

**SMITH O'CALLAGHAN & WHITE**  
33 NORTH LaSALLE STREET  
SUITE 3800  
CHICAGO, ILLINOIS 60602

TELEPHONE (312) 419-1000      FACSIMILE (312) 419-1007      WEBSITE [WWW.SOCW.COM](http://www.socw.com)

**STRATEGIES FOR DEFENDING WORKPLACE DEFAMATION CLAIMS**

**TERRY J. SMITH \***  
**ROBERT R. DUDA JR.**

**1. Defamation Claims Go Hand-in-Hand With Termination**

Employers are increasingly finding themselves defending a claim for defamation in addition to a terminated employee's typical claims for discrimination or wrongful discharge. Workplace defamation claims are especially problematic for employers because they often turn on factual issues and disputes making them problematic at summary judgment – in contrast to discrimination claims which are often ripe for summary dismissal. Workplace defamation claims also considerably increase the exposure of the employer as they allow for uncapped damages to an employee's reputation and potentially even punitive damages. The cost of defending workplace defamation suits can be quite costly to the employer as they are often not covered under an employer's insurance policy.

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\* Terry J. Smith is a partner with Smith O'Callaghan & White, a Chicago law firm representing employers in labor and employment law. Robert R. Duda Jr. is an associate with the firm and assisted in the preparation of these materials.

The firm has extensive experience in employment-related litigation in the federal and state courts, in particular in the areas of trade secret misappropriation, covenants not to compete, unfair competition, workplace defamation, employment discrimination, sexual harassment, wrongful discharge and ERISA. The firm represents several large national and international corporations, in matters arising in the Chicago area and in other jurisdictions, as well as mid-size companies and professional entities such as law firms.

## 2. **Elements of Defamation**

In order to state a claim for defamation under Illinois law, the plaintiff must show that the defendant made a false statement concerning plaintiff, that there was an unprivileged publication of the defamatory statement to a third party by the defendant and that the plaintiff was damaged. Gibson v. Philip Morris, Inc., 292 Ill. App. 3d 267, 272, 685 N.E.2d 638 (5<sup>th</sup> Dist. 1997) (former employee stating workplace defamation claim against employer).

## 3. **Defamation Per Se**

A statement is defamatory *per se* (meaning there is no need to establish actual damage to one's reputation) if it is obviously harmful to the plaintiff's reputation because the words (i) impute the commission of a criminal offense; (ii) impute an infection with a loathsome communicable disease; (iii) impute an inability to perform or want of integrity in the discharge of duties of employment; (iv) prejudice a party, or impute a lack of ability, in a person's trade, profession or business; or (v) impute adultery or fornication. See e.g., Van Horne v. Muller, 185 Ill. 2d 299, 307 (1999) (statements imputing that plaintiff committed a criminal act were defamatory *per se*); Bryson v. News America, 174 Ill. 2d 77, 90 (1996) (statements imputing that plaintiff was unchaste were defamatory *per se*).

- Employer calling an employee a poor performer may or may not be actionable as defamation *per se* even though it falls under a *per se* category:

Becker v. Zellner, 292 Ill. App. 3d 116, 126, 684 N.E.2d 1378, 1386 (2<sup>nd</sup> Dist. 1997) (defamation *per se* found where employer's statement imputed a lack of ability in employees' trade, profession or business – employer's "defamatory statements [that employees' work product was worthless] were obviously intended to describe and denigrate plaintiffs' abilities").

Gibson v. Philip Morris, Inc., 292 Ill. App. 3d 267, 274, 685 N.E.2d 638, 644 (5<sup>th</sup> Dist. 1997) (affirming judgment against employer and individual employees for compensatory and punitive damages in amount of \$1 million for defamation *per se*, where it internally communicated false statements regarding terminated employee's failure to follow employer's policies thereby imputing an inability or lack of integrity of employee in the discharge of his duties).

