko v. Cont’l Cas. Co.*, 823 N.E.2d 184, 187 (Ill. App. Ct. 2005) (rejecting defendant’s argument that comment from supervisor to his superior about the plaintiff was merely the corporation “talking to itself”); *Bals v. Verduzco*, 600 N.E.2d 1353, 1356 (Ind. 1992) (circulation of

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performance evaluation among management personnel constitutes publication); *Luttrell v. United Tel. Sys.*, 695 P.2d 1279 (Kan. 1985) (same).

One would think that a performance evaluation or a termination letter has not been published if it is merely given to the employee with a copy retained in her personnel file. Yet a handful of jurisdictions, including Iowa and Minnesota, have recognized an exception to the publication requirement for instances in which the employee is “compelled” to repeat the defamatory remarks to a third party. See *Theisen v. Covenant Med. Ctr.*, 636 N.W.2d 74, 83 (Iowa 2001); *Lewis v. Equitable Life Assurance Soc’y*, 389 N.W.2d 876, 886-88 (Minn. 1986). To invoke this exception, the plaintiff must demonstrate that it was foreseeable to the employer at the time the defamatory statements were made that the plaintiff would be compelled to repeat them to a prospective employer or some other third party.

The trouble with this rule is that all job applicants are asked why they left their previous jobs, and thus every defamed employee can claim that he or she was compelled to answer this question truthfully by repeating the employer’s explanation. For this and other reasons, most courts have rejected the doctrine. See *Cweklinsky v. Mobil Chem. Co.*, 837 A.2d 759 (Conn. 2004) (collecting cases).

QUALIFIED PRIVILEGE

Employers may be able to avoid liability for defamatory statements about an employee by invoking a qualified privilege. The “common interest” privilege applies to statements that the employer makes in good faith to someone else who has a legitimate reason to receive the information. The privilege has direct application in two recurring situations.

First, it may shield purely intra-corporate communications in jurisdictions that do not recognize the intra-corporate immunity doctrine in defamation actions. For instance, a supervisor who transmits a subordinate’s performance evaluation to senior management ordinarily will be able to invoke the privilege. See, e.g., *Mastro v. Potomac Elec. Power Co.*, 447 F.3d 843, 858-59 (D.C. Cir. 2006) (applying District of Columbia law).

Second, the privilege may protect employers that give a negative reference to a prospective employer. See *White v. Blue Cross & Blue Shield*, 809 N.E.2d 1034, 1038 (Mass. 2004).

The privilege is not absolute. It is forfeited if the information is disseminated to people who lack a legitimate interest in the subject matter or if the communication includes gratuitous defamatory remarks that were unnecessary to achieve the purposes of the privilege.

In a recent Texas case, for example, two employees alleged that they were falsely accused of violating a company policy in a report summarizing an internal investigation. The employees overcame the common-interest privilege by demonstrating that the employer discussed the report at six meetings attended by managers and senior executives, many of whom did not need to be aware of the information. See *Hines v. ExxonMobil Corp.*, 2006 WL 1529188 (Tex. Dist. Ct. May 17, 2006).

Likewise, the privilege is forfeited if the employer acts with malice, that is, if the employer knows the statements are false or it lacks a reasonable basis for believing them to be true. Because malice is a question of fact, a plaintiff can generally get to a jury by alleging that the employer made defamatory statements that it knew to be false.

The “common interest” privilege applies to good-faith statements made to someone else who has a legitimate reason to receive the information.

Proof of malice will not only vitiate the privilege but also permit the jury to award punitive damages. In *Government Micro Resources, supra*, for example, an executive alleged that the company he previously worked for defamed him by telling a prospective employer that he had been fired because he caused a \$3 million loss.

At trial, the corporate defendant could not rely on the common-interest privilege because its witnesses conceded that the executive was not responsible for the loss and that it would be false for someone to say as much. 624 S.E.2d at 70-71.

RUNAWAY JURIES

Recent verdicts indicate that defamation can no longer be regarded as a throwaway claim that has been tacked on to a complaint alleging more substantial employment claims. Instead, it is not unusual in a case alleging numerous claims for defamation to be among the handful of claims that actually go to the jury. Verdicts can be substantial because awards are not limited to economic losses, and the jury has wide latitude to fix the amount of compensatory damages.

Furthermore, if the jury is convinced that the offending statements were made in bad faith, it can award punitive damages. The *Jackson* case discussed above raised the high-water mark in Virginia: The jury awarded the former CEO \$5 million in compensatory damages and \$1 million in punitive damages (the latter amount remitted by statute to \$350,000).

Multimillion-dollar awards are not reserved for CEOs and other senior executives. To the contrary, a Kentucky jury returned a substantial verdict in favor of four store clerks who alleged that their former supervisor falsely accused them of eating damaged candy in violation of a store policy. They brought suit for defamation, intentional infliction of emotional distress and illegal eavesdropping. The jury awarded each plaintiff \$2 million in compensatory damages and \$3 million in punitive damages.

On appeal, the Kentucky Supreme Court vacated the award on the ground that the jury had not apportioned the damages to each count, and the court remanded for a new trial solely on the amount of damages. See *Stringer v. Wal-Mart Stores*, 151 S.W.3d 781, 787 (Ky. 2004).

A California jury awarded \$4.5 million to a 27-year-old salesman who alleged that his former employer had defamed him by telling others in the industry that he had fraudulently obtained a number of unearned commissions. On at least one occasion, a company executive referred to the plaintiff as a "crook" and a "thief."

The jury's award represented \$565,600 in lost wages, \$500,000 for reputational injuries and \$3.5 million in punitive damages against the company. The former executive was also named as a defendant, and the jury awarded \$9,000 in punitive damages against him personally. See *Burdette v. Carrier Corp.*, 2005 WL 1309233 (Cal. Super. Ct., Sacramento County Apr. 8, 2005).

AVOIDING LAWSUITS

Employers can take several steps to reduce the risk of an outsized judgment for defamation.

First, it is well known that truth is a complete defense to a defamation claim. Before criticizing some aspect of an employee's performance or conduct, employers must make sure that they have their facts right. The safest course is to have

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records substantiating each negative comment in the event that a particular criticism is challenged down the road.

Before disciplining an employee on the basis of a report from a direct supervisor, managers should make some effort to verify the key facts through an independent inquiry. The level of scrutiny should be commensurate with the seriousness of the charges; a seemingly unfounded accusation of theft has the potential to result in a huge defamation verdict, whereas employees who are dissatisfied with “needs improvement” performance ratings are likely to engender less sympathy with a jury.

It may be wise to speak with the employee directly to determine if she disputes the criticism; if she admits the underlying facts, it will be difficult for her to make out a colorable defamation claim later.

Employers also can reduce their exposure to defamation claims by transmitting negative information about an employee only to those people who actually need to be aware of the information. Again, the common-interest privilege can be forfeited if the jury concludes that defamatory comments have been circulated more broadly than was necessary to carry out the purposes of the privilege.

An employee would be hard-pressed to show that a performance evaluation was excessively published if it was shown only to the employee and a human resources manager tasked with ensuring the consistency of such reviews.

Recent cases suggest that it is never a good idea to tell line employees the reason why a former co-worker was terminated. The better practice is simply to state that the employee no longer works for the company.

Many articles have been written on the dangers of providing negative references to prospective employers, and many employers, fearing defamation suits, have established policies stating that only the dates of employment, title and salary of a former employee may be disclosed to a prospective employer.

By providing only factual data in accordance with such policies, the employer can achieve significant protection against defamation suits by terminated employees who are unable for one reason or another to find new employment.



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