

Employment Litigation Bulletin

Avoiding Defamation Claims in Connection with Employee Terminations

Defamation claims are on the rise in the workplace. Especially in connection with employee terminations, more and more employees subject to adverse action by their employers are turning to defamation actions as a means of challenging those employment decisions. The circumstances underlying these claims typically stem from the employee's belief in the unfairness of the termination or other adverse action, rather than alleged statements that may have been made about him or her. Yet, because state and federal laws generally preclude wrongful termination claims by at-will employees, terminated employees are using claims for defamation as a tenable legal substitute.

Defamation involves the making of a false statement to a third party that impugns a person's reputation. Putting aside the element of falsity, this legal framework lends itself well to the employment setting, given the ease of demonstrating harm to an employee's reputation as a result of his or her termination and because most terminations result from criticism or dissatisfaction with employee performance or behavior. Further, employers are often advised that best practices require documentation of substandard performance and behavior, creating a paper record that an employee can use to support a defamation claim. As a result, employers can unwittingly find themselves facing costly litigation and liability for significant monetary awards, even in the face of seemingly incredulous circumstances.

Take, for example, *Leyshon v. Diehl Controls N.A., Inc.*, 946 N.E.2d 864 (Ill. App. Ct. 2011). In that case, the former president of a company filed a defamation action after he had been fired by the company's new chairman. When the president asked the reason for his dismissal at the termination meeting, the chairman stated that he was not required to provide a reason. The president then summoned a human resources employee into the room to serve as a witness, and again requested the chairman to provide a reason for his termination. This time the chairman indicated that the president was being fired "for cause" under the terms of his employment agreement.

Citing the contractual definition of "cause," the president then inquired, "You are telling me that you are firing me for gross insubordination, for gross misconduct, for gross negligence and willful violation of the law?" In the heat of the exchange, the chairman responded, "Yes," but did not elaborate further.

While there was no mention of any further publication outside the meeting, the jury nevertheless returned a verdict in favor of the former president and awarded him \$2 million in compensatory damages and an additional \$10 million in punitive damages (which the trial court reduced to \$6 million, for a total recovery of \$8 million). An appellate court subsequently affirmed the damages awards.

The defendants in *Leyshon* failed to raise the "invited-defamation" defense, and the decision made no mention as to why certain other affirmative defenses, such as a qualified privilege, did not defeat the claim. Regardless, the decision serves as a stark reminder that defamation remains a serious concern in the workplace, and employers should be mindful and proactive to guard against such claims.

Employers should not abandon the still-prudent practice of documenting performance concerns and counseling employees about them. The law provides a qualified privilege to make negative comments about an employee so long as the comments (written or verbal) are made in good faith, for a proper purpose and in a legitimate manner. Thus, valid criticisms are protected if they meet these standards.

However, employers should be aware of court decisions in Illinois requiring employers to make a reasonable investigation before accusing employees of wrongdoing. The rationale is that, absent a reasonable investigation, unsubstantiated allegations of employee wrongdoing do not satisfy the good faith requirement necessary to invoke the qualified privilege.

Employers may implement various measures to reduce the risk of defamation claims arising from

employee terminations. Below are some best practices we recommend to minimize legal exposure:

- Train and sensitize human resources and other management personnel about defamation, just as you do with respect to discrimination and other common employment claims.
- Carry out terminations in a confidential and discreet manner. The only persons who should be present are those with a legitimate business interest in being there.
- Prepare in advance for the termination meeting and rely on a written script to inform the employee about the reasons for termination.
- Explain the reasons for termination in broad terms; i.e., "you are not meeting our performance or behavior expectations."
- Limit dissemination of information concerning an employee termination to persons with a legitimate business need to know.
- Avoid using details of a termination to remind employees that the company is serious about enforcing workplace policies.

- Use benign language to advise co-workers that an employee is no longer with the company.
- Do not use security personnel to escort a terminated employee from the premises unless the termination involves theft, unfair competition or threatening misconduct.

Given the rise in the number of defamation claims and the potential for significant verdicts such as that obtained by the former president in *Leyshon*, we encourage employers to implement policies consistent with these best practices and to ensure they are followed. Of course, defamation claims arise in a variety of employment settings aside from employee terminations, including interoffice communications, internal investigations and other disciplinary, privacy and workplace matters. Vedder Price attorneys frequently consult with and provide training to many of their clients' human resources personnel and management regarding litigation avoidance strategies, including defamation claims.

If you would like legal advice or counseling on the implementation of policies to guard against defamation claims in the workplace, please contact your Vedder Price attorney. ■

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