"My boss is telling lies about me! Can I sue?"

Evaluating an employee's claim of defamation against an employer

By John Kelley

It's a familiar scenario: Knowing you're a lawyer, a friend calls you in panic and anger, seeking advice about how to respond to lies, disparaging comments, and other negative remarks a supervisor or co-worker has made about him. You're immediately sympathetic to your friend David's difficulties, of course, but aren't sure whether he has a valid claim for defamation. To answer that question, you'll need a lot more information. Who made the statements, when, and how? What exactly was written or said, and to whom? What was the context? And – most importantly – is any of it true?

The statements in question

Pressed for details, David launches into a litany of negative remarks his supervisor and coworkers have made to and about him in the last few years.[1] "My officemate is constantly telling me I don't dress professionally enough and I'm going to get in trouble with management because I'm late to work so often. And my supervisor is trying to get rid of me, I'm sure. In our one-on-one sessions every few months, she always questions whether I'm really cut out for my job. She's always pushing me to take training courses to improve my skills, and says she thinks I would probably be happier at another company. I've also heard her talking politics with other people in our department, and at least once I overheard her say something about how I 'must be a liberal' since I grew up in San Francisco. How dare she make assumptions and say such things to my colleagues?"

You ask David about his written performance evaluations. "Well, in her first evaluation of me a couple of years ago, she wrote that I wasn't showing enough initiative and would need to show more enthusiasm and a better attitude to get ahead at the company. In my last evaluation a few months ago, she brought up the whole 'lack of initiative' issue again, and she mentioned a report I had recently prepared for a client. She said it was mediocre and unimaginative. Later that week, in a meeting with our whole team, I brought up her comment and asked her to explain exactly how she thought I should have prepared the report differently. Right there, in front of everyone, she started criticizing my report. She accused me of throwing it together quickly, not checking my sources, and leaving out key issues. I was so embarrassed I had to leave the meeting.

"Since then, things have just gotten worse, and last week was the last straw. She called me into a meeting with our human resources manager and accused me of plagiarizing a co-worker's report and lying about why I missed a day of work. They are putting a memo in my personnel file, and I'll be on probation for the next three months. I can't believe how many mean things she has said, and how many lies she has told about me. She's just getting away with it!

Can I sue to stop the defamation?

You will have to consider a number of factors in order to effectively advise your friend. A good first step is to determine which of the many statements can even be characterized as defamatory.

Fortunately for David, California has long provided for protection of citizens from defamation, (Cal. Civ. Code § 43.) whether written (libel) or spoken (slander). (*Id.* § 44.)

Libel is a "false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye." A libelous publication exposes a person to hatred, contempt, ridicule, or obloquy, or causes him to be shunned or avoided. A false publication that tends to injure a person in his occupation is considered libelous. (*Id.* § 44.)

Slander is a "false and unprivileged publication" made orally or "by radio or any mechanical or other means." (*Id.* § 44.)

A slanderous statement may charge someone with a crime, or with having been indicted, convicted, or punished for a crime. It may accuse him of suffering from an infectious, contagious, or other "loathsome" disease. Or of being impotent or lacking chastity! Indeed, any false statement which, "by natural consequence, causes actual damage," is slander. (*Ibid.*)

California law particularly recognizes the dangers of slander in the employment context. A false statement that tends directly to injure a person "in respect to his office, profession, trade or business" is slanderous. It may accuse him of being generally unqualified for the particular requirements of his office, profession, trade, or business, or it may impute something in connection with his office, profession, trade, or business that naturally tends to lessen its profits. (*Ibid.*)

Varieties of defamation

To prevail on a defamation claim, a California plaintiff must prove several elements. These vary considerably, depending on whether the plaintiff is a public or private figure, whether the subject matter of the defamation is a matter of public or private concern, and/or whether the defamation is per se or per quod.

If a plaintiff is a public figure, he has the burden of proving the statements false; if he is a private figure, the defendant has the burden of proving the statements true.

Similarly, if the subject matter of the alleged defamation is a matter of public concern, the plaintiff bears the burden of proving the statements false; if the matter is one of private concern, the defendant bears the burden of proving the statements true.

