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EMPLOYMENT & IMMIGRATION LAW

Interoffice Communication Can Lead to Employee Defamation

Termination proceedings can bring claims of false statements

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Defamation may not automatically come to mind when we think of employment litigation. However, claims for defamation and wrongful termination may go hand in hand more often than not.

Defamation is comprised of the torts of libel (written defamation) and slander (oral defamation). Although it has ancient roots—see Rodney A. Smolla's Law of Defamation § 1:2 (noting that "centuries ago the remedy for defamation was to cut out the offender's tongue")—the tort of defamation is very much alive today (minus the tongue extractions), including in the workplace.

In basic terms, defamation is the publication of false statements that tend to harm the reputation of another or lower him in the estimation of the community. Defamation can be either per se or per quod. When defamation is per se, injury to the plaintiff's reputation is presumed, and the plaintiff is not required to provide evidence of actual damages. Whether a communication is per se defamatory is a determination for the court.

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Statements that injure employees in their profession or calling or that charge employees with improper conduct, lack of skill or a lack of integrity in the performance of their duties have been found to be per se defamatory. See *Gaudio v. Griffin Health Services*, 249 Conn. 523, 543-44 (1999). For example, courts have found per se defamation where the plaintiff was accused by his employer of falsifying company documents (specifically, an expense form), see *Torosyan v. Boehringer Ingelheim Pharmaceutical*, 234 Conn. 1 (1995); displaying bad judgment and failing to follow established procedures, *Gaudio,* 249 Conn. 523; theft, *Gambardella v. Apple Health Care*, 291 Conn. 620 (2009); and misappropriating funds, *Miles v. Perry,* 11 Conn. App. 584 (1987).

Contrary to popular belief, defamatory statements need not be widely broadcast to be actionable. In the employment context, the requirement of publication is met pursuant to the doctrine of intracorporate communication when a false statement about an employee is communicated among the employee's supervisors or coworkers and is included in the employee's personnel file. Although employers do enjoy a privilege in communications related to employment decisions, this privilege is conditional or qualified and is lost where the employer or its agents have abused it by broadcasting defamatory remarks with malice, improper motive or bad faith.

The rationale for the privilege, namely that open and honest communications between managers and employees regarding an employee's job performance are necessary for intelligent employment decisions and

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will foster a happier more efficient working environment, is inapplicable when the communications are false and made by the employer or its agents with malicious intent.

It is important to note that the malice necessary to defeat the privilege is not restricted to hatred, spite or ill will, but also includes any improper or unjustifiable motive. In fact, the privilege may be defeated by a showing of either actual malice, i.e., publication of a false statement with actual knowledge of its falsity or reckless disregard for its truth, or malice in fact, i.e., publication of a false statement with bad faith or improper motive. *Gambardella,* 291 Conn. at 630.

Moreover and more important for our purposes today, courts have held that improper motive is established where the employer publishes a false statement in order to effectuate an employee's termination.

Termination Notice

For example, in *Weber v. FujiFilm Medical Systems U.S.A.*, 854 F. Supp. 2d 219 (D. Conn. 2012), the plaintiff brought claims against his former employer for age and national origin discrimination under state and federal law, and for defamation based on the defendant's publication of a termination notice stating that he had been terminated for cause.

The employer moved for summary judgment on the defamation charge, arguing that any statements charging for-cause termination were protected by the intracorporate communication privilege. The court denied the defendant's motion, holding that there was sufficient evidence of malice to defeat the privilege. In doing so, it stated: "There is evidence in the record that [the plaintiff] was not, in fact, fired for cause, but as part of a pattern of discriminatory animus. Evidence of this animus precludes summary judgment on [the plaintiff's] defamation claim because it may demonstrate 'improper or unjustifiable motive' in connection with his termination and the subsequent publication that he had been fired for cause."

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As noted above, whether an employer has abused its privilege in a particular case is a question of fact for the jury. In determining the amount of damages, the jury may consider the damage to the plaintiff's reputation as well as any emotional distress, embarrassment, anxiety and humiliation experienced by the plaintiff as a result of the defamation. And not only can the employer be held liable, but the supervisor or agent responsible for the communication can be held liable as well. See *Torosyan*, 234 Conn. at 27-28.

Further, when the plaintiff proves actual malice, that is that the defendant acted with knowledge of the statement's falsity or a reckless disregard for its truth, punitive damages are available. See *Gambardella*, 291 Conn. at 628. Whether an employer has acted with actual malice, as opposed to malice in fact, is also a question of fact for the jury.

As the Supreme Court pointed out, in considering the issue, the jury "is not required merely to accept a defendant's self-serving assertion that he published a defamatory statement without knowing that it was false." The court also stated: "It is axiomatic that a defendant who closes his eyes to the facts before him cannot insulate himself from a defamation charge merely by claiming that he believed his unlikely statement." Instead, the court found that reckless disregard for the truth may be found where the evidence demonstrates that the defendant entertained serious doubts as to the truth of a statement, or failed to investigate or retract a statement after the plaintiff notified the employer that the statement was false. In sum, employees have a right to their reputation. This means that, even in the context of at-will employment, employers have an obligation to fully and fairly investigate charges of employee misconduct before basing adverse employment actions on claims of impropriety. When an employer fails to do so, and questions exist as to the veracity of the charge, the employer may end up facing a claim of defamation. This is especially true when the alleged employee misconduct is of a dubious nature or is used to conceal the employer's own improper motive. ■