North Dakota Law Review

Volume 72 | Number 2 Article 2

1996

Avoiding Claims of Defamation in the Workplace

Thomas A. Jacobson

AVOIDING CLAIMS OF DEFAMATION IN THE WORKPLACE

THOMAS A. JACOBSON*

I. INTRODUCTION

The doctrine of at-will employment is, for the time being, alive and well in the state of North Dakota and in most other jurisdictions in the United States. That is, unless they agree to employment for a specific duration, both employers and employees generally enjoy the right to sever their employment relationship at any time and for any reason or for no reason at all.[1] Consequently, most involuntarily terminated employees cannot take advantage of contract theories when litigating against their former employers.

As an alternative to remedies under contract law, many employees seeking compensation have therefore chosen to sue under various tort theories such as intentional infliction of emotional distress,[2] interference with contract,[3] and even negligent discharge.[4] The most pervasive of these tort theories, however, is defamation.[5]

Defamation claims brought by terminated employees have been a commonly litigated issue in the employment area.[6] However, in recent years, the damages awarded in defamation cases has drastically increased. For example, a jury in Burleigh County, North Dakota,

---

* Thomas A. Jacobson, who was formerly an attorney with the law firm of Nilles, Hansen & Davies, Ltd., of Fargo, North Dakota, where he concentrated in the areas of employment law and civil litigation, is now an attorney with the law firm of Swenson, Lervick, Syverson & Anderson in Alexandria, Minnesota. He graduated *summa cum laude* from the University of North Dakota in 1987 and with honors from Drake University Law School in 1990. He would like to gratefully acknowledge the research assistance of Jackie Anderson (University of North Dakota Law School, 1995) without whose help this article would not have been possible.

1. N.D. CENT. CODE § 34-03-01 (1987); Osterman-Levitt v. Medquest, Inc., 513 N.W.2d 70, 72 (N.D. 1994); Rykowsky v. Dickinson Pub. Sch. Dist. No. 1, 508 N.W.2d 348, 349 (N.D. 1993); Bykonen v. United Hosp., 479 N.W.2d 140, 141 (N.D. 1992); Hillesland v. Federal Land Bank Ass'n, 407 N.W.2d 206, 212 (N.D. 1987).

2. Swenson v. Northern Crop Ins., 498 N.W.2d 174, 177 (N.D. 1993).

3. Demetracopoulos v. Wilson, 640 A.2d 279, 281-82 (N.H. 1994); Hennum v. City of Medina, 402 N.W.2d 327, 328 (N.D. 1987).

4. Chamberlain v. Bissell, Inc., 547 F. Supp. 1067, 1080-81 (W.D. Mich. 1982).

5. *See Rykowsky*, 508 N.W.2d at 350-51; Soentgen v. Quain & Ramstad Clinic, 467 N.W.2d 73, 77-78 (N.D. 1991); Little v. Spaeth, 394 N.W.2d 700, 705 (N.D. 1986); Eli v. Griggs County Hosp. & Nursing Home, 385 N.W.2d 99, 101 (N.D. 1986); Gowin v. Hazen Memorial Hosp. Ass'n, 311 N.W.2d 554, 557 (N.D. 1981).

6. The following cases illustrate defamation claims brought by terminated employees: Boston Mut. Life Ins. v. Varone, 303 F.2d 155 (1st Cir. 1962); Johnson v. Independent Life & Accident Ins., 94 F. Supp. 959 (E.D.S.C. 1951); Caslin v. General Elec. Co., 608 S.W.2d 69 (Ky. Ct. App. 1980); Stuempges v. Parke, Davis & Co., 297 N.W.2d 252 (Minn. 1980); McBride v. Sears, Roebuck & Co., 235 N.W.2d 371 (Minn. 1975); Jorgensen v. Pennsylvania R.R., 138 A.2d 24 (N.J. 1958).

recently awarded $1.2 million in general damages and $700,000.00 in punitive damages to a man the jury found had been defamed when his former employer sent a series of letters falsely stating that he had been "terminated for cause."[7] Awards of over $2 million,[8] $150,000.00,[9] and $100,000.00[10] have also been reported. Moreover, these costs do not include the significant attorney's fees that the employer will be forced to incur during the litigation process. The purpose of this article is to provide a basic outline of a workplace defamation claim and some practical suggestions that may help employers avoid such claims.[11]

II. ANATOMY OF A WORKPLACE DEFAMATION CLAIM

A. ESSENTIAL ELEMENTS OF THE CLAIM

Under North Dakota law, every person has the right of protection from defamation.[12] Defamation can be effected by libel or slander.[13] Libel is essentially the written form of defamation,[14] while slander is defamation by other means such as the spoken word.[15] The essential elements of a workplace defamation claim include the publication (i.e., communication to a third party) by the employer of false and unprivileged information that defames the employee.[16]

---

7. Vanover v. Kansas City Life Ins., No. — Civ. — (Burleigh County Dist. Ct. N.D. Sept. 19, 1995).

8. Brooks v. Doherty, Rumble & Butler, 481 N.W.2d 120, 124 (Minn. Ct. App. 1992).

9. Murray v. HeathEast, No. C4-90-1472 (Ramsey County Dist. Ct. Minn. Mar. 7, 1991).

10. Keenan v. Computer Assocs. Int'l, 13 F.3d 1266, 1268 (8th Cir. 1994).

11. The authority for this article is based primarily on North Dakota and Minnesota law.

12. N.D. CENT. CODE § 14-02-01 (1991).

13. *Id.* § 14-02-02.

14. *Id.* § 14-02-03. Under this section "civil libel" is defined as "a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." *Id.*

15. *Id.* at § 14-02-04. Under this section "civil slander" is defined as:

> [A] false and unprivileged publication other than libel, which:
> 1. Charges any person with crime, or with having been indicted, convicted, or punished for crime;
> 2. Imputes to him the present existence of an infectious, contagious, or loathsome disease;
> 3. Tends directly to injure him in respect to his office, profession, trade, or business, either by imputing to him general disqualifications in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits;
> 4. Imputes to him impotence or want of chastity; or
> 5. By natural consequence causes actual damage.

Id.

