

**DEFAMATION, TERMINATION
AND ACCOMMODATION:**
A Breakdown of Workplace
Issues for Employers

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**EX-EMPLOYEES AND SOCIAL MEDIA:
Dealing with Defamation**

Summary

1. Defamation
2. Specific Issues in Employment

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Social Media

- Social Media had radically changed how we shop, how we learn about news, and how we interact with each other.
- Social Media has sped up the process of information sharing.
- Social Media has made it easier to share that information.
- It is instant.

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Employment Context

1. Defaming Current Employer
2. Defaming a Former Employer
3. Defaming a Fellow Employee
4. Defaming a Company's Services or Products

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**EX-EMPLOYEES AND SOCIAL MEDIA:
Dealing with Defamation**

1. DEFAMATION

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Defamation

What is defamation?

- The action of damaging the good reputation of someone; slander or libel
 - Slander: spoken
 - Libel: recorded
- Tort
- Governed by the Common Law and the *Libel and Slander Act*

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Defamation – Test

Stage 1:

- A statement is defamatory if it would tend to lower the reputation of the person to whom it refers in the eyes of a reasonable person

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Defamation – Test

Stage 2: Does one of the defences apply?

- There are five defences to Defamation:
 - Justification / Truth
 - Absolute Privilege
 - Qualified Privilege
 - Fair Comment
 - Responsible Communication

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Defamation – Defences

JUSTIFICATION / TRUTH

- Justification is a defence that the defamatory expression at issue is true in substance and in fact.
- Complete defence.
- What is true cannot be defamatory.

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Defamation – Defences

ABSOLUTE PRIVILEGE

- A Defence extending to all statements made by high executive officers in the performance of their official duties relating to matters of state.
- All statements said in Parliament.
- All statements said in Court.
- Complete Defence.

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Defamation – Defences

QUALIFIED PRIVILEGE

- The defence will apply when:
 1. the defendant had an interest or duty to make the statement, and
 2. the person hearing or reading the statement had a corresponding interest or duty to receive it.

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Defamation – Defences

QUALIFIED PRIVILEGE *(cont'd)*

- Occasion is privileged
- Examples:
 - Teacher reporting abuse of a child
 - Witness communicating to police

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Defamation – Defences

QUALIFIED PRIVILEGE *(cont'd)*

- Will be defeated by malice.
- Will not apply if audience is too broad.

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Defamation – Defences

FAIR COMMENT

- Expression of opinion
- Defence will apply in the following circumstance:
 - a) the comment must be on a matter of public interest;
 - b) the comment must be based on fact;
 - c) the comment, though it can include inferences of fact, must be recognizable as comment;
 - d) the comment must satisfy the following objective test: could any person honestly express the opinion on the proved facts?; and
 - e) the defence can be defeated if the plaintiff proves that the defendant was subjectively actuated by express malice.

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Defamation – Defences

RESPONSIBLE COMMUNICATION

- Also known as “Responsible Journalism” and “Public Interest”
- The defence protects defendants against liability for false and defamatory facts in circumstances where the publisher has acted responsibly in attempting to verify information on a matter of public interest.
- The defence is thus grounded in the conduct of the publisher rather than the content of the publication.

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Defamation – Defences

RESPONSIBLE COMMUNICATION *(cont'd)*

- The Factors the Court will consider are:
 - a) The seriousness of the allegation;
 - b) The public importance of the matter;
 - c) The urgency of the matter;
 - d) The status and reliability of the source;
 - e) Whether the plaintiff's side of the story was sought and accurately reported;
 - f) Whether the inclusion of the defamatory statement was justifiable;
 - g) Whether the defamatory statement's public interest lay in the fact that it was made rather than its truth ("reportage"); and
 - h) Any other relevant circumstances. An individual's reasonable expectation of privacy must be respected in this determination.

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**EX-EMPLOYEES AND SOCIAL MEDIA:
Dealing with Defamation**

**2. SPECIFIC ISSUES IN
EMPLOYMENT**

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Defamation – Practical Concerns

- Unwanted Publicity (the "Streisand Effect")
- Unintended antagonism
- Employment context
 - Effect on Marketing, Reputation, and Public Relations
 - Effect on Morale
 - Potential Backfire
- Standard Litigation concerns:
 - Expensive
 - Time consuming

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Defamation – Practical Concerns

Have you possibly been defamed?

- Preserve the Evidence
 - Social media posts are deliberately easy to remove
 - How?
 - Screen shot any images
 - Download and videos or gifs

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Defamation – Practical Concerns

Have you possibly been defamed? (cont'd)

- Do NOT overreact
- Take steps to remove the defamatory post
 - Sending a demand letter to the poster
 - Corresponding with the social media company itself

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Defamation – Practical Concerns

Have you possibly been defamed? (cont'd)

- What if you do not know who posted?
 - Will require a court order in order to obtain ISP
 - Usually means starting a law suit
 - Internet provider generally will not take a position

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Defamation – Practical Concerns

Have you possibly been defamed?^(cont'd)

- If you start an action, you will be putting their reputation and character into evidence.
- This can be a very big deal.

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Defamation – Practical Concerns

Are you being accused of defaming someone?

- Did you publish the statement?
- What appetite do you have to fight about it?
- Can the post be removed?

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Defamation – Practical Concerns

Are you being accused of defaming someone? ^(cont'd)

- Would you consider retracting the statement and apologise?

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TRIALS AND TRIBULATIONS OF TERMINATIONS

WHAT TO DO AND NOT DO WHEN ENDING EMPLOYMENT

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Where to Start: Employment vs. Labour; Jurisdiction

- Collective agreement?
- Federal or provincial regulation?

