



**THE DANGERS OF DEFAMATION IN THE WORKPLACE**



**Karen G. Crutchfield**

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social media and in the 24/7 news cycle, it's not surprising that employers are facing liability issues regarding expanded theories of defamation from prior, current or potential employees.

Traditionally, defamation occurs when a person suffers reputational damage, and thus is harmed economically, from the false statements of another person, either verbally (which is called slander) or in writing (known as libel). The victim must show that the statements made are not opinions but are demonstrably false, that the statements are clearly about the victim and have been made to third parties, and that the victim has suffered damage by the false statements. Employers are now increasingly faced with defamation claims where employees or employment seekers apply these elements to traditional workplace interactions, such as hiring references or disciplinary proceedings.

The recent \$9.45 million-dollar jury verdict in *Desai, et al v. Charter Communications, LLC*, 3:14-cv-00459-DJH-DW in the Western District of Kentucky illustrates the dangers

Most employers and human resource professionals are familiar with the risks associated with responding to requests for references, verifications of qualifications of a former employee and sharing information about a former employee's work history. At the same time, employers who are evaluating prospective employees need complete and accurate information about an applicant's experience, qualifications and job history in order to hire the person best suited for the position, and to avoid hiring an incompetent or possibly dangerous employee. In the current social and political climate, where claims of libel, slander and defamation have become commonly discussed on

of defamation claims arising from employment decisions. In the *Desai* case, the plaintiffs are former employees of Charter Communications, who were terminated after accepting free printers for use at home from Charter's Office Supply Administrator, that they believed had been authorized by management. A dispute arose as to whether the company had authorized the printers to be taken home by the employees, and whether the employees should have known taking the printers home was not authorized and against company policy. After an internal investigation, the plaintiffs were fired or disciplined for violation of a company policy that prohibited the removal of company property from the premises without authorization.

Approximately one month after the plaintiffs were terminated or disciplined for accepting the printers, Charter's Human Resource Manager presented a PowerPoint at a Charter leadership conference that contained slides on "Leadership and Judgment" and emphasized the importance of "integrity and character." The slides also contained references to examples of a lack of integrity and character, including employees who were terminated for theft, drug-dealing and "Printer-gate." The plaintiffs in *Desai* learned about this presentation and PowerPoint, and filed suit against Charter for wrongful discharge, intentional infliction of emotional distress, and defamation. The plaintiffs' grounds for defamation were that Charter made false statements or representations that the plaintiffs were guilty of misconduct, represented to third-parties and other employees that they lacked integrity and character, and that the use of the term "Printer-gate" in conjunction with examples of terminations for theft and drug-dealing suggested they were guilty of criminal activity. The court dismissed the plaintiffs' claims for wrongful discharge and intentional infliction of emotional distress, but allowed the defamation claim to go to a jury because the PowerPoint and presentation could be interpreted as a "false claim of theft," giving rise to a presumption of both "malice and damage."<sup>1</sup>

After a two-day trial, the jury found the cable company was liable for defamation and awarded each of the seven plaintiffs \$1 million dollars in punitive damages and an additional \$350,000.00 for "embarrassment, humiliation

Continued on page 4 ►►

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## EEOC IS HOT ON HARASSMENT – TIPS FOR EMPLOYERS



**Howard B. Jackson**.....

*"The message from the EEOC is rather obvious. We are looking everywhere."*

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Georgia, Illinois, Texas and others. The message from the EEOC is rather obvious. We are looking everywhere.

What size were the employers? All sizes. The defendants include United Airlines, Piggly Wiggly (evidently, the EEOC is not "big on the pig"), a sports bar and restaurant, a country club, and a cleaning service. The EEOC message is again clear. Large or small, we're looking at you, kid.

What kind of harassment allegations were included? Many kinds. Allegations included sexual harassment such as comments, unwanted touching, sexual advances and demands for favors. The claims also included harassment on the basis of race and national origin, some of which involved explicit racial comments and epithets.

Some of the claims involved a class of persons, such

Apparently, the hot summer weather also heated up the EEOC's focus on harassment. On June 14, the EEOC (U.S. Equal Employment Opportunity Commission) filed seven lawsuits that primarily involved harassment allegations. On August 18, recent history repeated itself. The EEOC has filed seven more lawsuits that primarily involved harassment allegations.