Kolegas v. Heftel Broadcasting Corp., 154 Ill. 2d 1, 14, 607 N.E.2d 201, 208 (1992) (plaintiff stated claim for defamation *per se* where plaintiff's professional reputation was injured due to statements made by defendants that "imputed that [plaintiff] lacked integrity in carrying out his professional duties and prejudiced [him] in his business").

Barakat v. Matz, 271 Ill. App. 3d 662, 672, 648 N.E.2d 1033, 1042 (1<sup>st</sup> Dist. 1995) (statements that plaintiff was not "any good as a doctor" and that his "opinion wasn't any good" were defamatory *per se* where they directly related to plaintiff's professional conduct and ability).

*Compare with*, Hopewell v. Vitullo, 299 Ill. App. 3d 513, 519, 701 N.E.2d 99, 104 (1<sup>st</sup> Dist. 1998) (employer's statement that plaintiff "was fired because of incompetence" was nonactionable opinion that had no precise meaning and could not be verified as true or false).

Quinn v. Jewel Food Stores, Inc., 276 Ill. App. 3d 861, 866-867, 658 N.E.2d 1225, 1230-1231 (1<sup>st</sup> Dist. 1995) (affirming dismissal of defamation claim where employer's statements that employee was "cocky" and a "con artist" were merely opinions not objectively capable of proof or disproof and alleged no specific facts capable of being verified as true or false).

Maag v. Illinois Coalition for Jobs, Growth and Prosperity, 858 N.E.2d 967, 2006 Ill. App. LEXIS 1006, \*15 (5<sup>th</sup> Dist. Nov. 2, 2006) (affirming dismissal of plaintiff's defamation claim where defendants' statements on a campaign flyer about plaintiff's performance as a judge were merely nonactionable opinion and were "rhetorical hyperbole" or "too vague to be falsifiable.")

#### 4. **Defamation Per Quod**

If the alleged defamatory statement does not fit into one of the defamation *per se* categories, the plaintiff still may be able to bring an actionable claim for defamation *per quod* if the statement is either defamatory on its face (although not one of the *per se* categories) or defamatory based on extrinsic circumstances. In either case, to establish defamation *per quod*, the plaintiff will have to overcome the immeasurably more difficult requirement of pleading and proving special damages – meaning actual damage of a pecuniary nature, as a result of the defamatory statement.

Bryson v. News America Publications, Inc., 174 Ill. 2d 77, 104 (1996) (“In any defamation *per quod* action, the plaintiff must plead and prove actual damage to her reputation and pecuniary loss resulting from the defamatory statement (‘special damages’) to recover.”).

Maag v. Illinois Coalition for Jobs, Growth and Prosperity, 858 N.E.2d 967, 2006 Ill. App. LEXIS 1006, \*18 (5<sup>th</sup> Dist. Nov. 2, 2006) (affirming dismissal of plaintiff’s defamation *per quod* claim where plaintiff’s allegations of injury to reputation and humiliation and mental anguish did not meet the heightened standard of pleading special damages).

## 5. **Liability of Employer and Employee**

- Everyone who participates in or is involved with the publication of the defamatory statement is responsible for the publication and is subject to liability for defamation.

Van Horne v. Muller, 185 Ill. 2d 299, 705 N.E.2d 898 (1998) (radio show co-host liable for defamation *per se* where she went along with and repeated defamatory statements made by host of radio show).

Gibson v. Philip Morris, Inc., 292 Ill. App. 3d 267, 685 N.E.2d 638 (5<sup>th</sup> Dist. 1997) (judgment entered against both employer and co-workers who engaged in workplace defamation).

- For an employer to be held responsible under the doctrine of respondeat superior for defamatory statements made by a co-worker, the plaintiff must show that the statements fall within the scope of the alleged defamer’s employment and that the motivation for the conduct was based in part on a desire to further the interests of the employer.

