DEFAMATION IN EMPLOYMENT

By Christopher H. Whelan

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INTRODUCTION

This article concerns defamation, which is ". . . a forest of complexities, overgrown with anomalies, inconsistencies, and perverse rigidities." (*McNair v. Worldwide Church Of God* (1987) 197 Cal.App.3d 363, 375.) In spite of these complexities, defamation in employment is of great importance since it provides a terminated employee access to general, emotional distress, and punitive damages.

Redress for injury to reputation is an ancient right recognized as a fundamental public policy through centuries of common law, statutes (*Civ. Code, § 46*, and its predecessor since 1872) and the California Constitution (art. I, § 2, subd. (a)).

The fundamental right to redress for defamation has long been recognized as a "concept at the root of any decent system of ordered liberty." (*McNair v. Worldwide Church of God* (1987) 197 Cal.App.3d 363, 374-375 [Emphasis added.].) In *McCoy v. Hearst* (1986) 42 Cal.3d 835, the Supreme Court stated at p. 858:

> "Libel laws recognize that each person has a right not to be disparaged by false statements. [Citation omitted.] **Society's interest in redressing the harm done to one's reputation is strong**. [Citation omitted.] Moreover, this court is not unmindful that '[t]he harm done to one's reputation by erroneous charges of corruption or dishonesty can never be fully undone, . . . For even an erased question mark still suffices to raise the question, where perhaps none existed before.'" [Emphasis added.]

Also see footnote 22 in *McCoy v. Hearst Corp., supra*, 42 Cal.3d 835, at p. 858:

> "Good character, or reputation, consists of the general opinion of people respecting one. It is built up by a lifetime of conduct. It is probably the dearest possession that a man has, and once lost is almost impossible to regain. The possession of a good reputation is conducive to happiness in life and contentment. The loss of it, . . . brings shame, misery and heartache. (Eldredge, *The Law of Defamation, supra*, at pp. 12-13, quoting Judge James Gay Gordon, Jr.)" [Emphasis added.]

Also see McNair v. Worldwide Church of God (1987), *supra,* 197 Cal.App.3d 363, at pp. 374-375:

> "An individual's right to protect his/her good name has long been recognized. As one legal commentator has noted, 'A millennium ago a slanderer could lose his tongue.' While today the consequences suffered by the defamer are not so drastic,

> **there is no question that society continues to have** '. . . a **pervasive and strong interest in preventing and redressing attacks upon reputation**.' [Citation omitted.] Justice Powell quoting Rosenblatt, supra, **identified this interest as reflecting '. . . no more than our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty.' [Citation omitted.] "California has codified this interest in Civil Code sections 44 through 46**. Section 44 provides that defamation can be effected through either libel or slander, and sections 45 and 46 define these terms. In *McCoy v. Hearst* (1986) 42 Cal.3d 835. [Citation omitted.], our Supreme Court acknowledged that '**Society's interest in redressing the harm done to one's reputation is strong**.'" [Emphasis added.]

The California Supreme Court in *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 743-744, again recognized this fundamental public policy of insuring redress for defamation. In that case, the court balanced the news media's First Amendment rights, and the important societal goal of avoiding media self-censorship, versus the equally important fundamental public policy of redressing defamation. Even in a clash with society's strong interest in a free and robust press, society's interest in redressing damage to an individual's reputation was recognized as essential, fundamental and worthy of protection.

Certainly, when compared to the almost sacred position a free press has in our society, an employer's demand to conduct business without impediment by employee reputation rights has not been, and cannot be given greater protection then First Amendment Rights given to the media. The *Brown* court stated at pp. 742-744:

> "The news media contends the threat of defamation actions has a "chilling effect" on their willingness to report the news. Stated conversely, the argument is that obstacles to recovery for defamation increase the media's ability to report the news. '**The need to avoid self-censorship by the news media is, however, not the only societal value at issue**. If it were, this court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation. . . . Yet an absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation.' [Citation omitted.] There must be a 'proper accommodation between the law of defamation and the freedoms of speech and press.' [Citation omitted.] 'The great rights guaranteed by the First Amendment carry with them certain responsibilities as well.' [Citation omitted.] **Accommodation of the value of reputation is also required by this state's Constitution, which expressly provides that every person [including employers] must be responsible for the abuse of the right to free speech. (Cal. Const., art. I, § 2, subd. (a).). . . .**

> "'A society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few; as we have learned to our sorrow.' (Hand, The Spirit of Liberty (Dillard 1st Ed. 1952) at p. 190). **A reasonable degree of protection for a private individual's reputation is essential to our system of ordered liberty. 'It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part**.' (The Federalist No. 51 (J. Madison) (Cooke Ed. 1961) p. 351.)
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> "The need to redress defamation is as important now as when the tort of defamation was first recognized, perhaps more so. 'In an organized and centralized society, where at least economic relationships are likely to be based on an impersonal or reputational level as opposed to the more decentralized and personal approach characteristic of a bygone era, how we are perceived takes on greater significance. For better or worse, in today's world, most of us are known by our images.' [Citation omitted.] A tradesman in the 18th century defamed by a customer could rely on his good reputation with others and perhaps had a reasonable opportunity to present the truth to those who mattered to his livelihood. In today's business market, there is little realistic opportunity for self-help. . . .
>
> "We agree with the high court's observation that, **'the individual's right to the protection of his own good name' reflects no more than our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty**.' (Gertz, supra, 418 U.S. at p. 341 [41 L.Ed.2d at p. 806], quoting *Rosenblatt v. Baer* (1966) 383 U.S. 75, 92 [15 L.Ed.2d 597, 609, 86 S.Ct. 669] (conc. opn. of Stewart, J.).)." [Emphasis added.]

A California defamation case also citing *Gertz* came to the conclusion that the protection of an individual's reputation, "like the protection of life itself, is a legitimate state interest:"

> "The court in Gertz emphatically points out that the individual's right to the protection of his own good name is a basic concept of human dignity which is at the root of any system of ordered liberty. **As a consequence, the protection of private personality like the protection of life itself, is a legitimate state interest**." (*Roemer v. Retail Credit Co.* (1975) 44 Cal.App.3d 926, 932) [Emphasis added.].

The U.S. Supreme Court in *Curtis Pub. Co. v. Butts* (1966) 388 U.S. 130 said at pages 146-147:

> "We are told that '[t]he rule that permits satisfaction of the deep-seated need for vindication of honor is not a mere historic relic, but promotes the law's civilizing function of providing an acceptable substitute for violence in the settlement of disputes,' *Afro-American Publishing Co. v. Jaffe*, 125 U.S. App. D.C. 70, 81, 366 F.2d 649,660."

The fundamental importance to society of preventing and redressing defamation, recognized throughout the centuries, was recently reaffirmed by the California Supreme Court in *Bernson v. Browning-*

Ferris Industries (1994) 7 Cal.4th 926, 938, where it stated:

> "Stolen property may be replaced or recovered, but where does one go to restore one's reputation? In the immortal words of Shakespeare's Iago: 'Who steals my purse steals trash; . . . [¶] 'Twas mine, 'tis his, and has been slave to thousands; [¶] But he that filches from me my good name [¶} Robs me of that which not enriches him [¶] and makes me poor indeed.' (Shakespeare, Othello act III, scene 3.) However difficult, time-consuming and costly, a libel action may be the only recourse available to one who has been falsely maligned." [Emphasis added.]

In Civil Code Section 46(3) and its predecessor statute, the Legislature since 1872 has consistently expressly allowed redress for defamation usually published in the employment setting (injury to profession, trade or business reputation). The fundamental nature of this public policy is confirmed by the fact that the Legislature after 120 years, has not amended the civil code to create any special exception for employers to publish defamatory criticism of employees imputing general disqualification in respect to the employee's trade, business or profession.

It is interesting to note that many in the business community, while calling for the sacrifice of employees' fundamental reputation rights, are not also advocating the elimination of redress for trade libel caused by the disparagement of the products produced by those same employees that management wants to freely defame. Employers and business owners have sought damages for the disparagement of a wide range of products produced by their employees; for instance, see *Polygram Records, Inc. v. Superior Court* (1985) 170 Cal.App.3d 543, 545-547, involving disparagement of Rege wine by comedian, Robin Williams, when he called Rege wine a "m----r f----r;" *also see Erlich v. Etner* (1964) 224 Cal.App.2d 69, disparagement of kosher chicken breasts; and *Shores v. Chip Steak Co.* (1955) 130 Cal.App.2d 627, 628-629, disparagement of "thin sliced fresh beef known as . . . 'chipsteaks.'"

In our system of justice, an employee's reputation should have the same, if not greater protection than that afforded to "m----r f---[ing]" wine, chipsteak, and kosher chicken breasts.

I. WORKERS' COMPENSATION IS NOT THE EXCLUSIVE REMEDY FOR DEFAMATION IN EMPLOYMENT

In the past, claims of workers' compensation exclusivity caused some confusion and incorrect rulings for defamation in employment at the demurrer and summary judgment stage. However, it is now generally recognized in California that defamation was not part of the "bargained-for exchange" which gave rise to the workers' compensation scheme; and, therefore, defamation damages, including emotional distress damages, do not come within the workers' compensation exclusivity rule.

The courts have recognized a number of well-reasoned theories in support of this exception to the workers' compensation exclusivity rule. One of them is that defamation is based upon "proprietary rights" and, therefore, was never part of the "compensation bargain" of the workers' compensation scheme set up to expeditiously handle claims of industrial "personal physical injury or death." The workers' compensation statutory scheme clearly excludes, or does not even concern, property rights (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 16; *Livitsanos v. Superior Court* (1992) 2 Cal.4th 744, 756-757, fn. 9; *Davaris v. Cubaleski* (1993) 12 Cal.App.4th 1582, 1590-1592), or those theories unique to defamation such as presumed damages, which allows an award of damages without any evidence of actual injury or harm (*Contento v. Mitchell* (1972) 28 Cal.App.3d 356, 358; *Hanley v. Lund* (1963) 218 Cal.App.2d 633, 644-645).

The seminal California case on this issue, *Howland v. Balma* (1983) 143 Cal.App.3d 899, stated at p. 904:

> "The gist of an action for slander, however, is damage to reputation. (Civ. Code, § 46; 4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, § 271, p. 2542.) The harm flowing therefrom is not a 'personal injury' (i.e., medical or physical injury to the body) or a risk of employment within the purview of the workers' compensation law. [Citation omitted.] 'In fact, an injury to reputation affects a proprietary interest and
> as such is not a personal injury at all, any concomitant physical or mental injury notwithstanding.'" [Citation omitted.] [Emphasis added.]

The Supreme Court in *Shoemaker v. Myers*, *supra*, 52 Cal.3d 1, confirmed *Howland v. Balma* and ruled at p. 16:

> "However, in *Cole* we also identified a number of instances in which the exclusive remedy provisions are not applicable. First, the fundamental basis of workers' compensation is an injury sustained in and arising out of the course of employment when the injury is 'personal, physical injury or death.' (*Cole v. Fair Oaks Fire Protection Dist., supra,* 43 Cal.3d 148, 160.) Conversely, the exclusive remedy provisions apply only in cases of such industrial personal injury or death. (See, e.g., *Howland v. Balma* (1983) 143 Cal.App.3d 899 [workers' compensation not exclusive remedy for defamation]; . . ." [Emphasis added.]

The Supreme Court stated in Livitsanos, supra, 2 Cal.4th 744, at p. 757, fn. 9:

> "A number of courts have apparently determined that the gravamen of an action for libel or slander is damage to 'reputation,' a 'proprietary' as distinct from a physical or mental injury, and therefore have concluded that defamation does not lie within the purview of the workers' compensation law. (See, e.g., *Howland v. Balma* (1983) 143 Cal.App.3d 899 [192 Cal.Rptr. 286] [Citations omitted.] "Cited with approval in *Davaris v. Cubaleski, supra,* 1597." [Emphasis added.]

The Supreme Court in *Livitsanos v. Superior Court*, reversed the Court of Appeal's ruling upholding a demurrer to a defamation cause of action. In doing so, the Supreme Court recognized other theories, in addition to the "proprietary interest" theory, to support a finding that defamation is outside any workers' compensation exclusivity. These theories include the obvious conclusion that defamation by an employer or co-employee is "outside the course and scope of employment" and not within the "normal risks of employment."

