

Speaker Beware -- A Primer on Defamation in the Workplace

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by Tyler Paetkau

“I can’t believe she said that about him!” Lawsuits over negative employment references. Lawsuits by employees terminated for unlawful harassment or discrimination. Supervisors’ indefensible performance reviews. Negative posts on the Web. Human nature being what it is, the law of defamation is always hovering over the workplace. Telecommuting, e-mail, the Web and the virtual workplace have dramatically increased the risk of work-related defamation. Employers should accordingly understand basic defamation law and take steps to prevent defamation from occurring in their workplaces.

What exactly is defamation?

Defamation is a false, unprivileged statement of fact (not “opinion”) “published” (said) to another person. Employees and employers have litigated over the exact meaning of this brief definition for years. Historically, defamation consisted of slander (oral) and libel (written); modern courts and commentators have narrowed the distinction and often refer to both as “defamation.”

Most jurors understand the importance to society of protecting one’s reputation in the community. This understanding may make jurors more sympathetic to the defamed employee than to the one who was merely mistreated. The California Supreme Court -- quoting Shakespeare no less -- has recognized that protection from defamation is a fundamental right:

“Stolen property may be replaced or recovered, but where does one go to restore one’s reputation? In the immortal words of Shakespeare’s Iago: ‘Who steals my purse steals trash; . . . [] ‘Twas mine, ‘tis his, and has been slave to thousands; [] But he that filches from me my good name robs me of that which not enriches him and makes me poor indeed.’”

Bernson v. Browning-Ferris Indus., 7 Cal. 4th 926, 938 (1994) (quoting Shakespeare, *Othello*, Act III, scene 3).

Does the law of defamation apply to performance criticism?

California Civil Code Section 46(3) specifically addresses defamation per se affecting an individual’s occupational reputation:

“Slander is a false and unprivileged publication [orally uttered] . . . which . . . Tends directly to injure him in respect to his office, profession, trade, or business, either by imputing to him general disqualification in those respects which the . . . occupation peculiarly requires, or by

imputing something with reference to his . . . profession, trade, or business that has a natural tendency to lessen its profits [or earnings].”

The significance of defamation per se is that it is actionable without proof of the recipient’s belief in the defamation, and it is actionable without proof of special damages.

Numerous California cases hold that even common criticism of an employee’s performance can constitute defamation per se, including statements that an employee had “reprehensible personal characteristics or behavior;” that a bank loan officer accused of being “terminated because he was not following standard operating procedures . . ., lacked regard for customer’s privacy, and the bank had received a number of customer complaints about him;” that an office manager “fired for not doing things properly, for not following office rules,. . .has taken papers out of [a] private file without right to do so,. . .other brokers have also had trouble with [plaintiff];” that a manager was terminated as a result of internal publications of accusations of “sexual harassment and other improprieties;” that a car dealer was a “son of a bitch;” and that a baseball player was in the “dog house.”

But the defamatory statement is not “published” to a “third party” if it’s kept within the company, right?

Wrong, at least in the state of California. Nationally, courts are split on whether a “publication” may occur when one employee makes an alleged defamatory statement to another employee of the same employer. California follows the growing number of jurisdictions and the Restatement of Torts in allowing defamation claims based on communications between employees of the same employer.

But aren’t internal complaints of unlawful harassment or discrimination absolutely insulated from defamation liability?

You might reasonably think so, but you’d be wrong again. California Civil Code Section 47, subdivision (c) creates a qualified or conditional privilege for legitimate criticism of work performance (the “interested persons” privilege) and for employment references. It is critical to note, however, that “malice” can eliminate this qualified privilege. Even internal complaints of sexual harassment by a coworker are not absolutely protected under California law.

What conduct amounts to malice necessary to eliminate the qualified privilege?

Actual malice can be shown in many ways. An employee may establish it by showing the publication was motivated by anger, hostility, hatred, or ill will toward the employee, or that the publisher lacked reasonable grounds for his or her belief in the truth of the publication, or that it was published in reckless disregard of the defamed employee’s rights. A shoddy internal investigation can show malice and “excessive publication” also can show malice.

But how do I provide an accurate performance review without saying negative things about this employee?

The short answer is to conduct performance reviews with care and precision. Malice may be inferred when “the [internal workplace] investigation was grossly inadequate under the circumstances,” such as (for example) where reliance was placed upon “a source known to be hostile to the subject against whom the material is to be used.” *Fisher v. Larsen*, 138 Cal. App. 3d 627, 640 (1982). Malice can be established by either a failure to investigate thoroughly and verify the facts of the defamatory statements, or where the statements were published with knowledge of “obvious reasons to doubt the

veracity of the informant or the accuracy of his reports.” *Reader’s Digest Ass’n v. Superior Court*, 37 Cal. 3d 244, 257 (1984); see also *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 20 L.Ed.2d 262, 267 (1968). Malice may also be shown through an employer’s “purposeful avoidance of the truth,” or “[i]naction,” i.e., failure to investigate, which “was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [the subject] charges.” *Antonovich v. Superior Court*, 234 Cal. App. 3d 1041, 1048-49 (1991).