In cases of defamation per se – involving statements that a person has committed criminal acts, is afflicted with a loathsome disease, is impotent or unchaste, or is incompetent or otherwise unfit for his job or occupation – damages are presumed, and the plaintiff need not present evidence proving them. Statements not defamatory on their face are defamation per quod – the defamed person may prevail only by proving actual damages.

Defamation in employment – claims of defamation per se

Employees filing suit against their employers often include causes of action for defamation. This practice is understandable since, as noted above, defamatory statements that an employee is unable or lacks integrity to carry out his office or employment, or that hurt him in connection with his trade or profession, constitute defamation per se, and he need not prove actual damages. If a supervisor engages in defamatory conduct while acting in the scope of her authority and in furtherance of the employer's business, the employer may be vicariously liable under the doctrine of respondeat superior. (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 950.)

Where, as is usually the case, an employee is not a public figure and the subject matter of the statements is not a matter of public concern, the employee must prove four elements to establish defamation per se. First, he must prove "publication" – that the defendant made one or more of the statements to a third party. Second, he must prove that those who heard or read the statements reasonably understood them to be about him. Third, he must prove that the hearers reasonably understood the statements to mean that he is unable or lacks integrity to carry out his office or employment. Finally, he must prove that the defendant failed to use reasonable care to determine the truth or falsity of the statements. (See CACI 1704.) Once he has proven these four elements, the law assumes that his reputation has been harmed and, without further evidence of damage, he is entitled to such damages as the jury may find to be proper to compensate him for the assumed harm to his reputation. (*Ibid.)*

An employee may also recover damages for defamation per se by proving that the defendant's wrongful conduct was a substantial factor in causing such damages as (1) harm to his property, business, trade, profession, or occupation, (2) expenses necessitated by the defamatory statements, (3) harm to his reputation in addition to that assumed by the law; or (4) shame, mortification, or hurt feelings. (*Ibid.*) If he can prove by clear and convincing evidence that the defendant acted with malice, oppression, or fraud, punitive damages may be available.[2]

What's the truth?

In evaluating any potential defamation claim, this should be the first question. *Truth is a complete defense to a defamation claim.* (See CACI 1720.) If a statement is true, it doesn't matter whether it was made out of malice or in bad faith. (*Washer v. Bank of Am.* (1948) 87 Cal.App.2d 501, 509; *Campanelli v. Regents of Univ. of Cal.* (1996) 44 Cal.App.4th 572, 581.)

Nor must every detail of the statement be true; the defense applies so long as the substance or "gist" of the statement is true. (*Gantry Constr. Co. v. American Pipe & Constr. Co.* (1975) 49 Cal.App.3d 186, 194.) No matter how vicious, hurtful, damaging, or embarrassing a statement may be, an employee's defamation claim will fail if the employer presents credible evidence of the statement's truth. A cautious employer will carefully document an employee's sub-par job performance or failure to work cooperatively with supervisors and fellow employees. The employer may have records showing frequent tardiness, documentation detailing the employee's failure to complete projects on time or according to instructions, or written complaints by or records of interviews of fellow employees who have experienced rude, harassing, or otherwise inappropriate behavior by him. The employer may have evidence establishing his dishonesty.

Once you have identified all the statements David believes to be defamatory, you will need to roll up your sleeves and engage in a full and frank discussion with him to tease out which statements are, unfortunately, *true*. Did he copy another employee's work? Did he misrepresent the reason for his absence from work? Did he fail to include key issues in a report? If so, he will be unable to prevail upon a defamation claim based on those statements. Moreover, even if he assures you that the statements are false, you will need to determine what evidence his employer may be able to present, tending to establish their truth.

Timing is everything

As with most legal claims, the timing of a defamation claim is critical. In California, the statute of limitations on defamation claims is one year. (Cal. Civ. Proc. Code, § 340(c).) The statute generally begins to run upon the first publication or utterance of the defamatory statement. California also follows the "single publication rule," by which the initial publication or utterance gives rise to a single cause of action for defamation. (Cal. Civ. Code, § 3425.3.) Still, in appropriate circumstances the "discovery rule" may apply to defamation claims; if the person defamed could not have learned of the defamatory publication or statement, using reasonable diligence, the statute does not begin to run until he could have done so. (See *Manguso v. Oceanside Unified Sch. Dist.* (1979) 88 Cal.App.3d 725, 730-31.)