Livitsanos states at p. 757:

> "For even assuming, without deciding, that certain defamatory remarks in the employment context may be subject to workers' compensation, as we noted in the previous section the seriousness of the allegations in plaintiff's complaint and the hybrid nature of the relationship between plaintiff and defendants raise the further issue of whether defendants' conduct was outside the scope and normal risks of employment. Therefore, on remand, the Court of Appeals is directed to address these issues." [Citation omitted.] [Emphasis added.]

> Also, *Davaris v. Cubaleski, supra,* 12 Cal.App.4th 1582, stated at p. 1591:

> "Patently, however, defamatory statements which have no other purpose than to damage an employee's reputation are neither a 'normal part of the employment relationship' nor a risk of employment within the exclusivity provision of the Workers' Compensation Act. (*Howland v. Balma, supra,* 143 Cal.App.3d 899, 905)." [Emphasis added.]

II. PUBLICATION OF DEFAMATION IN THE EMPLOYMENT SETTING

A. Internal Publication

Defamation in employment usually arises when an employee is subjected to the publication of false criticism of poor performance, incompetence, or dishonesty. Of course, publication of defamation can be completely internal, that is, published and received solely by other employees of the defendant employer.

> "Defendant argues that plaintiff did not allege publication of these statements because plaintiff alleged only that the statements were made by one of defendants' employees to other employees of defendant. This argument is without merit as publication occurs when a statement is communicated to any person other than the party defamed." [Citation omitted.] "Under principles of respondeat superior, an employer may be held liable for a defamatory statement made by its employee." [Citation omitted.] That publication may involve internal corporate statements was recognized in *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 944 [Citation omitted.], the court stating that internal company statements regarding the plaintiff's 'lack of job knowledge and cooperation' were 'published.'" *Kelly v. General Telephone Co.* (1982) 136 Cal.App.3d 278, 284. [Emphasis added.] (Publication by former supervisor to other employees and personnel officers.)

Also see Biggins v. Hanson (1967) 252 Cal.App.2d 16, 19 involving an employee defamed by an immediate supervisors' publication to the personnel manager, and *Cruey v. Gannett Co.* (1998) 64 Cal.App.4th 356, 367 in which the plaintiff's subordinate published accusations of "sexual harassment and other improprieties" to the "Human Resources Department." In *Cruey* the court stated:

> We conclude that complaints to employers about workplace harassment should be privileged. To hold otherwise would have a chilling effect on an employee's right to be free from sexual harassment or discrimination in the workplace by exposing the employee to the risk of litigation as a consequence to seeking enforcement of this right. However, non of Lacy's authority stand for the proposition that a complaint to a private employer, even if made through the proper channels, is absolutely privileged. At best, it is conditionally privileged subject a finding of malice. Although it may appear incongruous to cloak a complaint made to an official body like EEOC with absolute immunity, but to deny such protection to the self-same complaint made through proper channels to a private employer who shares the same interest in ferreting out workplace misconduct; nonetheless, our Supreme Court has made clear that creation or expansion of existing statutory privileges involve matters of public policy more appropriately deferred to legislative judgment. (*Slaughter v. Friedman, supra*, 32 Cal.3d at p. 158.) Accordingly, we find Lacy's complaint to Gannett's department of human resources is conditionally privileged

subject to a finding of malice.

B. Publication Can Be Proven by Plaintiff's Testimony

Publication can be proven by the defamed employee's testimony of his or her knowledge:

> "We can find no precedent for defendant's contention that a slandered individual's testimony of publication is insufficient, as a matter of law, without corroboration. [Citation omitted.] The slander heard by one person is no less a slander than that heard by a multitude." (*Cunningham v. Simpson* (1969) 1 Cal.3d 301, 307.)

> "For purposes of the law of defamation, "publication" does not require dissemination to a substantial number of individuals; it suffices that the defamatory matter " `is communicated to a single individual other than the one defamed.' " (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203.)

C. Publication of Defamation May Be Proven by Hearsay since Publication Is an Operative Fact

> "There is a well-established exception or departure from the hearsay rule applying to cases in which the very fact in controversy is whether certain things were said or done and not as to whether these things were true or false, and in these cases the words or acts are admissible not as hearsay but as original evidence. (*People v. Henry* (1948) 86 Cal.App.2d 785, 789, *infra*, § 465; see also *People v. Rosson* (1962) 202 Cal.App.2d 480, 486-487 [20 Cal.Rptr. 833], infra, § 471.)"

> ". . . In these situations the words themselves, written or oral, are 'operative facts,' and an issue in the case is whether they were uttered or written." See McCormick [McCormick on Evidence], p. 463; 6 Wigmore [Wigmore on Evidence], § 1770; [Citation omitted]." (*Russell v. Geis* (1967) 251 Cal.App.2d 560, 571-572).

In *Russell v. Geis* (1967) 251 Cal.App.2d 560, at pages 571-572, hearsay evidence was admitted against defendant employer to prove the publication of defamation of plaintiff originally published by defendant but republished by school children to plaintiff's child at elementary school, who then repeated it to plaintiff. *Also see Stoneking v. Briggs* (1967) 254 Cal.App.2d 563, where the court at 577-578 admitted hearsay evidence to show the extent of publication relevant to the issue of damages.

"Where the fact of statements having been made is in controversy, rather than the truth of their contents, such are excepted from the hearsay rule." (*Mercado v. Hoefler* (1961) 190 Cal.App.2d 12, 19.)

(Also, see E.A. Heafey, Jr., *Calif. Trial Objections*, § 19.6, at 172-173 (4th ed. 1996); B.E. Witkin, *Calif. Evid.*, § 590, at 563 (3d ed. 1986); also *Cruey v. Gannett Co.* (1998) 64 Cal.App.4th 356, 366.)

D. Taking Part in the Publication Establishes Liability for Defamation

Anyone, " who takes a *responsible part* in the publication is liable for the defamation." (Original emphasis.) *Matson v Dvorak* (1995) 40 Cal. App. 4th 539, 549. (Also, *Osmond v EWAP, Inc*. (1984) 153 Cal. App. 3d 842, 852; *Jones v Calder* (1982) 138 Cal. App. 3d 128, 134).

III. EACH PUBLICATION AND REPUBLICATION OF A DEFAMATORY STATEMENT IS A NEW TORT. WHEN THIS IS COUPLED WITH THE LATE DISCOVERY RULE DEFAMATION HAS ALMOST A LIMITLESS ACTIONABLE LIFE

"Each publication ordinarily gives rise to anew cause of action for defamation." *Shively v. Bozanich* (2003) 31 Cal.4th 1230,1242. "The general rule is that every repetition of a defamation is a separate publication and gives rise to a new cause of action." (*Neal v. Gatlin* (1973) 35 Cal.App.3d 871, 877 fn. 4; *also see DiGiorgio Corp. v. Valley Labor Citizens* (1968) 260 Cal.App.2d 268, 273; *Schneider v. United Airlines* (1989) 208 Cal.App.3d 71, 77, "each publication is a separate wrongful act."

The "rule of discovery" applies to defamation, therefore, the one year statute of limitations for defamation does not begin to run until the defamation is discovered. For the principle of the "rule of discovery" see *Manguso v. Oceanside Unified School District* (1979) 88 Cal.App.3d 725, 728-731, where plaintiff's action, filed within one year of discovery of defamation placed in her confidential personnel file 16 years before she discovered the defamation, survived a statute of limitations attack. (*Also see Schneider v. United Airlines, Inc.* (1989) 208 Cal.App.3d 71, 77.)

An additional twist to the late discovery rule is found in *Bernson v Browning-Ferris Industries* (1994) 7 Cal. 4th 926. In that case plaintiff knew of the publication of defamation but was unable to discover who published it until four years after publication. The trial court granted summary judgment holding

plaintiff's claim was barred under the one year SOL. (CCP § 340(3). The Supreme Court said, not so fast you sneaky defendant.

> The statute of limitations usually commences when a cause of action "accrues," and it is generally said that "an action accrues on the date of injury." (Cite omitted.) Alternatively, it is often stated that the statute commences "upon the occurrence of the last element essential to the cause of action."(Cite omitted.)These general principles have been significantly modified by the common law "discovery rule," which provides that the accrual date may be "delayed until the plaintiff is aware of her injury and its negligent cause.(Cite omitted.)
>
> A close cousin of the discovery rule is the "well accepted principle . . . of **fraudulent concealment**.(Cite omitted.)"It has long been established that the defendant's fraud in concealing a cause of action against him tolls the applicable statute of limitations, but only for that period during which the claim is undiscovered by plaintiff or until such time as plaintiff, by the exercise of reasonable diligence, should have discovered it." (Ibid.) Like the discovery rule, the rule of fraudulent concealment is an equitable principle designed to effect substantial justice between the parties; its rationale "is that the culpable defendant should be estopped from profiting by his own wrong to the extent that it hindered an 'otherwise diligent' plaintiff in discovering his cause of action."
> [*Bernson v Browning-Ferris Industries* (1994) 7 Cal. 4th 926, 931]

IV. THE DEFAMER IS RESPONSIBLE FOR EACH AND EVERY FORESEEABLE REPUBLICATION; EVEN SELF-PUBLICATION BY THE DEFAMED EMPLOYEE

> "It is of course the general rule that, in the absence of a privilege, anyone who actively participates in the publication of a false and libelous statement is liable for special, general, and even punitive damages. Moreover, it is also the general rule that every repetition of the defamation is a separate publication and hence a new and separate cause of action though the repeater states the source (Prosser, Torts (2d ed.) p.787). And, ordinarily the originator of the defamatory matter is also liable for each such repetition if he could reasonably have foreseen the repetition." (*DiGiorgio Corp. v. Valley Labor Citizen* (1968) 260 Cal.App.2d, 273) (Emphasis added).
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> "According to the *Restatement Second of Torts* (1977) section 576, the original defamer is liable if either "the repetition was authorized or intended by the original defamer." (subd. (b)) or "the repetition was reasonably to be expected" (subd. (c)). California decisions follow the restatement rule. [Citations omitted.])" (*Mitchell v. Sup. Court* (1984) 37 Cal.3d 268, 281.)
>
> "[O]rdinarily, the originator of the defamatory matter is also liable for each such repetition if he could reasonably have foreseen the repetition." [Citation omitted.] (*DiGiorgio Corp. v. Valley Labor Citizens* (1968) 260 Cal.App.2d 268,

273.) (*Also see Neary v. Regents of the Univ. of California* (1986) 185 Cal.App.3d 1136, 1147; *Mercado v. Hoefler* (1961) 190 Cal.App.2d 12, 19; *Stoneking v. Briggs* (1967) 254 Cal.App.2d 563, 577.

A. Compelled Self-Publication

"Though California has never addressed this question, it has been addressed by several other jurisdictions. Those jurisdictions which have considered it have developed a well-recognized exception to the general rule respondents refer to. They have held the originator of the defamatory statement liable for damages caused by the disclosure of the contents of the defamatory statement by the person defamed where such disclosure is the natural and probable consequence of the originator's actions." (*McKinney v. County of Santa Clara* (1980) 110 Cal.App.3d 787, 796.) [Emphasis added.] *Also see Live Oak Pub. Co. v. Cohagan* (1991) 234 Cal.App.3d 1277, 1284-1285.)

B. "Responsible Part In Publication"

To support a claim for defamation plaintiff need only establish that the defendant took a "responsible part" in the publication of the defamatory matter. (*Hawran v Hixon* (2012) 209 Cal.app. 4th 256, 275-276) Also see, *Shively v Bozanich* (2003) 31 Cal. 4th1230, 1245; *Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App. 4th688,712

V. CRITICISM OF PERFORMANCE IS DEFAMATION PER SE

Civil Code Section 46(3) specifically concerns defamation per se affecting a person's occupational reputation. (*Washer v. Bank of America* (1943) 21 Cal.2d 822, 827.) Usually most defamatory criticisms of work performance or honesty will occur at the work place through criticism by an employer, a supervisor, fellow employees or by plaintiff's former employer. Civil Code Section 46(3) states:

"Slander is a false and unprivileged publication [orally uttered] . . . which: . . .

"Tends directly to injure him in respect to his office, profession, trade, or business, either by imputing to him general disqualification in those respects which the . . . occupation peculiarly requires, or by imputing something with reference to his . . . profession, trade, or business that has a natural tendency to lessen its profits [or earnings].