Mazeika v. Architectural Specialty Products, Inc., 2005 U.S. Dist. LEXIS 15531, \*20 (N.D. Ill. 2005) (plaintiff failed to state a claim against employer for defamation under the theory of respondent superior where alleged defamatory statement by co-worker was not employment-related, did not further the interests of employer and where court stated that it “cannot reasonably infer that [individual defendant] or any other employees of ASP are employed for the purpose of harassing or making false statements concerning other employees”).

## 6. Defenses to Workplace Defamation Claims

### A. Defamation Must be Alleged with Specificity

A plaintiff must plead specific facts of defamation in order to state an actionable claim, including stating in the complaint the specific defamatory statement made and the identities of the persons to whom the statement was communicated.

Doherty v. Kahn, 289 Ill. App. 3d 544, 554-56, 682 N.E.2d 163, 170-72 (1<sup>st</sup> Dist. 1997) (dismissing defamation claim with prejudice for lack of specificity where claim was premised on conclusory statements that plaintiff was “dishonest”).

Lykowski v. Bergman, 299 Ill. App. 3d 157, 163, 700 N.E.2d 1064, 1069 (1<sup>st</sup> Dist. 1998) (defamation claim dismissed with prejudice for failure to recite specific defamatory words where complaint merely alleged that defendant accused plaintiff of “certain unethical acts and improper conduct” and where allegations that defamatory statements were transmitted “to newspapers” and to “plaintiff’s employer” were not sufficiently specific).

### B. Truth

Truth is a defense to a defamation claim, (i.e., if a person admits that he is a thief, calling him a thief (the truth) is not defamation). Even “substantial truth” – when the statement’s “gist” or “sting” is true (labeling a person a crook, criminal, felon, burglar, robber, rule-breaker) – renders a statement non-defamatory.

Cianci v. Pettibone Corp., 298 Ill. App. 3d 419, 424, 698 N.E.2d 674, 678-679 (1<sup>st</sup> Dist. 1998) (employer’s alleged accusations that employee stole company property were non-defamatory because employee admitted using employer’s courier service for private use).

Harrison v. Chicago Sun-Times, Inc., 341 Ill. App. 3d 555, 563, 793 N.E.2d 760, 766 (1<sup>st</sup> Dist. 2003) (for defense of truth, defendant need only show “that the ‘gist’ or ‘sting’ of the allegedly defamatory material is true”). An employer should look to the allegations of the employee’s complaint and other admissions in the pleadings to determine if the employee has admitted the substantial truth of the statement. In Harrison, the court supported such an analysis and held the following:

Where the plaintiff's own characterization is not substantially different from the allegedly defamatory language, such language may be deemed substantially true.

Id. at 563, 793 N.E.2d at 766.

Wynne v. Loyola University of Chicago, 318 Ill. App. 3d 443, 452, 741 N.E.2d 669 (1<sup>st</sup> Dist. 2000) (affirming dismissal of plaintiff employee's defamation claim in part because she admitted to some of the facts contained in the allegedly defamatory memorandum that imputed an inability to perform her job, thus rendering it "substantially true").

Gist v. Macon County Sheriff's Dept., 284 Ill. App. 3d 367, 371, 671 N.E.2d 1154, 1157 (4<sup>th</sup> Dist. 1996) (affirming dismissal of defamation claim for failure to state a claim where alleged defamatory statements that plaintiff was a fugitive and wanted on an arrest warrant were substantially true).

**C. Innocent Construction**

Even if the alleged defamatory words fall into a *per se* category, the claim will not be actionable if the words are capable of an innocent construction. The rule provides that if the statement, when considered in the context in which it is made, may reasonably be innocently interpreted or reasonably be interpreted as referring to someone other than the plaintiff, it cannot be actionable *per se* and the defamation action must be dismissed. This is a powerful defense for Illinois employers that is not found in many jurisdictions. Tuite v. Corbitt, 224 Ill. 2d 490 (Dec. 21, 2006) (rejecting plaintiff's request to abandon the innocent construction rule and upholding its continued use in Illinois as a legal defense to defamation claims).

