3-1 Defamation: Libel and Slander

defamation
an intentional, false, and harmful communication

One of the most commonly committed workplace torts is **defamation**. The tort of defamation has been defined as follows:

> A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.[1]

Expanding on this bare-bones definition, it is said that language is defamatory:

> … if it tends to expose another to hatred, shame, obloquy, contempt, ridicule, aversion, ostracism, degradation, or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons and to deprive him of their confidence and friendly intercourse in society.[2]

libel
a written falsehood

slander
a spoken falsehood

Defamation is subdivided into the torts of **libel** and **slander**, the former being defamation by writing and the latter defamation through speech. These two torts may be further divided into the libel or slander that is per se and the libel or slander that is not per se. What makes this distinction critical in some cases is that libel or slander per se requires no showing of specific damages for the plaintiff to recover a judgment, whereas libel or slander that is not per se demands such a showing from the injured party. The term "per se" connotes that the third person to whom the defamation is communicated (and indeed the court) can recognize the damaging nature of the communication without being apprised of the contextual setting (innuendo) in which the communication was made. Professor Prosser, the greatest scholar of tort law, has identified the commonly recognized forms of per se defamation as:

> … the imputation of crime, of a loathsome disease, and those affecting the plaintiff in his business, trade, profession, office or calling …[3]

Business defamation thus may be defined as defamation per se having the following characteristics:

> False spoken or written words that tend to prejudice another in his business, trade, or profession are actionable without proof of special damage if they affect him in a manner that may, as a necessary consequence, or do, as a natural consequence, prevent him from deriving therefrom that pecuniary reward which probably otherwise he might have obtained.[4]

strict liability
plaintiff prevails without proving negligence

This definition leaves the door to the courtroom wide open to the defamed employee, whose job is his or her "business, trade, or profession." Indeed, since business defamation is a per se tort, it can amount to strict liability once the plaintiff has proved that the damaging statement was published. This use of the words **strict liability** is not to say that no defenses are available. On the contrary, it is possible to identify several. One can dispute the contention that one published the statement or that it is defamatory. Or one can try to prove that

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[1] *Black's Law Dictionary*, 6th ed. (St. Paul, MN: West, 1991), p. 288.

[2] *Ibid.*

[3] *Ibid.*

[4] *Ibid.*

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the statement is true. Failing these, the defendant may be able to argue successfully that the statement was made from behind the shield of a privilege.

qualified privilege
immunity from a suit in the absence of malice

The law recognizes **qualified privilege**. When a person is protected by qualified privilege, the remarks made will be immune from a defamation suit if the person made them in good faith. If the remarks were made with malice, or in bad faith, they will not be privileged. The law generally recognizes a qualified privilege where one person communicates with another who has a legitimate need to know the information. For example, comments concerning an employee's performance made to a supervisor, and communicated through the organizational structure, are privileged if made in good faith. In addition, assessments of an employee, communicated by a former employer to a prospective employer, made in good faith, are privileged. But comments or remarks, if not made in good faith and/or communicated to persons who have no legitimate need to know, are subject to a defamation action.

The following case is a good example of a case of qualified privilege, and how it can affect a defamation claim.

» CASE 3.1

TOLER V. SÜD-CHEMIE, INC.

– S.W.3d –, 2014 WL 7238202 (Ky. Supreme Ct. 2014)

Facts: Süd–Chemie manufactured catalysts used in various chemical operations. Toler began working for the company in 1976 at its southern Louisville plant, one of two it operates in the area. After nearly 25 years of employment with the company, Toler was promoted to a supervisory role. By all accounts, Toler excelled at his role in management until the incidents that were the subject of this litigation.

The company's human resources director, Scott Hinrichs, received reports from some employees regarding Toler's use of racist language in the workplace. Perhaps highlighting the obvious, Toler's statements were rather offensive. And Hinrichs was duty-bound under company policy to investigate any reports of racist language because the company had a zero-tolerance standard concerning the use of such language in the workplace. Accordingly, Hinrichs reviewed the written reports submitted by the employees and then sat down with each employee to discuss the allegations.

During this investigation, the employees all acknowledged and affirmed the written statement submitted to Hinrichs. Going further, the employees were unequivocal in confirming Toler had indeed uttered the offensive statements. Hinrichs, along with the company's plant manager, then met with Toler to hear his side of the story. At the meeting, Toler was provided with the names of the employees as well as the nature of the accusations levied against him. By Toler's account, he was not provided with the employees' actual written statements until the pretrial discovery process. Toler denied making such statements in the workplace and, in an attempt to explain the employees' motive, alleged he was the target of a "union gang-up" as a result of his disagreement with another employee named Allen Trice.

