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When Loose Lips Sink Ships: Guarding Against Retaliation and Defamation Claims By Former Employees

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Employers should not believe that potential problems with an employee necessarily end once that employee resigns or is terminated. Trouble can arise, for example, when careless statements are made about a former employee--especially when these statements relate to matters that can negatively impact a former employee's reputation.

Recent case law from the United States Court of Appeals for the Seventh Circuit (covering Wisconsin, Indiana and Illinois) confirms that an employer may be liable for derogatory rumors spread about a former employee. This is so even for statements uttered and rumors spread in response to an administrative discrimination charge filed *after* the former employee's employment has already ended. Such comments can be found to be retaliatory under anti-discrimination laws. Moreover, such comments could form the basis for a defamation claim.

Retaliation Claims

Whenever an employee alleges that his or her employer has taken some adverse action against him or her in response to the exercise of a legally-protected employment right, that employee has presented a claim for retaliation. Derogatory comments about a current or even a former employee can form the basis of a retaliation claim when these comments can be shown to be the result of the employee's prior exercise of a legally-protected right.

For example, in *Abdullahi v. Prada USA Corp.*, a recent case involving a former shoe store salesperson bringing a race discrimination claim, the federal trial court initially dismissed the former employee's retaliation portion of her claim because the EEOC charge that allegedly prompted the comments about her was not filed until after she was no longer employed by the company. However, the appellate court reinstated her retaliation claim, holding that such a claim is actionable under federal anti-discrimination and anti-retaliation law.

In another example, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997), a terminated former employee filed an EEOC charge alleging that his termination was discriminatory based on race. After the charge was filed, the former employee applied for a job and claims that the company he applied to received a negative review from his former employer, in retaliation for having filed the EEOC charge. The U.S. Supreme Court held that it would defeat the purpose of anti-retaliation protections in federal employment laws to hold that a former employee lacked the protection afforded to current employees, when (for example) only a former employee could allege discriminatory termination.

It is thus clear that a former employee can assert a retaliation claim against a former employer for negative comments published to third parties, even when the protected activity that allegedly prompts the retaliation is post-employment.

Defamation Claims

The elements of defamation claims vary somewhat from state to state. In Indiana, defamation is defined as "that which tends to injure reputation or to diminish esteem, respect, good will or confidence in the [former employee], or to excite derogatory feelings or opinions about [him or her]." While most types of claims in both state and federal courts do not have to be described in detail initially to survive dismissal, defamation claims are usually treated differently. For example, in Indiana

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(and in federal courts applying Indiana law), the complaint must provide detailed information about the alleged defamatory communication, including not only the statement or statements alleged to have been made, but also the speaker or speakers, to whom the statement or statements were made, and when or in what context the statement or statements were made. Claims lacking the requisite detail are subject to dismissal by the courts.

Typically, whether specifically-alleged statements are defamatory or not is a question of law, not fact. However, there are categories of statements that are generally accepted as defamatory simply by their very nature. For example, under Indiana law, statements about a person's criminal conduct, certain diseases, professional misconduct, or sexual misconduct are all defamatory "per se," when untrue. When these sorts of untrue statements are made about a former employee, the former employee does not need to identify specific damages he or she has suffered, because damage to reputation is presumed. Claims based upon other types of alleged defamatory statements require that the former employee identify specific damages that he or she has suffered (and "psychological injury" does not qualify as sufficient damage for these purposes).

A few more points: First, silence cannot be a "defamatory statement" under the law in Indiana and other states. For example, a former employee cannot make a claim for defamation based upon a silent response to an inquiry about him, regardless of whether the silent response creates some inference about the former employee's reputation. Second, a true statement of fact cannot be defamatory. This means objective factual statements - a former employee's dates of employment and position held, for example - generally cannot be defamatory when no additional information is provided. For this reason, a standard policy limiting employee references to only this information is a good idea. Third, there is a "qualified privilege" in Indiana and other states which protects certain types of statements against defamation claims. Specifically, inter-company communications regarding the fitness of a former employee are protected by law, to accommodate the important role of free and open communications that serve legitimate human resource management needs.

Conclusions

It is important to know how the law in your state affects the way you treat former employees. Regardless of your state's specific law, in the end, common sense is the most useful tool to prevent post-employment retaliation and defamation claims. Be direct with supervisors, managers and human resources as to

what they should and should not say about former employees, because the wrong words may come back to haunt you.

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