16. *See* Gowin v. Hazen Memorial Hosp. Ass'n, 311 N.W.2d 554, 557 (N.D. 1981). In Minnesota, there is no statutory cause of action for defamation. However, the Minnesota Supreme Court has relied upon the RESTATEMENT (SECOND) OF TORTS in holding that an employee can be defamed if the employer publishes a false statement which is about the employee and which also tends

B. TYPES OF COMMUNICATIONS WHICH, IF FALSE AND UNPRIVILEGED, MAY BE ACTIONABLE

One of the most frequent bases for workplace defamation claims is statements by the employer that tend to injure the employee's business reputation. For example, in *Vanover v. Kansas City Life Insurance*,[17] the jury found that an employee was defamed when his former employer falsely stated that he had been "terminated for cause."[18] In another example, an employer was held liable for falsely reporting to an employment agency that a former employee was a "poor salesman," "not industrious," "fired because he sold on friendship," and "did not belong in sales."[19] Furthermore, employers have been held liable for falsely stating that employees were fired for "gross insubordination"[20] and for falsely accusing an employee of erasing computer tapes.[21]

Sometimes, the defamatory statement stems from an accusation that the employee was involved in criminal activity.[22] Frequently, this occurs when the employer suspects the employee of theft[23] or drug use.[24] If the implication of the statement is that the employee was involved in any type of criminal activity, the statement may be actionable.[25]

"to harm the [employee's] reputation and to lower him in the estimation of the community." Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 255 (Minn. 1980).

17. No. — Civ. — (Burleigh County Dist. Ct. N.D. Sept. 19, 1995).

18. Vanover v. Kansas City Life Ins., No. — Civ. — (Burleigh County Dist. Ct. N.D. Sept. 19, 1995).

19. *Stuempges*, 297 N.W.2d at 255, 259.

20. Lewis v. Equitable Life Assurance Soc'y, 389 N.W.2d 876, 888 (Minn. 1986).

21. Staples v. Bangor Hydro-Elec. Co., 561 A.2d 499, 501-02 (Me. 1989). *See also* Keenan v. Computer Assocs. Int'l, 13 F.3d 1266, 1275 (8th Cir. 1994) (finding that an employee was defamed when he was forced to disclose to prospective employers that he had been terminated for "poor performance"); Brooks v. Doherty, Rumble & Butler, 481 N.W.2d 120, 129 (Minn. Ct. App. 1992) (determining that employee was defamed when he was terminated based on false reasons); Murray v. HeathEast, No. C4-90-1472 (Ramsey County Dist. Ct. Minn., Mar. 7, 1991) (finding an employee, who was a nurse, was defamed when several other employees stated that he had contributed to the death of a patient).

22. N.D. CENT. CODE § 14-02-04(1) (1991).

23. *See*, Miles v. Perry, 529 A.2d 199, 213 (Conn. App. Ct. 1987) (holding that statements concerning secretary's handling of finances amounted to an accusation of theft); Karnes v. Milo Beauty & Barber Supply, 441 N.W.2d 565, 567 (Minn. Ct. App. 1989) (accusing employee of stealing money from cash register drawer); Smithson v. Nordstom, Inc., 664 P.2d 1119, 1121 (Or. Ct. App. 1983) (finding sufficient evidence for jury determination that an employee was falsely accused of theft); Lawrence v. Jewell Cos., 193 N.W.2d 695, 697 (Wis. 1972) (noting as slander an accusation that employee had overcharged customers and had stolen money from employer).

24. Nicklow v. Menard, Inc., No. C2-91-2053, 1992 WL 153434 (Minn. Ct. App. July 7, 1992) (holding that an employee was defamed by being released from job for drug use when the employee had not in fact used drugs).

25. *See, e.g.*, Babb v. Minder, 806 F.2d 749, 759 (7th Cir. 1986) (holding that a statement by a manager that a former employee had shown her bare buttocks was defamatory per se as sufficient to impute crime of indecent exposure).

Courts have also recognized workplace defamation claims where employees have been accused of sexual misconduct.[26] For example, a cartoon drawn by co-worker depicting a female employee and male coworker in a sexually compromising position was found actionable because it imputed a lack of chastity to the female.[27] Similarly, statements made by an employer that an employee was having sexual relations with his daughter were held to be defamatory *per se*.[28]

Of course, not all disparaging remarks are actionable. Generally, a defamation claim cannot be based on statements of opinion.[29] Although, the United States Supreme Court has stated that not all opinion is automatically protected and that the distinction between fact and opinion is artificial,[30] there have been numerous phrases or terms which courts have determined are simply not actionable.

For example, the North Dakota Supreme Court noted that mere name-calling and the use of opprobrious epithets is not actionable.[31] In *Meier v. Novak*,[32] the defendant called the plaintiff an "asshole," and the court found that the defendant could not be held liable for this comment.[33] The court stated that the word "imputes no characteristic, habit, or condition which would fall within the definition of slander contained in our statute," and that although the word is "ill-mannered, rude, and objectionable in the extreme, especially when used in public, it does not constitute a basis for a cause of action for slander in this setting."[34]

Similarly, the Minnesota Court of Appeals recently noted that terms such as "brown nose," "shit heads," "favoritism," "Dick Lund," "sick" and "move-ups" are not actionable.[35] The court has also rejected actions based on the following words or phrases: "couldn't cut it;"[36] "senseless drivel," "gross injustice" and "crass insult" when

26. N.D. CENT. CODE § 14-02-04(4) (1991).

27. Linebaugh v. Sheraton Michigan Corp., 497 N.W.2d 585, 597 (Mich. Ct. App. 1993).

28. Brown v. Farkas, 511 N.E.2d 1143, 1146 (Ill. App. Ct. 1986). *See also* Delaney v. Taco Time Int'l, 681 P.2d 114, 118 (Or. 1984) (noting that words in a written report that an employee caused dissension in the workplace because her supervisor refused to sleep with her were arguably defamatory).

29. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) (stating that "[u]nder the First Amendment, there is no such thing as a false idea").

30. Milkovich v. Lorain Journal Co., 497 U.S. 1, 13-14 (1990).

31. Meier v. Novak, 338 N.W.2d 631, 635 (N.D. 1983).

32. 338 N.W.2d 631 (N.D. 1983).

33. Meier v. Novak, 338 N.W.2d 631, 635 (N.D. 1983).

34. *Id.*

35. Lund v. Chicago & Northwestern Transp. Co., 467 N.W.2d 366, 369-69 (Minn. Ct. App. 1991).

36. Gant v. Mohaney, Dougherty, & Mahoney, No. C6-90-571, 1990 WL 105956, at *1 (Minn. Ct. App. July 31, 1990).

describing a letter;[37] "fluffy," "bitch," "flirtatious;"[38] "out of control," "emotional," a "bad influence," "not a team player," and not "technically strong."[39] The United States District Court for the District of Minnesota has rejected similar claims based on words such as "complainer," "troublemaker,"[40] "hard to work with" and "rude."[41]

C. PUBLICATION

However, even the most disparaging remark made to an employee alone is not actionable. In order for a disparaging remark to be actionable, it must also be published.[42] That is, it must be communicated to someone other than the plaintiff/employee.[43] Because of the number of ways in which employers must communicate with their employees, there is great potential for employers to mistakenly disclose defamatory information. And, as employers begin to communicate more through technology such as electronic mail and the Internet, these media will also become sources of potential liability. Thus, the key is to identify the possible sources of defamatory information and to then control its dissemination.

