Employers: What is defamation and how do you protect your reputation?

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At a time when it is becoming harder to distinguish true information from fake news and when a photo posted on social media can travel the world, companies are eager to do all they can to protect their image. What about when it's your own employees who tarnish your company's reputation?

Defamatory acts are increasingly common in the workplace and should not be taken lightly. These manifest in different forms and can permanently damage the employer's reputation.

What is defamation?

The courts agree that defamation consists in the communication of spoken or written remarks that cause someone to lose in estimation or consideration, or that prompt unfavourable or unpleasant feelings toward him or her.

One might think that communication is limited to speech or writing. Nowadays, however, we recognize that defamation can be committed in many other ways, including through images or actions[1].

The anonymity of the web and the ease with which information can be shared have greatly altered the potential reach of a communication, which, while seemingly benign, can result in many legal proceedings. The courts have called the web the most powerful communication tool on Earth, capable of making a person famous in a few minutes or destroying their reputation with a single click![2]

The three situations likely to incur the author's liability

According to the Supreme Court[3], there are three main situations that can constitute defamation.

The first occurs when a person makes unpleasant comments about a third party that he or she knows to be false. Such statements can only be made out of malice, with the intention of harming others.

The second situation occurs when a person says unpleasant things about another when he or she ought to have known they are false. A reasonable person generally refrains from sharing negative information about others if he or she has reason to doubt its veracity.

Finally, the third, often forgotten, situation is that of a slanderer who makes unfavourable but true comments about another without any valid reason for doing so.

In the workplace, these three situations can occur between two employees, between a supervisor and his or her employee, or between an employee and the company he or she works for.

What about freedom of expression?

Freedom of expression, which is frequently invoked to defend statements made against a third party, is not without limits, especially in an employment context.

The concept of defamation makes it necessary to reconcile the right to protection of reputation with the right to freedom of expression, since the former generally takes away from the latter. The courts will seek a balance between these two fundamental rights, which are both protected by Quebec's *Charter of Human Rights and Freedoms*.

Thus, while in some cases the courts recognize the right of employees to express themselves online about their employer, they will ensure that the comments are not factual statements that prove to be false, unfounded, distorted or exaggerated[4].

In addition, employees may have various contractual obligations, such as any non-disclosure agreement or confidentiality agreement they may have signed, or they may be required to comply with various employer policies, for example on the use of social media or respect in the workplace. By entering into such agreements, the employee agrees to limit his or her right to freedom of expression[5].

Beyond any contractual obligations to which an employee has subscribed, the *Civil Code of Québec* obliges employees to act faithfully to their employer and not use any confidential information they obtain in the course of their work. These obligations apply not only in the context of employment, but also at all times where the information concerns the reputation and privacy of others. Moreover, these obligations continue for a reasonable time after the contract terminates.

The courts recognize that the obligation to act faithfully includes protecting the employer's reputation.

In case of defamation, what recourse does the employer have?

Sanction the offending employee

Whether the victim is an employee or a manager, the employer should not stand idly by if someone claims to be the victim of defamation. In addition to damaging the company's work environment and productivity, the victim may also be tempted to file a psychological harassment complaint, which is why it is important to act quickly and conduct a serious inquiry. The same reasoning applies when an employee makes defamatory statements about the company.

If the inquiry determines that defamation has occurred, the employer may sanction the offending employee. The applicable sanctions are determined on a case-by-case basis, but may include dismissal.

On this subject, we invite you to consult our guide on imposing disciplinary measures, published on the website.

Sue the offending employee

If the contested comments constitute a fault and cause damage, the employer could claim compensation from their author, even if he or she is a former employee, insofar as the employer can demonstrate prejudice and a causal link with the alleged comments.

For example, see our bulletin on the *Digital Shape Technologies* decision, under which a former employee was ordered to pay $11,000 to the employer in moral and punitive damages because of the prejudice caused by two negative comments posted anonymously online.

Six tips to prevent defamation

1. Implement a policy on non-denigration and social media use and regularly remind all employees of its existence, while making the necessary links with the policies on the prevention and handling of harassment complaints, as well as policies on the promotion of civility in the workplace.

2. Provide training to employees and educate them on the proper and ethical use of social media and the need to respect their obligation to act faithfully not only at work, but also outside it.

3. Revise policies and working conditions (contracts and manuals) to take into account technological innovations and users' new favourite networks.

4. Keep an eye on traditional and social media.

   In this respect, it has already been decided that an employer who monitors the media through an automated alert system that informs it when articles and other written material are published about it and that, in this way, finds comments made about it by employees, is not conducting illegal surveillance[6].

5. Quickly document any defamatory situation.

   This is particularly important when the comments are made on the internet. The employer should keep a copy of any video, comment, blog or webpage containing defamatory comments about the employer, as they may be modified by the author or deleted altogether. These files must not be altered or modified. When it comes to an email conversation, it will be necessary to try to obtain the entire conversation and not just the defamatory passage that could be misinterpreted out of context.

   When the statements have been made verbally, the employer should try to collect evidence and have it recorded in writing during the inquiry.

   Once the employer realizes that, as a result of its inquiry, it is reasonably able to conclude that a person is damaging the employer's reputation, it must give notice to the person to retract the comments and block any message reiterating such damage to the employer's reputation. The employer should also check to what extent the sites and technological tools allow it to intervene in order to block or rectify the alleged remarks directly.

6. Remember that the employer also has an obligation not to commit defamatory acts against its employees.

   An employer who speaks out in public and denounces the actions of its employees is equally liable. This was the case in particular in the Kativik case[7], where the employer had made statements in the *Journal de Montréal* concerning the unprofessional conduct of one of its employees, who had publicly reported an internal dispute. The comments were deemed to be

unfounded and read by more than one million readers, and the grievance arbitrator awarded the employee $15,000 in compensation.

Similarly, a prudent employer will not make defamatory comments or seek to harm a former employee when contacted by another employer for references. The employer must provide truthful information, with the prior authorization of the person concerned.

Prudent managers will be able to foster a respectful work environment both inside and outside the workplace through these preventive measures and, at the same time, reduce both potential and crystallized disputes by explicitly defining the behaviours expected of everyone and by acting promptly in the event of apparent breaches.

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1. *Bou Malhab* v. *Diffusion Métromédia CMR inc.* 2011 SCC 9, par. 15.
2. *Laforest* v. *Collins,* 2012 QCCS 3078, para. 117.
3. *Prud'homme* v. *Prud'homme,* 2002 SCC 85, par. 6.
4. *Digital Shape Technologies Inc*. *v. Walker*, 2018 QCCS 4374, par. 56 and 57.
5. Ibid, para. 29.
6. *Syndicat des employées et employés professionnels-les et de bureau, section locale 574 (SEPB-CTC-FTQ)* and *Librairie Renaud-Bray inc. (Julien Beauregard, griefs patronaux et syndicaux)*, 2017 QCTA 26.
7. *Association des employés du Nord québécois and Commission scolaire Kativik*,AZ-50966087.