Malice may also be shown where the republisher failed to interview obvious witnesses who could have confirmed or disproved the allegations. *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 682, 109 S. Ct. 2678, 2693, 105 L.Ed.2d 562 (1989) (approved in *Antonovich*, 234 Cal. App. 3d at 1048). A refusal to disclose to the plaintiff the sources of the defamatory information obtained in the investigation may establish malice. *Stationers Corp. v. Dun & Bradstreet*, 62 Cal. 2d 412, 420-21 (1965). Similarly, a failure to provide or disclose to the plaintiff exculpatory information found during an investigation has been recognized as evidence of malice. *Parrott v. Bank of Am.*, 97 Cal. App. 2d 14, 25 (1950); see also *Khawar v. Globe Int’l, Inc.*, 19 Cal. 4th 254, 275 (1998). Malice may also be demonstrated by showing “a long-standing grudge, . . . former disputes, . . . or any previous quarrel, rivalry, or ill feeling . . . in short, almost everything the defendant has ever said or done with reference to the plaintiff may be urged as evidence of malice.” *Larrick v. Gilloon*, 176 Cal. App. 2d 408, 416 (1959).

Significantly, the contents and the tenor of the defamatory publication themselves may prove malice. *Larrick*, 176 Cal. App. 2d at 411; *Brewer v. Second Baptist Church*, 32 Cal. 2d 791, 799 (1948). Malice may be inferred from “the manner of the statement,” i.e., if the facts believed to be true are “exaggerated, overdrawn, or colored to the detriment of plaintiff, or are not stated fully and fairly with respect to the plaintiff. The court or jury may properly consider these circumstances as evidence tending to prove actual malice.” *Shumate*, 139 Cal. App. 2d 121, 138 (1956) (emphasis added); *Brewer*, 32 Cal. 2d at 799. Finally, malice can be inferred from the defendants’ “reaffirming that the charges were true.” *Shumate*, 139 Cal. App. 2d at 138. Significantly, innocent motive, mistake or mere repetition of “truthful” defamatory publications are not defenses to defamation. In other words, a court will not care whether the supervisor “really didn’t mean it, made a mistake, simply repeated gossip, rumor or hearsay,” etc. Truth is a complete defense to a defamation claim. “The law infers that a defamatory publication is false. The burden of proving the truth of the article was therefore on defendants.” *Shumate v. Johnson Pub. Co.*, 139 Cal. App. 2d 121, 131 (1956) (emphasis added; citation omitted). To prove the defense of truth, a defendant must prove truth of the underlying defamatory statement and not the truth that others have in fact published that defamatory statement.

What damages are available to a defamed employee?

As one California court observed, “[a]n individual’s right to protect his/her good name has long been recognized. . . . ‘[A] millenium ago a slanderer could lose his tongue.’ While today the consequences suffered by the defamer are not so drastic, there is no question that society continues to have . . . a pervasive and strong interest in preventing and redressing attacks upon reputation.” *McNair v. Worldwide Church of God*, 197 Cal. App. 3d 363, 374-75 (1987). Not surprisingly, emotional distress damages are recoverable for defamation: “Plaintiff testified that as a result of defendant’s statements he suffered ‘mental’ upset and from lack of sleep, and from that time on has continued to have ‘a feeling of general ill-being and just mental strain and emotionalism.’ He also testified: ‘I felt very ashamed. I felt humiliated. I do to this day.’ This being a case of slander, which is libelous per se (charging the crime of theft), general damages are presumed as a matter of law.

In addition, plaintiff is entitled to damages for injury to his feelings, including mental worry, distress, grief, and mortification.” *Douglas v. Janis*, 43 Cal. App. 3d 931, 940 (1974). In addition, an employee can claim wage loss, medical expenses and seek punitive damages against both the employer and individual employees responsible for the defamation.

What preventative steps can and should employers take?

There are a number of steps employers can take to avoid defamation claims. For example, employers should educate all employees on the danger of defamation, and train managers and supervisors on the art of conducting effective performance reviews. Employers also should ensure that those conducting workplace investigations are fair, thorough and careful about what they say or reduce to writing about the accused employee. Investigators should, for example, follow up on leads, interview all witnesses and evaluate the credibility of those interviewed.

Employers should consider adopting a conservative policy governing requests for references concerning former employees. Employers should bear in mind that they do not have a duty to say anything about former employees. The more an employer says, the greater the risk of a defamation claim. Employers should also centralize the reference process, and train all employees that nothing they say is “off the record.” Finally, employers should consider adopting written policies governing issues such as performance reviews, workplace investigations and employment reference inquiries, and include them in the employee handbook.

More information

- Tyler Paetkau (tpaetkau@mdbe.com; 650/849-4810).

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