

CONDUCT UNBECOMING: HOW TO AVOID "DEFAMATORY CONDUCT"

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You just completed a comprehensive investigation of employee theft of company funds, including interviews with several of the accused thief's coworkers, determined that he committed the crime, locked him out of his office, terminated his employment and had him escorted off the premises by security. You just saved the company from a thief, right? Probably, but you also may have exposed the company to a large damage award in a defamation by conduct lawsuit filed by the terminated employee.

Investigating, disciplining, suspending, and terminating employees are part of the daily activities of HR Professionals. To accomplish these tasks without severe repercussions to the company in the

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form of litigation, HR Professionals should prepare themselves for the ever-increasing legislative and judicial oversight of the workplace, which includes training the company's managers and supervisors. One of the thorniest issues facing HR professionals in today's complex workplace is defamation: defamation in the actual process of terminating an employee, defamation in the rendering of negative references, defamation when disciplining employees, or defamation in the investigation of employees.¹

For most HR professionals, learning how to avoid making defamatory statements and training the company's managers and supervisors have been critical components of his or her job. While defamation typically takes the form of oral or written statements, in the last few years, an increasingly common cause of action brought by terminated employees against their former employers is defamation based upon the employer's conduct. In particular, HR professionals and those who typically are responsible for investigating problems in the workplace should also

be aware of the potential for the company's conduct toward the suspected employee to form the basis of a claim of defamation by conduct.² A recent trend amongst state courts has been to find that mere conduct alone, even absent defamatory oral or written statements, could support a claim of defamation.

I. WHAT IS DEFAMATION?

In general, defamation is a cause of action that attempts to compensate a plaintiff, i.e., disciplined or terminated employee, from injurious statements to his or her reputation. Generally, a disciplined or terminated employee must show he following in order to prove that his or her employer defamed him or her: "(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publi-

ation."³ This means that to establish a claim for defamation, a former or disciplined employee must demonstrate that the employer communicated a statement about the employee to a third person (publication)⁴ that could be damaging to the employee's reputation.

In order to prevail in his or her defamation suit, the employee must prove that the communication is capable of a defamatory meaning and that the communication was understood in this defamatory sense by the recipient.⁵ In order for a communication to have a defamatory meaning, the employee must show that the communication impugned the employee's reputation. To understand what types of conduct result in actionable and defamatory conduct, it is essential to understand that "communication" has been used to "denote the fact that one person has brought an idea to the perception of another."⁶ Additionally, communication can be understood as "written, spoken, or otherwise" as long as the recipient understands what it is trying to convey.⁷ In order to establish the defamatory meaning required to prove defamation, courts typically require that the plaintiff show that a third person (possibly a coworker) understood the significance of the conduct as defamatory, i.e., injurious to the employee's reputation.⁸

If the employees can show the above elements, then the employer can still prevail in the case if it can demonstrate the truth of the statement (which is a defense to defamation so long as the true statement is not misleading), or show that it obtained the employee's consent (which typically involves defamatory references),⁹ or

establish that it was privileged in making the statement, i.e., that it made the statement for a legitimate business reason to a person or persons with a legitimate business reason for receiving such statement.¹⁰

II. WHAT TYPES OF COMMUNICATIONS RESULT IN ACTIONABLE CONDUCT?

Any conduct that could impute incompetence, stupidity, unworthiness of continued employment, or dishonesty to the employee might be considered defamatory.¹¹ Reviewing recent cases in several state courts indicates that defamatory conduct may include the way in which an employee is terminated during an on-going investigation¹² or the way in which an employee is escorted around a building during an investigation.¹³ Courts also have found that when an employee was given a polygraph test and then discharged, the employer's conduct gave other employees the belief that the discharged employee had engaged in wrongful activity.¹⁵ Other cases addressing whether an employer's conduct could constitute defamation include the following: searching or packing up an employee's office,¹⁵ deactivation of a key card,¹⁶ interrogations or drug tests witnessed by other employees, and demotions or terminations.¹⁷ Although each case dealing with defamation by conduct is fact-specific, the purpose of this article is to alert HR professionals to certain actions that could lead to possible defamation by conduct suits if coworkers observe the employer's actions and conclude from these actions that the disciplined or terminated employee had done something disgraceful or wrongful.

The following lessons derived from the reported cases may help HR professionals minimize the possibility of an employee bringing a successful defamation by conduct suit.¹⁸ In addition to understanding the lessons that follow, one of the first steps that HR professionals should take is to determine whether their state courts recognize defamation by conduct. While some states including Massachusetts, Maryland, Pennsylvania, and Wisconsin have shown a willingness to adapt their states' defamation law to non-verbal conduct, many other states, including New Jersey and Minnesota, have explicitly rejected a cause of action based upon defamatory conduct. Moreover, HR professionals should be aware that some states that have previously avoided deciding whether to recognize a specific cause of action for defamatory conduct are now addressing the issue.¹⁹

III. LESSONS FOR HR PROFESSIONALS

Lesson One: HR Professionals should always plan and prepare before taking any action concerning investigations, suspensions, discipline, and terminations. Although it seems obvious, rash and hurried decisions could result in conduct that might be regarded as defamatory. For example, having security remove an employee from the shop floor and escort him or her out of the building while an investigation is pending or telling witnesses in an investigation that the company believes an employee has been stealing from the company before it establishes that this theft occurred might be understood by coworkers as a statement that the employee participated in a wrongful action. Such conduct by an employer coupled with cowork-

ers' perceptions of the conduct as communicating wrongful action by the employee could result in a finding that the employer engaged in defamation by conduct.