Written communications are fertile ground for litigation. Essentially, any intracompany communication may constitute publication, even though the publication may be privileged.[44] For example, although employers usually enjoy the privilege to communicate disciplinary and performance information, employees have frequently sued for disparaging remarks made about them in disciplinary notices and written evaluations.[45] Similarly, memoranda

---

37. Erven v. Provost, 413 N.W.2d 861, 863 (Minn. Ct. App. 1987).

38. Lee v. Metropolitan Airport Comm'n, 428 N.W.2d 815, 821 (Minn. Ct. App. 1988).

39. Geraci v. Eckankar, 526 N.W.2d 391, 397 (Minn. Ct. App. 1995).

40. Thompson v. Campbell, 845 F. Supp. 665, 680 (D. Minn. 1994). *See also* McGrath v. TCF Bank Sav., FSB, 502 N.W.2d 801, 804 (Minn. Ct. App. 1993), *modified on other grounds by*, McGrath v. TCF Bank Sav., FSB, 509 N.W.2d 365 (Minn. 1993) (addressing the term "troublemaker").

41. Schibursky v. IBM, 820 F. Supp. 1169, 1182 (D. Minn. 1993).

42. *See, e.g.*, Lindgren v. Harmon Glass Co., 489 N.W.2d 804, 811 (Minn. Ct. App. 1992) (noting that disparaging statements, if true, are not actionable and that letter of termination did not constitute publication).

43. Emo v. Milbank Mut. Ins., 183 N.W.2d 508, 512 (N.D. 1971) (citing Dvorak v. Kuhn, 175 N.W.2d 697, 703 (N.D. 1970)). *See also* Rouse v. Dunkley & Bennett, 520 N.W.2d 406, 411 (Minn. 1994) (citing Lewis v. Equitable Life Assurance Soc'y, 389 N.W.2d 876, 886 (Minn. 1986)) (discussing publication and communication with regard to defamation); Rickbeil v. Grafton Deaconess Hosp., 23 N.W.2d 247, 251 (N.D. 1946) (defining publication in defamation context).

44. *See Rickbeil*, 23 N.W.2d at 256 (holding that dictation to and subsequent transcription by secretary was a publication); *see also* Frankson v. Design Space Int'l, 394 N.W.2d 140, 144 (Minn. 1986) (holding that preparation of a defamatory letter and distribution constitutes publication). *See infra* part III.C. (discussing privilege defense).

45. *See, e.g.*, Caslin v. General Elec., 608 S.W.2d 69, 70 (Ky. Ct. App. 1980) (involving allegations of libelous performance appraisals of employee by supervisor); Bratt v. IBM, 467 N.E.2d 126, 130 (Mass. 1984) (involving personnel director's memorandum regarding employee's mental

prepared during internal investigations of misconduct such as alleged sexual harassment and theft have also generated litigation.[46] However, when investigating sexual harassment cases, employers will generally be protected by the Equal Employment Opportunity Commission's mandate that employers "take all steps necessary to prevent sexual harassment."[47] Company publications such as newsletters can also be a source of defamatory information.[48] Likewise, graffiti in the form of derogatory cartoons or otherwise could be interpreted as defamatory.[49] Thus, it is clear that any written or other graphic communication which is disseminated to a third party will satisfy the publication element of a workplace defamation claim.

Clearly, an employee can also be defamed by the spoken word. Typically, this occurs when the employer makes disparaging remarks about the employee during the evaluation, disciplinary, or discharge process. As with written comments made at these stages of employment, oral remarks will generally be protected as privileged.[50] Nevertheless, they are a frequent basis for workplace defamation claims.

For example, the Minnesota Supreme Court found in favor of an employee who was first accused of theft and then publicly fired at an employee meeting where the manager stressed the store's policy against theft.[51] The Oregon Court of Appeals has also found for an employee who was defamed when the company's general manager reported at a meeting of about 120 other employees that the employee was fired because he had been "drunk and misbehaving in a bar" and "had a drinking problem."[52]

One particularly difficult area is that of employee references. An employer who discusses a problematic employee with another prospective employer is faced with a dilemma: tell the whole truth, even if that means risking a defamation lawsuit by disclosing disparaging information about the employee; or, withhold information that would be

---

condition); Daywalt v. Montgomery Hosp., 573 A.2d 1116, 1117 (Pa. Super. Ct. 1990) (involving personnel director's memorandum regarding suspected alteration of timecard by employee).

46. Stockley v. AT&T Info. Sys., 687 F. Supp. 764, 768 (E.D.N.Y. 1988) (discussing memorandum implicating employee in sexual harassment case); Karnes v. Milo Beauty & Barber Supply, 441 N.W.2d 565, 568 (Minn. Ct. App. 1989) (referring to memorandum about employee theft circulated to various management personnel).

47. 29 C.F.R. § 1604.11(f) (1995). *See* Stockley v. AT&T Info. Sys., 687 F. Supp. at 769 (agreeing that communications made in connection with sexual harassment investigations are protected by a qualified privilege).

48. Zinda v. Louisiana Pacific Corp., 440 N.W.2d 548, 549 (Wis. 1989).

49. *See* Linebaugh v. Sheraton Michigan Corp., 497 N.W.2d 585, 587 (Mich. Ct. App. 1993) (finding that a cartoon depicting plaintiff engaged in sexual act is actionable for libel).

50. *See infra* notes 104-142 and accompanying text (discussing privilege defense).

51. Wirig v. Kinney Shoe Corp., 461 N.W.2d 374, 377 (Minn. 1990).

52. Benassi v. Georgia-Pacific, 662 P.2d 760, 763-67 (Or. Ct. App. 1983).

helpful to the prospective employer. This "conflict" has created a dilemma for the courts. As the Minnesota Supreme Court stated, "unless a significant privilege is recognized by the courts, employers will decline to evaluate honestly their former employees' work records,"[53] yet employees must also be protected from "malicious undercutting by a former employer."[54]

Thus, although the courts generally recognize that "[e]mployment references are conditionally privileged because the public interest is best served by encouraging accurate assessments of an employee's performance,"[55] employers may be held liable if they make defamatory statements about a former employee to that employee's new or prospective employer.[56] Likewise, employers have been held liable for defamatory statements made to employment agencies.[57]

Problems also arise when the employees themselves publish the defamatory information to new or prospective employers. Under certain circumstances, the doctrine of compelled self-disclosure may make the employer liable even if it is the employees who do the publishing.

