

Teacher's Manual
Developing Professional Skills: Workplace Law
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Chapter 3: Defamation

Problem: Mechanic brings defamation claim against former employer for false statement to prospective employer

Legal Rule(s): Tort of defamation

Skill(s): Advocacy in discovery and litigation strategy

Assignment: Draft interrogatories for defamation litigation

Practice Norm(s): Discovery practice

Professionalism Concept(s): R. 3.1: meritorious claims and defenses; R. 1.16: declining or terminating representation

Optional extension assignment: Role-play remonstrate client

Legal Rules

Defamation

Defamation claims are grounded in state tort law and provide a remedy to employees suffering reputational harm from their employers' publishing of false and defamatory statements about them. Courts recognize the harm such statements can have on employees' future job prospects. However, courts also acknowledge the strong countervailing benefit in open and honest communications between employers when discussing potential employees.

As set forth in Section 558 of the Restatement Second of Torts, the elements of defamation include: "(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication."

In analyzing the defamation claim of Bobbie Jones, students should first grapple with what constitutes a "false and defamatory statement concerning another." The statement at issue must be false; true statements, even if damaging to one's reputation, are not protected. Accordingly, a statement of opinion is not actionable unless the stated opinion relies on facts for the opinion that are false, and that false information damages the employee's reputation. For example, if an employer publishes a damaging statement that an employee engaged in negative conduct, this element may be demonstrated by proving that the employee did not engage in the accused conduct.

The statement at issue in the Bobbie Jones lawsuit is the opinion allegedly stated by former employer Morgan Sharpe, office manager of AMRS auto repair shop, to potential

employer British Auto Repairs, that Jones had been fired for “pilfering car parts from the shop.” Jones reports that the pilfering statement was an opinion by Sharpe that is based on false information provided to Sharpe by another mechanic. Jones argues that the allegation is false; in other words, Jones denies stealing car parts from AMRS. Accordingly, students can conclude from these facts that this element is likely met.

Second, students must analyze the “unprivileged communication to a third party” element. The publication requirement is quite broad; the communication can be oral, written, or non-verbal. Employees can allege the employer communicated through agents rather than directly. Courts disagree over whether intra-employer communications are publications for purposes of defamation law. Some courts have recognized an exception to the requirement of publication to a third party where a discharged employee is asked by a prospective employer to explain the circumstances of her or his discharge (a.k.a. “compelled self-publication” or “self-defamation”). To succeed on such a claim, the employee must show that the former employer should reasonably have foreseen that the employee would be compelled to repeat the defamatory statement to a third party.

Here, the publication alleged is from AMRS’s office manager Sharpe to prospective employer British Auto Repairs. Jones believes that publication occurred because Jones applied for a job with British Auto Repairs and despite strong qualifications and a positive interview, Jones did not receive the job. Students should recognize that such allegations are not enough without proof of a communication between the employers. Students should conclude that more information is necessary through discovery to prove that publication occurred.

Third, defamation requires that the publisher at least be negligent in publishing the false statement. The common law of defamation had imposed liability regardless of whether the employer knew or should have known that a published statement was false and defamatory. However, the Supreme Court in *New York Times Co. v. Sullivan*, held that a public official cannot recover damages “for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” 376 U.S. 254, 279-80 (1964). Now, many jurisdictions require private defamation plaintiffs seeking damages to demonstrate that defendant was at least negligent.

Jones will have to prove that AMRS was at least negligent in publishing the statement that Jones stole car parts from the shop. Student should analyze the facts surrounding the statement: that Sharpe did not have first hand knowledge of Jones stealing parts, but instead, reacted based on uncorroborated information from another mechanic that Jones had stole parts. Students should recognize that more discovery is needed on what Sharpe knew and any investigation of stolen parts at the shop that occurred to determine if Sharpe was acting negligently.

And lastly, per the Restatement of Torts, the requirement of special harm from the publication applies only to defamation through spoken words—slander—rather than through

written words—libel. Special harm is not required if the publication is disparaging such that the remarks regard a “matter incompatible with. . . business, trade, profession, or office” and to cause a loss of present or prospective employment. In *Gertz v. Robert Welch, Inc.*, the Supreme Court held that the First Amendment requires private figures to prove actual malice on the part of defendant in order to recover presumed or punitive damages, and to prove some level of fault in order to recover actual damages. 418 U.S. 323, 347-50 (1974).