Anderson v. Vanden Dorpel, 172 Ill. 2d 399, 413, 667 N.E.2d 1296, 1302 (1996) (dismissing defamation claim where supervisor's comments that employee failed to follow up on assignments innocently construed to mean simply that employee's actions did not fit in with the employer's standards).

Dunlap v. Alcuin Montessori School, 298 Ill. App. 3d 329, 698 N.E.2d 574 (1<sup>st</sup> Dist. 1998) (finding innocent construction of statements: "virtually a total breakdown of trust and confidence

between plaintiff and the Board” and “not satisfactorily performing her duties or carrying out the policies of the Board,” which could be innocently construed as plaintiff not performing well in this particular job).

Quinn v. Jewel Food Stores, Inc., 276 Ill. App. 3d 861, 868, 658 N.E.2d 1225, 1232 (1<sup>st</sup> Dist. 1995) (affirming dismissal of defamation claim with prejudice where statements that employee was “cocky,” a “con artist” and who speaks “bullshit” capable of innocent construction).

Rasky v. Columbia Broadcasting System, Inc., 103 Ill. App. 3d 577, 581, 431 N.E.2d 1055, 1058 (1<sup>st</sup> Dist. 1981) (alleged defamatory words “that are capable of being read innocently must be so read and declared nonactionable as a matter of law”).

*Compare with*, Gardner v. Senior Living Systems, Inc., 314 Ill. App. 3d 114, 119, 731 N.E.2d 350, 355 (1<sup>st</sup> Dist. 2000) (defamatory statements that former employee took employer’s software, stole its trade secrets, and unlawfully solicited employer’s clients were not capable of innocent construction: they were intended to accuse former employee of unauthorized control over employer’s property (a crime), not a lack of rigor in following company procedure).

**D. Opinion**

Statements of opinion are not actionable as defamation. The determination of whether a statement is a fact or opinion is a matter of law. In making this determination, courts consider: “(1) whether the statement has a precise core of meaning for which a consensus of understanding exists, or conversely, whether the statement is indefinite and ambiguous; (2) whether the statement is verifiable, i.e., capable of being objectively characterized as true or false; (3) whether the literary context of the statement would influence the average reader’s readiness to infer that a particular statement has factual content; and (4) whether the broader social context or setting in which the statement appears signals a usage as either fact or opinion.” Lifton v. Board of Education of City of Chicago, 318 F. Supp. 2d 674, 678-79 (N.D. Ill. 2004) (granting summary judgment for employer on defamation claim, where statements that employee was “lazy,” “burnt out,” “unstable” and “looking for sympathy” were opinions and “vague expressions of [employer’s] sentiments, not statements of verifiable fact”).

Quinn v. Jewel Food Stores, Inc., 276 Ill. App. 3d 861, 866-867, 658 N.E.2d 1225, 1230-1231 (1<sup>st</sup> Dist. 1995) (affirming dismissal with prejudice where employer's statements that employee was "cocky" and a "con artist" were merely opinions not objectively capable of proof or disproof and asserted no specific facts capable of being verified as true or false).

Hopewell v. Vitullo, 299 Ill. App. 3d 513, 519, 701 N.E.2d 99, 104 (1<sup>st</sup> Dist. 1998) (employer's statement that plaintiff "was fired because of incompetence" was nonactionable opinion that had no precise meaning and could not be verified as true or false).

Wynne v. Loyola University of Chicago, 318 Ill. App. 3d 443, 452, 741 N.E.2d 669, 676 (1<sup>st</sup> Dist. 2000) (affirming dismissal of employee's defamation claim where "[n]one of the words and phrases used by [defendant] are capable of verification:" statements used to describe employee, such as "seemed inappropriate," "appeared to wheedle, persuade, nag, and domineer," "uniformly unpleasant" and "totally repugnant" were merely expressions of opinion).

