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# 3 Key Points About Mass. Employee Defamation Claims

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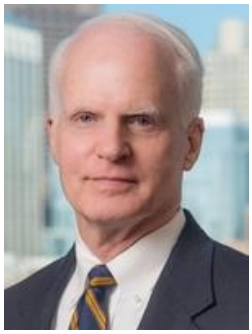
September 21, 2017, 10:42 AM EDT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Defamation law is complex and its nuances legion for many reasons, including the fact that a defamatory communication can be oral, written, a gesture or expression, or an idea conveyed by behavior.[1] And an employer's communication about an employee that is not defamatory nevertheless can create employer liability.[2] Still, Massachusetts employers are likely to find useful a short, relatively straightforward, unpublished opinion that the Massachusetts Appeals Court issued on June 15, 2017, because it explains the "conditional privilege" that can serve to protect employers from employees' defamation claims.

The recent case was Lopez v. Massachusetts General Hospital.[3] The plaintiff was a hospital worker who had been fired after allegedly passing a counterfeit bill in the hospital cafeteria. During the hospital's investigation of the incident, the plaintiff not only denied passing a counterfeit bill but also argued that, even if one of the bills she used did turn out to be counterfeit, she had no knowledge of its counterfeit nature. Instead, according to her explanation, she was merely spending in good faith some of the bills that hospital patients recently had given her in conjunction with their Christmas cards.

The hospital did not accept that story. Part of the reason was that, during the investigation, the plaintiff declined to disclose the names of the patients who allegedly had given her what she thought was valid currency. Instead, the plaintiff initially contended that she could not disclose the names because that would violate the patients' privacy rights, and she later asserted that disclosure of the names was impossible because she no longer could remember them. Thus, after conducting its investigation, the hospital fired the plaintiff, thus terminating her at-will employment.

The plaintiff responded by suing in Superior Court, claiming wrongful termination and defamation. According to the plaintiff, her termination was unlawful because it sufficiently violated public policy that it constituted an exception to the at-will employment doctrine. Further, according to the plaintiff's second theory, the hospital (and its cafeteria supervisor) had defamed her by telling other employees about the investigation of the counterfeit money and her firing.

The Superior Court granted summary judgment for the defense on both claims. The plaintiff then appealed, arguing, among other things, that the Superior Court wrongfully had disregarded material

facts that were in dispute.

But the Appeals Court agreed with the Superior Court, and thus found the appeal unpersuasive. And in the course of affirming the lower court ruling in favor of the hospital and its supervisor, the Appeals Court emphasized three key points about defamation claims brought by employees. They were as follows.

***1. An employee generally cannot prevail on a defamation claim against his or her employer without establishing three elements, one of which is the falsity of the allegedly defamatory communication.***

According to the Appeals Court, neither the hospital nor the supervisor in Lopez could be liable for defamation simply because they told other employees that the plaintiff had been involved in an investigation or was on investigatory leave "for some wrongdoing" having "something to do with counterfeit money." Nor could there be defamation liability for telling other employees that the plaintiff had been terminated for misconduct. That is because each of those communications was true.

As the Appeals Court explained, the three elements of a defamation claim are that (a) the defendant wrongfully published a false statement about the plaintiff, (b) the statement was capable of damaging the plaintiff's reputation in the community, and (c) the statement caused economic loss or was one that is actionable without proof of economic loss.[4]

Thus, as the court also explained, "truth" can be a defense to an employee's defamation claim, and as long as the employer's communication about the employee is substantially true, a minor inaccuracy will not support a claim of defamation.[5] As a result, the plaintiff in Lopez could not recover for that reason alone.

***2. Even when an employer makes a defamatory statement about an employee, a conditional privilege may apply to protect the employer.***

Implicit in Lopez's discussion of a conditional privilege is that there is no absolute privilege allowing employers to make defamatory statements about employees. But, as the Appeals Court noted, it was undisputed in Lopez that an employer has a conditional privilege to disclose defamatory information about an employee whenever the disclosure is reasonably necessary to serve a legitimate interest of the employer.

Moreover, one of the employer's legitimate interests is ensuring the fitness of an employee to perform his or her job. Accordingly, a second reason why the plaintiff in Lopez could not recover for defamation was that the hospital was conditionally privileged to speak about the terminated worker's misconduct in circumstances where disclosure was reasonably necessary to a legitimate interest of the hospital.

Such an interest, the court said, included telling supervisors about the discharged employee's misconduct. It also included providing related information to the individuals who were involved in scheduling the discharged employee's grievance hearing. And it also included making reports to the police about evidence of the employee's suspected crime.

***3. But an employer's recklessness, knowledge of falsity, or actual malice can result in loss of the conditional privilege.***

Perhaps the key takeaway from Lopez is this: The conditional privilege will not protect an employer from

defamation liability in any of three circumstances. There will be no protection if the employer (a) recklessly makes a defamatory statement that is an "unnecessary, unreasonable, or excessive publication"; (b) makes a defamatory statement with knowledge of its falsity or with reckless disregard of the truth; or (c) makes a defamatory statement with actual malice.

Further, according to the court, "actual malice" can be found when the defamatory words are "spoken out of some base ulterior motive," which may include the intent to injure another, the intent to use the privilege as a pretense, or a reckless disregard of the rights of another. Likewise, the requisite "recklessness" can be found whenever an employee shows with sufficient evidence that the employer in fact entertained serious doubt about the truth of its communication.

There was, however, no proof in Lopez of the employer's unreasonable or excessive publication, recklessness, knowledge of falsity, or actual malice. And thus for those reasons, as well, the Appeals Court affirmed summary judgment in favor of the defense.

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[1] See, e.g., Phelan v. May Department Stores Co., 432 Mass. 52 (2004).

[2] See, e.g., Soni v. Wespiser, 239 F.Supp.3d 373 (D. Mass. 2017) (negative, post-employment job reference can constitute unlawful discrimination and retaliation under Title VII and Massachusetts Fair Employment Practices Act, as well as tortious interference with contractual relationships); Equal Employment Opportunity Commission v. Zimmerman, No. 15-cv-1416, 2017 WL 3613022, at *14-15 (D. Conn. Aug. 22, 2017) (identifying employee by name and disclosing he filed charge of discrimination can be unlawful retaliation and interference with rights in violation of Americans with Disabilities Act).

[3] 2017 WL 2562429, decided June 14, 2017.

[4] Statements are actionable without economic loss if they constitute libel, charge the plaintiff with a crime, assert that the plaintiff has certain diseases, or prejudice the plaintiff's profession or business. Ravnikar v. Bobojavlensky, 438 Mass. 627, 630 (2003).

[5] The Lopez court did not mention that, under Massachusetts law, there is a narrow exception to basing a defamation defense on "truth." The truth or falsity of a written statement is immaterial, and a libel action may proceed, if the plaintiff can show that the defendant acted with "actual malice" in publishing the statement. See Noonan v. Staples, 556 F.3d 20, 26-30 (1st Cir. 2009); M.G.L. c. 231, § 92 ("The defendant in an action for writing or for publishing a libel may introduce in evidence the truth of the matter contained in the publication charged as libelous; and the truth shall be a justification unless actual malice is proved."). 