Here, harm is presumed if Jones lost the job at British Auto Repair because of Sharpe’s statement regarding stealing car parts. Students should analyze what facts are needed to prove that Jones lost the job *because of* the statements made by Sharpe.

Privilege

A qualified privilege exists in common law for employers who publish defamatory remarks in circumstances where the publisher, the recipient, or the general public has a sufficiently important interest in the publication. For example, an employer can argue for the privilege where it has an important interest in providing information to other employers on a prospective employee’s performance and character. Likewise, the general public has a strong interest in encouraging open and candid exchanges of information so that employers can determine with more complete information whether prospective employees are suited for employment. Accordingly, if a former employee has committed violent acts against coworkers or customers, such prior acts is important for the potential employer to know about. See Restatement of Employment Law, § 601.

This qualified privilege is available for employers who publish a statement without a reasonable intent to serve the employer’s and recipient’s legitimate interest in the information. See Restatement of the Law, Employment Law, § 6.02; Restatement Second, Torts § 604. For example, where the employer knows or should know that there is no legitimate interest in communicating the information to the third party, there is no privilege. Moreover, employers generally have no legitimate business interest in disseminating adverse or embarrassing facts about an employee, even if those facts resulted in the disciplining or termination of that employee. In some cases, however, employers may have a legitimate reason for potential employers knowing these types of facts, such as reasons for discipline.

Students should analyze this qualified privilege by examining whether there is sufficient public interest in the information Sharpe allegedly published regarding Jones’s stealing car parts. An argument can be made that providing British Auto Repairs with such information is sufficiently important because society has an interest in protecting potential employers from dishonest employees who engage in criminal conduct. Students should discuss whether it is likely that a court will find that Sharpe had a legitimate reason for telling British Auto Repairs about the allegation of stolen car parts.

Practice Norms

Discovery Practice

Students rarely have the opportunity to learn discovery skills in law school. Obtaining useful and relevant discovery requires strategy and experience that comes from practice. Taking depositions, retaining expert witnesses, making documents demands, and drafting appropriate interrogatories are skills attorneys must develop to be competent civil litigators.

Such discovery skills are also critical in employment litigation. In employment matters, plaintiff/employees are often at a disadvantage in discovery practice because defendant/employers are the parties in possession of the necessary facts and documents that plaintiffs need to prove their case, and plaintiffs typically have fewer resources at their disposal to obtain them. However, discovery can often be burdensome on defendants when plaintiffs ask for extreme amounts of data, which can be expensive to both procure and determine the relevancy, work product, or confidentiality issues within a particular data set.

Students would benefit from a discussion of all the likely discovery categories in Jones' defamation case, including: (1) Depositions of all persons involved (including Jones, Sharpe, mechanics at AMRS, representative of British Auto Repairs, and others potential witnesses); (2) Expert testimony needed to prove elements (such as labor economists for damages or industrial organizational psychologists for society and employment norms); (3) Document demands (including video footage of the shop, employer handbooks and policies, and budget reports); and (4) Written interrogatories to ask to get useful and relevant fact discovery. Students would also benefit from a candid discussion of the costs associated with these types of discovery, and will likely be surprised at how expensive such a process can be.

Particular to the class exercise, the class can also discuss the importance and types of interrogatories likely to be relevant in the Jones matter. Information-gathering interrogatories and contention interrogatories are both appropriate vehicles for discovering fact information relevant to the claims and defenses.

Litigation Strategy

In order to know what discovery a party should ask for, the party must have a clear litigation strategy: what are the elements of the claim/defense and how can I prove them? A party must analyze each element to figure out what facts, testimony, documents, or other discovery item is needed to prove such element. Defamation is a good first practice problem because the elements are clear and easy to understand.