One of the leading cases on this issue is the Minnesota Supreme Court's decision in *Lewis v. Equitable Life Assurance Society of the United States*.[58] In *Lewis*, the plaintiffs were fired for "gross insubordination," even though the employer admitted that their production and performance were satisfactory and even commendable.[59] The employer also admitted that the real problems could have been prevented had management provided the plaintiffs with proper guidelines.[60]

The employer in *Lewis* never published the "gross insubordination" statement to any of the plaintiffs' prospective employers.[61] However, the plaintiffs themselves were requested by potential employers to disclose the reasons for their departures from their former employer, and each of them stated she had been fired for "gross insubordination."[62] Under these circumstances the court found that the

53. Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 257 (Minn. 1980).
54. *Id.* at 258.
55. Hunt v. University of Minnesota, 465 N.W.2d 88, 92 (Minn. Ct. App. 1991).
56. Becker v. Alloy Hardfacing & Eng'g, 401 N.W.2d 655, 657-58 (Minn. 1987); Walsh v. Consolidated Freightways, 563 P.2d 1205, 1210 (Or. 1977); Geyer v. Steinbronn, 506 A.2d 901, 904 (Pa. Super. Ct. 1986); Frank B. Hall & Co. v. Buck, 678 S.W.2d 612, 617-18 (Tex. Ct. App. 1984).
57. *Stuempges*, 297 N.W.2d at 258.
58. 389 N.W.2d 876 (Minn. 1986).
59. Lewis v. Equitable Life Assurance Soc., 389 N.W.2d 876, 881-82 (Minn. 1986).
60. *Id.* at 882.
61. *Id.*
62. *Id.*

plaintiffs had established the publication element of their defamation claims:

> The concept of compelled self-publication does no more than hold the originator of the defamatory statement liable for damages caused by the statement whereby the originator knows, or should know, of circumstances whereby the defamed person has no reasonable means of avoiding publication of the statement or avoiding the resulting damages; in other words, in cases where the defamed person was compelled to publish the statement. . . .
>
> Accordingly, we hold that in an action for defamation, the publication requirement may be satisfied where the plaintiff was compelled to publish a defamatory statement to a third person if it was foreseeable to the defendant that the plaintiff would be so compelled.[63]

Several jurisdictions have adopted this doctrine.[64] One encyclopedic reference further states that:

> [T]he publication by the plaintiff of defamatory matter received by him is sufficient to support an action if disclosure is the natural and probable consequence of its receipt, or if the sender intends that it shall be communicated to a third person.[65]

In response to the *Lewis* case, the state of Minnesota enacted legislation which protects an employer's freedom to communicate information about its former employees.[66] The resulting statute

---

63. *Id.* at 888. *See also* Keenan v. Computer Assocs. Int'l, 13 F.3d 1266, 1269-70 (8th Cir. 1994) (applying Minnesota law); Pfluger v. Southview Chevrolet Co., 967 F.2d 1218, 1220 (8th Cir. 1992) (applying Minnesota law, but finding that the self-publication was not compelled).

64. Compelled self-publication doctrine is illustrated in the following: Elmore v. Shell Oil Co., 733 F. Supp. 544, 546 (E.D.N.Y. 1988); McKinney v. County of Santa Clara, 168 Cal. Rptr. 89, 94-95 (Cal. Ct. App. 1980); Churchey v. Adolph Coors Co., 759 P.2d 1336, 1344 (Colo. 1988); Grist v. Upjohn Co., 168 N.W.2d 389, 405 (Mich. Ct. App. 1969); Neighbors v. Kirksville College of Osteopathic Medicine, 694 S.W.2d 822, 824 (Mo. Ct. App. 1985). *See generally* David P. Chapus, Annotation, *Publication of Allegedly Defamatory Matter by Plaintiff ("Self-Publication") As Sufficient to Support Defamation Action*, 62 A.L.R.4th 616 (1988) (analyzing cases discussing the doctrine of compelled self-publication).

65. 50 AM. JUR. 2D *Libel & Slander* § 164 (1970).

66. *See* MINN. STAT. ANN. § 181.933 (West 1987). This statute provides:

> Subd. 1. Notice required. An employee who has been involuntarily terminated may, within five working days following such termination, request in writing that the employer inform the employee of the reason for the termination. Within five working days following receipt of such request, an employer shall inform the terminated employee in writing of the truthful reasons for the termination.
>
> Subd. 2. Defamation action prohibited. No communication of the statement furnished by the employer to the employee under subdivision 1 may be made the subject of any action

essentially affords an employer protection from defamation liability if the employer provides the employee with the employer's truthful reasons for the termination pursuant to subdivision 1 of section 121.933.[67] There are also a number of courts that have rejected compelled self-publication as a basis for a defamation claim.[68] North Dakota employers do not, however, enjoy such statutory immunity.

It does appear that defamation by conduct alone, where an employer does not speak or write a defamatory remark, is not actionable.[69] In *Bolton v. Department of Human Services*,[70] the plaintiff had been employed as a social work specialist for the Fergus Falls Regional Treatment Center.[71] Due to an alleged conflict of interest and a problem relating to a guardianship issue, the center terminated him and provided him with a letter setting forth the reasons for the termination.[72] The center's chief executive officer then told the plaintiff to collect his personal belongings and to leave the premises immediately.[73] The CEO also followed company policy and instructed another of the center's directors to escort the plaintiff out of the building.[74] Following these instructions, the director escorted the plaintiff back to his office.[75] This walk took less than one minute.[76] So as to not draw attention to the situation, the director deliberately walked behind the plaintiff and did not communicate with him.[77] The director then waited while the plaintiff

---

for libel, slander, or defamation by the employee against the employer.

Id.

67. *See* Huthwaite v. H.B. Fuller Co., No. C8-91-2090, 1992 WL 95879 (Minn. Ct. App. May 12, 1992) (rejecting defamation claim where the employer complied with MINN. STAT. ANN. § 181.933(1)).

