The 3-D's: Discipline, Defamation and The Defenses

Parts I and II of this series, which appeared in the *Advisory* and are now available on the PAESSP web site, discussed defamatory statements at a board meeting made by a member of the public or by members of the Board. In Part III we will discuss allegedly defamatory statements by the superintendent and by the principal about an assistant principal made in the context of a performance rating, dismissal hearing, Equal Employment Opportunity Commission ("EEOC") hearing, and as part of letters of reference and of recommendation.

Scenario. *An assistant principal, Edie Inept, in her first year in Pennsylvania, is rated unsatisfactory by the principal. Edie is 55 years old and her professional training is deficient in special education and computers. As part of her performance evaluation in the anecdotal records, Principal Isaac Improve referred to her as " technologically challenged" and as an "old school disciplinarian insensitive to behavioral intervention strategies." The Superintendent reviewed the factual details of Edie's failures to communicate by email and maintain electronic records and her failure to comply with special education requirements on discipline and then conferred with Isaac. After his discussions with Isaac, the superintendent recommended dismissal to the board, which held a hearing and terminated Edie.*

Edie filed an age discrimination complaint with the EEOC; Isaac testified at the discrimination hearing. After the termination, the superintendent provided a letter of reference to Prospective School District that simply described her job duties and dates of employment; at Edie's request Isacc submitted a letter of recommendation that disclosed, but minimized, her flaws and commended her work ethic and positive interactions with parents. One month after the termination, in the faculty lounge, some teachers asked Principal Improve about why Edie was dismissed. He responded that Edie was "behind the times" and hadn't been able to keep up with changes in special education and technology. Prospective School District does not employ Edie and she brings a defamation suit against the principal and superintendent.

Q. WHAT STATEMENTS CONSTITUTE DEFAMATION?

A statement is considered defamatory "if it tends to harm the reputation of another so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." A statement "that ascribes to another conduct, character or a condition that would adversely affect his fitness for the proper conduct of his proper business" also is defamatory.[1] Statements are *not* defamatory if they are "merely annoying or embarrassing" to the plaintiff.[2] Whether a statement will be found to have a defamatory meaning also depends on the context in which the statement is uttered. For example, in the case *Pizzimenti v. Goralski*, a substitute teacher was dismissed for "misconduct." In a subsequent defamation action, the dismissed teacher argued that the dictionary definition of "misconduct" could mean illegal behavior or malfeasance. Recognizing that such an interpretation of the term "misconduct" could be defamatory, the court held that, *in context*, the term was not defamatory because it was followed by a description of her misconduct, which consisted of a repeated failure to respond to calls requesting her to substitute. Although potentially embarrassing, these statements were not defamatory.

Q. WHAT STATUTORY IMMUNITY TO DEFAMATION CLAIMS IS CREATED BY THE POLITICAL SUBDIVISION TORT CLAIMS ACT ("PSTCA")?

In a lawsuit based on negligent conduct, local agencies (such as school districts) and their employees are immune from liability unless the negligent conduct falls within one of eight specified exceptions to immunity: (1) operation of any motor vehicle, (2) care, custody or control of personal property of others in the possession or control of the local agency, (3) care, custody or control of real property, (4) trees, traffic controls and street lighting, (5) utility service facilities, (6) streets, (7) sidewalks, and (8) care, custody or control of wild animals.[3] An employee acting within the scope of his or her employment does not face liability for a negligent act if the negligence does not fit within one of the eight exceptions. The term ***negligent acts*** does not include "acts or conduct which constitutes a crime, actual fraud, actual malice or willful misconduct."[4]

Because a defamatory statement does not fall within the enumerated exceptions, a local agency is immune from a claim of defamation that is based on negligence. School Districts are immune from suit in a cause of action for

defamation.[5]

Q. WHAT IS THE OFFICIAL IMMUNITY CREATED BY THE PSTCA?

Principals, acting within the scope of their offices or duties, are subject to liability for their negligent acts to the same extent that the employer/school district is liable.[6] If the claim arises from their duties, principals have the following three additional defenses under the PSTCA: (1) defenses available under the common law; (2) the conduct that gave rise to the claim was authorized or required by law, or that they in good faith reasonably believed the conduct was authorized or required by law; (3) the act was within the policymaking discretion granted to principals by law.[7]

This immunity is particularly beneficial with regard to damages. Under the Pennsylvania statutory provisions governing liability for defamation, damages may be recovered only if the defaming statement was maliciously ***or negligently made***.[8] Because of official immunity prohibiting claims for negligence, damages can only be awarded against principals if the plaintiff can prove malice.[9]

