Court Nixes Fired Employees' Defamation Suit

By: Jayna Genti

All of us have made intemperate remarks about others. If the intemperate language is directed to employees whom we supervise or manage, however, the words may become fodder for a defamation lawsuit. What can you do if you are on the receiving end of such a suit? How do you defend yourself?

A recent ruling by a Prince Edward County Circuit Court judge provides some helpful guidance. The judge dismissed the defamation claims of four former employees of a Southside community services agency, Crossroads. *See Baldwin v. Baker* (Teefey) No. CL 16- 218(L); Oct. 11, 2016; Prince Edward County Cir. Ct. In doing so, the judge clarified the law of defamation and made clear that certain types of statements about an employee and his or her work performance cannot be the subject of a defamation claim.

The Facts

Crossroads, a community services board, is part of a state agency that coordinates mental health, mental disability, and substance abuse services for Virginia counties. In October, 2015, in a closed session meeting of the Crossroads Board of Directors, four Crossroads employees who had worked in supervisory, professional, or administrative positions for many years expressed their concerns about the management and administration of Crossroads. The Board took no action on the employees' reports.

Later, in mid-January, 2016, the employees sent an email to the new Board Chair, Sydney Smyth, inquiring about what action the Board would take on their reports. In response, Mr. Smyth expressed extreme displeasure with the employees' decision to go behind the back of the Executive Director, Dr. Susan Baker, and complain to the Board. In his reply email Mr. Smyth stated:

> I do not have the time nor do I desire to micro-manage Crossroads. The Board fully supports Dr. Baker, and she is the one you should address your concerns to. If you find that you cannot work within these parameters, then I suggest that you and your cronies might want to look elsewhere for employment.
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> On a personal note, I think you need to know that I find insubordination to be despicable. It is immature and unprofessional. Frankly, if you were my subordinate and I found you were making end runs behind my back to Board members, I would fire you on the spot, but, as I said before, my capacity as a Board member and as its Chairman is not to micromanage the day to day operations of the organization.

Less than a week later, Dr. Baker terminated the four employees, informing them that the termination was necessary for workforce reductions.

The Lawsuit and Court Opinion

The four employees filed suit in Prince Edward County Circuit Court against Dr. Baker and Mr. Smyth. In addition to alleging wrongful termination, the employees also claimed that Dr. Baker and Mr. Smyth made defamatory statements about them, including the statements in Mr. Smyth's reply email.

In an extensive opinion, Judge Designate Joseph M. Teefey, Jr., ruled the challenged statements were not actionable defamation. The judge reasoned that many of the statements did not constitute verifiably false statements of fact, which is required for a defamation claim. Instead, the statements merely expressed Dr. Baker or Mr. Smyth's opinions, and, at most,

constituted "rhetorical hyperbole." As Judge Teefey explained, "speech which does not contain a provably false factual connotation, or statements which cannot reasonably be interpreted as stating actual facts about a person cannot form the basis of common law defamation claim."

No False Facts

For example, Judge Teefey found that Dr. Baker's statements that two of the terminated employees "are not as knowledgeable as you think," "they are liars," and "they were dangerous to Crossroads and needed to be removed" may have been insulting or offensive, but, nonetheless, were merely opinion, not provably false fact.

Similarly, Mr. Smyth's statements calling the employees' actions "despicable insubordination" that was "immature and unprofessional" and that warranted "fire[ing] them on the spot," according to the judge, may have been intemperate, but again Judge Teefey ruled they were non-actionable opinion. That was because no reasonable interpretation of the statements could find Mr. Smyth stating actual, provable facts.

Additionally, the statements did not carry the requisite "sting" to the employees' reputation to be actionable. As Judge Teefey explained, an actionable defamatory statement must be strong enough to shame or disgrace the person, tend to subject the individual to scorn, ridicule, or contempt, or render the individual infamous, odious, or ridiculous. None of the statements rose to this level of scorn or ridicule.

No Defamation *Per Se*

Judge Teefey also found that none of the statements constituted defamation *per se,* which "imput[es] to a person unfitness to perform the duties of an office or employment of profit, or want of integrity in the discharge of the duties of such an office or employment" or "prejudices such person in his or her profession or trade." In examining the statements, the judge explained

that they did not rise to the level of defamation *per se* because they referenced single instances, not habitual conduct or the want of qualities or skill that the public is reasonably entitled to expect of persons engaged in a business or profession.

For example, Dr. Baker claimed one of the employees was "insubordinate" for failing to follow her directive to terminate a Crossroads program. However, according to Judge Teefey, "[a] supervisor's rebuke of an employee's single failure to follow a directive is far removed from commenting that the employee wants for skills or qualities necessary for her position."

Similarly, an internal comment sent by Dr. Baker directly to another employee stating that the budget was "in the red" did not constitute defamation *per se* because it did not expressly or implicitly reference the employee's qualities or skills and made no assertions, implicit or explicit, regarding responsibility for the overspending. Mr. Smyth's email calling the employees "cronies," according to Judge Teefey, in and of itself, was not even insulting and, hence, could not be defamation *per se*.

Bottom Line: Judge Teefey's opinion provides some useful ammunition to defend yourself from a defamation suit based upon any intemperate statements you may have made pertaining to an employee's poor job performance or inappropriate or unprofessional conduct. To the extent that the statements merely reflect your personal views, rather than stating actual, provable facts, Judge Teefey's opinion makes clear that they cannot be the subject of a defamation claim. Additionally, statements pertaining to the inability of an employee to perform a specific job task cannot constitute defamation *per se.*

Notwithstanding Judge Teefey's limits on what may constitute actionable defamation, it always is better not to make any intemperate statements in the first place. Use of "rhetorical hyperbole" likely will inflame the situation and make things worse. Saying that an employee's

conduct was “despicable” or “immature,” as Mr. Smyth did, may have accurately reflected his opinion, but the statements did not help the situation and, instead, made things worse.

Taking a measured approach when dealing with matters involving your employees always is the better route. Remember, not only can loose lips sink ships, they also may prompt lawsuits – a result that usually benefits only the lawyers.