The disagreement with Trice, an African American employee working under Toler, stemmed from an incident in which Trice allegedly failed to follow Toler's instruction. As a result, Toler, acting within the company's protocol, sent Trice home. In the end, the company terminated Trice's employment. A short time after Trice's termination, Trice filed a racial-discrimination claim with the Equal Employment Opportunity Commission. As it happens, the company learned of Trice's EEOC complaint the day after it received the employees' written statements about Toler. Members of the local workers' union, according to Toler, became upset with him over his handling of Trice. For each of the complaining employees, Toler provided an account of a disagreement that, in his view, essentially prompted a vendetta aimed at ousting him as a supervisor. The company terminated Toler's employment the day after his meeting with Hinrichs and the

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company's plant manager. Toler then filed the present case, arguing the employees had fabricated the allegations resulting in his termination, and, as a result, had defamed him.

Analysis: The Court of Appeals relied heavily on a Kentucky Supreme Court precedent to reach the conclusion that, generally speaking, the determination of whether a defendant abused its qualified privilege is a question of fact properly reserved for the jury. It therefore reversed the trial judge's grant of the company's motion for a directed verdict. But, continued the Supreme Court, its prior decision in no way altered the proof required for a party opposing a directed verdict motion—Toler in this case—to be successful in that opposition. Not only was the analysis undertaken by the Court of Appeals incorrect, it seemed especially curious to the justices in light of a decision of that Court of Appeals in another case that it announced on the same day as its opinion in the Toler case. That other case, *Harstad v. Whiteman*, was applauded by the justices as a thorough, accurate review of Kentucky case law and the proper analytical approach to qualified-privilege defamation cases.

The Court of Appeals in *Harstad* made a number of important observations regarding the burden of proof carried by the plaintiff in a defamation case involving the qualified privilege. In the words of the *Harstad* court:

> "It was Harstad's burden to present some evidence that would incline a reasonable person to believe that Lowe's perception was not simply the product of mistaken observation, but the result of malice, i.e., some evidence that Lowe knew she was lying or making wholly unfounded statements without regard to their truth or falsity."

In this case, Toler simply had not presented any evidence indicating the company's malicious publication. To be sure, conceded the Justices, Toler wove a "dramatic narrative filled with collusion and rumor." But simply alleging union retaliation without any further proof could not support a jury verdict against the company, and, therefore, could not defeat its directed-verdict motion. The majority of Toler's allegations revolved around the retaliatory motivations of the employees in publishing the statements to the company, rather than any maliciousness behind the company's publication during the meeting with Toler.

The company, on the other hand, acted prudently within the scope of its qualified privilege by investigating the claims levied against Toler, meeting with Toler to discuss the claims, and simply enforcing a well-known, understood, and reasonable corporate policy of not permitting such offensive statements in the workplace. Toler presented no evidence that the company excessively published the material or otherwise abused its privilege. Instead, this case presents a "paradigmatic example of why the qualified privilege is recognized: society benefits when employers, or others who share common interests, are permitted to discuss matters freely, even if those discussions are found to be based on erroneous beliefs or misinformation."

Finally, concluded the high court, Toler's argument failed because merely alleging falsity is not enough to defeat a directed-verdict motion based on the qualified privilege. As the Harstad court noted, "[e]ven were we to conclude that each of these inconsistencies was both material and indicative of a specific falsehood, we could not reasonably conclude from their falsity alone that they were malicious utterances as opposed to mistaken observations." Added the justices, "We are in much the same position with Toler's claims. And Toler 'was required to do more than assert that these statements were false; people are sometimes wrong without even suspecting it.' The qualified privilege, it should be remembered, requires evidence of malice in fact, i.e., actual malice, and 'not every erroneous statement is expressed with malice.'"

Further expounding on malice, they wrote that the abuse-of-privilege question typically is one for the jury, as are a great many determinations in tort law. But the submission of the question to the jury is not automatic. A jury is entitled to draw all reasonable inferences from the evidence, but when insufficient evidence is presented to enable a jury to infer an issue "in accordance with reason or sound thinking and within the bounds of common sense without regard to extremes or excess" a reasonable inference cannot be drawn. In other words, providing evidence permitting a jury to perform mere guesswork—"making a judgment without adequate information, or to conjecture, or to speculate"—does not defeat a directed-verdict motion.

Decision: Simply put, held the high court, Toler failed to produce any evidence tending to show that the company acted toward him with malice. The trial court's directed verdict was appropriate. Any finding of malice on the company's part would have been nothing more than conjecture or speculation. Toler was required to put forth evidence sufficient to support a jury verdict founded on reason rather than emotion or prejudice. Accordingly, in light of the company's qualified privilege, the Kentucky Supreme Court reversed the decision of the Court of Appeals and reinstated the trial court's directed verdict in favor of the company.

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