68. *See* De Leon v. St. Joseph Hosp., 871 F.2d 1229, 1237 (4th Cir. 1989) (holding that the state of Maryland would reject the doctrine of compelled self-publication because it "might visit liability for defamation on every Maryland employer each time a job applicant is rejected"); Yeitrakis v. Schering-Plough Corp., 804 F. Supp. 238, 250 (D.N.M. 1992) (holding that the state of New Mexico would reject the doctrine of compelled self-publication); Hensley v. Armstrong World Indus., 798 F. Supp. 653, 657 (W.D. Okla. 1992) (holding that the state of Oklahoma would reject the doctrine of compelled self-publication); Ritter v. Pepsi Cola Operating Co., 785 F. Supp. 61, 64 (M.D. Pa. 1992) (applying Pennsylvania law in rejecting the compelled self-publication doctrine); Mandelblatt v. Perelman, 683 F. Supp. 379, 386 (S.D.N.Y. 1988) (rejecting compelled self-publication claim on the basis that any self-publication was not "strongly compelled"); Layne v. Builders Plumbing Supply, 569 N.E.2d 1104, 1111 (Ill. App. Ct. 1991) (refusing to recognize tort of compelled self-defamation); Hoover v. Livingston Bank, 451 So. 2d 3, 5 (La. Ct. App. 1984) (noting that only publication was by plaintiff); Yetter v. Ward Trucking Corp., 585 A.2d 1022, 1025 (Pa. Super. Ct. 1991) (holding publication requirement not satisfied through proof of compelled self-publication); Lunz v. Neuman, 290 P.2d 697, 701-02 (Wash. 1955) (holding employer not liable for plaintiff's own statements in subsequent employment applications).

69. Bolton v. Department of Human Servs., 540 N.W.2d 523 (Minn. 1995).

70. 540 N.W.2d 523 (Minn. 1995).

71. Bolton v. Department of Human Servs., 540 N.W.2d 523, 523 (Minn. 1995).

72. *Id.* at 524.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Bolton*, 540 N.W.2d at 524.

77. *Id.*

boxed his personal items.[78] From the plaintiff's office, the director again escorted the plaintiff to the front door, again following him without a word spoken.[79] This walk lasted about 30-45 seconds.[80] One co-worker apparently saw the plaintiff carrying the box, saw the director in the plaintiff's office and "sensed a tense atmosphere."[81] From this set of facts, the plaintiff sued the center, alleging he was defamed by this action.[82]

The district court dismissed the action, and the plaintiff appealed.[83] The Minnesota Court of Appeals reversed and held for the plaintiff, reasoning as follows:

> Language is a "social instrument" used for the "communication of ideas." . . . It is the "device whereby we communicate with our fellow men." . . . "Language" may include gestures or actions; communication is not a captive of the voice.
>
> In the present situation, Bolton has presented sufficient evidence that Klein's actions conveyed a "statement" of the reasons for Bolton's discharge. The statement conveyed was that Bolton was dishonest and was not to be trusted to leave the building unaccompanied. The evidence of this "statement" by Klein is at least sufficient to survive respondents' summary judgment motion.[84]

The Minnesota Supreme Court then reversed the Court of Appeals.[85] In its decision, the Supreme Court first noted that "[i]n substance, although words and conduct may support each other's meanings in the defamation context, . . . Minnesota has never recognized defamation by conduct alone."[86] The court then concluded that "in the context of these facts, where there is no word spoken or conduct other than a simple escorting of the plaintiff to the exit door upon his termination, we conclude that as a matter of law respondent was not defamed."[87] Thus, although the Minnesota Supreme Court rejected the concept of defamation by action alone under the facts of the *Bolton* case, it appears that in Minnesota, the door may still open for such a

78. *Id.*
79. *Id.*
80. *Id.*
81. *Bolton*, 540 N.W.2d at 524.
82. *Id.* at 525.
83. Bolton v. Department of Human Servs., 527 N.W.2d 149, 152 (Minn. Ct. App. 1995).
84. *Id.* at 156-57 (citations omitted).
85. Bolton v. Department of Human Servs., 540 N.W.2d 523, 525 (Minn. 1995).
86. *Id.* (citation omitted).
87. *Id.* at 526.

claim where the conduct is more egregious and/or where the conduct is combined with the spoken word as well.

The North Dakota Supreme Court does not appear to have had the opportunity to address this precise issue. However, the court has hinted that, under the proper set of facts, defamation by conduct alone might be possible: "Ordinarily, publication in a slander case is accomplished by the communication of the allegedly defamatory matter to a third party by spoken words, by transitory gestures, or *by any form of communication* other than such form as would make it a libel."[88]

III. DEFENSES TO A WORKPLACE DEFAMATION CLAIM

There are a number of defenses which protect employers from workplace defamation liability. However, some of these defenses, such as privilege, can be lost. Therefore, it is important for employers to recognize and preserve these protections.

A. TRUTH

Because the essence of a defamation claim is that the disparaging matter is *false*, truth is a complete defense to a claim for workplace defamation.[89] For example, in *Eli v. Griggs County Hospital & Nursing Home*,[90] the plaintiff was fired for breach of confidentiality after having made inappropriate remarks about her supervisor and her employer in general.[91] A statement summarizing the misconduct was placed in her personnel file.[92] The plaintiff contended that this was defamation, but the North Dakota Supreme Court found that it was not because it was true that the plaintiff had made the remarks she was accused of making.[93]

Similarly, the Minnesota Court of Appeals rejected a workplace defamation claim where it was determined that the allegations against the claimant were true.[94] In *Gillson*,[95] the plaintiff sued her supervisor and her employer for sexual harassment.[96] The supervisor counterclaimed

88. Gowin v. Hazen Memorial Hosp. Ass'n, 311 N.W.2d 554, 558 (N.D. 1981) (emphasis added) (citing RESTATEMENT (SECOND) OF TORTS, § 568(2)).

89. *See* Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 255 (Minn. 1980) (stating that falsity is a well-settled element of defamation); Eli v. Griggs County Hosp. & Nursing Home, 385 N.W.2d 99, 101 (N.D. 1986); Meier v. Novak, 338 N.W.2d 631, 635 (N.D. 1983) (noting that to be defamatory, the statement must be false).

90. 385 N.W.2d 99 (N.D. 1980).

91. Eli v. Griggs County Hosp. & Nursing Home, 385 N.W.2d 99, 100 (N.D. 1980).

92. *Id.* at 101.

93. *Id.* at 101-02.

94. Gillson v. State Dep't of Natural Resources, 492 N.W.2d 835, 843 (Minn. Ct. App. 1992).

95. 92 N.W.2d 835 (Minn. Ct. App. 1992).

