Washington Defamation Law

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The plaintiff in a defamation case must prove the defendant: (1) published (2) false, defamatory and (3) unprivileged (4) statements of fact with the (4) requisite mental state (either negligent or intentional disregard of the truth) (5) causing damages. Mark v. Seattle Times, 96 Wash.2d 473, 486 (1981), cert. denied, 457 U.S. 1124 (1982).

A. What is Publication?

"Publication" requires communicating the defamatory statement to at least one third party, either orally, electronically, or in writing. A private communication sent by the defendant solely to the plaintiff in a case, does not meet the publication requirement. Pate v. Tyee Motor Inn, Inc., 77 Wn.2d 819, 821 (1970). In the workplace, a communication sent by an employee solely to his manager or supervisor in the ordinary course of employment may not meet the publication requirement if it relates solely to relevant work behavior of another employee. Doe v. Gonzaga University, 143 Wn.2d 687 (2001), judgment rev'd on other grounds, 536 U.S. 273 (2002) citing Prins. V. Holland-North America Mortg. Co., 107 Wash. 206, 208 (1919). The theory behind the "intracorporatee nonpublication" rule is that:

> "Agents and employees of (the same principal) are not third persons in their relations to the corporation, within the meaning of the laws pertaining to the publication of libels. For the time being, they are a part and parcel of the corporation itself, so much so, indeed, that their acts within the limits of their employment are the acts of the corporation. For a corporation, therefore, acting through one of its agents or representatives, to send a libelous communication to another of its agents or representatives, cannot be a publication of the libel on the part of the corporation. It is but communicating with itself."

B. What is Defamatory?

In order to be actionable, the defendant's statement must be a false assertion of fact which subjects the plaintiff to hatred, contempt or ridicule. Valdez-Zonletk v. Eastmont School Dist., 154 Wash App 147, (Div 3 2010). Whether a statement is a defamatory assertion of fact, is

usually a question for the jury. However, there are four types of statements that are *defamatory per se* including:

- false allegations the plaintiff committed a serious crime
- false allegations the plaintiff has a loathsome disease
- false allegations the plaintiff is unchaste
- false allegations the plaintiff engaged in conduct incompatible with his business, trade, profession, or office.

If the defendant's statements are *defamatory per se, then damages are presumed*. This means the plaintiff is not required to prove economic loss or emotional distress in order to obtain substantial monetary damages.

C. Fact vs. Opinion

In order to be actionable, the defendant's statement must be an assertion of fact, not rhetorical hyperbole or a statement of opinion protected by the First Amendment. Camer v. Seattle Post-Intelligencer, 45 Wash.App. 29, 39 (1986) citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 339, (1974).

Whether something is a statement of fact versus opinion or rhetorical hyperbole, is a threshold question of law for the court which considers:

(1) the medium and context in which the statement was published;

(2) the audience to whom it was published; and

(3) whether the statement implies undisclosed facts. Dunlap v. Wayne, 105 Wash.2d 529, 539 (1986).

Opinions and rhetorical hyperbole are statements that cannot be proved true or false and therefore, although offensive, are inactionable as a matter of law. For example: Robel v.

Roundup, 148 Wn.2d 35 (2002)(Fred Meyer employees called a co-worker an *idiot, snitch, and liar*); Sisley v Seattle Public Schools, 180 Wn App 83 (Div 1 2014)(high school newspaper reporter called residential rental properties *crack shacks*); Jewell v. NYP Holdings, Inc., 23 F. Supp.2d 348 (S.D.N.Y. 1998)(newspaper article called the plaintiff who found the backpack bomb at the 2004 Olympics in Atlanta, *a fat, failed, former sheriff's deputy*); Seelig v. Infinity Broadcasting, 97 Cal. App. 4th 798 (Cal. Ct. App. 2002)(radio talk show host described the plaintiff as *a local loser and big skank*)[1]; Cochran v. NYP Holdings, Inc., 58 F Supp2d 1116 (newspaper article claimed that OJ Simpson's attorney, Johnnie Cochran, *will say or do just about anything to win, typically at the expense of the truth*); Burke v Gregg, 55 A.3d 212 (R.I. 2012)(radio talk show host called a restaurant owner a *punk and a manipulative piece of garbage*).

