An Employer's Guide to Workplace Defamation: the Gift that Keeps on Giving

by Charles A. Horowitz

In today's economic climate, the stigma to an employee terminated for workplace misconduct can make an already challenging job environment next to impossible. What employer, facing a desk piled high with applications from qualified job seekers, would hire an applicant fired from a previous job based on the former employer's mistaken belief that he or she had stolen from the cash register? Recognizing the injustice of this scenario, Minnesota courts allow wrongfully accused employees the right to sue former employers for damages in defamation. Although this right is limited by statute, it is important for any employer in Minnesota to know and understand the law of workplace defamation. This article is meant to provide employers a concise overview of the law to protect against costly and contentious defamation suits.

Defamation 101

Defamation under the common law allows a person to recover in court damages from one who makes or disseminates untruthful written or spoken statements of fact. Statements of **opinion**, no matter how reprehensible, do not fall under the protections of defamation law (although they may potentially fall under other tort theories, such as intentional infliction of emotional distress). Defamation requires the additional element of "publication." That is, the false statement needs to be disseminated to a "third party," meaning someone other than the defamer and the defamation victim. To prevail on a defamation claim, it is usually necessary to prove damages or injury resulting from the false statement. Exceptions to this requirement, known as defamation "per se," include false statements relating to a person's business, trade or profession. Examples might include:

- "Half of Dr. X's patient's develop complications after surgery;"
- "Restaurant Y uses beef from downer cows in its burgers;"
- "Employee Z came to work intoxicated."

For such claims, damages are presumed and need not be proven. Under the common law, there was no need to prove intent on the part of the defamer; negligence was enough. In the 1960s and 1970s, the United States Supreme Court held that speech critical of persons of certain status, namely public officials and figures, to be constitutionally protected under the First Amendment, unless made with "actual malice, " meaning "ill-will and improper motive or wishing wantonly and without cause to injure the plaintiff." *Stuempges v. Parke, Davis & Co.* (As explained below, Minnesota by statute applies a similar standard to employers, if certain conditions are met.) Finally, it bears noting that truth is a complete defense to a defamation claim. However, an employer that needs to prove to a jury the truth of an allegedly defamatory statement has already lost, in that the employer will have spent potentially tens of thousands of dollars in legal fees to defeat the employee's claim.

Common Law Employee Defamation Claims

In seeking a new job, the hypothetical employee in the introductory paragraph (fired based on a false accusation of theft) faces a Catch-22: either lie on the application by saying he quit and face possible termination later for having lied on the application, or tell the truth and say "it was all a big misunderstanding." Given that most employers do not, as part of the screening process, wire up applicants to lie detectors, and given the realities of today's labor market, the latter scenario virtually ensures the applicant will not be hired. In response to this problem, Minnesota courts years ago recognized the common law claim of "self-publication defamation," under which an employee may sue his or her employer for false reasons given for termination. Under this theory, the publication element is satisfied by the presumption that an employee himself or herself must "publish" the false statement by truthfully responding to a prospective employer's inquiry into separation from prior employment.

Legislative Responses

In response to employer concerns over defamation lawsuits, the Minnesota Legislature in 1987 adopted a statute requiring a terminated employee be given, within five business days of the request, a written statement of the reasons for the termination. The statute further provides that this written statement cannot be made the subject of any defamation lawsuit. The statute's effect on curbing employee lawsuits is doubtful, because few employees in practice make such a request, and an employer may still be sued if the employee can demonstrate that the reason given for the termination was not "truthful." In addition, the statute does not address at all statements made by an employer to a prospective new employer.

In 1989, the legislature went further, immunizing statements in a personnel file from defamation lawsuits. Under the new law, employees were given the right to challenge any statement contained in their personnel record (most commonly, a performance evaluation) by meeting with the employer to request it be revised or deleted, and if no agreement can be reached, by submitting a written statement of up to five pages, to be placed alongside the disputed item in the personnel file. However, if no such challenge is made by the employee, then the unchallenged statement cannot be the subject of a defamation lawsuit. In practice, not many employees avail themselves of this right, so this particular employer protection potentially does have teeth.

