

DEFAMATION

According to *Black's Law Dictionary*, defamation is the act of harming the reputation of another by making a false statement to a third person.¹ It is causing harm to another's good name. Defamation is not a criminal act, but a tort, defined broadly as a civil wrong. There are two types of defamation—libel and slander. Libel is committed by the written publication of matter that tends to injure a person's reputation, while slander is spoken. As noted above, both libelous and slanderous actions "must have been published to some third person and must have been capable of defamatory meaning and understood as referring to the plaintiff in a defamatory sense."²

Elements

There are specific elements of a defamation claim that must be met in order for actions to be found to be defamatory. Elements for both libel and slander claims vary from state to state, but are generally as follows:³

1. The statement must be false. True statements may be hurtful to one's reputation, but cannot legally be defined as being defamatory. In a pending or potential lawsuit, the burden of proof lies with the defendant; this means that the defendant has the responsibility of proving the statement is true rather than the plaintiff (the alleged defamed) proving the statement to be false.
2. In cases of libel claims, written publication does not literally mean published and printed but, rather, a communication to the public at large.
3. The statement needs to clearly be of and concerning the plaintiff. For example, a statement such as "Managers at this company are embezzlers" cannot be defined as defamatory as it does not address a specific person, but rather a group of people. In the case that the said company has only one manager, this may be considered to be defamatory.
4. Damages: the person claiming to have been defamed must have been damaged in some way, such as reputation, economic, etc. "The wrongs and correlative rights recognized by the law of slander and libel are in their nature material rather than spiritual."⁴ In other words, the law does not compensate for mere injury to one's feelings.

Defenses

The most important defense to an action for defamation is *truth*, which is an absolute defense to an action for defamation.⁵

Another defense to defamation is *privilege*. One example of privilege is statements made by witnesses or attorneys in courtroom proceedings. Statements made in the course of legislative proceedings or federal executive officials while exercising the functions of their office are also ordinarily privileged and cannot support a cause of action for defamation, no matter how false or outrageous.⁶ Statements made between spouses are also considered to be privileged.

Another defense recognized in most jurisdictions is *opinion*. "If the person makes a statement of opinion as opposed to fact, the statement may not support a cause of action for

defamation.”⁷ Whether a statement is viewed as fact or opinion can depend upon context; additionally, the law considers whether the person who made the statement would be perceived by an ordinary person as being in a position to know whether or not it is true. For example, if a supervisor calls an employee a thief, it is less likely to be regarded as an opinion than if the same statement were to be made by somebody the employee just met.

A defense similar to opinion is *fair comment on a matter of public interest*.⁸ For example, if the CEO of a large company is involved in a corruption scandal, an employee expressing the opinion that he or she believes the allegations are true is not likely to support a cause of action for defamation. Additionally, a defendant may also attempt to show that the plaintiff had a poor reputation in the community to begin with in order to diminish any claim for damages resulting from the defamatory statements. It is very difficult to show damage to the reputation of a person who is already known to have a poor reputation.

Finally, someone who makes a defamatory statement without having awareness of its content may raise the defense of *innocent dissemination*. For example, the post office is not liable for delivering a letter that has defamatory content, as it is not aware of the contents of the letter.⁹

An uncommon defense, but sometimes used, is that the plaintiff consented to the dissemination of the statement.

Public Figures

Public figures cannot generally claim to have been defamed. The definition of a public figure is much broader than, but does include, celebrities and politicians. A person can become an involuntary public figure as the result of publicity, even though that person did not want or invite public attention. Examples of involuntary public figures include those accused of high profiled crimes, people who appear on television, and partners and family members of politicians and other celebrities. In a typical workplace, a large company’s CEO is likely to be a public figure while a regional supervisor or divisional manager is likely not to be. Under the First Amendment of the United States Constitution, as set forth by the U.S. Supreme Court in the 1964 Case, *New York Times v Sullivan*, where a public figure attempted to bring an action for defamation, “the public figure must prove an additional element: That the statement was made with ‘actual malice’ [personal ill will].”¹⁰ In other words, if a person is a public figure, another person will not be held liable for defaming him unless the comment was made with “knowledge of its falsity or in reckless disregard of whether it was false or true.”¹¹

Relevance to HRD

Defamation’s presence in the HRD field most often arises in the process of giving reference to former employees. Because the most important, and non-arguable defenses to an action for defamation is *truth*,⁵ one must take caution to give only true, factual statements when giving references, especially if the information being shared is negative. To avoid any claim of defamation, it is wisest to operate under the guise that true statements can always be

proven. Many believe that it is unlawful to share information that contributes to or causes a former employee not to be hired in a new position; negative information shared that can be proven true can not be claimed to be defaming.

NOTES

1. Bryan A. Garner, ed., *Black's Law Dictionary*, 8th ed. (St. Paul, MN: Thomson West, 2004).
2. William A. Kaplin and Barbara A. Lee, *A Legal Guide for Student Affairs Professionals*. (San Francisco: Jossey-Bass, Inc., 1997), 102).
3. Aaron Larson, "Defamation, Libel, and Slander Law, 2003."
http://www.expertlaw.com/library/personal_injury/defamation.html)accessed February 19, 2007).
4. Samuel Warren and Louis D. Brandeis, "The Right to Privacy,". *Harvard Law Review* 193 (1890): 7.
5. Larson, "Defamation, Libel, and Slander Law, 2003."
6. Ibid.
7. Larson, "Defamation, Libel, and Slander Law, 2003."
8. Ibid,
9. Ibid,
10. Ibid., 15.
11. *Garrison v. Louisiana*, 379 U.S. 64, 71 (1964).
12. Ibid.

Lea Hanson