"These definitions [Civ. Code, § 46] have been held to include almost any language which, upon its face, has a natural tendency to injure a person's reputation, either generally, or with respect to his occupation. . . ." (*Washer v. Bank of America* (1943) 21 Cal.2d 822, 827.) [Emphasis added.]

Cameron v. Wernick (1967) 251 Cal.App.2d 890, 893 provides a concise definition of defamation "per se":

> " `The code definition of libel is very broad and has been held to include almost any language which, upon its face, has a natural tendency to injure a person's reputation, either generally, or with respect to his occupation. [Citation.] In the determination of this question, the alleged libelous publication is to be construed "as well from the expressions used, as from the whole scope and apparent object of the writer." [Citation omitted.] A person may be liable for what he insinuates as well as for what he says explicitly. [Citation omitted.]" "An article may be libelous on its face even thought it is susceptible to an innocent meaning."
>
> "[F]alse statements charging the commission of crime or tending directly to injure a plaintiff in respect to his or her profession by imputing dishonesty or questionable professional conduct are defamatory per se." *Burrill v. Nair* (2013) 217 Cal. App. 4th 357, 383.

Numerous cases set forth below hold commonly occurring criticism of performance can be defamation per se. In fact, the courts have held even a performance review can be defamatory (Jensen v. Hewlett-Packard Co. (1993) 14 Cal.App.4th 958, 965), if it accuses an employee of "criminal conduct, lack of integrity, dishonesty, incompetence, or reprehensible personal characteristics or behavior."

A. Examples of Defamatory Criticism of Work Performance

> [Bank employee and lawyer] The former employer published plaintiff was "dishonest," his performance was "unsatisfactory," "inefficient" and "insubordinate," he "had falsified his expense account," and was guilty of "embezzlement," and had "misappropriated and failed to properly account for funds." These statements were ". . . libelous and slanderous per se insofar as it related to his qualification as an employee." (*Washer v. Bank of America* (1943) 21 Cal.2d 822, 825-828.)
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> [Businessman] was "out for a fast buck" "describ[ing] a businessman of questionable ethics." (*Cameron v. Wernick*, (1967) 251 Cal.App.2d 890, 894.)
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> [City manager] Plaintiff (city manager) terminated because she was "incompetent." *Gallant v. City of Carson* (2005) 128 Cal.App.4th 705, 709.
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> [Consulting engineer connected with embassy] was "caught carrying on flagrant espionage activities." . . . "and as a consulting engineer, he suffered special damages in this, that he lost employment . . ." (*Prindonoff v. Balokovich* (1951) 36 Cal.2d 788, 789-790.)

[Engineer] terminated as a result of a conspiracy to defame through publication of defamatory per se statements that Plaintiff was "not a competent engineer" and a "traitor to the company." (*Rodriguez v. North American Aviation, Inc.* (1967) 252 Cal.App.2d 889, 894.)

[Engineer] terminated as a result of internal publications concerning his alleged "lack of job knowledge and cooperation." These publications were found to have been "maliciously motivated for the purpose of terminating Agarwal." (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 944-945.)

[Real estate agent] was a "crazy old woman . . . she belonged in an institution and that they were thinking of putting her there;" the other, [statement] referred to her as "this crazy old woman Ms. Clay . . . that has mistyped these move in letters . . ." (*Clay v. Lagiss* (1956) 143 Cal.App.2d 441, 446.)

[Attorney] Attorney's conduct was "inconsistent with the due fulfillment of what the party, in virtue of his employment or office, has undertaken." (*Maidman v. Jewish Publications, Inc*. (1960) 54 Cal.2d 643, 650-651.)

[Attorney] is a "crook," "thief" or running a "scam." (*Albertini v. Schaefer* (1979) 97 Cal.App.3d 822, 834-835.)

[Attorney] Lawyer called a "hypocrite." (*Newby v. Times Mirror Co.* (1920) 46 Cal.App. 110, 120.)"It is libelous *per se* to falsely charge that a person is a hypocrite."

[Attorney for a bankruptcy trustee] was "'milking' the bankrupt estate," "charged and received fees to which he was not entitled because he had done little or no work . . ." (*Fairfield v. Hagan* (1967) 248 Cal.App.2d 194, 201.)

[Loan officer at bank] was accused of being "terminated because he was not following standard operating procedures . . .," lacked regard for customer's privacy, and the bank had received a number of customer complaints about him." (*Prevost v. First Western Bank* (1987) 193 Cal.App.3d 1492, 1497.)

[Paving contractors] "were responsible for the delay in the . . . project," and were "incompetent." (*Williams v. Daily Review, Inc.* (1965) 236 Cal.App.2d 405, 411.)

[Subforeman] was "disloyal," "insubordinate." (*Biggins v. Hanson* (1967) 252 Cal.App.2d 16, 19-20 [published only by internal memo by immediate supervisor to personnel manager].)

[A former partner] "falsely charging a person with a violation of confidence reposed in him or with treachery to his associates is actionable per se." (*Dethlefsen v. Stull* (1948) 86 Cal.App.2d 499, 502.)

[Corporate officer] accused of "making false statements," used "his office to obtain revenge," being a "black sheep," "unscrupulous," using "lies and hypocrisies," having "desire for power" causing "him to act without reason," being "a parasite in the organization; who did nothing," "proud, snobbish and vain," "insane in command," "irresponsible," "unable to assume responsibility and direction of groups." (*Correia v. Santos* (1961) 191 Cal.App.2d 844, 854.)

[Maintenance men] "have been terminated." "These men have been replaced with personnel having more experience and knowledge . . . [therefore] we expect to provide you with better and more efficient service in the future." (*Patton v. Royal Industries, Inc.* (1968) 263 Cal.App.2d 760, 764-765.) "[T]he implication that plaintiffs' services had not been first class or satisfactory was a serious reflection upon their ability and a libel as a matter of law." (*Patton v. Royal Industries, Inc.* (1968) 263 Cal.App.2d 760, 766.)

[Former employee] terminated because he "misused company funds," "falsified invoices" and was "ineligible for rehire" [published only internally by former supervisor to various other employees and personnel officers]. (*Kelly v. General Telephone Co.* (1982) 136 Cal.App.3d 278, 284-285.)

[School principal] was a "weak spot" in the school system, and imputed to plaintiff "a general disqualification" in the respects which his profession peculiarly require. (*Oberkotter v. Woolman* (1921) 187 Cal. 500, 504.)

[School principal] did not supervise students properly. Published "with the purpose of causing the school board to discharge [plaintiff] from employment." (*Larive v. Willitt* (1957) 154 Cal.App.2d 140, 141-142.)

[Superintendent of Schools] accused by trustees in statements to reporters and members of the public, to have of suppressed facts from the board, tampered with minutes of board meetings, received "kickbacks" from district employees, engaged in "shady dealings" and "cleaned up" on business transactions involving the district. (*Lipman v. Brisbane Elementary Sch. Dist.* (1961) 55 Cal.2d 224, 234.)

[Teacher] suffered from narcissistic sexual deviation. (*Menefee v. Codman* (1957) 155 Cal.App.2d 396, 402-403.)

[Oral surgeon's] insurance administrator described certain of plaintiff surgeon's work as "unnecessary" and that claims would not be processed for plaintiff because of "overcharging." (*Slaughter v. Freidman* (1982) 32 Cal.3d 149, 153.)

[Doctor] accusations of malpractice and negligence. (*Hanley v. Lund* (1963) 218 Cal.App.2d 633, 637-638.)

[Doctor] "he is an incompetent surgeon and needs more training." (This was found to be factual and defamatory per se if false, however the Court ruled the statement to be true and therefore not defamatory.) (*Gill v. Hughes* (1991) 227 Cal.App.3d 1299, 1309.)

[President of an association] described as obtaining committee decision by making false statements; ". . . using his office to obtain revenge"; . . . "black sheep in an association" . . .; unscrupulously obtaining support by "lies and hypocrisies"; with a desire for power which caused him to act without reason; ". . . a parasite in the organization"; "proud, snobbish, and vain;" insane, in command" and "irresponsible" . . . (*Correia v. Santos* (1961) 191 Cal.App.2d 844, 854.)

[Union officer's] conduct was "the subject of long investigation. . . ." and "removed [from office] for internal reasons "the sting of the accusation is that he had failed to act for the best interest of the membership and was grossly incompetent to occupy the office of president." (*Stoneking v. Briggs* (1967) 254 Cal.App.2d 563, 572-573.)

[Union activist] was defamed through various defamatory per se statements including being called a "demagogue and would be dictator," engaging in a "lying attack on officers and directors of the Guild," "seeks to further his own selfish ambitions at the expense of [others]"; a "discredited leader . . ."; engaged in "underhanded schemes . . ." (*Jeffers v. Screen Extras Guild, Inc.* (1951) 107 Cal.App.2d 253, 254-255.)

[Sales representative's] incompetent performance inferred by false accusation of making a "$100,000 mistake in a bid." (*Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1154.)

[Sales representative] "funneling leads to [a competitor]," "had stolen leads," "stealing leads and databases from the company," plaintiff was "totally unethical," a "thief," had "no integrity," "terminated for poor performance," "had engaged in theft," "stealing from the company," *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App. 4th 686, 710.

[Office manager] "[F]ired for not doing things properly." Fired "for not following office rules;" "has taken papers out of [a] private file without right to do so;" "other brokers have also had trouble with [plaintiff]." (*Mercado v. Hoefler* (1961) 190 Cal.App.2d 12, 16.)

[Office manager] was "behind in her work," "stealing money from the company" and "conspiring to steal money," and worked a health insurance deal "to the detriment of other employees" [published internally]. (*Davaris v. Cubaleski,* (1993) 12 Cal.App.4th 1582, 1586-1587, a wrongful termination/defamation case.)

[General manager of business] was accused of being responsible for money "unaccountably missing," taking "unauthorized pay increase," "sabotaging production" and "blackmailing" the owner. (*Livitsanos v. Superior Court* (1992) 2 Cal.4th 744, 756-757; also fn. 8, 9.) (The named Defendant in this case is also the Defendant in *Davaris v. Cubaleski, supra*.)

[Manager] discharged as a result of internal publications of accusations of "sexual harassment and other improprieties." (*Cruey v. Gannett Co.* (1998) 64 Cal.App.4th 356, 367.

[Manager of Credit Union] terminated based on accusations of "receiving kickbacks on insurance policies," "keeping infrequent office hours," "keeping irregular business hours," making "irregular business expense claim,"or "incorrectly reporting business expenses." (*Cuenca v Safeway San Francisco Employees Credit Union* (1986) 180 Cal.App. 3d 985, 990)

[Gen. Mgr. City] Plaintiff reports and complains of illegal activity in awarding bid for City disposal services. Plaintiff is terminated and called "incompetent." "The alleged statements– that Gallant is incompetent– are defamatory." *Gallant v. City of Carson* (2005) 128 Cal.App.4th 705, 709

[Member of Board of Directors] of bank was "ousted" from board because of delinquent loans published in two news articles. The agreement to sell Plaintiff's stock to pay defaults was described by bank president in publications to stockholders as "illegal" and "not in the best interest" of bank. *Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1152-1153.

[Journalist] "charged with conduct which is generally regarded as unethical under accepted journalistic standards" (compromised objectivity) causing her termination. (*Savage v. PG&E* (1993) 21 Cal.App.4th 434, 446.)

[Horsebreeder] accused of using cosmetic surgery to conceal a genetic defect on a show horse. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1197-1201.)

[Antique dealer] accused by KGO-TV of selling a stolen candelabra, at a grossly inflated price; misrepresented the maker, condition, origin, and province of the candelabra; was associated with a man recently convicted of insurance fraud; inadequately repaired the candelabra, refused to cooperate in establishing the background of the candelabra and generally defrauded the museum. (*Weller v. ABC, Inc.* (1991) 232 Cal.App.3d 991, 998.)

A [cook] had syphilis. (*Schessler v. Keck* (1954) 125 Cal.App.2d 827, 832.)

[Ordained minister] "allegedly revealed himself" . . . as totally unworthy of the continued confidence, respect and fellowship of a great church." (*Brewer v. Second Baptist Church* (1948) 32 Cal.2d 791, 796.)

[Car dealer] a "son of a bitch." (*White v. Valenta* (1965) 234 Cal.App.2d 243, 257-258.)

[Baseball player] had "dog house" status. (*Cepeda v. Cowles Magazine and Broadcasting, Inc*. (9th Cir. Calif. 1964) 328 F.2d 869, 870-871.)

