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Employers Who Have Nothing Nice to Say Should Say Nothing at All

By: Faith Alejandro. ***This was posted Tuesday, June 26th, 2012***

With high unemployment rates comes increased demand on human resource departments to provide employee references. Even though many **employers** increasingly shield themselves from providing insight into the former employment relationship by using resources such as **http://www.theworknumber.com/**, many future employers trying to get a sense of their possible future employee still try the old fashioned telephone call to see what shakes loose in the conversation.

What may shake loose, however, is a defamation claim, or even criminal liability. Many employers take false security behind a Virginia statute that provides only limited protection. In the context of high employee turnover, the following rules are worth reviewing.

Defamation.

The **Supreme Court of Virginia** recently reminded employers of their potential liability for **defamatory** statements relating to an employee's work or business. In **Askew v. Collins**, an employee of the **City of Hampton** drug treatment court sued the presiding judge (her "employer") for **defamation per se**. The judge was found to have falsely stated to a newspaper that the employee had been "institutionalized," which was "the only way you qualify for family leave." Interestingly enough, the statement was not published in the paper, but ***merely stated to and discussed among the paper's staff***.

That case was based upon the legal theory of "per se" defamation. Even though the employee provided no evidence about the amount of damages she suffered from the alleged statement, the Supreme Court affirmed the jury's award of $350,000 in **compensatory damages** to the employee. The high court stated "the reputational damage to Collins resulting from Askew's statement was properly presumed . . . ." In other words, for defamation per se, the employee only has to prove that the employer knowingly made a false statement to another that adversely reflected on the employee's abilities in his or her business, trade, or profession.

Thus the employee does not have to prove anything about his or her damages. Instead, the trier of fact can simply presume the employee's compensatory damages for his or her injury to reputation, humiliation, and embarrassment.

In the context of providing a reference, employers may inherently exercise more caution. But the Supreme Court of Virginia reminded employers several years ago to extend that caution to current employees such as during performance evaluations.

In **Hyland v. Raytheon, 277 Va. 40 (2009)**, the Virginia high court held the following statements from a performance review supported sending the affected employee's defamation claim to the jury:

Cynthia lead [the employer] in the protest of the FAA's evaluation selection process for the TSS contract and through a difficult procurement for the TSA, both of which demanded her constant attention. These visible losses created significant gaps in our strategic plans and in her business unit financial performance.

Cynthia and her team met their cash goals, but were significantly off plan on all other financial targets including Bookings by 25%, Sales by 11.5%, and profit by 24%.

These statements sound like statements of opinion, which would be protected, because of the words "significant" and "significantly." But the court found differently.

Instead, the Court held that these statements were subject to empirical proof and were "not merely the view of the writer." Thus, the employee was entitled to put the statement before a jury to decide whether or not the claim was true or false **even though the statement was shared only with others within the confines of the company**.

A key element of defamation is that the false and damaging statement must be "published," that is, shared, with a third party. In both of these Virginia cases, even though the "sharing" element of the alleged defamatory content was more subtle, it was actionable.

Limited Statutory Protection for References

Some employers may think the law protects their statements made to prospective employers about a former employee's work performance because of **Va. Code § 8.01-46.1**. This statute provides that employers who provide information to a prospective employer about a current or former employee's professional conduct, reasons for leaving the job, and job performance (including written performance evaluations) are immune from civil liability as long as the employer does not act in bad faith. Although the law presumes employers act in good faith, this can be rebutted by clear and convincing evidence that the employer knowingly disclosed false information. If liable, the employer could also be required to pay punitive damages.

A defamation claim requires proof that the employer knowingly disclosed false information. Therefore, this statute does not totally defeat an employee's ability to bring a defamation claim. At best, it requires a higher level of proof in the employee's claim that the employer knowingly disclosed the false information. Plus, this "immunity" is only available to employers responding to requests by prospective employers.

Possible Criminal Liability.

When employers communicate with prospective employers, they should also be aware of potential criminal liability for preventing a former employee's prospective employment opportunities. **Section 40.1-27** of the

Code of Virginia makes it a crime for an employer to willfully and maliciously prevent or attempt to prevent “by word or writing, directly or indirectly” a former employee from obtaining employment with another person. Statements made by former employers could, in extreme cases, be the basis of a criminal prosecution under this often overlooked statute.

If you should have questions about how to minimize your exposure to defamation claims, the **Virginia employment lawyers** at **Sands Anderson PC** are glad to talk with you.