D. Public vs. Private Figures

Whether the plaintiff is a public or private figure is a key issue in any defamation case. This is because if the plaintiff is a public figure and the statements at issue concern his public duties, the plaintiff must prove the defendant spoke with *actual malice.* Herron v King Broadcasting Co., 112 Wn.2d 762 (Wash 1989) citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *Actual malice* does not mean hostility, spite or ill will. Actual malice means the defendant knew his statements were false or made in reckless disregard of the truth and must be proved by clear and convincing evidence.

Alternatively, the private figure plaintiff must prove the defendant knew, or in the exercise of reasonable care should have known, that his defamatory statements were false or

[1] But see In the Matter of Liskula Cohen, 887 N.Y.S. 2d 424 (2009)(terms like "skank" and "hoe" may be actionable if used to falsely imply sexual promiscuity).

would create a false impression. In a private figure case, this negligence must be proved by the regular civil standard of preponderance of the evidence.

E. Damages

In a private figure defamation case, the plaintiff may recover *actual damages* for economic loss and reputational injury. In a public figure defamation case, if the plaintiff proves the defendant acted with actual malice, the jury is instructed to *presume* damages. This means the plaintiff is not required to prove economic loss or emotional distress in order to obtain monetary damages.

F. Defenses

There are several possible defenses to a defamation claim. This article discusses just two of them.

1. The Truth

The truth is a complete defense to any defamation claim. In order to obtain summary dismiss of the case, the defendant only has to prove that the gist of his statements were *substantially true.* Mark v Seattle Times, 96 Wn.2d 473, 486 (1981), *cert. denied*, 457 U.S. 1124 (1982). A plaintiff may not base a defamation claim on true statements or the negative implications of true statements. Lee v. Columbian, Inc., 64 Wash. App 534, 583 (1991).

2. The Common Interest Qualified Privilege

There are certain kinds of statements made in certain contexts that are privileged and inactionable as a matter of law. For example, statements made in a judicial proceeding and statements made in good faith to governmental agencies on matters of public concern are privileged and cannot support a defamation claim.

The common interest qualified privilege may protect from liability someone who publishes a defamatory statement to third parties with whom he shares a legitimate common interest. The requirements for invoking the privilege are:

(1) the declarant and the recipient(s) must have a common interest in the particular subject matter of the communication; and

(2) the declarant must correctly or reasonably believe that facts exist which the persons sharing the common interest are entitled to know.[2]

The common interest qualified privilege has been frequently litigated in cases where defamatory statements are spread in the workplace by employers or employees acting in the ordinary course of their work.[3]

In Messerly v. Asamara Minerals, Inc., 55 Wn App 811 (Div. 3 1989), the plaintiff miners were terminated for allegedly smoking marijuana on the job in violation of company policy and state law. The plaintiffs denied the accusations but their employer conducted an investigation and concluded the charges were supported by credible evidence. After firing the plaintiffs, an Asamera supervisor sent this written notice to all employees:

> "I am sure you are all aware of the recent terminations of several mine employees. Some of the situations involve use of illegal drugs on the job. As all of us are aware, company policy in regard to smoking underground, use of any alcohol,

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[2] Moe v. Wise, 97 Wash.App. 950 (1999); Pate v. Tyee Motor Inn, Inc., 77 Wash.2d 819 (1970); Bass v Matthews, 69 Wash. 214 (1912).

[3] See Messerly v. Asamera Minerals, Inc., 55 Wash.App. 811, 817-18, (1989) and cases cited therein including Garziano v. E.I. Du Pont De Nemours & Co., 818 F.2d 380 (5th Cir.1987) (publication to coworkers that plaintiff was discharged for violating sexual harassment policy was privileged by commitment to enforcement of statutory duty to maintain work place free of sexual harassment); Gordon v. Tenneco Retail Serv. Co., 666 F.Supp. 908 N.D.Miss.1987) (employer's statement to employees that plaintiff terminated for theft was privileged); Burns v. Supermarkets Gen. Corp., 615 F.Supp. 154 (E.D.Pa.1985) (supervisor's comments to coworkers that plaintiff was discharged for theft was privileged); Happy 40, Inc. v. Miller, 63 Md.App. 24, 491 A.2d 1210, review denied, 304 Md. 299, 498 A.2d 1185 (1985) (employer's interest in avoiding appearance of arbitrariness that would affect employee morale sufficient to sustain privilege); Ponticelli v. Mine Safety Appliance Co., 104 R.I. 549, 247 A.2d 303 (1968) (statements to employees regarding plaintiff's "push[ing] a pencil" privileged when made with purpose of protecting plant property).

