

So Here's What I Think About That Former Employee...

Labor & Employment Law Update

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Unless we have been living under a rock for the last few weeks, it is likely that we may have wondered if former FBI Director James Comey could sue President Trump for defamation. Indeed, President Obama's former Ethics Chief, Norm Eisen, recently tweeted that the president's "false, malicious accusation of criminal conduct is libel [published defamation] *per se* by Trump. @Comey could sue- & might win..." Without weighing in on the viability of such a claim, however, it is prudent to review a few defamation principles to keep in mind.

Acknowledging that laws vary from state to state, to establish a claim for defamation a plaintiff must show the following: 1) that the defendant made a false statement about the plaintiff; 2) that the defendant "published" the statement to a third party; 3) that the defendant either knew the statement was false or lacked reasonable basis to believe the statement was true; 4) that the statement was not "privileged"; and 5) that the plaintiff was harmed by the publication of the false statement. In a *per se* defamation case, the plaintiff may not have to show harm because the statement is so damaging on its face, e.g. the individual is said to have "committed many crimes."

In the context of employment, such claims typically arise in connection with an employee reference check. These kinds of claims are difficult to prove and laws generally provide certain defenses and privileges or immunities. For instance, truth is an absolute defense – if the statement is true, the claim would fail. In addition, statements of opinion will not be sufficient, even if they are negative and unkind ("*slippery...not smart*"). An individual making the statement may also have the protection of an "absolute privilege" or immunity, such as the president or other high ranking public officials who enjoy absolute immunity for statements made "in the course of their official acts." Other types of statements fall under a "qualified privilege," where the individual has a right to make the statement, such as might be found in the context of an employment relationship where a supervisor is engaged in evaluating an employee. Here, the plaintiff would have to show that the individual acted with malice to establish liability.

Of course, most employers and their agents will not enjoy "absolute immunity." Depending on your home state, certain immunities in providing references may apply under a specific statutory framework. To minimize the incidence of such claims, however, it will be critical to establish specific guidelines to ensure consistency in handling reference requests. Designate certain individuals to

respond to reference requests. Additionally, employers may want to maintain a database of how to address specific reference requests as there may be, in addition to written guidelines, specific separation agreements that will govern how references will be provided. Finally, managers and supervisors ought to be trained in proper evaluation and performance review methodology to avoid making statements that may be deemed defamatory by a disgruntled employee (e.g., sticking to the handbook policy the employee violated in a write up, as opposed to the opinion of the employee being a criminal or thief). And finally, do not use Twitter or other social media vehicles to address an employee's performance or separation.

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