

E-Mail Messages and Defamation Claims : Avoiding Liability

By the NHBA Ethics Committee

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The results of a recent Technology Fax Talk, published in *Inc.Technology Magazine's*, September 17, 1996 edition, indicates that 94 percent of the business respondents participating use e-mail to communicate with employees, managers, customers and vendors. While the survey recognized many of the benefits of using e-mail for business communications, it also recognized one significant potential drawback, depending upon your perspective. The sending of an e-mail message "always leaves a written record." Such a record is likely to be found to satisfy the publication element necessary to support a defamation claim.

For a communication to be defamatory, it must be "published." Publication occurs when the defamatory matter is communicated by the defendant to a third person intentionally or by a negligent act, according to the *Restatement (2nd) of Torts*. Thus, while a letter sent only to one person by another is not normally a publication, an e-mail message sent by an employee to another employee may be considered a publication because of the electronic record created and the availability of the record to the system administrator or other system users. When using e-mail, it is reasonable for one to expect that a third person can read the e-mail message, even though the e-mail message is addressed to a single user of the e-mail system.

Under ordinary circumstances, an employer can be held liable for defamation if it makes a statement with reckless disregard to whether or not the statement is true or not. Often, courts will hold that employers have a "qualified privilege" to communicate the reasons for personnel decisions, so they will not be liable for defamation as long as their communication and decision are not made carelessly and wantonly or because of ill will or other improper motives. This privilege allows employers some latitude in regard to internal communications with its management, however, because of the potential liability involved with communicating adverse personnel decisions more broadly, employers should require that the communication of such actions have a proper foundation in fact. The more serious the action taken, the more detailed should be the record establishing the good faith of the decision maker. In a First Circuit decision, an employer was required to pay \$448,200 to a discharged employee, who proved that a rumor was circulated within the company that he was a drug addict, after he failed a question on drug use asked during a polygraph test administered in connection with his employment.

A person who repeats or otherwise republishes the defamatory matter (i.e. spreading of a rumor via the e-mail system) is likely to be subject to the same liability as if that person had originally published it. Conceivably, an employer may be liable for a republication of defamatory matter if it negligently allows the defamatory matter to remain for an unreasonable time on property over which it has control, such as the e-mail archives.

To a marginally skilled "hacker" e-mail is far less secure than other non-electronic files maintained by the employer. In order to prevent defamation suits, from e-mail or otherwise, an employer must incorporate the following policy statements and precautions into its related policies:

- Employers should restrict disclosure and publication of unfavorable information about employees to those with a need to know. Disclosure should not be made using the e-mail system;
- When accusations of misconduct are made, especially involving dishonesty, illegality, or immoral acts, take no action without careful investigation and documentation.
- When the decision is communicated to the employee, do not use the e-mail system. Avoid accusations of criminal wrongdoing, dishonesty, or moral turpitude. Instead focus communication on specific facts and the conclusion that adverse action is warranted.
- Inform a terminated employee in person. Advise them that no information will be released regarding employment and termination except the position held and the dates of employment.
- Assure that statements and documentation sent or stored on the e-mail system avoid inclusive allegations.