[Actress], Elke Sommer, was defamed by Zsa Zsa Gabor who publishes Sommer was "broke, had to sell her house in Hollywood, now lives in the worst section, hangs out in sleazy bars, lives from selling her hand-knit sweaters for $150 and nobody wants to have anything to do with her. [Elke] Sommer is lying about her age; she is not 48, but 62, . . . suppliers tell us that [her] bills remain unpaid. In Hollywood, nobody recognizes her anymore, and she cannot afford the $500.00 ticket for a benefit party . . . she has hardly any hair left and looks like a 100 year old grandmother." *Sommer v. Gabor* (1995) 40 Cal.App.4th 1455, 1461, 1473-1474, fn. 7. (It appears Zsa Zsa Gabor, the defendant, felt justified in publishing these defamatory statements against Elke Sommer since Ms. Sommer allegedly said Zsa Zsa has such a big behind, "that she could not even manage to get on [a] horse by herself.") See Section X below for a discussion of the defense of truth.

[Actress] Carol Burnett "had been boisterous and loudly argumentative in a public dining place, had 'traipsed' around the restaurant sharing prat of her dinner indiscriminately, and had 'raised eyebrows' when she boorishly giggled instead of apologizing after spilling wine on another, a message that reasonably carried the implication [Burnett's] actions were the result of some objectionable state of inebriation." *Burnett v. National Enquirer, Inc.* (1983) 144 Cal.App.3d 991, 1013.

VI. INSINUATED OR IMPLIED CRITICISM OF PERFORMANCE IS DEFAMATORY EVEN IF INNOCENT INTERPRETATION IS ALSO POSSIBLE

"A person may be liable for what he insinuates as well as for what he says explicitly." [Citation omitted.] "An article may be libelous on its face even though it is susceptible to an innocent interpretation . . ." "It is error for the court to rule that a publication cannot be defamatory on its face when by any reasonable interpretation the language is susceptible of a defamatory meaning." (*Cameron v. Wernick* (1967) 251 Cal.App.2d 890, 893.)

"A defendant is liable for what is insinuated, as well as for what is stated explicitly." . . . "To constitute a libel it is not necessary that there be a direct and specific allegation of improper conduct, as in a pleading. The charge may be either expressly stated or implied; and in the latter case the implication may be either apparent from the language used, or of such a character as to require the statement and proof of extrinsic facts (inducement, colloquium, and innuendo) to show its meaning." . . .

"The fact that an implied defamatory charge or insinuation leaves room for an innocent interpretation as well does not establish that the defamatory meaning does not appear from the language itself." . . .

"Such hair-splitting analysis of language has no place in the law of defamation, dealing as it does with the impact of communications between ordinary human beings. It is inconsistent with the rule that "the publication is to be measured not

so much by its effect when subjected to the critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of the average reader." (*MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536, 547-551.) [Emphasis added.]

"... our "inquiry is not to determine if the communications may have an innocent meaning but rather to determine if the communication reasonably carries with it a defamatory meaning." (*Slaughter v Friedman* (1982) 32 Cal. 3d 149, 154)

"Nonetheless a writing's susceptibility to innocent meaning does not in itself preclude a finding that an ordinary reader would understand it in a libelous sense." (*Okun v. Sup. Court* (1981) 29 Cal.3d 442, 450.)

Also, see *James v. San Jose Mercury News, Inc.* (1993) 17 Cal.App.4th 1, 12:

"`[I]f the defendant juxtaposes [a] series of facts so as to imply a defamatory connection between them, or [otherwise] creates a defamatory implication ... he [she] may be held responsible for the defamatory implication, . . . even though the particular facts are correct.' [Citation.] [Citation.] Therefore, `it is the defamatory implication -- not the underlying assertions giving rise to the implication -- which must be examined . . .'"

"A defendant is liable for what is insinuated, as well as for what is stated explicitly. [Citation.]" (*Bates v. Campbell* (1931) 213 Cal. 438, 442 [Citation.].) Thus, as noted, a writing can be libelous if it implies a false assertion of fact. *(McGarry, supra,* 154 Cal.App.4th at p. 112.)...Even if defendants' reading of the review were reasonable, statements can be libelous despite the possibility of an innocent, nondefamatory interpretation. (*MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536, 548-551 [Citation.].) *Wong v. Jing,* (2010) 189 Cal. App. 4th 1354, 1372.

" A claim for defamation requires proof of a false and unprivileged publication that exposes the plaintiff "to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." (Civ. Code, § 45.) A statement is defamatory when it tends "directly to injure [a person] in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits." (Civ. Code, § 46, subd. 3.) Statements that contain such a charge directly, and without the need for explanatory matter, are libelous per se. (Civ. Code, § 45a.) A statement can also be libelous per se if it contains a charge by implication from the language employed by the speaker and a listener could understand the defamatory meaning without the necessity of knowing extrinsic explanatory matter. (MacLeod v. Tribune Publishing Co. (1959) 52 Cal.2d 536, 548–550 [343 P.2d 36].) However, if the listener would not recognize the defamatory meaning without "knowledge of specific facts and circumstances, extrinsic to the publication, which are not matters of common knowledge rationally attributable to all reasonable persons" (Barnes-Hind, Inc. v. Superior Court (1986) 181 Cal. App. 3d 377, 387 [226 Cal. Rptr. 354]), the matter is deemed defamatory per quod

and requires pleading and proof of special damages." (Ibid.) (*McGarry v. University of San Diego* (2007) 154 Cal. App. 4th 97, 112)

VII. PLAINTIFF HAS A BURDEN TO ESTABLISH MALICE, OR AN ABUSE OF THE CONDITIONAL PRIVILEGE, ONLY IF DEFENDANT FIRST MEETS IT BURDEN TO ESTABLISH A BASIS FOR A CONDITIONAL PRIVILEGE

In most employment situations, an employer will claim a conditional privilege to publish criticism of an employee's performance, competency or honesty within the corporation or to interested outsiders. Employers often misinterpret this conditional privilege as some kind of an absolute privilege.

It is the defendant's initial burden to show that the allegedly defamatory statement was made on a privileged occasion. Only at that point does the burden shift to plaintiff to show that the statement was made with malice. (*Mann v Quality Old Time Service, Inc.* (2004) 120 Cal. App.4th 90, 108). The existence of the privilege is ordinarily a question of law for the court. *Mann, infra,* 108, and (*Kashian v Harriman* (2002) 98 Cal.App. 4th 892, 915).

The conditional privilege "is recognized where the communicator and the recipient have a common interest and the communication is of a kind reasonably calculated to protect or further that interest." (*Deaile v. Gen. Tel. Co. of Ca.* (1974) 40 Cal. App. 3d 841,846). The "interest" cannot be mere general or idle curiosity. The "interest" must be something such as the parties to the communication "share a contractual, business or similar relationship or the defendant is protecting his own pecuniary interest." Mann, supra, p. 109, and *Rancho LaCosta, Inc. v. Sup. Ct.* (1980) 106 Cal.App.3d 646, 664-665. If defendant fails to meet its burden of establishing the basis for a conditional privilege the burden to never shifts to Plaintiff to establish the statements were made with malice. (*Lundquist v Reusser* (1994) 7 Cal. 4th 1193, 1202-1203; (*Mann v Quality Old Time Service, Inc*. (2004) 120 Cal. App.4th 90, 108)

The conditional privilege created by section 47, subdivision 3, is lost if the privilege is abused or if the publication was motivated by malice. (*Deaile v. General Telephone Co. of California*

(1974) 40 Cal.App.3d 841, 847 [Citation omitted].)

VIII. MALICE TO OVERCOME THE CONDITIONAL PRIVILEGE ONLY REQUIRES A SHOWING OF HATRED OR ILL WILL EVIDENCING AN INTENT TO VEX, ANNOY OR INJURE

In order to overcome or eliminate any conditional privilege, a plaintiff need only show some evidence of either malice or abuse of privilege, the existence of which is a factual issue. Malice for the purposes of showing an abuse of the conditional privilege only requires a showing of a state of mind arising from hatred or ill will evidencing a willingness "to vex, harass, annoy or injure." (*Burnett v. Nat. Enquirer, Inc.* (1983) 144 Cal.App.3d 991, 1009; *Morcom v. S.F. Shopping News* (1935) 4 Cal.App.2d 284, 290; *Davis v. Hearst* (1911) 160 Cal. 143, 157-163.) The Supreme Court has said malice for purposes of overcoming a conditional privilege merely requires a showing of a "state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy, or injure." (*Agarwal v. Johnson*, (1979) 25 Cal.3d 932, 944-945.) This type of malice is usually not difficult to establish, especially in a vindictive or callous termination where previously promised procedures to insure fairness, privacy and discretion were ignored.

Actual malice can be evidenced in many ways. An employee may establish it by showing the publication was motivated by anger and hostility, or hatred, or ill will toward the employee (*Widener v. PG&E* (1977) 75 Cal.App.3d 415, 436; *Reader's Digest Assn. v. Sup. Ct.* (1984) 37 Cal.3d 244, 258), or that the publisher lacked reasonable grounds for belief in the truth of the publication (*MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536, 552), or that it was published in reckless disregard of plaintiff's rights (*Stationers Corp. v. Dun & Bradstreet, Inc.* (1965) 62 Cal.2d 412, 418). Malice can be evidenced when a company policy to maintain privacy of personnel matters is violated by any widespread publication of criticism "beyond the group interest"(*Emde v. San Joaquin County Etc. Council* (1943) 23 Cal.2d 146, 154-155), especially when there was no inquiry or need to know, and the publication was made to those who had a mere "idle or general curiosity"(i.e. to those who did not participate in the disciplinary action or termination). Such "excessive publication" abuses the conditional privilege.

(*Rancho La Costa, Inc. v. Superior Court* (1980) 106 Cal.App.3d 646, 665-666; *Inst. Of Ath. Mot. v. Univ. of Ill.* (1980) 114 Cal.App.3d 1, 12-13; *Brewer v. Second Baptist Church* (1948) 32 Cal.2d 791, 797.) *Payton v. City of Santa Clara* (1982) 132 Cal.App.3d 152 is a good case on the right to privacy as to the excessive publication of the reasons for termination. That case involved the company's posting for any employees view the reasons for Payton's termination ("unauthorized absence, failure to observe departmental rules, and dishonesty. . .").

Malice may also be established by either a failure to investigate thoroughly and verify the facts of the defamatory statement (*Rollenhagen v. City of Orange* (1981) 116 Cal.App.3d 414, 423*; Widener v. PG&E* (1977) 75 Cal.App.3d 415, 434-435); or by publication "based wholly on an unverified anonymous "[source]," . . . or if the ". . . allegations are so inherently improbable that only a reckless man would have put them in circulation[,]" or the statements were published with knowledge of "obvious reasons to doubt the veracity of the informant or the accuracy of his reports." (*Reader's Digest Assn. v. Sup. Ct.* (1984) 37 Cal.3d 244, 257); or if there was a "lack of reasonable grounds for believing the statement to be true" (*Mullins v. Brando* (1970) 13 Cal.App.3d 409, 420; *Cuenca v. Safeway S.F. Employees Fed. Credit Union* (1986) 180 Cal.App.3d 985, 997).

Malice may be shown when "the investigation was grossly inadequate under the circumstances" for example, where reliance was placed upon ". . . a source known to be hostile to the subject against whom the material is to be used" (*Fisher v. Larsen* (1982) 138 Cal.App.3d 627, 640.); or if reliance is placed upon a source "known to be biased against the plaintiff," *Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 258; or by evidence of a "purposeful avoidance of the truth," or "inaction" (i.e., failure to investigate), which was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [the subject] charges." . . . (*Antonovich v. Sup. Ct.* (1991) 234 Cal.App.3d 1041, 1048-1049; *Roemer v. Retail Credit Co.* (1970) 3 Cal.App.3d 368, 372); and malice is shown where there is a republication of a third person's defamatory falsehoods and "'where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports'

(*Harte-Hanks Communications v. Connaughton (1989)* 491 U.S. 657.), and the republisher failed to interview obvious witnesses who could have confirmed or disproved the allegations (id. at p. 682 [109 S.Ct. at p. 2693]) or to consult relevant documentary sources (id. at pp. 683-684 [109 S.Ct. at pp. 2693-2694] [failure to listen to tape]).” *Khawar v. Globe Internat., Inc.* (1998) 19 Cal.4th 254, 276.