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Where to Start: Kinds of Terminations

BY EMPLOYER

- Termination for just cause (aka termination for cause or with cause)
- Termination without cause
 - Constructive dismissal
- Layoff ≠ termination (sort of)

BY EMPLOYEE

- Resignation

TIP: Avoid assuming you have just cause to terminate

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What to Give: Entitlements on Termination

- Termination with just cause = no notice or pay in lieu of notice
- Termination without cause = it depends
 - Common law (reasonable notice) → generally 24-month max
 - Written employment contract
 - Employment Standards Act → 8 week max (+ any group termination pay (16-week max))

TIP: A written employment agreement with an enforceable termination provision is the most important tool for employer protection

What to Give: Entitlements on Termination

- Resignation = it depends
 - Written employment contract
 - Common law (reasonable notice)
- Waiver → pay in lieu of notice required
- Voluntary?

TIP: Accept the resignation in writing

What to Give: Notice or Pay in Lieu?

- Notice = working notice
 - CONS
 - Motivation
 - Retaliation
 - Confidentiality
 - PROS
 - Payments spread out
 - Work in return for pay
 - Possible resignation

What to Say: Termination Meeting

- Privacy
- 2 employer representatives
- Be brief
- Be truthful
- No access
- Personal items
- Getting home
- Notes

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What to Say: Post-Termination

- Pay within 48 hours
- Record of employment (5 calendar days)
- Internal announcement → "need to know" standard
- Reference checks → recommendation vs. employment confirmation
 - Defamation
 - Human rights
 - Privacy

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DUTY TO ACCOMMODATE



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Accommodation – What is it?

Under human rights law, employers are subject to duty to accommodate employees with disabilities, up to point of undue hardship

- Duty to take all reasonable steps to avoid negative effect on a personal characteristic
- Can arise at any time and without intent
- Includes direct and indirect discrimination
- “Undue hardship” where reasonable accommodations are financially difficult, unduly extensive, substantial or disruptive

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Employer Obligations

- Review policies, procedures, practices and activities to identify and remove discriminatory barriers
- Consider employee's request in good faith
- Work with employee to consider possible accommodations
- Ask questions to clarify information needed to respond to request
- Maintain confidentiality
- Grant request in timely manner, to point of undue hardship

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Employee Obligations

- Tell employer/union rep about individual circumstances that relate to protected ground(s)
- Discuss changes that can be made to accommodate needs
- Share information with employer
 - May include medical information verifying disability, setting limitations
- Fully participate in process
- Be reasonable, not all accommodations appropriate or feasible
- Be open to alternative suggestions, not about employee preferences

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Duty to Accommodate and Covid-19

Family status accommodation and Covid-19

- Child care obligations can trigger duty
- Not legally obligated to accommodate a conflicting schedule
- Employee must demonstrate "serious interference with a substantial parental or other family duty"

Employees may also request an accommodation because they reside with an at-risk family member

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Accommodation and Mental Health Issues

Gordy v. Oak Bay Marina Ltd., 2004 BCHRT 225 (cont'd)

- Fishing guide terminated from position at Oak Bay Marina after entering manic phase of bipolar disorder
- Employer argued assuming safety risk of continuing to employ guide amounted to undue hardship
- Tribunal disagreed, found Employer didn't have accurate information about bipolar disorder or likelihood of relapse
- Decision appealed to BC Supreme Court
 - Set aside Tribunal's decision, finding it erred in failing to consider observations of managers
 - Decision appealed

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Accommodation and Mental Health Issues

Gordy v. Oak Bay Marina Ltd., 2004 BCHRT 225 (cont'd)

- BC Court of Appeal upheld the decision, agreed Employer entitled to rely on personal observations of employees
 - Case referred back to Tribunal
- Tribunal returned to initial decision,
 - Found Employer's knowledge of employee's condition was justified concern and could form part of risk assessment
 - However, duty required Employer to undergo full assessment, including educating themselves about bipolar disorder in general and risk of relapse, prior to properly assessing risk

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Failure to Accommodate

Failure to accommodate considered infringement on human rights legislation

- Various remedies available under s. 37 of the BC Human Rights Code
 - Employer may be required to pay damages for injuries to dignity, feelings & self respect, lost wages, punitive damages and back wages
 - » *University of British Columbia v. Kelly*, [2016 BCCA 271] Resident in Family Medicine awarded \$75,000 for injury to dignity
 - Employer may be required to reinstate employee

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Failure to Accommodate – Can be Costly!

Datt v. McDonald's Restaurants of Canada Ltd., [2007] B.C.H.R.T.D. No. 324 (cont'd)

- Restaurant required frequent handwashing, employee developed painful skin condition, went on short term disability, saw specialist, attempted to return to work three times
- Duties were never modified, employee felt she could do certain jobs
- McDonald's provided a 3-month job search program, then terminated employee November 2004
- Panel found McDonald's did not ask right questions in attempt to accommodate, made no real attempt to find work available for employee
- Tribunal awarded \$35,000 for wage loss and \$25,000 due to emotional & financial stress of being terminated

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Tips for Employers

- Ask the right questions, clarify ambiguous or contradictory information
- Rely on doctors for expertise and knowledge
- Ensure doctors have full information about job duties, functions of current job and other jobs being considered
- Document process to accommodate the employee
- Identify problems with possible accommodations, gather evidence determine if amounts to "undue hardship"
- Maintain regular, direct contact with employee
- Do a final review of the information and the process

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Questions?

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These materials are necessarily of a general nature and do not take into consideration any specific matter, client or fact pattern.

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