Thus, to the extent his supervisor wrote or uttered defamatory statements about David – or he could only have learned of such statements using reasonable diligence – within the last year, those statements may be actionable. But statements more remote in time, such as those included in his first performance

evaluation two years ago, are time-barred.

Just the facts, Ma'am

Regardless of the writer or speaker's malicious intent, or the damaging effect of the statements, only statements of *fact* – not *opinion* – may properly form the basis for a defamation claim. To be defamatory, a statement must be capable of being proven true or false. (*Hofmann Co. v. E.I. Du Pont de Nemours & Co.* (1988) 202 Cal.App.3d, 390, 397.) Determination as to whether a statement is fact or opinion is a question of law. (*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260.) In making that determination, a court examines such factors as the statement's context, the addressee, the purpose to be served, and the other circumstances surrounding the publication. (*Jensen v. Hewlett-Packard Co.* (1993)14 Cal.App.4th 958, 971.)

Many, if not most, of the statements David has identified are most accurately categorized as opinions rather than facts. Statements by his co-worker about David's business attire and the potential effects of his tardiness are opinions, not facts, as are his supervisor's statements about whether he is really cut out for the job, should take additional training courses, or would be happier somewhere else. Statements in the recent performance evaluation about David's lack of initiative, and the mediocre and unimaginative nature of his client report, are also most likely to be considered mere statements of the supervisor's opinion, as is the speculation that David "must be a liberal." On the other hand, the supervisor's recent accusations about plagiarism and David's lying about his absence from work would likely qualify as statements of fact. Because those statements may be proven true or false, they may constitute defamation.

If it wasn't published, your claim perishes

Regardless of their truth or falsity, only statements that are *published* to someone other than the plaintiff can be the basis for a defamation claim. But a statement need not be disseminated to the public in general or to any particular number of individuals. Publication to a single person other than the plaintiff suffices. (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645.) Moreover, while the person who reads or hears a statement must perceive it as referencing the plaintiff, the defamer need not mention him by name. If a statement describes the plaintiff in such a way as to direct attention to him, and the hearer or reader therefore understands the statement to refer to the plaintiff, the requirement of identification is met. (*Dewing v. Blodgett* (1932) 124 Cal.App. 100, 105.)

Based on what David has told you so far, many of the offending statements will not qualify as defamation, because they were not actually published. Even were they false statements of fact and not opinion, his co-worker's comments about David's manner of dress and tardiness still would not be actionable unless the co-worker communicated them to someone else. Similarly, his supervisor's statements to David during periodic one-on-one sessions can't be defamatory, since no one else heard them. In contrast, the supervisor's statements in written evaluations distributed to other corporate personnel would be considered "published," as would the supervisor's statements in staff meetings, casual conversations with other supervisors or employees, or meetings with the human resources manager.

No defamation if there is consent

Statements made with the consent – or at the request – of the defamed person cannot be the basis of a defamation claim. For example, where an employer makes false statements to an employee in private, and the employee thereafter urges the employer to repeat and explain the basis of the statements in the presence of others, he cannot rely upon the statements as evidence of defamation. (See *Royer v. Steinberg* (1979) 90 Cal.App.3d 490, 498-99.)

Here, David's staff meeting request that his supervisor explain how he should have prepared his client report differently would likely qualify as consent to the supervisor's remarks. Having urged his supervisor to explain, in a group setting, David could not rely upon the supervisor's "published" comments about the shoddy report as evidence of defamation.

Conditional privilege

One of the most difficult challenges facing an employee seeking to recover damages for defamation is the broad statutory conditional privilege protecting statements made by employers in the context of employment evaluations. As noted above, California law defines both libel and slander as "a false and *unprivileged* communication." (Cal. Civ. Code, §§ 45, 46 (emphasis added).)

A privileged publication includes one made

> [i]n a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information.

(Cal. Civ. Code, §§ 47(c).)

This conditional "common interest" privilege is important from a public policy perspective, since it allows employers to provide frank, honest criticism of employees' attitudes, qualifications, and performance, without fear of having those criticisms recast as defamation claims. To the extent negative comments in employee evaluations may be characterized as statements of fact rather than of opinion, the conditional privilege further protects employers from potential liability for inadvertent factual misstatements.