Where were the suits filed? All over. There were multiple in suits southern California. But there were also suits in Alabama, Colorado,

as that a restaurant subjected a class of female employees to unwanted comments and touching. Other cases involved only one or two employees.

The alleged harassers included "almost everybody" in some cases, as well as business owners, or rogue individuals such as an airline pilot who allegedly targeted one flight attendant by posting sexually oriented pictures of her on internet sites.

Not surprisingly, several of the cases contain additional claims of retaliation. The EEOC alleged that persons who complained of the unlawful conduct were thereafter retaliated against in a variety of ways.

In addition to the recently-filed cases, on August 1, the EEOC announced a \$3.5 million settlement with Alorica, Inc. Alorica provides third party call center and technical services. The EEOC alleged that a sexually hostile work environment existed for both male and female employees at Alorica. The settlement money will be placed in a fund to compensate a class of employees who were subjected to the unlawful environment.

*EDITOR'S NOTE: With the media focus on harassment claims and the EEOC's increased emphasis on finding and litigating such claims across the country, it would certainly appear to be a good idea for employers to analyze and update their harassment policy, as well as their policies against retaliation and their reporting procedures. In addition, providing training is crucial. Our Wimberly Lawson attorneys offer expert and up-to-the-minute guidance on harassment issues, policies, and training, on a cost-effective basis, for employers, management, and HR. Many claims can be handled successfully on a proactive, preventative basis - with proper education, policies, and training. And when they are not? The EEOC may see you in court.*

## OSHA ISSUES PROPOSED RULE ON ELECTRONIC FILINGS



**Mary C. Moffatt**.....

potential disclosure under the Freedom of Information Act, as well cost considerations of collecting the information.

As readers may recall, OSHA regulations require recording of work-related injuries that involve death, loss

On July 30, 2018, the Department of Labor's Occupational Safety and Health Administration (OSHA) issued a proposed Rule to rescind the requirement for establishments of at least 250 employees to submit electronically information from OSHA Forms 300 and 301. The proposed Rule is intended to protect sensitive worker information from

of consciousness, days away from work, restriction of work, transfer to another job, medical treatment other than first aid, or diagnosis of a significant injury or illness by a physician or other license health care provider. In 2016, OSHA amended the regulations to require employers with 250 or more employees to submit annually to OSHA electronically the information from OSHA Forms 300, 300A, and 301, and to require employers with 20 to 249 employee in certain industries to submit electronically information from the annual summary Form 300A. The proposed Rule would not affect the requirement to submit information electronically from the 300A summaries and would add a new requirement for covered employers to submit their Employer Identification Numbers electronically. OSHA is accepting Comments on the Rule until September 28, 2018.



**Anne E. Sartwell**

*"The EEOC sued, and [cosmetics giant Estee Lauder] settled in July of 2018 for \$1 million to more than 200 male workers."*

## THE "PARENT TRAP" – IS YOUR PARENTAL LEAVE POLICY AN INVITATION FOR TROUBLE?

Paid time off to bond with a newly arrived infant is a wonderfully generous (and rare) benefit, but it can also get a well-intended employer into trouble. In 2016, according to the Bureau of Labor Statistics, only 14% of civilian employees had access to paid family leave in the United States. See <http://www.pewresearch.org/fact-tank/2017/03/23/access-to-paid-family-leave-varies-widely-across-employers-industries/>. The United States stands alone among all industrialized nations as the only country which has no paid

parental leave of any kind. See [https://www.oecd.org/els/family/PF2\\_5\\_Trends\\_in\\_leave\\_entitlements\\_around\\_childbirth.pdf](https://www.oecd.org/els/family/PF2_5_Trends_in_leave_entitlements_around_childbirth.pdf). California, New Jersey, New York and Rhode Island currently offer paid family and medical leave funded through employee-paid payroll taxes and administered through their state disability programs. Washington passed a paid family leave law in 2007, but the law was never implemented and its implementation has been indefinitely postponed.

