Defamation in the Workplace

by Jill K. Blackmer and Gayle Morrell Braley

Is it defamatory for a company president to make statements about an employee to the comptroller which resulted in the comptroller writing a letter to the employee demanding the return of property claimed to belong to the company? Does a general contractor risk defaming a sub-contractor when it fires the sub-contractor and orders it off the job site? If a manager accuses one of her employees of theft in front of other employees or customers, has she defamed that employee? Does it matter if the accusation turns out to be true?

In New Hampshire, to prevail on a defamation claim, a plaintiff must prove that the defendant

(1) failed to exercise reasonable care in publishing to a third party,

(2) without a valid privilege,

(3) a false and defamatory statement of fact

(4) about the plaintiff.

The statement in question must tend to lower a person in the esteem of any substantial and respectable group, even though it might be quite a small minority. Several twists to this seemingly straightforward definition warrant comment.

Although the law is undecided in New Hampshire, it is reasonable to assume that under the first part of the definition employers who act with reasonable, or due, care under the circumstances will be shielded from liability for defamation. Businesses should remember, however, that the question of reasonable care frequently is susceptible to differing interpretations and judicial interpretation of this issue, therefore, is likely to be an expensive and uncertain undertaking.

While a defamatory remark or comment must be published or otherwise disseminated, this requirement does not mean that it must appear in the company's employee newsletter or the company 's bulletin board. Rather, in some instances so-called intracorporate communication may constitute publication sufficient for defamation to have occurred.

For example, a manager runs the risk of defaming an employee by making statements to another manager that the employee has unlawfully removed company property unless the statements, although untrue, were published on a lawful occasion, in good faith, for a justifiable purpose, and with a belief, founded on reasonable grounds of truth. Chamberlain v. 101 Realty, Inc., 626 F. Supp. 864 (D.N.H. 1985) (citations omitted).

For practical purposes, when businesses are dealing with employee conduct in any situation that could result in defamation (in particular evaluations, investigations, terminations, and recommendations), the employer is well advised to (1) take pains to gather and evaluate all the pertinent facts to avoid jumping to conclusions, and (2) disseminate information only for legitimate and justifiable business reasons solely to individuals with a need for this information.

It also is important to keep in mind that conduct, as well as words, may give rise to an action for defamation. For example, firing a sub-contractor and ordering it to vacate the job site may constitute defamation if third parties conclude the sub-contractor had breached its contract and this was not true.

Employers frequently are asked to provide employee references to prospective employers. While such information is often very valuable, revelation of unflattering information can give rise to claims of defamation and invasion of privacy by the employee. It is recommended that employers either adopt a policy whereby

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they provide only name, rank and serial number information or, alternatively, require a release from the employee before disclosing more detailed information.

Statements of opinion -- in contrast to statements of fact -- are not generally considered defamatory. This opinion/fact dichotomy, however, does not mean that an employer can merely couch fact-laden statements in the guise of "opinion" and hope to avoid a defamation action.

For example, in 1992 the federal district court in New Hampshire determined that statements to an employee in front of others— such as 'your job isn' t important and doesn't require brains' ; 'you have a lot of growing up to do '; 'you have a bad attitude '; 'who do you think you are working for' ; and 'you should learn what you're doing here'— were sufficiently factual in nature for the case survive summary judgement. Godfrey v. Perkins-Elmer Corp., 794 F Supp 1179 (D.N.H. 1992).

Although employers may in limited circumstances be able to defend against a defamation claim by asserting that their comments were partially privileged, this defense offers little solace for two reasons. First, the New Hampshire law pertaining to qualified privileges in the employment context is either old or unclear, or both. Second, relying on a defense of privilege rarely avoids litigation and its attendant burdens.

The concerns about defamation in the workplace should not serve to mute employers voices or deter their vital communications. To this end, it is important to remember that a statement that is substantially true cannot be defamatory. Furthermore, to the extent general guidelines are useful, businesses are advised, when dealing with potentially defamatory remarks or situations, to avoid accusations and bald assertions either to third parties or in the presence of third parties and to restrict the dissemination of the potentially defamatory information to those who truly need to know it. ■

Ms. Blackmer and Ms. Braley have authored the New Hampshire chapter of the Libel Defense Resource Center's 50-State Survey: Employment Libel and Privacy Law which will be published in 1999. Each chapter's coverage will range from basic employment, libel and privacy law to the emerging issues of e-mail monitoring and employee drug testing.

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In New Hampshire, to prevail on a defamation claim, a plaintiff must prove that the defendant (1) failed to exercise reasonable care in publishing to a third party, (2) without a valid privilege, (3) a false and defamatory statement of fact (4) about the plaintiff. The statement in question must tend to lower a person in the esteem of "any substantial and respectable group, even though it might be quite a small minority." Several twists to this seemingly straightforward definition warrant comment.

Although the law is undecided in New Hampshire, it is reasonable to assume that under the first part of the definition employers who act with reasonable, or due, care under the circumstances will be shielded from liability for defamation. Businesses should remember, however, that the question of reasonable care frequently is susceptible to differing interpretations, and litigation of this issue is therefore likely to be an expensive and uncertain undertaking.

While a defamatory remark or comment must be "published" or otherwise disseminated, this requirement does not mean that it must appear in the employee newsletter or on the company's bulletin board. Rather, in some instances so-called "intra-corporate communication" may constitute publication sufficient for defamation to have occurred. For example, one manager runs the risk of defaming an employee by making statements to another manager that the employee has unlawfully removed company property unless the statements, "although untrue, were published on a lawful occasion, in good faith, for a justifiable purpose, and with a belief, founded on reasonable grounds of truth." *Chamberlain v. 101 Realty, Inc.*, 626 F. Supp. 864 (D.N.H. 1985) (citations omitted). For practical purposes, when businesses are dealing with employee behavior or conduct that is potentially defamatory, they are well advised to take pains to gather and evaluate all the pertinent facts to avoid jumping to conclusions, to consider whether the information is being disseminated for a legitimate and justifiable business reason (such as the need to investigate a complaint of sexual harassment) and to publicize the information or parts thereof only to those with a need to know.

It also is important to keep in mind that conduct, as opposed to words, may give rise to an action for defamation. For example, firing a sub-contractor and ordering it to vacate the job site may constitute defamation if third parties conclude the sub-contractor had breached its contract and this was not true.

Employers frequently are asked to provide employee references to prospective employers. While such information is often very valuable, revealing unflattering information can give rise to claims of defamation and possibly invasion of privacy by the employee. It is recommended that employers either adopt a policy whereby they provide only "name, rank and serial number" information or, alternatively, receive a release from the employee before disclosing more detailed information.

Statements of opinion -- in contrast to statements of fact -- are not generally considered defamatory. This opinion or fact dichotomy may arise when employers comment on employees. For example, in 1992 the federal district court in New Hampshire determined that statements to an employee in front of others such as your "job is not important and does not require brains"; "you have a lot of growing up to do"; "you have a bad attitude"; "who do you think you are working for"; and "you should learn what you're doing here" were sufficiently factual -- and not just expressions of the employer's opinion -- to allow the case to proceed to trial. *Godfrey v. Perkins-Elmer Corp.*, 794 F. Supp. 1179 (D.N.H. 1992).

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