Unfortunately, almost all of the negative statements by David's supervisor in written evaluations and the meeting with the human resources manager may be privileged. Even the recent criminal accusations of plagiarism and dishonesty may be immune from attack, since the supervisor published them to the human resources manager in the course of evaluating David's job performance and disciplining him for misconduct.

All may not be lost

While there are serious weaknesses in David's defamation claims, particularly given the breadth of the common interest privilege, all may not be lost. The privilege is *conditional*; in order for it to apply, the employer must have made the statements *without malice*. (*Ibid.*) To defeat the conditional privilege, an employee may establish that the employer in fact made the statements with malice.

He can do this by showing that the defamer made the statement either with knowledge of its falsity or with reckless disregard as to its truth or falsity (*Widener v. Pacific Gas & Elec. Co.* (1977) 75 Cal.App.3d 415, 436). He may show that the defamer failed to investigate the allegations (*Id.* at 435), exhibited anger and hostility toward him (*Id.* at 436), relied upon sources known to be unreliable (*Curtis Pub. Co. v. Butts* (1967) 388 U.S. 130, 156.) or to be biased against him (*Fisher v. Larsen* (1982) 138 Cal.App.3d 627, 640), or had no reasonable grounds for believing the statement to be true (*Brewer v. Second Baptist Church* (1948) 32 Cal.2d 791, 797).

The privilege is also lost where the statement was motivated by hatred or ill will (*Davis v. Hearst* (1911) 160 Cal. 143, 164.), by any cause other than the desire to protect the interest for the protection of which the privilege is given (*Agarwal*, 25 Cal.3d at 945), or was unnecessarily communicated to individuals not involved in the disciplinary action (*Rancho La Costa, Inc. v. Super. Ct.* (*Penthouse Int'l, Ltd.*) (1980) 106 Cal.App.3d 646, 665-66). The manner in which the defamer made the statement may suggest the existence of malice, particularly if the facts alleged are exaggerated, overdrawn, or colored to the defamed person's detriment, or are not stated fully and fairly (*Snively v. Record Pub. Co.* (1921) 185 Cal. 565, 577). "[A] long-standing grudge, . . . former disputes, . . . or any previous quarrel, rivalry, or ill feeling . . . in short, almost everything the [defamer] has ever said or done with reference to the [defamed person] – may be urged as evidence of malice." (*Scott v. Times-Mirror Co.* (1919) 181 Cal. 345, 362.)

Does David have evidence of past disagreements or arguments with his supervisor? Evidence that she dislikes him? Evidence that she is a political conservative who is biased against liberals? Evidence that she did not investigate the allegation of plagiarism or the reason for David's absence from work, or relied upon information from other employees who may not be reliable sources, or who themselves are biased against David? Did she repeat the allegations of plagiarism and dishonesty to David's co-workers, to other personnel uninvolved in the disciplinary process, or to nonemployees? Did she make the statements about plagiarism and dishonesty in an angry or hostile tone? If so, David may be able to defeat the conditional privilege with evidence of malice.

Conclusion

Defamation claims are common in employees' suits against employers, but they can be difficult to prove, notwithstanding the benefits of the respondeat superior doctrine and statements qualifying as defamation per se. The statements must be false – or at least not provably true. They must be statements of fact, not opinion, published to at least one other person, and the employee must have learned of them within the last year. Even if the statements meet all of these criteria, the conditional common interest privilege may insulate the employer from liability. Still, if the employee can present credible evidence that the statements were made with malice, the claims may well be worth pursuing.

John Kelley is a partner at Niesar & Vestal LLP *in San Francisco, where his practice includes business and commercial disputes, consumer fraud, intellectual property, personal injury and employment claims. He also provides counseling to clients regarding business formation, intellectual property and employment issues.*

Kelley

Endnotes:

[1] Few individuals are as self-unaware, as potentially paranoid, or as beleaguered with employment troubles as David, whom the author has invented for illustrative purposes and the reader's amusement. Still, occasionally one may find a needle of actionable defamation deep in a haystack of innocent remarks, unpublished criticisms, opinions, and privileged statements.

[2] *Id.* CACI 1704 defines "malice," "oppression," "despicable conduct," and "fraud" for purposes of determining the availability of punitive damages.