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3-1 Defamation: Libel and Slander

defamation
an intentional,
false, and harmful
communication

libel
a written falsehood

slander
a spoken falsehood

strict liability
plaintiff prevails without
proving negligence

One of the most commonly committed workplace torts is **defamation**. The tort of defamation has been defined as follows:

A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.¹

Expanding on this bare-bones definition, it is said that language is defamatory:

... if it tends to expose another to hatred, shame, obloquy, contempt, ridicule, aversion, ostracism, degradation, or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons and to deprive him of their confidence and friendly intercourse in society.²

Defamation is subdivided into the torts of **libel** and **slander**, the former being defamation by writing and the latter defamation through speech. These two torts may be further divided into the libel or slander that is *per se* and the libel or slander that is not *per se*. What makes this distinction critical in some cases is that libel or slander *per se* requires no showing of specific damages for the plaintiff to recover a judgment, whereas libel or slander that is not *per se* demands such a showing from the injured party. The term "*per se*" connotes that the third person to whom the defamation is communicated (and indeed the court) can recognize the damaging nature of the communication without being apprised of the contextual setting (*innuendo*) in which the communication was made. Professor Prosser, the greatest scholar of tort law, has identified the commonly recognized forms of *per se* defamation as:

... the imputation of crime, of a loathsome disease, and those affecting the plaintiff in his business, trade, profession, office or calling ...³

Business defamation thus may be defined as defamation *per se* having the following characteristics:

False spoken or written words that tend to prejudice another in his business, trade, or profession are actionable without proof of special damage if they affect him in a manner that may, as a necessary consequence, or do, as a natural consequence, prevent him from deriving therefrom that pecuniary reward which probably otherwise he might have obtained.⁴

This definition leaves the door to the courtroom wide open to the defamed employee, whose job is his or her "business, trade, or profession." Indeed, since business defamation is a *per se* tort, it can amount to strict liability once the plaintiff has proved that the damaging statement was published. This use of the words **strict liability** is not to say that no defenses are available. On the contrary, it is possible to identify several. One can dispute the contention that one published the statement or that it is defamatory. Or one can try to prove that

¹ *Black's Law Dictionary*, 6th ed. (St. Paul, MN: West, 1991), p. 288.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*



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