A refusal to disclose to the plaintiff the sources of the defamatory information obtained in the investigation may establish malice. (*Stationers Corp. v. Dun & Bradstreet*, (1965) 62 Cal.2d 412, 420-421.) Likewise, a failure to provide or disclose to plaintiff exculpatory information found during an investigation has been recognized as evidence of malice. (*Parrott v. Bank of America* (1950) 97 Cal.App.2d 14, 25.)

Malice may be inferred by a “summary suspension” [or for that matter, termination] “without consulting with any of the vast number of available witnesses. . . .” (*Toney v. State of Calif* (1976) 54 Cal.App.3d 779, 794.)

However, the mere failure to conduct a thorough and objective investigation standing alone does not prove actual malice. (*Reader’s Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 258.) Mere negligence in investigation of the facts, in the sense of oversight or unintentional error, alone does not establish malice. (*Bierbower v. FHP, Inc.*(1999) 70 Cal.App.4th 1, 9.) Although, if the “negligence amounts to a reckless or wanton disregard for the truth, so as to imply a willful disregard for or an avoidance of accuracy” then malice is shown. (*Roemer v. Retail Credit Co.* (1970) 3 Cal.App.3d 368, 372.) “Reckless is, after all, only negligence raised to a higher power. Further, `actual malice’ may be inferred when the investigation was grossly inadequate under the circumstances.” [Citations omitted.] (*Fisher v. Larsen* (1982) 138 Cal.App.3d 627, 640.)

Malice may also be shown by evidence that the publication was motivated by any cause other than the desire to protect the interest for which the privilege was given. (*Agarwal v. Johnson*, (1979) 25 Cal.3d 932, 944-945; *Inst. of Ath. Mot. v. U. of Ill.*, (1980) 114 Cal.App.3d 1, 12.)

Malice may be shown by evidence that the publication included "immaterial matters which have no bearing upon the interest sought to be protected" (*Deaile v. G.T.C.* (1974) 40 Cal.App.3d 841, 847), or by evidence that the publication was motivated by any cause other then that for which the conditional privilege was established. (*Brewer v. Second Baptist Church* (1948) 32 Cal.2d 791, 797.)

Malice may be shown by evidence that the publication was made with knowledge of its falsity (*Roemer v. Retail Credit Co.* (1970) 3 Cal.App.3d 368, 371; *Biggins v. Hanson* (1967) 252 Cal.App.2d 16, 20-21; *Boyich v. Howell* (1963) 221 Cal.App.2d 801, 803); or by evidence that the publisher had no belief, or no reasonable grounds for believing, (*Inst. of Ath. Mot. v. U. of Ill.* (1980) 114 Cal.App.3d 1, 12; *Cuenca v. Safeway S.F. Employees Fed. Credit Union* (1986) 180 Cal.App.3d 985, 997; *Roemer [2] v. Retail Credit Co.* (1975) 44 Cal.App.3d 926, 936) or no probable cause for believing the statements to be true (*Roemer v. Retail Credit Co.* (1970) 3 Cal.App.3d 368, 371; *Biggins v. Hanson* (1967) 252 Cal.App.2d 16, 20-21; *Brewer v. Second Baptist Church* (1948) 32 Cal.2d 791, 797; *Di Giorgio Fruit Corp. v. AFL-CIO* (1963) 215 Cal.App.2d 560, 574-575; *Stationers v. Dun & Bradstreet* (1965) 62 Cal.2d 412); or where the publication is based on information from a source known to be hostile to the subject against whom the material is used, or from a source known to be biased against the person accused. *Fisher v. Larsen* (9182) 138 Cal.App.3d 627, 640. Malice may also be inferred by publication of defamatory statements with "doubts of their truthfulness." Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice. (*Field Research Corp. v. Patrick* (1973) 30 Cal.App.3d 603, 610; *Reader's Digest Assn. v. Sup. Court* (1984) 37 Cal.3d 244, 256.)

Malice can be evidenced by showing "a long-standing grudge, . . . former disputes, . . . or any previous quarrel, rivalry, or ill feeling . . . in short, almost everything the defendant has ever said or done with reference to the plaintiff - may be urged as evidence of malice." (*Larrick v. Gilloon* (1959) 176 Cal.App.2d 408, 416.) It can also be evidenced by the defamer's angry reactions to negative job evaluations by the defamed, such as the defamer stating that the defamed cannot threaten her job and family, and that she knows how to protect her job. (In *Cruey, supra,* the defamer's method of protecting

her job was an arguably knowingly publishing false and defamatory accusation of sexual harassment by the supervisor who gave her a negative job evaluation.) (*Cruey v. Gannett Co.* (1998) 64 Cal.App.4th 356, 369-370.)

The existence of prior defamation of similar import may evidence malice. (*McMann v. Wadler* (1961) 189 Cal.App.2d 124, 129.)

"Malice is shown where 'a story is fabricated by the defendant, [or] is the product of his imagination … .' " (St. Amant v. Thompson (1968) 390 U.S 727, p. 732.; also, *Christian Research Institute v. Alnor* (2007)148 Cal.App.4th 71, 85).

Malice may be proven by the contents and tenor of the defamatory statement itself. (*Larrick v. Gilloon* (1959) 176 Cal.App.2d 408, 411; *Brewer v. Second Baptist Church* (1948) 32 Cal.2d 791, 799.) Malice may be inferred from "the manner of the statement," that is, if the facts believed to be true are "exaggerated, overdrawn, or colored to the detriment of plaintiff, or are not stated fully and fairly with respect to the plaintiff. The court or jury may properly consider these circumstances as evidence tending to prove actual malice." (*Shumate v. Johnson Pub. Co.* (1956) 139 Cal.App.2d 121, 138; *Brewer v. Second Baptist Church* (1948) 32 Cal.2d 791, 799.)

Malice may be established by a showing a publication was made for an improper purpose for example "...because they wanted to see plaintiff fired for engaging in the protected activity..."*Goold v. Hilton Worldwide, et al* (2014) 2014 U.S. Lexis 74966. (Also see, "..publication for an improper purpose,"*Brewer v. Second Baptist Church* (1948) 32, Cal. 2d 791, 797. The same basis for malice is discussed in *Mamou v Trendwest Resorts, Inc*. 165 Cal. App. 4th686 ,729, " Here a jury could easily find that the statements by Lee and Fiore were motivated by ill will towards plaintiff. For one thing there was the evidence that Lee was hostile toward Mamou as a member of the "Syrian regime" some members of Trendwest management had, inferentially, undertaken to purge." Also, "[s]imilarly, the treatise authored by Harper et al. states: "As to '**malice**,' i.e., actual ill will or improper purpose that constitutes an abuse of the occasion and therefore defeats a qualified privilege..." *Lindquist v Reusser* (1994) 7 Cal 4th 1193,

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Malice can be inferred from the pleading of truth as a defense (*Shumate v. Johnson Pub. Co.* (1956) 139 Cal.App.2d 121, 138), or by defendants "reaffirming that the charges were true" (*Hanley v. Lund* (1963) 218 Cal.App.2d 633, 640, 645), or by a failure of the publisher to testify it was not his intent to injure the plaintiff by his publication. (*Shumate v. Johnson Pub. Co.* (1956) 139 Cal.App.2d 121, 139.)

If a republication of an alleged defamatory article is found to be malicious, that can be evidence of the maliciousness in the original publication. (*Church of Scientology of California v. Dell Pub. Co. Inc*. (1973) 362 F. Supp.767, ___).

IX. THE EXISTENCE OF MALICE IS A FACTUAL ISSUE THAT CAN BE PROVEN CIRCUMSTANTIALLY

"The existence or nonexistence of malice is a **question of fact for the jury**. . . ." (*McMann v. Wadler* (1961) 189 Cal.App.2d 124, 129.) [Emphasis added.]

> "[Malice] may be proved directly or indirectly, that is to say by direct evidence of the evil motive and intent, or by legitimate inferences to be drawn from other facts and circumstances in evidence. . . ." (*Burnett v. Nat. Enquirer, Inc.* (1983) 144 Cal.App.3d 991, 1007-1008.) [Emphasis added.]

> "As *St. Amant's* examples suggest, actual malice can be proved by circumstantial evidence. "[E]vidence of negligence, of motive and of intent may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity." (*Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 257) [Emphasis added.]

Also see Khawar v. Globe Internat., Inc. (1998) 19 Cal.4th 254, 275, in which the court states, "to prove this culpable mental state [malice] the plaintiff may rely on circumstantial evidence, including evidence of motive and failure to adhere to professional standards."

"Whether malice may or may not be inferred from the intrinsic evidence which the publication affords is for the **trier of fact** to say." (*Shumate v. Johnson Publishing Co.* (1956) 139 Cal.App.2d 121, 136.) "The question of defendant's state of mind [the existence of malice] **was one of**

fact for the jury to determine." (*Deaile v. GTC* (1974) 40 Cal.App.3d 841, 847.) [Emphasis added.]

Also see Agarwal v. Johnson (1979) 25 Cal.3d 932, where the California Supreme Court states at pp. 944-945: "The **factual issue** is whether the publication was so motivated [by malice]." [Emphasis added.]

> ". . . [W]here the defendant alleges that the publication was justified on the ground that it was privileged, actual malice or malice in fact becomes an issue; that the question of whether a publication was inspired by actual malice is essentially and peculiarly **a question of fact**; that therefore any evidence which would logically tend to solve the question and which is not otherwise objectionable is admissible; that the test to be applied to evidence offered for this purpose is: Does it tend to prove the state of mind of the party responsible for the publication?; that if the evidence has such logical import and is not otherwise incompetent, it must be received, and **it is for the triers of the fact to determine the weight to be given such evidence**." (*Larrick v. Gilloon* (1959) 176 Cal.App.2d 408, 416 [Emphasis added.]; *Biggins v. Hanson* (1967) 252 Cal.App.2d 16, 21; and *Widener v. PG&E* (1977) 75 Cal.App.3d 414, 433.)

"Does the evidence support the finding that the publication . . . was done `maliciously' . . . **Here we have a question of fact**." (*Fairfield v. Hagen* (1967) 248 Cal.App.2d 194, 201.) [Emphasis added.] Also, the excessiveness of the publication and whether the conditional privilege under Civil Code section 47(6) was exceeded by excessive publication "is one of the factual matters which are to be determined at trial." *Stationers Corp. v. Dun & Bradstreet* (1965) 62 Cal.2d 412, 422.) [Emphasis added.]

X. A DEFENDANT'S CLAIM OF INNOCENT MOTIVE, MISTAKE, OR MERE REPETITION OF RUMORS DOES NOT ESTABLISH A DEFENSE FOR DEFAMATION

A. Rumors

This issue of republication of rumors was addressed in the case *Ray v. Citizen-News Co.* (1936) 14 Cal.App.2d 6, at pages 8-9. "A false statement is not less libelous because it is the repetition of rumor or gossip or of statements or allegations that others have made concerning the matter. [Citations omitted.] `A defamatory article which would be libelous per se, if its matter was directly stated, does not

lose its quality in this regard because it is couched in the form of an interview with another person, or because it seeks to avoid its otherwise obvious character as a libel per se by the statement that it is reported or asserted or believed to be true.'" [Emphasis added.]

Arditto v. Putnam (1963) 214 Cal.App.2d 633, stated at page 639, fn. 2:

> A false statement is no less libelous because it is the repetition of rumor or gossip or of statements or allegations that others have made concerning the matter. [Emphasis added.]

In this footnote, the court discusses a similar issue, that is, what must be shown to establish the defense of truth for republication rumors originally published by others. In order to prove the defense of truth, a defendant must prove truth of the defamatory statement not the truth that others have in fact published that defamatory statement. The *Arditto* Court in fn. 2 at page 639 states:

> "Where one person purports to repeat another's defamatory statement, he is merely republishing the same libel or slander. [Citations omitted.] Proof that the first person actually made the statement is therefore immaterial; to constitute a defense the defamatory charge itself must be shown to be true. `If A says B is a thief, and C publishes the statement that A said B was a thief, in a certain sense this would be the truth, but not in the sense that the law means . . . it would be but a repetition by him of a slanderous charge. His defense must consist in showing that in fact B is a thief.' " [Original emphasis.]