Lesson Two: Depending on whether the HR professional is dealing with an investigation, discharge, or both, the HR professional should analyze when and if the employee's access to buildings and computer systems should be terminated. When dealing with investigations or discharges, HR professionals should generally not deactivate the employee's access to the buildings or the computer systems before meeting with the employee to discuss the situation unless there is concern that confidential business information will be compromised. The reason for waiting to end the employee's access to buildings and computers systems until during or immediately after meeting with the employee is due to the possibility of an employee being locked out of a building or a computer system and his or her coworkers observing the employee's inability to enter or gain access. If the coworkers observe this action and view it as defamatory, then the locking out or deactivation could be actionable. One approach to this tricky timing issue is to instruct the security and intellectual technology (IT) departments to deactivate these means of access at a specific time when the employee in question will be meeting with the HR professional. Then, if the employee requests to download certain personal files from the computer, have the computer moved to a private area and instruct the IT employee to download the files for the employee in his or her presence.

Lesson Three: Try not to conduct the disciplinary or termination meetings or searches employees' offices in locations where coworkers could view the conduct, which includes keeping doors open when searching an employee's office. Instead, limit the number of coworkers who can observe the company's conduct and interpret that conduct as communicating a defamatory statement. HR professionals can achieve this goal by finding a private room outside of the earshot and sight of coworkers when discussing the disciplinary action or termination or inspecting the employee's office with the door shut.

Embedded in this issue of location is the element of publication. Publication occurs when the company or a representative of the company communicates to a third person, i.e., at least one coworker, a statement about the employee that could be harmful to the employee's reputation, which in an increasing number of jurisdictions includes communication through conduct. To limit publication and exposure to defamation by conduct, discussions concerning discipline or termination, interrogations, polygraph tests, and searches should be conducted in private areas. Being discrete and respectful when conducting discipline, termination, demotions, interrogations, investigations, and searches can diminish the possibility of successful defamation by conduct causes of action.

Lesson Four: HR professionals should train the company's supervisors and managers how and why to avoid grabbing, chasing, or restraining employees; especially in front of his or her fellow co-

workers, unless such conduct is unavoidable. Moreover, HR professionals should instruct supervisors and managers that if a physical confrontation is likely, alert security, but with discretion; do not attempt to handle those situations themselves.²⁰ Part of the training should include how to avoid any extreme conduct that conveys a clear and unambiguous message that the employee engaged in criminal wrongdoing. By avoiding specific and obvious conduct that demonstrates that the employee may have engaged in criminal wrongdoing and any chasing, grabbing, or restraining, the employer avoids exhibiting conduct that tends to create a belief in coworkers that the employee was doing something illegal or wrongful, which in turn decreases the chances of a court finding the conduct defamatory.

Lesson Five: HR Professionals should consider whether certain communications are protected by an employer's legitimate business interest, the so-called "conditional privilege." In general, the alleged defamatory conduct may be protected by an employer's conditional privilege to publish defamatory material if the publication was reasonably necessary to the protection of a legitimate business interest, so long as that privilege is not abused.²¹ That is, an employer may lose the conditional privilege based on a legitimate business interest if the employer recklessly over-publishes the information by exhibiting the defamatory conduct to an excessive number of coworkers or if the context of the conduct is such that it destroys the privilege entirely, i.e., a showing of actual malice toward the employee.

IV. RESULT OF DEFAMATORY CONDUCT: DAMAGES

Defamatory conduct could open the company up to damages for defamatory communication for harm caused to the reputation of the person defamed.²² In general, damages for defamatory actions are imposed for the purpose of compensating the employee for the harm that the publication caused to his or her reputation.²³ If the defamatory conduct imputes a serious crime or discredits a person in his or her trade or profession, the plaintiff may receive damages for lost earnings and emotional distress. Also, if the employer's conduct was particularly egregious, then, depending on the jurisdiction, the plaintiff may receive punitive damages.²⁴

The result of defamatory conduct by HR professionals or other representatives of a company could lead to substantial monetary repercussions for the company as well as a decreased reputation and standing amongst other employees. HR professionals must realize that their conduct reflects upon the well-being of the company and should, therefore, attempt to act accordingly. The company's general training for managers and supervisors should include a component addressing defamation of all types: what it is, how to avoid it, and its consequences.

V. CONCLUSION

In some states, defamation is no longer merely oral or written statements, but now includes conduct. A recent trend in state courts has been to find that mere conduct alone could support a claim of defamation: an employer may be held liable for defamatory "statements" either orally (slander) or through written words (libel) or conduct.