If an employer provides "parental leave" benefits and the policy distinguishes between men and women, at the very least if the leave is for "bonding" as opposed to "medical leave," it is time for redrafting. Cosmetics giant Estee Lauder previously provided paid medical leave for recovery from childbirth and then 6 weeks of "bonding" leave for female employees but only 2 weeks of paid "bonding" leave for males. The Equal Employment Opportunity Commission (EEOC) sued, and the company settled in July of 2018 for \$1 million to more than 200 male

workers. In May of 2018 the company revised its policies to provide all eligible full-time employees, regardless of gender or caregiver status, the same rights to 20 weeks of paid leave for the purposes of child bonding and a six-week flexibility period to return to work from parental leave. A similar claim filed in 2017 by the American Civil Liberties Union and Outten & Golden targeted JPMorgan Chase & Co.'s policy that gave "secondary caregivers" less paid leave than primary caregivers, and considered "birth mothers" presumptive status as primary caregivers rather than fathers. That claim is still pending before the EEOC as of this time.

If an employer chooses to provide paid parental leave, the safest course of action would be to simply provide a maximum amount of paid time to males and females for the birth or placement of a child for adoption. If an employer desires to provide additional paid medical leave for the purpose of recovery from childbirth, the policies should clearly distinguish between the two. Court cases addressing paid parental leave are few. In 2005, the U.S. Court of Appeals for the Eighth Circuit ruled against a father who challenged a policy allowing biological mothers and adoptive parents to use accumulated sick leave upon arrival of a new child without extending the same benefit to biological fathers under a medical disability policy. Notably, adoptive parents of both genders were permitted to use sick leave for a bonding period (albeit for a briefer period of time than for childbirth recovery). *Johnson v. University of Iowa*, 431 F.3d 325 (8th Cir. 2005).

*NOTE: To learn more about the latest tips, trends, and traps for your HR policies and/or handbooks, PLEASE JOIN US for our Labor & Employment Law Update Conference in Knoxville, Tennessee, on November 1-2, 2018. For more information or to register, please see the bottom of page 4.*

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and mental anguish.” The case is currently in post-trial motions, and likely will be appealed to the Sixth Circuit.

While the *Desai* case is an example of defamation arising from statements made about employee terminations, and dissemination to third-parties *after* these events had occurred, it is more common for employees to claim defamation in cases where a false statement or statements by the employer were the *cause* of termination or discipline. Risk arises in cases where supervisors make or use false statements in deciding promotions, raises, bonuses, or transfers. Special cases include “inferred” defamation or defamation by conduct, where employees are terminated or disciplined for actions they did not commit and thus suffer reputational harm. Employers can also be liable in cases where defamatory statements are made by other employees or business partners (usually in writing, such as emails, texts, social media or signs) and the company takes no conclusive action to stop, correct or remove the statements.

Another type of common defamation claim arises from hiring references, where the former employee blames the employer for lost job opportunities or inhibited career advancement arising from negative or false information passed to others through a referral. While employers may be reluctant to give references for this reason, they may still risk exposure to the employee who perceives their silence as a “negative” reference to the prospective employer. Alternatively, liability can also accrue to a former employer when the current employer sues for a “negligent referral” in cases of nondisclosure of adverse employee information.

As in all cases of defamation, the truth is an absolute defense and employers are reminded that no claim of slander or libel can succeed against true statements, regardless of the intent of the disclosure. True statements by employers

during workplace disciplinary proceedings and hiring referrals that are not misleading are protected and are not subject to a claim of defamation. There are also instances of privilege, both absolute and conditional, where employers are protected from defamation claims in the interest of full disclosure, such as during certain public policy proceedings, and where information is needed for a common business interest or public safety concerns. Consent to publication is also a complete defense against defamation, but its application will depend on the circumstances of publication and the information disclosed.

Employers who seek to limit liability exposure are encouraged to keep a comprehensive and up-to-date paper trail of employee interactions, including personnel files, signed releases and consent forms, and clearly acknowledged company policy provisions. Professional employment records and employee interactions should avoid all instances of unsubstantiated rumor, gossip or unconfirmed suspicions. Disciplinary actions should be made according to a written procedure that is clear, reasonable, objective, and avoids unnecessary disclosure to third-parties. Hiring references should follow an established company guideline that emphasizes factual objective statements over subjective statements open to interpretation or opinions. Employers will want to periodically review hiring and discipline policies with legal counsel, to make sure they are up-to-date and in compliance with state and federal laws and regulations, as well as to have policies in place that reduce the risk of liability for defamation or other employment claims.

<sup>1</sup>See Memorandum Opinion and Order on Defendant’s Motion for Summary Judgment, *Desai, et al v. Charter Comm. LLC*, 3:14-cv-00459-DJH-DW, Doc. 129, January 4, 2018.



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