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3/6/2009

DEFAMATION IN ILLINOIS WORKPLACES

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INTRODUCTION

This article is for informational purposes only and should not be construed as legal advice. Also, this article discusses Illinois defamation law. The defamation law of other States and jurisdictions may differ significantly from Illinois.

Current and former employees are sometimes targets of false statements made in the workplace. Defamation is a tort action which allows the employee who was wronged (plaintiff) to recover for harm to his or her reputation. In the workplace, such situations typically happen when an employee is falsely accused of serious misconduct. Other common situations are when the employer provides a false reference or performance evaluation.

Slander and libel are forms of defamation. The common law cause of action for defamation is a remedy which can be used in the representation of employees. The following topics will be covered here: 1) publication of the defamatory statement; 2) qualified privilege; 3) defamation per se; 4) innocent construction; 5) defamation per quod, 6) damages potential and 7) protecting employees wrongfully accused.

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PUBLICATION OF FALSE STATEMENT

The publication (or communication) of the false statement to someone other than the plaintiff is essential whether the defamatory statement is in writing (libel) or made verbally (slander). Typically, the false statements will be communicated to other employees of the corporation.

However, the defamation law of many states does not recognize communications between employees of a corporation as a "publication" of the defamatory statement. In contrast, in Illinois, communications between corporate employees are enough to establish the publication requirement. Gibson v. Philip Morris, Inc., 292 Ill. App. 3d 267, 276, 685 N.E.2d 638, 645 (5th Dist. 1997), appeal denied, 176 Ill. 2d 573, 690 N.E.2d 1381 (1998).

QUALIFIED PRIVILEGE

Ordinarily, workplace plaintiffs must still overcome the defense of "qualified privilege," also known as conditional privilege, which the employer can plead as an affirmative defense. The qualified privilege is based on the policy of protecting honest communications of misinformation in certain favored circumstances in order to facilitate the availability of correct information.Kuwik v. Starmark Star Marketing and Administration, Inc., 156 Ill. 2d 16, 24, 619 N.E.2d 129, 132 (1993). Communications which take place in the workplace ordinarily are covered by qualified privilege.

Thus, even if a statement is false, an employer still may be insulated from liability based on the qualified privilege. An employer may nevertheless be liable for defamation if the privilege is abused by the employer. One way to prove abuse is to establish that the employer, or its agent, had a direct intent to injure the plaintiff.

In Illinois, actual malice must be proven by a minimum standard of recklessness once the qualified privilege has been established by the defendant. 156 Ill. 2d at 19, 619 N.E.2d at 135 (1993).

"[A]n abuse of a qualified privilege may consist of any reckless act which shows a disregard for the defamed party's rights, including the failure to

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properly investigate the truth of the matter, limit the scope of the material, or send the material to only the proper parties." 156 Ill. 2d at 20, 619 N.E.2d at 136.

The Illinois legislature has given employers even greater protection than that available under common law. An employer or authorized employee or agent acting on behalf of an employer, who receives an inquiry by a prospective employer, is immune from civil liability for the disclosure or the consequences of the disclosure as long as the information is provided in good faith. However, the presumption of good faith can be rebutted by showing that "the information disclosed was knowingly false or in violation of a civil right of the employee or former employee." 745 ILCS 46/10.

DEFAMATION PER SE

Libel and slander cases are often, as a practical matter, won or lost on the basis of whether the plaintiff-employee can establish defamation per se. The plaintiff-employee who establishes defamation per se is entitled to presumed damages without any specific proof of injuries. Defamation per se â€œrequires that the words used are in and of themselves so obviously and naturally harmful that proof of special damages is unnecessary. Fried v. Jacobson, 99 Ill. 2d 24, 27, 457 N.E.2d 392, 400 (1983).

There are five classes of words, if falsely communicated, which constitute defamation per se: (1) Those imputing the commission of a criminal offense; (2) Those imputing infection with a communicable disease of any kind which, if true, would tend to exclude one from society; (3) Those imputing inability to perform or want of integrity in the discharge of duties of office or employment; (4) Those prejudicing a particular party in his profession or trade; and (5) those imputing adultery or fornication. Van Horne v. Muller, 185 Ill. 2d 299, 307, 705 N.E.2d 898, 903 (1999).