#### **E. Privilege**

Employers also may be protected as a matter of law from actionable defamation if the statements were made pursuant to either an absolute or qualified privilege – particularly where the statements were made in good faith within a legitimate business context.

Layne v. Builders Plumbing Supply Co., 210 Ill. App. 3d 966, 969, 569 N.E.2d 1104, 1106 (2<sup>nd</sup> Dist. 1991) ("Whether a defamatory statement is protected by an absolute or a qualified, or conditional, privilege is a question of law for the court.").

Quinn v. Jewel Food Stores, Inc., 276 Ill. App. 3d 861, 871, 658 N.E.2d 1225, 1233 (1<sup>st</sup> Dist. 1995) ("In determining whether a privilege exists, the court looks only to the occasion itself to determine as a matter of law and general policy whether the occasion created a recognized duty or interest that makes the communication privileged.").

**(i). Absolute Privilege**

An absolute privilege arises when statements are made “in the course of judicial or quasi-judicial proceedings as well as actions ‘necessarily preliminary’ to judicial or quasi-judicial proceedings.” Layne v. Builders Plumbing Supply Co., 210 Ill. App. 3d 966, 969, 569 N.E.2d 1104, 1106 (2d Dist. 1991) (employer’s statements to police department that employee has threatened, harassed and assaulted a co-worker were absolutely privileged). Significantly, the “absolute privilege provides complete immunity from civil action, even though the statements are made with malice . . . because public policy favors the free and unhindered flow of such information.” Id.

Hartlep v. Torres, 324 Ill. App. 3d 817, 819-820, 756 N.E. 2d 371, 373 (1<sup>st</sup> Dist. 2001) (supervisor was absolutely privileged in making defamatory statements about an employee during the course of the employee’s disciplinary hearing before an administrative agency).

Golden v. Mullen, 295 Ill. App. 3d 865, 871, 693 N.E. 2d 385, 390 (1<sup>st</sup> Dist. 1998) (absolute privilege of attorneys to make defamatory statements related to judicial proceedings also applies to post-litigation statements).

**(ii). Qualified Privilege**

More frequently, employers must rely on a qualified privilege to protect intra-corporate communications. Under Illinois law, “[t]hree conditionally privileged occasions are recognized: (1) situations that involve some interest of the person who publishes the defamatory matter; (2) situations that involve some interest of the person to whom the matter is published or of some third person; and (3) situations that involve a recognized interest of the public.” Cianci v. Pettibone Corp., 298 Ill. App. 3d 419, 426, 698 N.E. 2d 674, 679 (1<sup>st</sup> Dist. 1998) (alleged defamatory statements made on a proper occasion among small group of employees also involved in plaintiff’s use of employer’s courier service for personal business were protected by qualified privilege).

An employer may have a qualified privilege to make defamatory statements about an employee if the statements: (1) are made in good faith by the employer; (2) involve an interest or duty to uphold; (3) are limited in scope to that purpose; (4) are made on a proper occasion; and (5) are published in a proper manner and to proper parties only. Kuwik v. Starmark Star Market & Admin, Inc., 156 Ill. 2d 16, 25 (1993) (finding qualified privilege existed where defendant insurance company had an interest in transmitting letters relating to qualifications and licensing of plaintiff physician).

Larson v. Decatur Memorial Hospital, 236 Ill. App. 3d 796, 803-804, 602 N.E.2d 864, 870 (4<sup>th</sup> Dist. 1992) (employer's statements that employee used and sold drugs protected under qualified privilege where made in good faith as part of the employer's investigation, even though statements ultimately proven false).

Achanzar v. Ravenswood Hospital, 326 Ill. App. 3d 944, 948-49, 762 N.E.2d 538, 543 (1<sup>st</sup> Dist. 2001) (affirming trial court's decision that a qualified privilege existed as a matter of law because the alleged defamatory statement that plaintiff threatened to kill a hospital employee was made by a coworker to a supervisor and then published only to the human resources department charged with investigating worker safety: "The statement was properly limited in scope and purpose and was revealed only to proper parties.").