Q. HOW CAN THE PLAINTIFF OVERCOME OFFICIAL IMMUNITY OR WHAT ACTS DEPRIVE THE PRINCIPAL OF OFFICIAL IMMUNITY?

When the alleged wrongful conduct of the principal "constituted a crime, actual fraud, actual malice or willful misconduct," the immunity defenses are negated.[10]If the alleged statements constitute willful misconduct, then the principals or superintendent waive their right to assert immunity on the basis that the conduct was reasonably related to their duties. The immunity shield is also destroyed if the principal is acting outside the scope of his employment. For example, a school board member who makes a defamatory statement after the conclusion of a dismissal hearing after the charges are dropped is acting outside the scope of his or her duties. Therefore, official immunity is not available as a defense.[11]

The courts have not determined whether superintendents, like school board members, are ***high public officials*** cloaked with absolute immunity.[12] The advantage of such absolute immunity is that if a board member can establish that a statement was made within the scope of his office, the defense cannot be waived even by malicious actions. Absolute immunity is a better shield than the PSTCA; this absolute privilege founded in the common law has not been diminished by PSTCA.

Q. WHAT CONSTITUTES ACTUAL MALICE THAT UNRAVELS THE CLOAK OF IMMUNITY?

Actual malice in the context of defamation requires proof that the defamatory publication was made with knowledge of its falsity or a reckless disregard of whether it was false or not.[13] The plaintiff will often assert that the alleged defamatory remarks were motivated by malicious personal animosity. The accuser must prove underlying facts establishing malice or from which it could be inferred that the principal is acting maliciously. Nothing in the hypothetical establishes a fact of malice or a fact from which malice could be inferred.

Q. WHAT OTHER PRIVILEGES OR DEFENSES ARE AVAILABLE?

The statutory provisions on defamation prescribe the following defenses, which the defendant bears the burden of proving: (1) truth of the defamatory communication; (2) the privileged character of the occasion on which it was published; or (3) the character of the subject matter of defamatory comment as of public concern.[14]

Q. HOW ARE PERFORMANCE EVALUATIONS TREATED UNDER DEFAMATION LAW?

Evaluations of teachers or other professional employees' performance is an essential duty of the superintendent and principals under the School Code.[15] Any alleged defamatory statements made about a subordinate as a function of a principal's evaluation fall within the scope of his duties and are protected by immunity under PSTCA. Because Isaac's evaluation of Edie was a statutory duty, he is immune from liability on the statements made in the anecdotal record.[16]

Q. HOW ARE ALLEGEDLY DEFAMATORY DISCUSSIONS AMONG ADMINISTRATORS TREATED UNDER DEFAMATION LAW?

A conditional privilege shields persons from claims of defamation for statements involving: (1) some interest of the person who publishes defamatory matter; (2) some interest of the person to whom the matter is published or some other third person; or (3) a recognized interest of the public. In the employment context, employers are protected by this conditional privilege when they communicate among managers regarding employee job performance, discipline and termination and when the publisher of the defamatory communication and the person who receives the communication share an interest in the employee's performance.[17]

In the hypothetical, the conditional privilege applies to the conversations between Isaac and the Superintendent because they share an interest in Edie's job performance. This conditional privilege probably does not extend to the communications to teachers by the Principal after the termination occurred.

If Isaac proves the privileged occasion of the evaluation discussions, the assistant principal must prove abuse of the conditional privilege. To show abuse of the conditional privilege, a plaintiff must show the statements were actuated by malice, or made for a purpose other than that for which the privilege is given, or made to a person not reasonably believed to be necessary for the accomplishment of the purpose of the privilege or include a defamatory matter not reasonably believed to be necessary for accomplishment of the purpose.[18] Edie would assert that the statements made to teachers by Isaac were not necessary for the accomplishment of the privileged purpose of evaluating employee performance.

Q. HOW ARE LETTERS OF TERMINATION TREATED UNDER DEFAMATION LAW?

Pennsylvania law recognizes an absolute privilege of employees to publish defamatory statements in a notice of termination. The purpose of this privilege is to "encourage the employer's communication to the employee of the reasons for discharge by eliminating the risk that the employer will possibly be subject to liability for defamation."[19]

Q. HOW DOES THE PRINCIPAL LOSE THE ABSOLUTE PRIVILEGE PROTECTING NOTICES OF DISCIPLINE BY COMMUNICATING BEYOND THE CIRCLE OF WHO NEEDS TO KNOW?

An employer's absolute privilege to issue defamatory disciplinary notices to an employee is lost "if the information is disseminated beyond the circle of those who reasonably need to know the reason for the employee's dismissal."[20] Excessive publication of the defamatory statement constitutes an abuse of the absolute privilege, thereby destroying that privilege. In *Agriss v. Roadway Express*, for example, a truck driver received a warning letter that falsely accused him of opening company mail.[21] The plaintiff could not bring a defamation claim for the false accusation in the warning letter because the employer's statement was treated like a termination letter and absolutely privileged. However, because the nature of the warning was communicated to numerous other employees of the trucking firm, the plaintiff was able to demonstrate that the absolute privilege had been lost by publication beyond those who had a need to know about the warning.