In 1986, the Supreme Court addressed this issue in *Frommoethelydo v. Fire Ins. Exchange* (1986) 42 Cal.3d 208. This case involved a false report made by an insurer to the Insurance Bureau. at 217 and said:

> "The fact that the insurer may have accurately reported the salesman's [defamatory] statements does not mean that the insurer may not be held responsible for those statements. When one person repeats another's defamatory statement, he may be held liable for republishing the same libel or slander."

The republication of rumors by a defendant who has no reasonable grounds for believing the statement to be true evidences malice that can destroy a conditional privilege. (See *Brewer v. Second Baptist Church* (1940) 32 Cal.2d 791 at 797, and *Inst. of Ath. Mot. v. Univ. of Ill.* (1980) 114 Cal.App.3d

1, 12.) Many years ago, the Supreme Court addressed the same issue of the repetition of a rumor in *Wilson v. Fitch* (1871) 41 Cal. 363, 379 and stated:

> "It cannot be denied, and the counsel for the defendants concedes to the fullest extend that it is well established, both on reason and authority, that if a libel assert the defamatory matter, not as a fact, but only on the belief of the author, or as a rumor or general suspicion, the libel cannot be justified by proof that the author believed it to be true, or that there was such a rumor or general suspicion."

In *DiGorgio v. Valley Labor Citizen* (1968) 260 Cal.App.268 the addressed the common rumor type of a situation where a defamatory statement is republished but attributed to another. The court at page 273:

> "Moreover, it is also the general rule that every repetition of the defamation is a separate publication and hence a new and separate cause of action though the repeater states the source."

B. Claimed Innocent Motives or Good Faith

A claim of innocent motives in publishing the defamatory statement is no defense. See *Patton v. Royal Industries, Inc.* (1968) 263 Cal.App.2d 760, 766:

> "The deliberate publication of known false and defamatory statements cannot be excused upon the claim they were made in good faith and from innocent motives. Such abuse of the privilege destroys it."

A defendant's claim of good faith and belief is inadequate to either establish truth of the statement or of good faith. Plaintiff has a right to have a jury view the events to determine the truthfulness of these assertions. On this issue see *Widener v. PG&E* (1977) 75 Cal.App.3d 415, 435:

> "The mere profession of a defendant that he believed in good faith that his statements were true does not automatically entitle him to a verdict in his favor. (*St. Amant v. Thompson, supra*, 390 U.S. at pp. 732-733 [Citation omitted].) `As in all cases, civil or criminal, turning upon the state of an individual's mind, direct evidence may be rare; usually the trier of fact is required to draw inferences of the state of mind at issue from surrounding acts, utterances, writings, or other indicia.' "

The Supreme Court in *Stationers Corp. v. Dun & Bradstreet, Inc.* (1965) 62 Cal.2d 412 discussed this issue at the summary judgment level at pages 420-421:

> "It would be grossly unjust to permit a defendant, in the pursuit of his commercial interests, to rely upon the special privilege granted by section 47, subdivision 3, without requiring him to disclose information in his possession necessary to determine whether the statements were made without malice. Defendants cannot require a court to accept their ipse dixit assertion of good faith, particularly on motion for summary judgment." [Original emphasis.]

Again and again courts confirm a defendant's claim of lack of malice is insufficient to establish that fact in and of itself. The court in *Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908 also addressed this issue at page 922 and stated:

> "We assume defendants felt no personal animus toward plaintiffs. But `intent', in the law of torts, denotes not only those results the actor desires, but also those consequences which he knows are substantially certain to result from his conduct. (Rest. 2d Torts, § 8a; Prosser Torts (4th ed. 1971) pp. 31-32.) The jury in the present case could reasonably infer that defendants acted in callous disregard of plaintiffs' rights, knowing that their conduct was substantially certain to vex, annoy, and injure plaintiffs."

See *Fisher v. Larson* (1982) 138 Cal.App.3d 627 where the Court states at page 640:

> "The mere profession of a defendant that he believed in good faith that his statements were true does not automatically entitle him to a verdict in his favor."

A claim of mistake or innocent misinterpretation of a statement likewise is no defense. In *Montandon v. Triangle Publications, Inc.* (1975) 45 Cal.App.3d 938, 949 the court stated:

> "Leaving the article without something more than the brief statement which remained, resulted in the false impression of Miss Montandon's status. While this result was apparently not intentional, it was one which those responsible should have foreseen and one which showed a reckless disregard for the truth or falsity of the statement. The conduct of those responsible for the publication was more than negligence, it amounted to an indifference to the impression being given to the general public." [Emphasis added.]

Also see Kirby v. Hal Roach Studios (1942) 53 Cal.App.2d 207, 213 where the court stated:

It is well established that inadvertence or mistake affords no defense to a charge of libel, where the defamatory publication does, in fact, refer to the plaintiff.

See *Rosenberg v. J. C. Penney Co.* (1939) 30 Cal.App.2d 609, 623 where the court stated:

"Clearly, however, the master is liable if he employs an employee to speak for him, and it is immaterial if, acting in the scope of his authority, he makes a mistake as to the truth or acts with a bad motive."

C. Claimed Jest or Humor

Even a claim the statement was made in jest does not afford the publisher a defense. See *Arno v. Stuart* (1966) 245 Cal.App.2d 955, 962 where the court states:

"Resort to humor will not preclude responsibility for defamatory matter, but a distinction may be drawn between jocular utterances which are intended to be and are susceptible of a defamatory interpretation; those which are made without intent to defame but which may be susceptible to such an interpretation, and those which are made without intent to defame and which are not reasonable subject to such an interpretation."

"Prosser has the following comments on the matter at hand: `One common form of defamation is ridicule.' . . . "It is of course possible that humor may be understood by all who hear or read it as good natured fun, not to be taken serious or in any defamatory sense; but when it carries a sting and causes adverse rather than sympathetic or neutral merriment, it becomes defamatory."

XI. IN THE TYPICAL EMPLOYMENT/DEFAMATION CASE, UNLIKE A CASE INVOLVING A MEDIA DEFENDANT, OR A MATTER OF PUBLIC CONCERN OR A PUBLIC FIGURE, TRUTH IS AN AFFIRMATIVE DEFENSE THAT MUST BE PLEAD AND PROVEN BY THE DEFENSE

(PLAINTIFF DOES NOT HAVE TO PROVE FALSITY)

"The burden of proof with respect to the issue of truth or falsity [of the defamatory statement] is on the defendant." [Citation omitted]. "As a general rule, the burden of pleading a particular matter and the burden of proving it correspond." [Citation omitted] ". . . [T]he defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances. It follows that a plaintiff need not allege the statements are false. (*Lipman v. Brisbane Elem. Sch. Dist.* (1961) 55 Cal.2d 224, 233.) "Defendant

has the burden of proving truth by a preponderance of the evidence as defined by the court. To establish this defense, defendant must prove the truth of all important aspects in the statement." (*Gantry Const. Co. v. Amer. Pipe & Constr. Co.* (1975) 49 Cal.App.3d 186, 194.) [Emphasis added.]

"Truth, of course, is a defense to an asserted libel. Being an affirmative defense, the burden is on the defendant to establish it." (*Fairfield v. Hagan* (1967) 248 Cal.App.2d 194, 203.)

"The law infers that a defamatory publication is false. [Citation omitted] The burden of proving the truth of the article was therefore on defendants." (*Shumate v. Johnson Publishing Co.* (1956) 139 Cal.App.2d 121, 131.)

The affirmative defense of truth must be specially pleaded. (Witkin, *California Procedure*, Pleading § 1023, p. 440.)

XII. A DENIAL OF PUBLICATION, OR OF BELIEF IN THE TRUTH OF THE PUBLICATION, OR OF KNOWLEDGE OF THE TRUTH OF THE PUBLICATION RESULTS IN LOSS OF THE AFFIRMATIVE DEFENSE OF CONDITIONAL PRIVILEGE

"The persons to whom defendant allegedly made the accusations against plaintiffs were unquestionably "interested persons" with the rationale of section 47. The court took the issue from the jury, which at first blush would appear to be error, but a review of the record reflects that the trial judge had no choice but to rule out the defense of conditional privilege. Defendant had flatly denied ever making defamatory or accusatory statements about either plaintiff at any time. Additionally, at least twice when asked whether he believed the girls had taken any money from him, defendant unequivocally answered "No, sir."

"Every authority we find discussing the subject of conditional privilege, whether a judicial opinion, Restatement of the Law, textbook or treatise, is in accord that for one to assert the defense of conditional privilege he must believe the defamatory matters to be true. [Citations omitted.] We learn from Prosser, *Law of Torts* (3d ed.) page 822, the reason for the rule is that "**there is no social advantage in the publication of a deliberate lie, the privilege is lost if the defendant does not believe what he says**."

"Even were we to interpret defendant's answers to questions concerning his belief that plaintiffs took his money to mean merely that he did not know whether they had, still he could not avail himself of conditional privilege which requires belief in the truth of the defamatory matters. If there was uncertainty in his mind, it was his duty to have the books audited to ascertain the facts. . . ."

"In view of defendant's uncontradicted testimony that he never believed plaintiffs took his money, we find no error in taking the defense of conditional privilege from the jury and determining that issue as a matter of law."

". . . **He [defendant] denied that he made the statements attributed to him by the two girls** [plaintiffs], **and it would be incongruous, to say the least, to permit him to explain his state of mind in making a statement which he denied making**." (*Russell v. Geis* (1967) 251 Cal.App.2d 560, 566-567, 572.) [Emphasis added.]

"For this conditional privilege extends to false statements of fact, although the occasion may be abused and the protection of the privilege lost, by the publisher's lack of belief, or of reasonable grounds for belief, in the truth of the defamatory matter. . . ." (*Emde v. San Joaquin County Etc. Council* (1943) 23 Cal.2d 146, 154-155. [Emphasis added.].

XIII. THE EMPLOYER IS LIABLE FOR DEFAMATION PUBLISHED BY ITS EMPLOYEES OR AGENTS

"A master is subject to liability from defamatory statements made by an agent acting within the scope of his authority." (*DiGiorgio Fruit Corp. v. AFL-CIO* (1963) 215 Cal.App.2d 560, 576.)

"Thus while the plaintiff had decided not to proceed directly against [employees] for their conduct, she did manifest a desire to hold defendant company liable for its acts as a principal." (*Deaile v. G.T.C.* (1974) 40 Cal.App.3d 841, 848-849.)

"It is well established that a principal can be liable for the malicious torts of his employee committed within the scope of his employment, despite any contention that the employee may not have had authority to engage in tortious conduct." (*Mercado v. Hoefler* (1961) 190 Cal.App.2d 12, 17.) [Emphasis added.]

"As a general proposition it may be said that, if an employee or agent while acting in the scope of his authority and in furtherance of the employer's business defames another, his employer or principal may be held liable therefor. (*Correia v. Santos* (1961) 191 Cal.App.2d 844, 855 [13 Cal.Rptr. 132].) This is so even though the agent may have exceeded his express authority (*Draper v. Hellman Com. T. & S. Bank* (1928) 203 Cal.26, 38-39 [263 P. 240]), and it is true regardless of the agent's motive (*Rosenberg v. J. C. Penney* Co. (1939) 30 Cal.App.2d 609, 623). It has been said that the rule is supported by 'The great weight of authority.' (See Annot. 150 A.L.R. 1338, 1344.)" (*Sanborn v. Chronicle Pub. Co.* (1976) 18 Cal.3d 406, 411.) [Emphasis added.].

Also see (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 950).

> "A corporation can act only through its agents. Mr. Witkin has stated, "A private corporation is ordinarily liable under the doctrine of respondeat superior for torts of its agents or employees committed while they are acting within the scope of their employment." (4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, § 26, p. 2326, original italics; also see 1 Witkin, Summary of Cal. Law (8th ed. 1973) Agency and Employment, § 155, p. 754.)" (*Kelly v. General Telephone Co.* (1982) 136 Cal. App. 3d 278, 286).

> The court in *McLachlan v. Bell* (2001) 261 F. 3d 908, confirmed an employer's responsibility for the defamation published by its employees. At page 912 the court stated, " Under the broad California doctrine, the conduct of all three defendants was within the scope of their employment. All three acted foreseeably, in the sense that their conduct was 'not so unusual or startling' that it would seem unfair to include the loss resulting from it among other costs of the employer's business. There is unfortunately nothing 'unusual or startling ' about personal hostility, backbiting, resentment of another's success, false rumors, and malicious gossip in the workplace."

