

Defamation in Discrimination Cases

by Darren Feider

In *Valdez-Zontek v. Eastmont School District*, 154 Wn. App. 147 (2010), a Washington appellate court affirmed a former special program director's defamation claim against her ex-employer, the local school district. In *Valdez-Zontek*, some in the school district believed that the special program director had submitted false time sheets and that those time sheets were approved by the superintendent because they were having a sexual affair. These affair and time sheet allegations were discussed at school board meetings and rumors of the affair circulated throughout the school district and local community. There were board discussions that the superintendent would be forced to resign because of the affair. The school district determined that the time sheet incident was a misuse of public funds and, without asking for any explanation, referred the matter to the Washington State Auditor's office. The auditor found no misuse of public funds based on the school district's past practices of allowing the time sheets to be filled out after the work had been completed. The superintendent denied that there was any sexual affair. No one asked the special programs director if there had been an affair, but she denied its existence at trial. The school board took no action to stop the rumors from circulating throughout the community.

The special program director quit and sued the school district asserting race and gender discrimination and harassment along with several common law torts such as defamation. The jury found in favor of the plaintiff on all claims, and on the defamation claim awarded \$35,000 in economic damages, \$75,000 in non-economic damages (emotional distress damages) and \$75,000 in presumed damages. The school district appealed only the defamation award.

Defamation is where a person wrongly makes a false statement that is unprivileged and results in damages. In *Valdez-Zontek*, the school district conceded that there was no evidence the special programs director had an affair with the superintendent – *i.e.*, false statement, but it defended on the basis that it was not at fault. If the special programs director was a private individual, the school district would be at fault if it acted negligently – *i.e.*, it failed to investigate the rumor before publishing it. The school district conceded that it had not investigated the rumor, but countered that the special programs director was a public figure or official so it could only be at fault if its statement were made with actual malice – *i.e.*, it knew that the affair rumor was false or recklessly disregarded *whether or not it was true*. The school district did not know it was false and had, in fact, assumed it was truth. That is why the school board kept discussing it. The law provides less protection to public figures because of their involvement in public issues or assumption of greater risk of public scrutiny. The actual malice standard applies to any aspect of a public official's life reflecting upon his or her fitness for the position. The *Valdez-Zontek* court rejected the public figure fault standard, holding that the special program director's conduct did not involve a public issue. If she had been accused of falsifying her time sheets and unlawfully receiving public money, then the actual malice standard might have applied. Her defamation claim, however, related to the alleged sexual affair, not to the time sheet fiasco.

Next, on appeal, the school district claimed that the board discussions were mere expressions of opinion. Although expressions of opinion can be protected by the First

Amendment, with public employers like the school district, purely false statements made in the form of an opinion are actionable. A speaker cannot dodge liability in publishing a false statement by using the phrase “it’s my opinion.” The *Valdez-Zontek* court noted that, even after the superintendent had denied having an affair, the school board continued to discuss it and his proposed resignation at board meetings. Most who heard their discussions assumed there had been an actual relationship between the superintendent and the special programs director. Nor did the school board’s use of the words “inappropriate relationship” sanitize their discussion.

Even if it had committed defamation, the school district asserted that there was a “common interest privilege,” which permitted it to discuss the alleged affair at the board level. A common interest privilege allows members of organizations, partnerships or associations to discuss matters of a common interest. The school district claimed that it had a common interest to discuss the alleged sexual affair. The *Valdez-Zontek* court agreed that had the school district discussed only the relationship as it related to a perceived conflict of interest with the time sheets or a misuse of public funds, it may have had a common interest defense. However, the school district abused any common interest privilege when it continued to discuss or speculate about the alleged affair after the superintendent had denied its existence and there was no other independent evidence of the affair. The school district took no steps to squelch the rumor mill. The *Valdez-Zontek* court found the school district had discussed the alleged affair with a high degree of awareness that the assertion there had been an affair was probably false. There was no common interest defense.

On appeal, the school district’s then fought the damage award. The jury had awarded the special programs director (1) her lost wages after quitting, (2) emotional distress damages, and (3) *per se* damages, which are damages that are presumed to exist if a false, defamatory statement injures the plaintiff in her profession or capacity to earn. With *per se* damages, the special programs director did not need to prove any actual damages caused by the alleged affair rumor. It was enough that the statement had been made. The *Valdez-Zontek* court rejected the school district’s concern and affirmed the award of all three forms of defamation damages along with prejudgment interest. The court also awarded the plaintiff additional monies to alleviate the adverse tax consequences of her attorney fees and litigation expenses recovered. The total attorney fee and cost award was in excess of \$210,000 along with \$10,000 in tax consequences.

The take away from *Valdez-Zontek* is that management should take concrete steps to confidentially investigate workplace rumors and not contribute to the rumor mill. When a manager is accused of having an affair with a subordinate that may impair his or her judgment, that accusation should be promptly and confidentially investigated and not accepted at face value. Not all rumors are accurate, and there should be no widespread workplace discussion. The other take away is that good workplace investigations can help defeat defamation claims. After being concerned about the special program director’s time-keeping practices, the school district assumed that she must have been having an affair with her supervisor. When confronted, the supervisor denied it. Nonetheless, the school district board continued to discuss the alleged affair at meetings without further action. Their inaction and continued discussion inexorably lead to litigation. Any common interest

privilege was lost when the school district did not take steps to stop the spread of the rumor. The jury was outraged that the school district would publish rumors of a sexual affair. All employers have a legitimate reasons to investigate misuse of funds, falsifying records or even affairs between a supervisor and subordinate. They must actually investigate, consider the evidence, and make a conclusion.