Q. HOW ARE LETTERS OF REFERENCE TREATED UNDER DEFAMATION LAW?

"Letters of Reference" are distinguished from "Letters of Recommendation" in this Article. A letter of reference is sent on behalf of the employer, and the sender has been authorized to speak on behalf of the District. Such a spokesperson would normally be a superintendent or director of human resources. School boards may have adopted a policy that the district shall only respond to requests from prospective employers by supplying dates of employment and a description of job duties. If the district's policy permits a more thorough response, the following safeguards should be part of the process with the goal that all references will fall within the conditional privilege:

> 1) The prospective employer should be required to document its request for the reference and the specific purpose of the request. This document will establish the scope of the request as a basis to assert the conditional privilege.
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> 2) As a condition of giving a reference, the district should require the former employee to sign a

release, authorizing the district to give a reference and waiving liability against the employer and the particular administrator providing the reference. The objective of this consent is to create an absolute privilege.

3) Any information provided in a reference should be factual and verifiable.

4) The authority to provide employment references should be limited to the superintendent or someone designated by the superintendent.

5) Individuals who are not authorized to provide references should be advised to state that they are not responding on behalf of the district, but in their individual capacity. No such individual letters of recommendation should be written on district letterhead.

By definition, letters of recommendation are unofficial responses by colleagues or supervisors not responding on behalf of the district. In most cases, principals would be writing letters of recommendation not letters of reference. The hypothetical is attempting to emphasize the point that the superintendent is cloaked in immunity to a greater extent than the principal.

Principals should recognize that a former employee who believes that she received a negative reference or letter of recommendation may bring a variety of claims against the District, superintendent, and principal, only one of which is defamation. The other possibilities include interference with contractual relations, invasion of privacy, discrimination under Title VII, the Age Discrimination Act or the Americans with Disabilities Act. The U.S. Supreme Court permitted a suit under Title VII by a former employee discharged from his job. The employee alleged that a negative reference to a prospective employer was in retaliation for the racial discrimination complaint filed when he was discharged.[22]

Q. WHAT ARE SOME PRACTICAL SUGGESTIONS WITH REGARD TO LETTERS OF RECOMMENDATION?

At this point, It should be obvious that the letter of recommendation is more dangerous in creating liability for defamation for the principal than the letter of reference. The allegedly defamed assistant principal is going to argue that the recommendation is ***outside the scope*** of the principal's duties and should not be privileged or protected by official immunity under the PSTCA. Recognizing this, any principal offering a letter of recommendation should not comply with a teacher's or other employee's request unless his/her job description or Board policy requires this as part of the principal's duties or the employee signs a release/waiver. In the event your intent is to supply some negative information, you may wish to advise the employee in advance so that the consent is given with knowledge and, therefore, will not be later disavowed on the basis of lack of informed consent.

In settlement agreements that are negotiated for principals leaving a district, PAESSP recommends a paragraph on the subject of letter of reference that incorporates by reference a specific letter of reference agreed to in advance, which is attached to the settlement agreement as an exhibit. We also recommend that anyone responding for the district or providing a letter of recommendation be identified in this paragraph of the settlement agreement. This should avoid defamation suits against those responding and should limit the gratuitous negative comments of those not listed. The problem that PAESSP has encountered is board members and other administrators ignoring the settlement agreement and volunteering negative information to prospective employers. The objective in identifying those persons authorized by the District to respond is to forfeit the privilege of those individuals not named to communicate their negative personal opinions. The legal strategy is that even high official immunity is sacrificed if the action is outside the scope of employment.

Q. HOW IS A PRINCIPAL'S TESTIMONY ON AN UNSATISFACTORY RATING AT A DISMISSAL HEARING OR EEOC HEARING TREATED UNDER DEFAMATION LAW?

In order to encourage openness before a judicial tribunal, statements that "are made in the regular course of judicial or quasi-judicial proceedings and are pertinent and material to such litigation" are protected by an absolute judicial privilege.[23]Both school board dismissal hearings and other administrative hearings are considered quasi-judicial proceedings.[24] Therefore, all statements made in these proceedings by a party, witness, counsel or judge are absolutely privileged and cannot be subject to a defamation claim. This judicial

privilege cannot be destroyed by abuse in the way that a conditional privilege can. Therefore, Isaac's testimony at the EEOC hearing does not expose him to liability for defamation.