96. *Id.* at 840.

for defamation based on a letter written by the plaintiff.[97] The letter stated that other employees had complained about the supervisor and that the plaintiff's performance review had suffered because of her rejections of the supervisor's advances.[98] Because these statements were found to be true, the court affirmed the trial court's dismissal of the case.[99]

B. LACK OF PUBLICATION

Likewise, even the most false and disparaging remark is not actionable if it is not published to a third party.[100] Thus, if the employer does not communicate the information to anyone other than the employee, the employer will generally not be liable.[101]

However, as previously noted, even if the employer says nothing to anyone other than the employee, the doctrine of compelled self-publication may make the employer liable once the employee is forced to re-publish the statement to others.[102] In these circumstances, it is important to determine whether the communication was actually self-published[103] and compelled.[104]

C. PRIVILEGE

In order for defamatory matter to be actionable, it must also be unprivileged.[105] As the North Dakota Supreme Court has noted, "[p]rivilege is based upon the sound public policy that some communications are so socially important that the full and unrestricted exchange of information requires some latitude for mistake."[106] In the employment context, privilege is the most important defense because it gives employers the freedom to communicate honestly about their

---

97. *Id.*

98. *Id.*

99. *Id.* at 843. *See also* Wilson v. Minnesota Valley Memorial Hosp., Nos. C6-93-424, C0-93-1097, 1993 WL 459846 at *2 (Minn. Ct. App. Jan. 14, 1993) (rejecting defamation claim when alleged sexual relationship at work was found by the jury to be true).

100. Lindgren v. Harmon Glass Co., 489 N.W.2d 804, 811 (Minn. Ct. App. 1992) (upholding summary judgment for employer where employee failed to prove that discharge letter was ever published).

101. *Id.* at 810-11 (citations omitted).

102. *See supra* text accompanying notes 63-68 (discussing the doctrine of compelled self-publication).

103. Rouse v. Dunkley & Bennett, 520 N.W.2d 406, 410-11 (Minn. 1994) (holding that plaintiff failed to meet his burden of proving self-publication where he could not provide names of interviewers nor documentary evidence of applications, resumes or rejections).

104. Pfluger v. Southview Chevrolet Co., 967 F.2d 1218, 1219-20 (8th Cir. 1992).

105. N.D. CENT. CODE § 14-02-03 (1991) (stating that "[l]ibel is a false and *unprivileged* publication") (emphasis added); *Id.* § 14-02-04 (stating that "[s]lander is a false and *unprivileged* publication other than libel") (emphasis added).

106. Soentgen v. Quain & Ramstad Clinic, 467 N.W.2d 73, 78 (N.D. 1991) (citations omitted).

employees. Thus, if a privilege exists, the employer will be immune from liability even if it causes the publication of false and defamatory information about an employee. However, as the following discussion illustrates, an unwary employer can, in some situations, lose the protection of the privilege defense.

Under North Dakota law a privileged communication is statutorily defined as follows:

> A privileged communication is one made:
>
> 1. In the proper discharge of an official duty;
> 2. In any legislative or judicial proceeding, or in any other proceeding authorized by law;
> 3. In a communication, without malice, to a person interested therein by one who also is interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information; and
> 4. By a fair and true report, without malice, of a judicial, legislative, or other public official proceeding, or of anything said in the course thereof.
>
> In the cases provided for in subsections 3 and 4, malice is not inferred from the communication or publication.[107]

There are two categories of privilege: absolute and qualified or conditional.[108] The North Dakota Supreme Court has stated that subdivisions (1) and (2) of section 14-02-05 create an absolute privilege where the free exchange of information is so important that even defamatory statements made with actual malice are privileged.[109] For example, comments made during an official proceeding such as a school board meeting will be absolutely privileged.[110]

Similarly, Minnesota employers enjoy an absolute privilege under certain circumstances, such as: during judicial or quasi-judicial proceedings, so long as the comment is pertinent and relevant to the proceeding;[111] when required by law;[112] for statements obtained during a

---

107. N.D. CENT. CODE § 14-02-05 (1991).

108. *Soentgen*, 467 N.W.2d at 78.

109. *Id. See also* Dorn v. Peterson, 512 N.W.2d 902, 906 (Minn. Ct. App. 1994) (citing Matthis v. Kennedy, 67 N.W.2d 413, 417 (Minn. 1954)) (stating that an "[a]bsolute privilege provides complete immunity for publication of allegedly false and defamatory statements regardless of the actor's intent").

110. Rykowsky v. Dickinson Pub. Sch. Dist. No. 1, 508 N.W.2d 348, 351 (N.D. 1993) (applying N.D. CENT. CODE § 14-02-05(2) (1991)).

111. *Dorn*, 512 N.W.2d at 906.

112. *See, e.g.*, McIntire v. State, 458 N.W.2d 714, 719-20 (Minn. Ct. App. 1990) (holding state

review of the employee's personnel file pursuant to Minnesota's personnel records review statute, provided that the employer complies with the statute;[113] and, when the employer responds appropriately to an employee's statutory request for the reasons for termination.[114]

Like an absolute privilege, a qualified privilege frees an employer from liability for defamation.[115] However, a qualified privilege is not absolute, and it can be lost if it is abused.[116] Thus, application of the qualified privilege defense in a workplace defamation case entails a two pronged analysis. First, the court must determine whether or not the qualified privilege exists; second, if a qualified privilege is found, the fact-finder must determine whether or not the privilege has been lost through abuse.[117]

Employers enjoy a qualified privilege to communicate about their employees in a wide variety of situations. As the North Dakota Supreme Court noted in *Soentgen*,[118] when considering the qualified privilege defense in a workplace defamation claim, "[w]e start with the premise that generally communications by an employer concerning the conduct of an employee are, when necessary to protect interests of the employer, qualifiedly privileged."[119] Similarly, the Minnesota Supreme Court acknowledged that as long as an employer's communication about an employee is made upon a proper occasion, with a proper motive, and based upon reasonable or probable cause, the communication will be qualifiedly privileged.[120]

Applying this analysis, courts have found a qualified privilege to exist under the following scenarios: comments about investigations into a physician's competency made by hospital management during a

---

employer immune from suit where supervisor was required by law to disclose the reasons for the state employee's discharge).

113. MINN. STAT. ANN. § 181.962(2) (West 1993). *See, e.g.*, Lloyd v. In Home Health, 523 N.W.2d 2, 3-4 (Minn. Ct. App. 1994) (applying § 181.962(2)).

114. MINN. STAT. ANN. § 181.933. *See, e.g.*, LeBaron v. Minnesota Bd. of Pub. Defense, 499 N.W.2d 39, 42 (Minn. Ct. App. 1993) (applying § 181.933).

115. Soentgen v. Quain & Ramstad Clinic, 467 N.W.2d 73, 78 (N.D. 1991). Procedurally, the employer has the burden of establishing that the qualified privilege exists. *Id.* at 78-79. Whether or not there is a qualified privilege is a question of law for the court to decide. *Id.* If the employer can establish the qualified privilege, the burden then shifts to the employee to prove that the privilege was abused. *Id.* at 78-79. Whether or not the privilege is abused is generally a question of fact for the jury to determine. *Id.* at 78. *See also* Lewis v. Equitable Life Assurance Soc'y, 389 N.W.2d 876, 890 (Minn. 1986); Utecht v. Shopko Dep't Store, 324 N.W.2d 652, 654 (Minn. 1982); Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 257 (Minn. 1980); McGrath v TCF Bank Sav., FSB, 502 N.W.2d 801, 808 (Minn. Ct. App. 1993).