> illegal drugs, or any other substance that could affect your performance is very clear. It will not be tolerated."

The appellate court affirmed the trial court's dismissal of the plaintiffs' defamation claims on the grounds that the employer's notice was protected by the common interest privilege and the plaintiffs could not prove Asamera knew its statements were false.

In order to overcome the common interest qualified privilege in a defamation case, the plaintiff must prove by clear and convincing evidence that the defendant's statements at issue were false and published with *actual malice* which means the defendant knew his statements were false or were communicated in reckless disregard of the truth. Lillig v. Becton-Dickinson, 105 Wash. 2d 653 (1986). This is the same degree of *scienter* necessary to prove the defendant's liability for defaming a public figure and must also be proven by clear and convincing evidence. As indicated in the Messerly case, the defendant may show his honest belief arose from a fair and impartial investigation or from some other reasonable basis.

In Ward v. Painters' Local 300, 41 Wash.2d 859 (1953), the defendant accused a union official of stealing union funds during a union meeting. The accusation was investigated by an insurance company which found insufficient evidence to pay an embezzlement claim. No criminal charges were filed. The union official accused of the theft filed suit for defamation.

The trial court dismissed the claim on the grounds of the common interest qualified privilege. The appellate court agreed that union members have a common interest and privilege amongst themselves to discuss the qualifications and activities of its officers and members. Consequently, the communication at the meeting of union members was conditionally privileged

as a matter of law. The appellate court remanded the case to the trial court solely to determine whether there was any proof that the conditional privilege had been abused.[4]

In Hitter v. Bellevue School Dist. No. 405, 66 Wn.App. 391 (Wash.App. Div. 1 1992), cert denied 120 Wash. 2d 1013 (1992), the plaintiff was a special education teacher who was terminated after some co-workers accused him of inappropriately touching a disabled student. The plaintiff was vindicated and won reinstatement at an arbitration conducted pursuant to a collective bargaining agreement. He then sued the school district under various tort theories, including defamation. The defamation claim was based on the school principal's disclosure of the allegations to the student's mother.

The appellate court affirmed the trial court's dismissal of the defamation claim on the grounds that the principal's conversation with the student's mother was subject to the common interest privilege. Although the allegations of misconduct were unfounded, the plaintiff had no clear and convincing proof that the school principal knew her statements were false or acted in reckless disregard of the truth. Moreover, she had merely disclosed the fact of the accusation and had refrained from making any personal or editorial comment.

G. Civil Immunity for Giving Bad References

In 2005, the Washington state legislature enacted **RCW 4.24.730** to protect employers who give job references from being sued by their employees for defamation and invasion of privacy. The statute confers a broad immunity from civil liability to employers who disclose information about former or current employees to prospective employers or employment agencies if certain conditions are met:

[4] Abuse of the privilege-- can occur when the statements at issue are published to third parties outside the common group or the statements contain information or allegations outside the scope of the group's common interest.

1. the information must be provided at the request of another employer or employment agency, it cannot be unsolicited;

2. the disclosed information must relate solely to the employee's ability to perform his/her job; the diligence, skill or reliability with which the employee carried out the duties of his/her job; or any illegal or wrongful act committed by the employee when related to the duties of his/her job;

3. the employer must retain a written record of the identity of the person or entity to which information is disclosed for a minimum of two years from the date of disclosure;

4. the employee or former employee must have the right to inspect any such written record upon request;

5. the written record must be filed by the employer alphabetically in a central "References" file maintained by the records custodian of the relevant department or division.

RCW 4.24.730 provides that, if all of these conditions are met, then the employer shall enjoy a presumption of good faith that can only be rebutted by clear and convincing evidence that the information disclosed by the employer was knowingly false, deliberately misleading, or made with reckless disregard for the truth.