Students were provided a form "Defamation Worksheet" to identify and analyze each element of the defamation claim (as outlined above in the Legal Rules section). Students should brainstorm what evidence is needed to prove each element, including:

1. A false and defamatory statement: evidence that Sharpe made an opinion that Jones stole car parts without verifying the veracity of the allegation.
2. An unprivileged communication to a third party: evidence that Sharpe communicated the allegation that Jones stole car parts to British Auto Repairs or any other car shop.
3. Negligence by the publisher: evidence that Sharpe failed to investigate whether Jones actually stole car parts.
4. Harm to the claimant: evidence that Jones did not get the job at British Auto Repairs because of the statement made by Sharpe that Jones stole car parts from AMRS.

Students should then translate the above Defamation Worksheet into concrete written interrogatories. A sample Interrogatory Form is provided for students to fill out. Sample interrogatories include:

1. State all steps AMRS took to determine if Jones took car parts from AMRS without paying for them.
2. State the name and contact information for all mechanics at AMRS that told Sharpe or any AMRS employee that Jones took car parts from AMRS without paying for them.
3. State all information that resulted from any investigation AMRS took regarding stolen car parts of any employee (including but not limited to Jones), including questioning any persons identified in interrogatory #2.
4. State all information and identify all documents that show that car parts were taken by employees (including but not limited to Jones) without being paid for by any employee of AMRS.
5. State the date and contents of all discussions between representatives of AMRS (including but not limited to Sharpe) and any and all other car shops (including but not limited to British Auto Repairs) regarding Jones's employment with AMRS.
6. State any and all reasons for Jones's termination.
7. State when the decision to terminate Jones occurred and identify all persons that were involved in that decision.
8. Identify all documents (including but not limited to electronic mail, instant messaging, notes, and memos) that reference Jones's termination.
9. State all facts and identify all documents that AMRS relies on for asserting that Jones was terminated for taking car parts without paying for them.
10. State all the facts and identify all documents that AMRS relies on for asserting any qualified privilege in the defamation claim asserted by Jones against AMRS in this lawsuit.

Professional Ethics

In the Points to Consider, questions three and four ask students to suppose that Jones later tells the attorney that Jones did take car parts but only "once or twice" and for a total amount of less than \$10.00. The questions ask the students to ponder whether the defamation

claim is now without merit and what is the attorney's ethical obligation given the Complaint states that "Jones never stole anything of value from AMRS."

An engaging discussion can ensue about clients who sometimes surprise their attorneys with new information about their employment.

1. Model Rule 3.1: Meritorious Claims and Defenses

Students should analyze whether the defamation claim is now without merit given Jones's new information. The issue is whether the alleged statement by Sharpe to British Auto Repairs (that Jones stole car parts) is now not false, and therefore, the first element cannot be met. Students should engage with the facts to determine if Jones's new information makes the claim not false. Then, the students should evaluate the attorney's ethical obligation regarding meritorious claims.

MRPC Rule 3.1: A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law.

2. Model Rule 3.3: Candor Toward the Tribunal

In determining the attorney's obligations, students must then analyze whether the Complaint's allegation has to be amended.

MRPC Rule 3.3: A lawyer shall not knowingly:

- (1) make a false statement of facts or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.**

Additionally, most state courts have rules against dishonesty to the tribunal similar to **Federal Rule of Civil Procedure 11:**

(b) Representations to the Court: By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

...

- 2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

- 3) the factual contentions have evidentiary support, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- 4) the denial of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

3. Model Rule 1.16: Declining or Terminating Representation

If Jones's attorney decides that the defamation claim is now without merit because of the new information Jones provided, and Jones refuses to allow the defamation claim to be withdrawn, students should consider whether the attorney must continue representing Jones in the defamation claim or whether the attorney can terminate the representation.

MRPC Rule 1.16: Declining or Terminating Representation

- ¶(a) [A] lawyer shall not represent a client . . . if:
- 1) the representation will result in a violation of the Rules of Professional Responsibility or other law;
 - 2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
 - 3) the lawyer is discharged.

Add-on Exercise

Professors can build on this student assignment by having the students remonstrate the client regarding Jones's desire to go forward with the claim if the attorney determines the defamation claim is no longer viable. Students should prepare for the client conference by completing a conference prep sheet (like the one provided in Chapter 2) to brainstorm the talking points, what the client is likely to say, and how to address the possible client responses. Students should prepare for having to terminate the relationship if the client refuses to agree to withdraw the defamation claim from the Complaint.