Some Illinois appellate courts have shown reluctance in allowing plaintiff-employees to establish defamation per se through the third or fourth classes of words. E.g., Heying v. Simonaitis, 126 Ill. App. 3d 157, 466 N.E.2d 1137 (1st Dist. 1984). However, Gibson v. Philip Morris, Inc. held that the statements of the defendants which falsely alleged that Gibson, a salesperson, sold incentive items, such as a Marlboro belt buckle, for

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personal profit, rather than utilizing them for company promotions:

could have been found false by implication and could have been found to have been written in such a manner as to impute plaintiff with a want of integrity (theft of company property) in the discharge of his employment, the third category of defamation per se.

292 Ill.App.3d at 274, 685 N.E.2d at 644.

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INNOCENT CONSTRUCTION

Another potential pitfall for employees asserting defamation per se is the innocent construction doctrine. Even if the challenged statement fits within one of the recognized categories which will sustain a per se action, recovery will not be allowed if the statement can reasonably be given an innocent construction. The innocent construction rule does not apply to defamation per quod claims. Anderson v. Vanden Dorpel, 172 Ill. 2d 399, 412 667 N.E.2d 1296, 1302 (1996).

A court must consider a statement in context in determining whether it is capable of an innocent construction, giving the words and their implications their natural and obvious meaning. Gardner v. Senior Living Systems, Inc., 314 Ill. App.3d 114, 119, 731 N.E.2d 350, 354 (2000), citing Bryson v. News America Publications, Inc., 174 Ill.2d 77, 90, 672 N.E.2d 1207, 1215 (1996).

It is a question of law for the court to decide as to whether an innocent interpretation is reasonable. A court is not required to construe the words in their best possible sense where the defamatory meaning is far more reasonable, nor does a Court need to espouse a naivete unwarranted under the circumstances. Gardner, 314 Ill. App.3d at 119-120, 731 N.E.2d at 355, quoting Bryson, 174 Ill.2d at 94, 672 N.E.2d at 1217.

Tuite v. Corbitt, 224 Ill.2d 490, 866 N.E.2d 114 (Ill 2006) reaffirms that: "When a defamatory meaning was clearly intended and conveyed, [the Illinois Supreme Court] will not strain to interpret allegedly defamatory words in their mildest and most inoffensive sense in order to hold them nonlibelous under the innocent construction rule." Id. at 504, 866 N.E.2d at 123 (quoting Bryson).

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DEFAMATION Per Quod

In the absence of defamation per se, a plaintiff-employee must meet the more demanding requirements of a defamation per quod action. In such circumstances, a plaintiff must plead and prove extrinsic facts to explain the defamatory meaning of the statement. The plaintiff must also plead and prove special damages. Bryson v. News America Publications, Inc., 174 Ill. 2d 77, 103, 104, 672 N.E.2d 1207, 1221 (1996). As a practical matter, a plaintiff may find it difficult to prove special damages.

DAMAGES

If the claimant establishes that the qualified privilege has been breached and that defamation per se occurred, the recovery may be substantial. However, the common law tort of defamation does not include the remedy of attorney's fees.

The recovery in Gibson v. Philip Morris is encouraging. The plaintiff, at trial, received $15,000 for lost wages, $100,000 for lost benefits at $20,000 per year for five years, $100,000 for personal humiliation, mental anguish, and suffering, and $1,000,000 for punitive damages. These damages were affirmed on appeal. 292 Ill. App. 3d at 279, 685 N.E.2d at 647.

Protecting Employees Wrongfully Accused

Raymond Hugley v. The Art Institute of Chicago, et al., No. 98 L 8352 is a workplace defamation case decided by a jury trial. The Art Institute's locksmith, asserted that he was discharged after being falsely accused by a security guard of making a death threat against another employee. A copy of the Hugley v. Art Institute et al. complaint is available on-line.

Judge James P. Flannery, Jr., Law Division, Jury Section, Circuit Court of Cook County, Illinois, presided over the jury trial. On January 26, 2000, the jury reached a verdict of $116,470 against The Art Institute of Chicago and the security guard who made the false statement. $41,470 was stipulated as special damages for net back pay loss. $75,000 was general damages for personal humiliation, embarrassment, injury to reputation and standing in

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the community, mental suffering, and anguish and anxiety. The judgment included a stipulation for Hugley to receive credit to his pension from the date of his termination through January 2000.

Ronald B. Schwartz and Edward J. Whalen represented Mr. Hugley. Bruce R. Alper and Thomas M. Wilde represented the Art Institute and the security guard.

CONCLUSION

Actions for slander and libel are another way to address workplace wrongs. Like other employment remedies, the employment lawyer must carefully assess whether the facts of a particular situation fit the elements, privileges and defenses of a defamation action.

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