More recently in 2004, the legislature finally took up the subject of communications to prospective employers, enacting a true qualified immunity statute. Among other things, the law prohibits suits by employees based upon statements made to prospective employers and employment agencies concerning:

- the employee's job descriptions and duties;
- training provided to the employee; and
- acts of violence, theft, harassment, or illegal conduct documented in the personnel record that resulted in disciplinary action or resignation and the employee's written response, if any, contained in the employee's personnel record.

An exception exists for "false and defamatory" statements by an employer, but only if the employer knew or should have known of the statement's falsity. Moreover, the employee must show that the employer made the statement with a "malicious intent to injure." This raises the interesting scenario in which an employee is fired for an alleged act of serious misconduct that the employer takes no steps to investigate. For example, Employee A tells employer that Employee B stole from the cash register. Employer takes Employee A's word, based upon her reputation for truthfulness and diligence, and then fires Employee B, without having added up the money in the register and compared it to the register tape. A jury under such circumstances could certainly find the employer "should have known" of the statement's falsity. Proof of "malicious intent," however, would be challenging. To date, the Courts of this state have not reconciled the incongruity of a side-by-side "should have known" and "malicious intent" standard.

Employee Lawsuits Continue Unabated

Despite the legislature's efforts to curb perceived excesses in employee litigation, employment defamation remains an actively litigated field. Employers seeking to avoid facing an employee lawsuit should be mindful of recent cases, including the following. The *Kesanen v. D & H Const. of Eveleth, Inc*. case from 2006 involved an employee of a building firm who was offered a job with the Federal Aviation Administration as an air traffic controller, contingent upon a background check. The employee was informed that he failed the background check due in part to the background investigation interviews. His supervisor provided the only negative review to FAA investigators. The Court of Appeals held that the statements, including "I believe Mr. Kesanen stole company tools and materials, this allegation was never proven" and "I believe Mr. Kesanen has a drinking problem" were defamatory.

In another case, *Keuchle v.Life's Companion P.C.A., Inc*., an employee sued her employer after being terminated from her position as a nurse in a home health care business. Keuchle's supervisor had asked her "if she would be around in a few minutes" and if so, to pass on a message to a colleague. The employee stayed in the office for another 20 minutes but the colleague did not appear. The employee received a termination letter which stated that she had disobeyed "a direct order" and "neglected" her duties. Because the statement was untrue, the employer was liable for defamation and the employee was awarded over $22,000 in damages and over $100,000 in attorney's fees.

Best Practices

Policies of employers to provide to prospective new employers only dates of employment and job titles for former employees have become commonplace within Minnesota's largest companies in the state. To avoid costly litigation, smaller employers would be wise to adopt this practice of only giving "name, rank and serial number" as well. Ethical considerations such as not wishing a terrible employee on a fellow business owner should be balanced against humanitarian considerations such as allowing an employee a second chance (what person hasn't made a mistake in judgment?) and from a bottom line perspective, avoiding expensive and contentious litigation, which may, depending on the newsworthiness of the case facts, give the company unflattering media attention.

A second, inexpensive step to minimize the risk of litigation is to closely monitor supervisor recommendations, or even prohibit them altogether. Although recommendations requested and obtained under such circumstances are generally positive, some supervisors do in fact provide prospective new employers facts that cause the applicant to not be hired. By controlling the recommendation process, an employer can control the "message" and minimize the risk of a suit by a disgruntled former employee.

MT&C is Here to Help

If you are sued by a former employee and need a legal defense, or if you would like advice on practical measures to help limit the risk of your company being sued in the first place, the Firm is available to assist you. Give us a call, and we would be glad to review or help create your employee handbook and sound workplace policies, so that you can focus your attentions on the growth of your business instead of costly, distracting and contentious litigation.