Q. IS THERE A FEDERAL CONSTITUTIONAL CLAIM BASED ON DEFAMATION IN THE COURSE OF DISMISSAL FROM PUBLIC EMPLOYMENT?

Although the Constitution generally does not protect one's reputation, public employees have a recognized liberty interest in not being defamed or stigmatized in the course of a dismissal from public employment. A public employee who is dismissed under circumstances that impugn the employee's reputation is entitled to a "name-clearing hearing" if so requested by the employee. The purpose of the name-clearing hearing is to permit the employee "an opportunity to refute the charges and clear [his or her] name."[25] Whereas injury to one's reputation alone is not a constitutional injury, when that harm is coupled with the economic injury of a dismissal the Constitution recognizes a procedural due process right to attempt to prove that the statements made were false and thereby clear one's name. There are no formal procedures that must be followed in conducting a name-clearing hearing. A pre-suspension (*Loudermill*) hearing or a school board dismissal hearing generally will provide the employee with an opportunity to prove that the charges were false. Therefore, even if the hearing is not called a "name-clearing hearing," the due process requirements will be satisfied so long as the employer provides an opportunity for the employee to clear his or her name.[26]

WE DIGRESS

Finally, we would like to digress for a moment to "red flag" some related concerns that are outside the scope of this article. When the district opts for a letter of reference with dates only or with a positive reference without advising the prospective employer of serious deficiencies affecting the health and welfare of students, what is the liability created? The fact scenario is that the teacher in the new district molests a student. The claim has been made against former principals under Section 1983 for violation of a student's constitutional rights to be free from bodily injury by the same teacher. The argument is, but for the omission of material defects in performance, the teacher would not have been hired and the student would not have been sexually molested in the new district. In *Doe v. Methacton School District*,[27] the failure to disclose occurred prior to the amendment of the Child Protective Services Law ("CPSL") requiring school administrators to report suspected abuse of students by school employees to the district attorney and the local police. Note that CPSL specifically provides, however, that the reporting school employee may not reveal the existence or content of the report to another person. Another issue not discussed is when the conduct of the employee becomes a public issue as a result of the employee in trouble seeking the support of parents or their colleagues or because of the seriousness of the misconduct (health and welfare). At some point, it would appear that the principal may defend by arguing that the subject matter has become a "public concern."

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[1] *Puchalski v. School District of Springfield*, 161 F. Supp. 2d 395, 407 (E.D. Pa. 2001).

[2] *Goralski v. Pizzimenti*, 540 A.2d 595, 597-98 (Pa. Cmwlth. Ct. 1988).

[3] 42 Pa. C.S. §8542(b).

[4] 42 Pa. C.S §8542(a).

[5] *Petula v. Mellody,* 631 A.2d 762 (Pa. Cmwlth. Ct. 1993).

[6] 42 Pa. C.S. §8545.

[7] 42 Pa. C.S. §8546.

[8] 42 Pa. C.S. §8542(b)(2).

[9] *Malia v. Monchak*, 543 A.2d 595 (Pa. Cmwlth. Ct. 1988).

[10] 42 Pa. C.S. §8550.

[11] *Malia*, 543 A.2d at 496.

[12] *See Petula, supra,* and *Habe v. Fort Cherry S.D.,* 786 F. Supp. 1216 (W.D. Pa. 1992).

[13] *Goralski,* 540 A.2d at 600.

[14] 42 Pa. C.S. §8343(b).

[15] *See* 24 P.S. §11-1123, *Malia*, *supra.*

[16] 42 Pa. C.S. §8546(2).

[17] *Puchalski*, 161 F. Supp. 2d at 409.

[18] *Giusto v. Ashland Chem. Co.*, 994 F. Supp. 587 (E.D. Pa. 1998).

[19] *Davis v. Resources for Human Development, Inc.*, 770 A.2d 353 (Pa. Super. Ct. 2001).

[20] *Smyth v. Barnes*, 1995 WL 576935 (M.D. Pa. Sept. 25, 1995).

[21] *Agriss v. Roadway Express, Inc.*, 334 Pa. Super. 295, 483 A.2d 456 (1984).

[22] *Robinson v. Shell Oil Company*, 117 S.Ct. 843 (1997).

[23] *Giusto*, *supra.*

[24] *See Giusto and Augustine v. Turkeyfoot Val. Area School Dist.*, 9 Pa. D. & C.3d 147 (Somerset Co. Ct. Com. Pl. 1977).

[25] *Puchalski*, 161 F. Supp. 2d at 406.

[26] *See Tonkovich v. Kansas Bd. of Regents,* 159 F.3d 504 (1998), in which the court denied a tenured law professor's claim that he was denied a name-clearing hearing after his dismissal for allegedly having sex with a female student, because the employer afforded him both pre- and post-termination hearings.]

[27] 914 F. Supp. 101 (E.D. Pa. 1996), *aff'd*, 124 F.3d 185 (3rd Cir. 1997).