In general, an HR professional who considers timing, preparation and planning, location, and discretion before acting will be better equipped to help the company avoid conduct that could be considered defamatory. Moreover, if the company's general training for managers and supervisors addresses all kinds of defamation, verbal, written, and non-verbal, then the company will be better protected from the risk of defamation by conduct suits.



NOTES

1. There are many forms of defamation, which include both libel (written) and slander (verbal). This list is merely illustrative and not exhaustive.
2. Another layer embedded in this thorny issue lies in the increasing legislative requirements that mandate a company to detect, monitor, and remedy any theft, fraud, or financial irregularities. HR professionals frequently find themselves conducting investigations to identify and remedy such issues. While conducting an investigation it may be necessary for the HR professional to address the necessity of isolating certain individuals suspected in any possible theft, fraud, or financial irregularities from having access to important files and certain individuals. See Arthur P. Murphy and Quinn H. Vandenberg, "How to Conduct a Fraud Investigation," HR Advisor, September/October 2003.
3. Restatement (Second) of Torts, §577 (1977).
4. For a more detailed discussion of publication, refer to Section III, Lesson 3.
5. See, Restatement (Second) of Torts § 613 comment c (1977).
6. See, Restatement (Second) of Torts § 559 comment a (1977).
7. See, Restatement (Second) of Torts § 563 comment a (1977).
8. See, Restatement (Second) of Torts § 613 comment c and d (1977).
9. Consent typically involves defamatory references. Although defamatory references is outside the scope of this article, it is important to note that obtaining an employee's written consent at the beginning of his or her employment with a company to release information to future employers is vital to defend against defamatory reference claims.
10. Courts have recognized a limited number of such privileges including absolute and conditional (qualified) privileges. For the purposes of this article, we will focus upon a conditional privilege that deals with legitimate business purposes. This privilege is given to employers who can show a legitimate business purpose for communicating a defamatory statement about an employee to a third party, which is discussed in Section III.
11. HR professionals should review their respective state's case law to determine whether or not their specific state allows a defamatory conduct cause of action.
12. *Paul v. Lanckenau Hosp.*, 543 A.2d 1148, 1158 (Pa. Super. Ct. 1988) rev'd on grounds not pertaining to the actual defamatory conduct, 569 A.2d 346, 349 (Pa. 1990)
13. See *Phelan v. May Department Stores*, 443 Mass. 52 (2004) (holding that Massachusetts had a cause of action for defamatory conduct, but that the employee failed to present testimony from at least one co-worker who observed and interpreted the [security officer's]actions as defamatory).
14. *Tyler v. Macks Stores of S.C., Inc.*, 272 S.E.2d 633, 634 (S.C. 1980). HR professionals should note that some states prohibit employers from administering polygraph tests in connection with employment.
15. *Coleman v. Am. Broad. Co., Inc.*, No. 84-1594, 1985 WL 365 (D.D.C. June 18, 1985).
16. *Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 878 (D.C. 1998)
17. See generally, Dave Klut, "Beyond Words: The Potential Expansion of Defamation", 83 B.U.L. Rev. 619 (2003).
18. See, Section IV for a discussion concerning damages.
19. For instance, in Massachusetts, the Supreme Judicial Court, Massachusetts' highest state court, decided *Phelan v. May Department Stores Company & Others* in December of 2004. In this case, a former employee brought suit against his former employer for being escorted around the workplace by a security guard during an investigation into alleged accounting irregularities. 443 Mass. 52 (2004). While the court found that defamation by conduct was a valid cause of action in Massachusetts, the court held for the employer because the former employee's belief that his coworkers viewed him in a defamatory light was insufficient to establish defamatory publication without evidence that his coworkers viewed him in a defamatory light. *Id.*
20. Such conduct can give rise not only to a defamation by conduct claim, but also civil and criminal assault and battery claims, among others.
21. In general, "[t]he existence of a privilege, whether consensual or irrespective of the other's consent, prevents an act or omission which otherwise would be tortious from so being and, therefore, protects the actor from liability to which he would otherwise

<p>be subject." Restatement (Second) of Torts §10 comment a (1965).</p> <p>22. Restatement (Second) of Torts §621 (1977).</p> <p>23. Restatement (Second) of Torts §621 comment a (1977).</p> <p>24. There has been uncertainty about the constitutionality of punitive damages in defamation actions, but in <i>Dun & Bradstreet, Inc.</i></p>	<p><i>v. Greenmoss Builders, Inc.</i>, 472 U.S. 749 (1985), the Supreme Court held that in cases where a private citizen is suing for defamation not involving matters of public concern, an award for punitive damages does not violate the First Amendment. It is important to note that the allowance of punitive damages is state specific. Compare, <i>Stone v. Essex County Newspapers, Inc.</i>, 330</p>	<p>N.E.2d 161 (Mass. 1975) (disallowing any punitive damages in defamation suits whether the suits are based on negligence or reckless or willful conduct) with <i>Davis v. Schuchat</i>, 510 F.2d 731 (D.C. Cir. 1975) (upholding punitive damages upon a finding of malice as long as the award "does not exceed limits of propriety").</p>
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