Showing of Actual Malice Trumps Truth and Conditional Privilege in Employer Communications Defamation Case

Massachusetts employers considering whether to distribute a mass e-mail announcing an employee's termination should think twice before hitting send, as it could subject them to liability for defamation. While Massachusetts courts historically recognized truth as an absolute defense against libel and slander claims, a recent First Circuit decision, *Noonan v. Staples, Inc.*, held that employers who publicize a discharged employee's name and the circumstances of his or her dismissal could be liable for defamation, even though the employer's statements are true.

In *Noonan v. Staples, Inc.*, the plaintiff, a former sales director, filed suit for libel after the employer's executive vice president disseminated an email to approximately 1,500 Staples employees, broadcasting the plaintiff's dismissal for violations of the company's travel and expense policies. The e-mail was intended to remind staff that Staples strictly enforces its company policies.

While the defenses of truth and conditional privilege historically protect statements that are either true or "reasonably related to the employer's business interest," and are not knowingly false or published with reckless indifference to their truth or falsity, the First Circuit in *Staples* held that Massachusetts General Laws ch. 231, § 92 permits a narrow exception to these defenses. This exception applies if the defendant acted with "actual malice" in publishing the statements; that is, an employer who publishes a statement with actual malice may now be held liable for defamation, even if the published statement is true.

The most striking feature of the *Staples* decision is its definition of the "actual malice" required to attach liability to an employer who has otherwise published a privileged or truthful statement. Rejecting the definition established in *New York Times v. Sullivan*, which held that "actual malice" means "the defendant acted with knowledge of falsity or reckless disregard for whether a statement was true or false," the First Circuit applied a 100-year-old Massachusetts law defining malice sufficient to attach defamation liability for a truthful or privileged statement as "actual malevolent intent or ill will."

"Actual malice" may require a lesser degree of malevolence than an employer might think. The First Circuit held that a fact-finder may infer that Staples acted with ill will in disseminating the email based on evidence of the surrounding circumstances. First, Staples did not have a past practice of issuing such cautionary e-mails, and the executive vice president had never before identified a discharged employee by name in a mass communication. Second, Staples did not distribute a mass communication announcing a second employee's embezzlement and discharge, which could support a finding that the company's practice was inconsistent and that the plaintiff had been singled out. Finally, the e-mail distribution list could be considered overly broad, because it included employees not even subject to Staples's travel and expense policy and who thus had no reason, in the court's view, to receive the company's admonition.

In light of this case, employers should exercise caution when publicizing the facts of an employee's dismissal to its workforce. Although teachable moments can be tempting, employers should avoid identifying terminated employees by name in mass communications, and should also steer clear from disclosure of an individual's recognizable characteristics. While the Staples case did not address whether the same standard applies in the context of employer reference-giving, the court did find that

the plaintiff's showing of actual malice trumps conditional privilege; so employers should proceed with circumspection when providing a job reference. Although there may be value in using the dismissal of an employee as a vehicle for publicly deterring worker misconduct, communicating such consequences in general terms is a safer approach for the employer legally.

To learn more about the implications of this decision in your workplace or any other labor and employment issue, please contact any member of the Ropes & Gray Labor and Employment department or your usual Ropes & Gray advisor.