116. *Soentgen*, 467 N.W.2d at 78 (citing N.D. CENT. CODE § 14-02-05(3), (4) (1991)).

117. *Id.* The Minnesota courts apply a similar two-step analysis. *Id.*

118. 467 N.W.2d 73 (N.D. 1991).

119. *Id.* at 79 (citations omitted).

120. Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 256-57 (Minn. 1980) (citations omitted).

meeting with the physician;[121] during an employee review process;[122] while investigating employee misconduct;[123] while explaining to other employees the reasons for an employee's discharge or discipline;[124] while giving references to a former employee's new or prospective employer;[125] and, during the disciplinary process.[126] On the other hand, the Minnesota Court of Appeals held that there was no qualified privilege in a case where the defendant's failure to investigate led to the conclusion that there was no probable cause and/or proper occasion and motive for the defamatory statement.[127]

As previously noted, if the employer can establish that it is protected by a qualified privilege, then the inquiry shifts to whether the privilege was lost through abuse. In *Soentgen*, the North Dakota Supreme Court analyzed this step as follows:

> We turn to whether the defendants abused the qualified privilege. A qualified privilege is abused if statements are made with actual malice, without reasonable grounds for believing them to be true, and on a subject matter irrelevant to the common interest or duty. The plaintiff must prove actual malice and abuse of the privilege. . . .
>
> Actual malice is required in order to defeat a qualified privilege. Actual malice depends on scienter and requires proof that a statement was made with malice in fact, ill-will, or wrongful motive. If the occasion is one of qualified privilege,

---

121. *Soentgen*, 467 N.W.2d at 79.

122. Puckett v. Cook, 864 F.2d 619, 621 (8th Cir. 1989) (applying Arkansas law); Caslin v. General Elec., 608 S.W.2d 69, 70-71 (Ky. Ct. App. 1980); Bratt v. IBM, 467 N.E.2d 126, 129 (Mass. 1984); Stearns v. Ag-Chem Equip., No. Co-91-933, 1991 WL 209998, at *6 (Minn. Ct. App. Oct. 22, 1991); Clough v. Ertz, 442 N.W.2d 798, 804 (Minn. Ct. App. 1989); Kletschka v. Abbott-Northwestern Hosp., 417 N.W.2d 752, 755 (Minn. Ct. App. 1988).

123. Vackar v. Package Mach., 841 F. Supp. 310, 314-15 (N.D. Cal. 1993); Stockley v. AT&T Info. Sys., 687 F. Supp. 764, 768-69 (E.D.N.Y. 1988); McBride v. Sears, Roebuck & Co., 235 N.W.2d 371, 374 (Minn. 1975); Olson v. Midwest Business Sys., C2-92-1561, 1993 WL 205176, at *2 (Minn. Ct. App. June 15, 1993); Fontaine v. St. Germain's Co., No. CX-92-1842, 1993 WL 121282, at *2 (Minn. Ct. App. Apr. 20, 1993); Silvernail v. Lagerquist Corp., No. C1-92-2099, 1993 WL 107771, at *2-3 (Minn. Ct. App. Apr. 13, 1993); Wilson v. Weight Watchers, 474 N.W.2d 380, 384-85 (Minn. Ct. App. 1991); Southwestern Bell Tel. v. Dixon, 575 S.W.2d 596, 599 (Tex. Civ. App. 1978).

124. Conerly v. CVN Cos., 785 F. Supp. 801, 811 (D. Minn. 1992) (citing Wirig v. Kinney Shoe Corp., 461 N.W.2d 374, 379-80 (Minn. 1990)).

125. Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 257 (Minn. 1980).

126. Turner v. IDS Fin. Servs., No. C5-91-2192, 1992 WL 83313 (Minn. Ct. App. Apr. 28, 1992); Daywalt v. Montgomery Hosp., 573 A.2d 1116, 1118-19 (Pa. Super. Ct. 1990).

127. Smits v. Wal-Mart Stores, 525 N.W.2d 554, 557 (Minn. Ct. App. 1994). *See also* Wirig v. Kinney Shoe Corp., 461 N.W.2d 374, 380-81 (Minn. 1990) (finding no privilege because employer failed to conduct an adequate investigation of allegations of theft before publicly firing employee at meeting of all store employees).

> actual malice is not inferred from the communication or publication even if statements are slander per se.[128]

Thus, under North Dakota law, the employee must always prove actual malice (i.e., malice in fact, ill-will, or wrongful motive) to defeat the qualified privilege. It will not be enough for the employee to simply show a lack of reasonable grounds or irrelevance to the common interest or duty.

The *Soentgen* Court found that the plaintiff failed to defeat the employer's qualified privilege.[129] In *Soentgen*, the nursing staff complained about the doctor/employee's competency, so the hospital/employer independently evaluated the situation.[130] Two hospital executives discussed the results of the investigation at a meeting with the doctor.[131] The doctor claimed that she was slandered during this meeting.[132] Based on these facts, the court found that because the comments related to the doctor's competency and were discussed only by those who had a direct interest in the issue, there was no inference of malice in fact, ill-will, or wrongful motive.[133]

To defeat the qualified privilege under Minnesota law, an employee must still prove that the employer acted with malice.[134] However, the Minnesota courts appear to apply a slightly different standard for proving malice. As noted in *Kletschka v. Abbott-Northwestern Hospital*,[135] "[t]o demonstrate malice, [plaintiff] must prove [defendant] 'made the statement from ill will and improper motives, or causelessly and wantonly for the purpose of injuring the plaintiff.'"[136]

Applying this standard, Minnesota appellate courts have affirmed juries' determinations of malice. For example, in one case, the supreme court upheld a jury's finding of malice where the employer filed a false

---

128. Soentgen v. Quain & Ramstad Clinic, 467 N.W.2d 73, 79 (N.D. 1991) (citations omitted).

129. *Id.* at 80.

130. *Id.* at 76.

131. *Id.* at 76-77.

132. *Id.* at 76, 79-80.

133. *Soentgen*, 467 N.W.2d at 80.

134. *See* Keenan v. Computer Assocs. Int'l, 13 F.3d 1266, 1269-70 (8th Cir. 1994) (stating that once the employer has established the qualified privilege, the burden shifts to the employee to show abuse of that privilege by proof of actual malice).

135. 417 N.W.2d 752 (Minn. Ct. App. 1988).