**(iii). Abuse of Qualified Privilege**

The qualified privilege is lost when it is abused by excessive publication, malice or reckless disregard for the truth or falsity of the statement. To overcome the employer's qualified privilege, an employee must allege specific factual support indicating how the privilege was abused and may not rely upon a bare and conclusory assertion of malice or bad faith. The plaintiff must present evidence of a "reckless act which shows a disregard for the defamed party's rights, including the failure to properly investigate the truth of the matter, limit the scope of the material, or send the material to only the proper parties." Kuwik v. Starmark Star Marketing & Admin. Inc., 156 Ill. 2d 16, 30 (1993).

Achanzar v. Ravenswood Hospital, 326 Ill. App. 3d 944, 948-49, 762 N.E.2d 538, 543 (1<sup>st</sup> Dist. 2001) (interpreting Kuwik and holding that the question of whether a qualified privilege exists is a question of law for the court, but whether the privileged has been abused is a question of fact for the jury to decide).

Although the question of whether a privilege has been abused is a question of fact, "the plaintiff must come forward with actual evidence creating an issue of fact." Vickers v. Abbott Labs., 308 Ill. App. 3d 393, 404-06, 719 N.E.2d 1101, 1110-12 (1<sup>st</sup> Dist. 1999) (employer did not abuse qualified privilege in making statements to current and former subordinates of plaintiff during investigation of alleged sexual harassment by plaintiff).

Gist v. Macon County Sheriff's Dept., 284 Ill. App. 3d 367, 374, 671 N.E.2d 1154, 1159 (4<sup>th</sup> Dist. 1996) (affirming dismissal of defamation claim where plaintiff failed to set forth any facts showing bad faith by the defendants in its privileged communication of defamatory statement).

Genelco, Inc. v. Bowers, 181 Ill. App. 3d 1, 7-9, 536 N.E.2d 783, 786-788 (1<sup>st</sup> Dist. 1989) (“bare allegations, unsupported by facts, that the defendant acted maliciously, with knowledge of the falsity or with wanton disregard for the rights of others . . . are not sufficient to negate the good faith of the defendant who is protected by a qualified privilege”).

Izadifar v. Loyola University, 2005 U.S. Dist. LEXIS 13602, \*20-21 (N.D. Ill. 2005) (plaintiff failed to come forward with actual evidence creating an issue of fact as to whether employer abused its qualified privilege by discussing plaintiff's alleged misconduct with her former co-employees, including subordinates, or by conducting an investigation that did not conform strictly to the University's bylaws – plaintiff made no showing that the investigation was conducted in reckless disregard of her rights).

*Compare with*, Welch v. Chicago Tribune Co., 34 Ill. App. 3d 1046, 1051, 340 N.E.2d 539, 543 (1<sup>st</sup> Dist. 1975) (employer did not have privilege to communicate defamatory statement that employee was terminated for “alcoholism, inefficiency, lack of punctuality and unreliability” to all employees in company including those outside of terminated employee's department).

**F. No Publication of Defamatory Statement**

To have an actionable claim for defamation, an employee must establish that the defamatory statement was published to another person. Often times, publication is not in dispute. However, in some jurisdictions, an employer may have a defense that the publication element has not been met if the statement was only communicated internally within a company or organization.

This is known as the “nonpublication rule.” Under the nonpublication rule, communication among employees of the same organization is not publication for defamation purposes because it is the equivalent of the corporation “communicating with itself.” If available, this defense would immediately extinguish many workplace defamation claims that are based solely on internal intra-corporate communications.

