



California Employers May Sue For Online Defamation

Insights

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The situation is a familiar one. Disgruntled current or former employees leave negative and harmful comments about their employer on online workplace review websites such as glassdoor.com or vault.com, or on customer review sites such as yelp.com. Until recently, employers had little recourse. Website operators are generally immune from liability under the federal Communications Decency Act of 1996, and they historically have objected strenuously, on First Amendment and privacy grounds, to identifying persons who post defamatory comments anonymously on their websites.

A recent California appellate court ruling, however, clarifies when an employer may compel a website operator to identify persons posting defamatory statements online so that they can be sued individually. The case, *ZL Technologies, Inc. v. Does*, involved seven anonymously-posted reviews by current and former employees of ZL Technologies on glassdoor.com. The reviews communicated negative information about the company and its management. The company sought to sue the employees and former employees for defamation, and it subpoenaed glassdoor.com for information identifying the posters. The website operator refused to comply with the subpoenas and the court dismissed the case. The company appealed and received a much more favorable ruling from the court of appeal.

The appellate court recognized the First Amendment right of individuals to publish even harsh criticism of other persons or organizations. Yet, quoting an earlier court decision, the court maintained: “When vigorous criticism descends into defamation ... constitutional protection is no longer available.” The court further recognized that a corporation can be defamed by statements that injure its business reputation and that a corporation’s reputation as an employer is an important aspect of its business reputation.

The court held that in order to obtain the identity of anonymous posters from a website operator, an employer must be able to establish the prima facie elements of a legally sufficient claim for libel. These are (1) a false and unprivileged written publication (2) that injures another’s reputation. The key element is a *falsehood*, and for this reason courts distinguish between statements of fact and statements of opinion, and only the former can produce liability for defamation. Statements of opinion generally are constitutionally-protected. Only statements that involve provably false assertions of fact may be the basis for compelling a website operator to identify an anonymous poster.

Thus, for example, assertions that a company is “unfair to its employees” or “fails to promote the best candidates into management,” or has supervisors who are “poor communicators and terrible mentors” are mere statements of opinion. They cannot serve as the basis for a defamation lawsuit.

On the other hand are statements of purported fact that may be disproven. The court in the *ZL Technologies* case cited some examples of potentially defamatory statements: That the company had no organizational chart, job titles or job descriptions; that most new hires left the company within three to six months; that the company had 50% employee turnover; that the company’s CEO disparaged subordinates in the presence of their peers; that there was a 90% turnover rate in sales and marketing.

Similarly actionable statements might include “the company is frequently sued for illegal discrimination,” “the CEO is having an affair with my colleague and shows her favoritism,” “female engineers are paid less than male engineers for the same work,” “the company misclassifies employees as independent contractors so they can deny them benefits,” “employees are required to work overtime but are not paid for it,” and “women never get promoted into management unless they are related to the owners.”

Of course, not every unfavorable statement about an employer on a website will warrant a defamation lawsuit. But where a concerted campaign by current or former employees is underway that is spreading false information damaging to a company’s business reputation, this new case provides a potent weapon for the employer to use to fight back.

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