XIV. OPINION OR FACT

If the questioned statement is a statement of opinion it is not actionable. "The reason for this rule is that, "[U]nder the First amendment there is no such thing as a false idea. However, pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 339-340 [41 L.Ed. 2d 789,805, 94 S.Ct. 2997].) "The sine qua non of recovery for defamation . . .is the existence of a falsehood." *Letter Carriers v. Austin* (1974) 418 U.S. 264, 283 [41 L.Ed.2d 745, 761, 94 S. Ct. 2770].

The determination of whether an allegedly defamatory statement constitutes fact or opinion is usually a question of law (*Seelig v. Infinity Broadcasting Corp. (2002) 97 Cal.App. 4th 798, 810. Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 601; *Okun v. Superior Court* (1981) 29 Cal.3d 442, 450). However, if the alleged defamatory statements do not unambiguously constitute either fact or opinion and ". . . the allegedly libelous remarks could have been understood by the average reader in any sense, the issue must be left to the jury's determination." (*Good Government Group of Seal Beach, Inc. v. Superior Court* (1978) 22 Cal.3d 672, 682; *Summit Bank v. Rogers* (2012) 206 Cal.App. 4th 669, 698) "Whether published material is reasonable susceptible of an interpretation which implies a provably false

assertion of fact– the dispositive question in a defamation action – is a question of law for the court." (*Couch v. San Juan Unified School District* (1995) 33 Cal. App. 4th 1491,1500.) "If it is equally of both an innocent and libelous construction, it is for the jury to decide how the statement was understood."(*McGarry v University of San Diego* (2007) 154 Cal. App. 4th 97, 117).

In making the fact or opinion determination,

> "the court must place itself in the position of the hearer or reader, and determine the sense or meaning of the statement according to its natural and popular construction. (Cit. omitted.) That is to say, the publication is to measured not so much by its effect when subjected to the critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of the average reader." *Baker v. Los Angeles Hearld Examiner* (1986) 42 Cal.3d 254, 260.

However, a statement in the form of an opinion may be actionable if the publisher implies that it is based on undisclosed defamatory facts, or implies a false assertion of fact, (*Wilbanks v Wolk* (2004) 121 Cal. App.4th 883, 902-903; *Gallant v. City of Carson* (2005) 128 Cal.App.4th 705; *Gill v. Hughes* (1991) 227 Cal.App.3d 1299, 1309; *Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 266; *Okun v. Superior Court* (1981) 29 Cal.3d 442, 451-452.), or if the accusations "carry a ring of authenticity and might reasonably be understood as being based on fact." *Slaughter v. Friedman* (1982) 32 Cal.3d 149, 154.

> "The distinction [between fact and opinion] frequently is a difficult one..." [Citations omitted.] To make the differentiation `California Courts have developed a `totality of the circumstance test. . . .' ... "In addition to the language, the context of a statement must be examined. [Citation omitted.] The Court must `look at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed.' " (*Hofmann Co. v. E.I. Du Pont de Nemours & Co.* (1988) 202 Cal.App.3d 390, 398.)

In *Edwards v. Hall* (1991) 234 Cal.App.3d 886, 901-902, the court distilled the case law in this area including the key case, *Milkovich v. Lorain Journal Co.* 497 U.S. 1, (1990); *Philadelphia*

Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, and the *Bresler-Letter Carriers-Fallwell*[1], and *New York Times-Butts -Gertz*[2]*- Bose*[3] lines of cases, and came to the following conclusion:

> "The dispositive question a court needs to answer in determining whether a false statement is actionable is: Could a reasonable trier of fact conclude the published statements imply a provably false factual assertion? (Cit. omitted.) In answering this question in the affirmative, the *Milkovich* court relied on the following three factors: (1) whether '[t]his [was] the sort of loose, figurative or hyperbolic language which would negate the impression that the writer was seriously maintaining [the plaintiff] committed the crime of perjury'; (2) whether 'the general tenor of the article negate[s] this impression'; and (3) whether 'the connotation that [the plaintiff] committed perjury is sufficiently factual to be susceptible of being proved true or false.'" *Edwards v. Hall* (1991) 234 Cal.App.3d 886,902-903.

In *Weller v. American Broadcasting Companies, Inc.* (1991) 232 Cal.App.3d 991, 999, the court commented that:

> "However the United States Supreme Court has recently rejected the contention that a separate constitutional privilege exists to protect statements of opinion." [Citations omitted.] "The court pointed out that expressions of "opinion" may often imply an assertion of objective fact."

The *Weller* court at p. 1001 restates the current standard (post *Milkovich*) to determine whether an alleged statement is "fact" or "opinion":

> "Thus, even after *Milkovich,* under existing federal constitutional law, we must determine whether the statements that form the basis of a defamation claim: (1) expressly or impliedly assert a fact that is susceptible to being proved false; and (2) whether the language and tenor is such that it cannot 'reasonably [be] interpreted as stating actual facts.'" [Citation omitted.] [Emphasis added.]

In an employment case, *Kahn v. Bower* (1991) 232 Cal.App.3d 1599, at page 1609 the court

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[1]*Greenbelt Pub. Assn. v. Bresler* (1970) 398 U.S. 6; *Old Dominion Branch No. 496, etc. v. Austin* (1974) 418 U.S. 264; and *Hustler Magazine v. Fallwell* (1988) 485 U.S. 46.

[2]*New York Times Co. v. Sullivan* (1964) 376 U.S. 254; *Curtis Pub. Co. v. Butts* (1967) 388 U.S. 130; and *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323.

[3]*Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485.

addressed the issue of whether a supervisor's comments on a worker's job performance were fact or opinion. The court found statements, such as, "**I feel** her level of incompetence . . . makes it impossible for us to work with her" to be statements of fact not opinion. The court held that the ". . . imputation of incompetence . . ." was a fact since the statement was ". . . reasonably susceptible of a provable false meaning." [Emphasis added.]

In another employment case, *Gallant v. City of Carson* (2005) 128 Cal App.4th 705, the court addressed the situation where the statement might sound like an opinion but it implies an assertion of false objective facts. In those situations the statement is a statement of fact not opinion. The court stated:

> "The alleged statements—that Gallant is incompetent–are defamatory. 'The allege defamatory statements are not protected if they imply an assertion of false objective fact. The statement that the plaintiff 'is an incompetent [employee]...' implies a knowledge of facts which lead to this conclusion and further is susceptible of being proved true or false ...Since the statement implies that plaintiff is generally disqualified for [her] profession, it is defamatory if it is false. . . Consequently, the trial court erred in finding this statement was not defamatory because of being an 'opinion.'(Cit. Omitted.)."*Gallant v. City of Carson* (2005) 128 Cal App.4th 705, 709.

XV. DEFAMATION PER SE IS ACTIONABLE WITHOUT PROOF OF THE RECIPIENT'S BELIEF IN THE DEFAMATION

"It is not necessary that anyone believe them to be true since the fact that such words are in circulation at all concerning the plaintiff must be to some extent injurious to his reputation.. . ." (*Arno v. Stewart* (1966) 245 Cal.App.2d 955, 963; *Polygram Records, Inc. v. Sup. Court* (1985) 170 Cal.App.3d 543, 555.)

XVI. GENERAL DAMAGES, INCLUDING EMOTIONAL DISTRESS DAMAGES, ARE PRESUMED FOR DEFAMATION PER SE

> ". . . [I]n an action for damages based on language defamatory per se, damage to the plaintiff's reputation is conclusively presumed and he need not introduce any evidence of actual damages in order to obtain or sustain an award of damages."

> (*Contento v. Mitchell* (1972) 28 Cal.App.3d 356, 358.) [Emphasis added.] ". . . [S]lander per se is presumed to cause damage and plaintiff may recover for her hurt feelings, mental suffering and humiliation without proving any out of pocket loss." (*Schomer v. Smidt* (1980) 113 Cal.App.3d 828, 834.) [Emphasis added.]
>
> ". . . [A]s defined, general damages encompass the loss of reputation, shame and mortification and hurt feelings in any context, including the plaintiff's trade or business. (cf. *Correia v. Santos* (1961) 191 Cal.App.2d 844, 856-857 [Citation omitted.]" (*Gomes v. Fried* (1982) 136 Cal.App.3d 924, 939.) [Emphasis added.]
>
> "Therefore, [in a defamation per se case] there need not have been any evidence of actual damage to support an award of compensatory damages." (*Hanley v. Lund* (1963) 218 Cal.App.2d 633, 644-645).] *also see Behrendt v. Times-Mirror Co.* (1938) 30 Cal.App.2d 77, 84-85; *Maidman v. Jewish Publications, Inc.* (1960) 54 Cal.2d 643, 654.)

Also, see *Contento v. Mitchell* (1972) 28 Cal.App.3d 356, which states at page 358:

> "However, it is equally well-settled that in an action for damages based on language defamatory per se, damage to plaintiff's reputation is conclusively presumed and he need not introduce any evidence of actual damages in order to obtain or sustain an award of damages." [Citations omitted.] [Emphasis added.]

Emotional distress damages are clearly recoverable for defamation. This is confirmed through the following cases including *Douglas v. Janis* (1974) 43 Cal.App.3d 931, 940 which states:

> "Plaintiff testified that as a result of defendant's statements he suffered `mental' upset and from lack of sleep, and from that time on has continued to have `a feeling of general ill-being and just mental strain and emotionalism.' He also testified: `I felt very ashamed. I felt humiliated. I do to this day.' `This being a case of slander which is libelous per se (charging the crime of theft), general damages are presumed as a matter of law. (*Clay v. Lagiss*, 143 Cal.App.2d 441, at p. 448 [Citation omitted.].) [¶] In addition, plaintiff is entitled to damages for injury to his feelings, including mental worry, distress, grief, and mortification." [Emphasis added.]

Also, *Behrendt v. Times-Mirror Co.* (1938) 30 Cal.App.2d 80 which stated at page 83:

> "Complaint is also made of the ruling of the court by which plaintiff was permitted to testify concerning his condition of mind resulting from the publication of the libel. Defendant particularly criticizes the form of some of the questions. In one instance plaintiff was asked, `In your own mind Doctor, what did you think about your own professional career?' The witness answered, `I thought my-in as far as the practice of medicine in this community, it was

> finished on my own part.' It was proper for plaintiff to prove that his feelings had been injured and that he believed that the libels had affected his standing in the community and the happiness of members of his family. These matters could be presented as tending to prove injury to his feeling." [Emphasis added.]

The Supreme Court in *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.App.3d 711, 725 recognized the significant damages that can flow from defamation and said, " The injuries suffered from defamation can be more real and debilitating – at least emotionally and financially– than palpable injuries and are equally worthy of compensation."

The court in *Carney v. Santa Cruz Women Against Rape* (1990) 221. Cal.App.3d 1099, 1022, cited *Gertz* on the issue of actual damages from defamation and said, "In *Gertz v. Robert Welch*, supra, 418 U.S. 323, the Supreme Court discussed actual injury in libel cases:'Suffice it to say that actual injury is not limited to out-of- pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, mental anguish and suffering."

The court in *Clay v. Lagiss* (1956) 143 Cal.App.2d 441, 449 cited the California Supreme Court in *Earl v. Times-Mirror Co.*, (1921) 185 Cal. 165, at page 170 on the causation of injury issue for defamation. It does not limit awards of damages to only those situations in which the plaintiff proves the defamation was a "substantial factor" in causing the damage. The court held, "We think, therefore, that mental worry, distress, grief, mortification, where they are shown to exist, are properly component elements of that mental suffering for which the law entitles the injured party to redress in monetary damages.'" [."". . . Defendant says this instruction does not limit the jury to consideration of mental suffering experienced by plaintiff 'was the direct, proximate and immediate effect' of the slander. We find no merit in this point which ignores the concluding words of the third sentence of this instruction, 'where they are shown to exist." .]

> "There is evidence of mental and physical suffering. Plaintiff testified that when she heard of the slanderous statement it made her ill for weeks. It made her ashamed to see people. She could not work for days. In view of this evidence and

> of the presumption which the law entertains that a person is damaged by the utterance of remarks which are slanderous per se, there is no basis for a reviewing court to hold this verdict excessive." *Clay v. Lagiss* (1956) 143 Cal.App.2d 441, 449.