136. Kletschka v. Abbott-Northwestern Hosp., 417 N.W.2d 752, 756 (Minn. Ct. App. 1988) (quoting Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 257 (Minn. 1980). *See also* Bauer v. State, 511 N.W.2d 447, 451 (Minn. 1994) (stating that actual malice can be demonstrated by "intrinsic evidence" such as "the exaggerated nature of the libel, the character of the language used, the mode and extent of the publication and other matters in excess of the privilege"); Karnes v. Milo Beauty & Barber Supply, 441 N.W.2d 565, 568 (Minn. Ct. App. 1989) (stating that actual malice is "actual ill will, or intent to causelessly and wantonly injure the plaintiff").

stolen car report and stated that the employee had retained company property.[137]

In another case, the court of appeals affirmed a jury's finding of malice where a supervisor failed to investigate an incident but nonetheless fired an employee for "gross misconduct" after stating he would be "building the appropriate file" to replace the employee.[138] Furthermore, the court of appeals upheld a finding of malice in a case where the employee was terminated upon suspicion of drug use.[139] In *Nicklow v. Menard, Inc.*,[140] the employee denied drug use, passed a drug test which he had volunteered to take, and offered to have his person and truck searched.[141] The employer fired the employee even though the tests and searches produced no evidence of drug use.[142] News of the situation spread to an out-of-state branch of the employer.[143] The court held that these actions, including the "excessive publication" supported a finding of malice.[144]

D. CONSENT AND OPINION

1. Consent

An employer may be absolved of liability if the disparaged employee consents to the publication.[145] In *Utecht v. Shopko Department Store*,[146] the plaintiff's wallet was stolen, so he asked the defendant to be alert for unauthorized credit card use.[147] The defendant then posted signs telling cashiers not to accept the plaintiff's cards.[148] The Minnesota Supreme Court held that it was a question of fact as to whether the plaintiff had consented to the method used by the defendant.[149]

---

137. Becker v. Alloy Hardfacing & Eng'g, 401 N.W.2d 655, 656 (Minn. 1987).

138. Bradley v. Hubbard Broadcasting, Inc., 471 N.W.2d 670, 675 (Minn. Ct. App. 1991).

139. Nicklow v. Menard, Inc., No. C2-91-2053, 1992 WL 153434 (Minn. Ct. App. July 7, 1992) (sustaining $75,000.00 verdict for defamed employee).

140. No. C2-91-2053, 1992 WL 153434 (Minn. Ct. App. July 7, 1992).

141. Nicklow v. Menard, Inc., No. C2-91-2053, 1992 WL 153434, at *1 (Minn. Ct. App. July 7, 1992).

142. *Id.*

143. *Id.*

144. *Id.* at *2 (citation omitted).

145. Utecht v. Shopko Dep't Store, 324 N.W.2d 652, 654 (Minn. 1982); Otto v. Charles T. Miller Hosp., 115 N.W.2d 36, 39 (Minn. 1962).

146. 324 N.W.2d 652 (Minn. 1982).

147. Utecht v. Shopko Dep't Store, 324 N.W.2d 652, 653 (Minn. 1982).

148. *Id.*

149. *Id.* at 654.

In *Otto v. Charles T. Miller Hospital*,[150] an employee was accused of arson and was told she should discontinue her employment.[151] The employee then brought a union representative to a subsequent meeting where the charges against her were repeated.[152] Under these facts, the Minnesota Supreme Court held that the plaintiff had consented to the publication because it was reasonable for her to have expected the charges to be repeated at the meeting.[153]

2. *Opinion*

As previously noted, generally a defamatory statement must refer to a fact, not an opinion. Thus, if the alleged defamatory is clearly no more than an expression of opinion, it likely will not be actionable.[154]

IV. PRACTICAL SUGGESTIONS FOR REDUCING THE RISK OF WORKPLACE DEFAMATION LIABILITY

Despite the myriad of situations that give rise to a workplace defamation claim, there are many things an employer can do to reduce the risk of liability for such a claim. The following discussion is intended to offer some practical policies and procedures that employers may want to implement to reduce potential exposure.

Conduct regularly scheduled employee evaluations. Document each evaluation, keep them as objective as possible—avoid subjective adjectives that are subject to misinterpretation. Allow employees to provide their own input and response to the evaluation. For example, provide them with space on their evaluation forms to respond to the evaluators' comments. Distribute the evaluation results to only those who have a need to see them. Limit access to personnel files to only those who have a need to see them.

Investigate possible employee misconduct. When alleged employee misconduct is reported, do not take adverse action against the employee before investigating the situation as promptly and reasonably as the circumstances warrant. Do not jump to conclusions or take action without investigating to ensure there is a reasonable basis for taking the action. Verify the facts and make decisions based on verified facts and not on rumors, opinions, or innuendo. If possible, to avoid inconsistent investigations, have one person trained and designated to handle such

150. 115 N.W.2d 36 (Minn. 1962).
151. Otto v. Charles T. Miller Hosp., 115 N.W.2d 36, 37 (Minn. 1962).
152. *Id.* at 38.
153. *Id.* at 39.
154. *See supra* text accompanying notes 30-31.

situations. Before taking disciplinary action, consider having the alleged action reviewed by another supervisor as a method of checks and balances. Communicate findings to the employee, and give the employee the chance to respond, but release findings only to those who need to know them.

Handle terminations sensitively. Make sure termination is done only after a proper and thorough investigation. Release information about the discharged employee to only those in the organization who need to know. Take action to prevent and/or stop false rumors that might begin circulating. Minnesota employers should also be aware of and use the personnel records privilege statute. To the extent possible, assist the employee in locating new employment. Remember that lawsuits of this nature are brought by disgruntled employees who believe they were not treated fairly by the employer. This perception of unfairness can be greatly reduced if the termination is handled carefully, respectfully, and sensitively. Consider asking for a signed release from the employee which authorizes you to release information to prospective employers who may inquire.

Respond carefully to reference inquiries. Direct inquiries to a centralized office such as personnel or human resources offices. Verify the identity of the person seeking the information to confirm that they have a legitimate need for the information. Insist that inquiries be made in writing. Disclose only dates of employment, positions held, and wage/salary information, or keep discussions with prospective employers limited to other verifiable and objective facts. Avoid giving subjective or emotional evaluations.

Correct mistakes. Take prompt action to correct any inaccuracies in information provided about the employee.

Train supervisory personnel in the proper methods of employee evaluation, investigation and termination. None of the aforementioned suggestions will be effective unless supervisors are trained in how to implement them.

V. CONCLUSION

Given that terminated employees generally cannot avail themselves of contract theories of recovery against their former employers, those employees routinely seek damages for defamation. When such claims have gone before juries, verdicts in favor of those employees have been substantial. Therefore, it is imperative that employers take protective measures such as those suggested herein, to prevent such unnecessary and expensive liability.