**States recognizing the nonpublication rule.** The nonpublication rule has been found as a valid defense to a claim of intra-corporate defamation in Alabama, Georgia, Louisiana, Missouri, Oklahoma, South Carolina, Tennessee, Washington and Wisconsin. See e.g., Dixon v. Economy Co., 477 So. 2d 353, 354 (Ala. 1985); Williams v. A.L. Williams & Assocs., Inc., 555 So. 2d 121, 124 (Ala. 1989); Williams v. Cook, 386 S.E. 2d 665, 666 (Ga. App. 1989); Agee v. Huggins, 888 F. Supp. 1573, 1580 (N.D. Ga. 1995); Cangelosi v. Schwegmann Bros. Giant Super Markets, 390 So. 2d 196, 198 (La. 1980); Noel v. Andrus, 810 F.2d 1388, 139. (5<sup>th</sup> Cir. 1987) (applying Louisiana law); Lovelace v. Long John Silver's, Inc., 841 S.W. 2d 682, 684 (Mo. App. 1992); Magnolia Petroleum Co. v. Davison, 148 P.2d 468,471 (Okla. 1944); Starr v. Pearle Vision, Inc., 54 F.3d 1548, 1553 (10<sup>th</sup> Cir. 1995) (applying Oklahoma law); W.U. Tel. Co. v. Lesesne, 198 F.2d 154, 156-57 (4<sup>th</sup> Cir. 1952) (applying South Carolina law); Payne v. FMC Corp., 1991 U.S. Dist. LEXIS 15499, \*19 (D.S.C. 1991); Woods v. Helmi, 758 S.W. 2d 219, 223 (Tenn. Ct. App. 1988); Prins v. Holland-North America Mortgage Co., 181 P. 680, 681 (Wash. 1919); Flynn v. Reinke, 225 N.W. 742, 744 (Wis. 1929); Halsell v. Kimberly-Clark Corp., 683 F.2d 285, 288-89 (8<sup>th</sup> Cir. 1982) (applying Wisconsin law).

**States not recognizing the nonpublication rule.** Courts in many other states find that the nonpublication rule provides too much blanket protection to employers and that communications among co-employees constitute publication for purposes of defamation claims. Illinois rejects the nonpublication rule and again recently held that “state and federal courts in Illinois -- in addition to numerous other authorities -- recognize that communication within a corporate environment may constitute publication for defamation purposes.” Popko v. Continental Casualty Co., 355 Ill. App. 3d 257, 823 N.E.2d 184 (1<sup>st</sup> Dist. 2005); Gibson v. Philip Morris, Inc., 292 Ill. App. 3d 267, 275, 685 N.E.2d 638, 644 (1997) (rejecting the nonpublication rule and stating “there is no statement of law in Illinois that corporate internal communications are not publications”). Other states that have specifically declined to adopt the nonpublication rule include California, Connecticut, Florida, Kansas, Massachusetts, Michigan, New Mexico, New York and Texas.

## 7. **Damages**

Workplace defamation claims can present significant exposure for employers of all sizes because there are no caps or limits on damage awards (unlike discrimination claims), they present the threat of punitive damages against the employer and can be

brought against any size employer or even an individual employee. Moreover, in most workplace defamation actions, successful plaintiffs need not make any showing of an actual injury to their reputations.

■ **No Showing of Actual Injury or Damages Required**

For defamation *per se* claims, the plaintiff need not plead or prove actual damages because damage to the plaintiff's reputation is presumed. Van Horne v. Muller, 185 Ill. 2d 299, 307 (1998) ("Certain limited categories of defamatory statements are deemed actionable *per se* because they are so obviously and materially harmful to the plaintiff that injury to the plaintiff's reputation may be presumed. A plaintiff need not plead or prove actual damage to their reputation to recover for a statement that is actionable *per se*").