XVII. DEFAMATION PER SE IS ACTIONABLE WITHOUT PROOF OF SPECIAL DAMAGES

"It is to be noted that an article libelous on its face is actionable without proof of special damage." *DiGiorgio Fruit Corp. v. AFL-CIO* (1963) 215 Cal.App.2d 560, 569.

Also, at page 577 of *DiGiorgio Fruit Corp. v. AFL-CIO, infra*, the court states:

> "The general rule is that the victim of a defamation which is actionable per se can recover the general damages without proof of loss or injury which is conclusively presumed to result from the defamation. He is not required, in order to recover the general damages, to make proof of any special damages that may have accompanied them, although he is at liberty to prove them if he desires. . . ."

XVIII. EVIDENCE TENDING TO SHOW LACK OF INJURY TO REPUTATION IS INADMISSIBLE, AND QUESTIONS INTO THAT AREA ARE IMPROPER IF PLAINTIFF SEEKS ONLY GENERAL DAMAGES FOR DEFAMATION PER SE

". . . [P]laintiff pleaded general, not special damages and when, as here, the utterance is slanderous per se, damages are presumed and evidence tending to show lack of injury to the reputation is inadmissible." (*Clay v. Lagiss* (1956) 143 Cal.App.2d 441, 448.) In a defamation per se case involving only a claim for general damages, it is not proper to ask the recipient of the defamation if it had an impact on him, that is, did the defamation damage plaintiff's reputation. (*Clay v. Lagiss*, *infra*, p. 447-448.)

XIX. AT WILL EMPLOYMENT IS NO DEFENSE TO A WAGE LOSS CLAIM CAUSED BY DEFAMATION

> "Respondent North American Aviation argues that loss of earnings could not be charged against it in any event, because the company could have terminated

> appellant's employment at will. But the allegations as to damages against North American Aviation relate not to the loss of salary from North American Aviation but to loss of employability by others following appellant's separation from his employer, a loss alleged to have been caused by the defamation." (*Rodriguez v. No. Amer. Aviation, Inc.* (1967) 252 Cal.App.2d 889, 894-895.) [Emphasis added.]

See *Russell v. Geis, supra*, p. 572 for recognition of "inability to obtain employment" as a defamation damage. *Also see Gomes v. Fried* (1982) 136 Cal.App.3d 924, 940: "[I]nability to secure employment insufficient for claim of special damages, but admissible as to claim for general damages." [Emphasis added.]

An additional theory that allows a defamed employee to collect damages for wage loss is identified in *O'Hara v. Storer Communications, Inc.* (1991) 231 Cal.App.3d 1101, 1114-1115 where the court acknowledged:

> "One's loss of employment due to emotional instability "[caused by defamation]" certainly results in loss of "property, business, trades, profession or occupation" as set out in the statute. . . .[s]ubstantial evidence supported the jury verdict she [plaintiff] "had suffered monetary damage through inability to work as a direct and proximate result of the defamation."

Finally, the California Supreme Court recognizes "loss of employment" is a proper element of a claim for special damages caused by defamation per se tending to injure plaintiff in his occupation. (*Washer v. Bank of America* (1943) 21 Cal.2d 822, 829.) [Emphasis added.] In *Pridonoff v. Balokovich* (1951) 36 Cal.2d 788, 792, the Supreme Court again recognized the loss of a job as a proper special damage claim in a defamation case. The court ruled at page 792:

> "Plaintiff's allegation of special damage is sufficiently specific. He alleges that as a result of the publication of the alleged libel" [charge of "flagrant espionage" by consulting engineer connected to embassy] "he has lost employment with a specific employer, the Parsons Aerojet Company, for a specified period, to his damage in the amount of $5,000. Defendants are thereby informed of the exact nature of the claim of special damages and afforded an opportunity to prepare a defense against it. That is all that is required of the allegation." [Emphasis added.]

XX. PLEADING OF EXACT SLANDEROUS STATEMENT NOT NECESSARY

A party is no longer required to plead slander (contrast with libel) with common law exactness, and less particularity is needed where it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy.

> "Less particularity is required when it appears that defendant has superior knowledge of the facts, so long as the pleading gives notice of the issues sufficient to enable preparation of a defense. [Citation omitted.] Nor is the allegation defective for failure to state the exact words of the alleged slander. . . . [W]e conclude that slander can be charged by alleging the substance of the defamatory statement." (*Okun v. Superior Court* (1981) 29 Cal.3d 442, 458; *Schessler v. Keck* (1954) 125 Cal.App.2d 827, 835.)

XXI. SINCE EACH PUBLISHER IS INDIVIDUALLY RESPONSIBLE FOR HIS/HER DEFAMATION DIVERSITY CAN BE DESTROYED BY SUING THE CALIFORNIA RESIDENT, INDIVIDUAL PUBLISHER, ALONG WITH THE EMPLOYER

The individual publisher (local resident) is personally responsible for his/her defamation. The case *Digiorgio Corp. V. Valley Labor Citizen* (1968) 260 Cal. App. 2d 268, 273, states,

"It is of course the general rule that, in the absence of a privilege, anyone who actively participates in the publication of a false and libelous statement is liable for special, general and even punitive damages." [Emphasis added.] . . . . "And, ordinarily the originator of the defamatory matter is also liable for each such repetition if he could reasonably have foreseen the repetition."*Osmond v EWAP, Inc*. (1984) 153 Cal.App. 3d 842, 852, "The general rule for defamation is that everyone who takes a *responsible* part in the publication is liable for the defamation." [Original italics, emphasis added.]. *McGuire v Brightman* (1978) 79 Cal.App.3d 776, 789, "... the general rule for defamation is that everyone who takes a responsible part in the publication is liable for the defamation." (See Prosser, Law of Torts (4th ed. 1971) sec. 113, p.768.) [Emphasis added.]

In *Behrendt v. Times-Mirror Co.* (1938) 30 Cal.App. 2d 77, 83, the court stated, "Each libel is a separate and distinct tort, and each person who sees fit to publish it is separately liable to the plaintiff

for what ever damages may be fairly said to accrue." [Emphasis added.]. Further support for individual liability can be found in *Mercado v Hoefler* (1961) 190 Cal.App. 2d 12, 19, where the court held "[t]he original utterer of slanderous remarks can be liable for the consequences of republications to third persons." [Emphasis added.].

XXII. THE EMPLOYER IS ALSO RESPONSIBLE FOR THE DEFAMATION OF ITS AGENT/EMPLOYEE.

"A master is subject to liability from defamatory statements made by an agent acting within the scope of his authority." *DiGiorgio Fruit Corp. v. AFL-CIO* (1963) 215 Cal.App.2d 560, 576. "Thus while the plaintiff had decided not to proceed directly against [employees] for their conduct, she did manifest a desire to hold defendant company liable for its acts as a principal." (*Deaile v. G.T.C.* (1974) 40 Cal.App.3d 841, 848-849.) "It is well established that a principal can be liable for the malicious torts of his employee the scope of his employment, despite any contention that the employee may not have had authority to engage in tortious conduct." *Mercado v. Hoefler* (1961) 190 Cal.App.2d 12, 17.

Also, "[a]s a general proposition it may be said that, if an employee or agent while acting in the scope of his authority and in furtherance of the employer's business defames another, his employer or principal may be held liable therefor. *Correia v. Santos* (1961) 191 Cal.App.2d 844, 855. This is so even though the agent may have exceeded his express authority *Draper v. Hellman Com. T. & S. Bank* (1928) 203 Cal.26, 38-39, and it is true regardless of the agent's motive. *Rosenberg v. J. C. Penney Co.* (1939) 30 Cal.App.2d 609, 623. It has been said that the rule is supported by 'The great weight of authority.' (See Annot. 150 A.L.R. 1338, 1344.)" *(Sanborn v. Chronicle Pub. Co.* (1976) 18 Cal.3d 406, 411.); also see Agarwal v. Johnson (1979) 25 Cal.3d 932, 950).

In *McLachlan v. Bell* (2001) 261 F. 3d 908, 912 the court discussed the "the broad California doctrine" based upon "foreseeability" as a basis for an employer's or principal's liability based upon the defamatory conduct of its employees or agents. The court stated that,

"under the broad California doctrine, the conduct of all three defendants was

> within the scope of their employment. All three acted foreseeably, in the sense that their conduct was 'not so unusual or startling' that it would seem unfair to include the loss resulting from it among other costs of the employer's business. There is unfortunately nothing 'unusual or startling' about personal hostility, backbiting, resentment of another's success, false rumors, and malicious gossip in the workplace."

XXIII. THE "MANAGERIAL PRIVILEGE" IS NOT AN ABSOLUTE PRIVILEGE. IT IS NOTHING MORE THAN A CONDITIONAL PRIVILEGE WITH A DIFFERENT NAME

The so called "managerial privilege" in *Kacludis v. GTE* (1992) 806 F.Supp. 866 is nothing more then another name for a conditional or qualified privilege that can be defeated with a showing of malice. Therefore, defendants who cite this case for the claim that the managerial privilege is an absolute privilege are misrepresenting the case.

The *Kacludis* court at footnote 10 expressly states that it is not making the determination of whether the alleged "managerial privilege" is conditional or absolute. It states, "The case law is split, with some cases holding the privilege to be absolute and others holding it to be qualified." Furthermore, the case cited by *Kacludis* at footnote 10 regarding an absolute privilege is a contract case and has nothing to do with defamation.

That case, *Aalgaard v. Merchants National Bank* (1990) 224 Cal. App.3d 674, does not support a claim that a "managerial privilege" is an absolute privilege, even for a contract case. At page 685 that court states, "It should be clear from these cases that the privilege should not [be -sic] merely upon a defendant's position with respect to the breaching party but upon the defendant's purpose in inducing the breach. Footnote 8 page 685 of *Aalgaard* cites *Sade Shoe Co. v. Oschin & Snyder* (1984) 162 Cal.App.3d 1174, 1181. That case states, "'The privilege is at most a qualified one dependent for its existence upon the circumstances of the case. It is essentially a state-of- mind privilege ... The resolution of the issue turns on the defendant's predominant purpose in inducing the breach of contract."

The general rule regarding individual liability for defamation [clearly a different legal

principle than contract law] is stated in *DiGiorgio Corp. v,. Valley Labor Citizens* (1968) 260 Ca1. App. 2nd 268. That court holds at p.273, "It is of course the general rule that, in the absence of a privilege, anyone who actively participates in the publication of a false and libelous statement is liable for special, general and even punitive damages." Of course, with the showing of malice there is an absence of privilege. Also see, *Behrendt v. Times Mirror Co.* (1938) 30 Cal. App.2nd 77,83 "Each libel is a separate and distinct tort, and each person who sees fit to publish it is separately liable to the plaintiff for whatever damages may be fairly said to accrue."

Another more recent case on the issue of an employee's individual liability for the defamation of another employee, when the statement was published in the course of business, and for a business related purposes, i.e. to stop sexual harassment is *Cruey v. Gannett Co.* (1998) 64 Cal.App.4th 356, 366-370. That court found a basis for individual liability and that any privilege to internally publish the defamatory statements was a conditional privilege.

In summary *Aalgaard*, which *Kacludis* relied upon regarding the issue of "managerial privilege" involved (1) a contract case, (2) does not even mention defamation, (3) does not address Civil Code §47 at all, and (4) expressly states in footnote 8 at page 685 that the "managerial privilege" is a qualified privilege.

The real point *Kacludis* makes concerning defamation is that you must plead facts to establish malice and not just rely upon the bold allegation of the existence of "malice." Therefore, when pleading defamation plead facts that establish malice (i.e., publication with knowledge of falsity, publication for an improper purpose not protected by any privilege, excessive publication to people who had no need to know and who made no reasonable request for the information, publication as a result of prior quarrels, rivalry, ill-will and disputes (so describe these in pleadings i.e. disputes, fights, shouting matches about raises, transfers, performance reviews), publication as the result of reckless disregard or no investigation, publication without a reasonable basis to believe etc., etc.).

CONCLUSION

Defamation in employment is a complex area, however, redress for damage to this fundamental, but fragile, right should be vigorously pursued on behalf of defamed employees. Defamation in employment destroys careers, and the financial and emotional well-being of employees and their families. Full redress for these damages is not some new theory, but has been recognized throughout the history of our law and society as "a concept at the root of any decent system of ordered liberty." (*McNair v. World Church of God, supra*, 197 Cal.App.3d 363, 374-375.)

Dated: May 1, 2015 CHRISTOPHER H. WHELAN, INC.

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