In Illinois, presumed damages in defamation actions are damages for economic loss ("special damages"), damages for mental suffering, personal humiliation, and impairment of personal and professional reputation and standing in the community. Gibson v. Philip Morris, Inc., 292 Ill. App. 3d 267, 685 N.E.2d 638 (5<sup>th</sup> Dist. 1997) (plaintiff prevailed on his workplace defamation claim against employer and co-workers and was awarded \$115,000 in lost wages and benefits, \$100,000 for personal humiliation, mental anguish and suffering and another \$1,000,000 for punitive damages at bench trial).

■ **Actual Showing of Damages Required for Defamation Per Quod**

"If a defamatory statement does not fall within one of the limited categories of statements that are actionable *per se*, the plaintiff must plead and prove that she sustained actual damage of a pecuniary nature ("special damages") to recover. Bryson v. News America Publications, Inc., 174 Ill. 2d 77, 87-88 (1996).

"General allegations such as damage to one's health or reputation, economic loss, and emotional distress are insufficient to state a cause of action for defamation *per quod*." Salamone v. Hollinger Int'l, Inc., 347 Ill. App. 3d 837, 842, 807 N.E.2d 1086, 1092 (1<sup>st</sup> Dist. 2004) (affirming dismissal of plaintiff's defamation *per quod* claim because plaintiff failed to allege with particularity which members of the community stopped associating with him and patronizing his store and also failed to allege an actual monetary loss from a lack of business).

Anderson v. Vanden Dorpel, 172 Ill. 2d 399, 416-17 (1996) (vague allegations that plaintiff “has been damaged monetarily by losing gainful employment and wages” and that she “suffered great mental pain and anguish” are not sufficient to plead special damages for a claim of defamation *per quod*).

## 8. **Insurance Coverage of Workplace Defamation Claims**

Many employers are finding that their commercial liability insurance and umbrella policies may exclude certain acts from coverage, including specifically enumerated employment-related practices exclusions. Many times the question of whether or not the insurance company will cover a claim by a current or former employee for defamation turns on the context in which the statement was made.

- Whether or not workplace defamation claims fall under an insurance policy’s employment-related practices exclusion may further depend on when the defamatory statements were made and whether they relate to the employee’s performance or employment. Under some circumstances, post-termination acts of defamation can reasonably arise directly and proximately from the termination and fall within the employment-related practices exclusion.

Adams v. Pro Sources, Inc., 231 F. Supp. 2d 499, 505 (M.D. La. 2002) (claim that employer defamed former employee in an online database in the trucking industry in retaliation for employee’s complaint of hostile work environment was covered by employment-related practices exclusion and therefore excluded from coverage).

Low v. Golden Eagle Insurance Co., 104 Cal. App. 4<sup>th</sup> 306, 315, 128 Cal. Rptr. 2d 423, 429 (2002) (statement by insured’s president on radio program that a supervisor had been accused of sexual harassment qualified as employment-related and insurer therefore had no duty to defend under employment-related practices exclusion of policy).

*Compare with*, American Alliance Insurance Co. v. 1212 Restaurant Group, L.L.C., 342 Ill. App. 3d 500, 794 N.E.2d 892 (1<sup>st</sup> Dist. 2003) (insurance company had duty to defend employer on claim of defamation *per se* brought by former employee where some of the alleged defamatory statements were personal insults and lewd comments and not related to employee’s employment or termination, and therefore *did not* fall under the employment-related practices exclusion of employer’s insurance policy which excluded employment-related defamation claims from coverage).

- If the defamatory statement was made in the conduct of the insured's business or profession, coverage may also be denied under an applicable professional services exclusion.

Hurst-Rosche Engineers, Inc. v. Commercial Union Insurance Co., 51 F.3d 1336, 1344 (7<sup>th</sup> Cir. 1995) (insurance companies were not required to defend or indemnify insured engineering firm in defamation lawsuit even though insurance policy specifically covered defamation claims, where defamatory letter imputing lack of ability on the part of general contractor in construction project was cast as injury resulting from engineering firm's review of contractor's work and falling within the policy's professional services exclusion).