

Legal Spotlight

What Can a Faculty Member Say or Write?

This information is provided courtesy of the National Association of Colleges and Employers (NACE).

REFERENCES: Whether it is a letter from a faculty member evaluating a student's work in class, an evaluation of a student teacher on a teaching assignment, or a report from an employer on a student's progress in his/her cooperative education assignment, what can the evaluator say or write? Reference writers want to know if they will get in trouble if they write that the person has a performance problem or needs to improve in certain areas.

The answers to these questions lie in another set of questions: To whom is this information to be given? Is that person entitled to the information? What is the purpose of the information? Is the information verified and accurate?

For example, a student has a cooperative education assignment in a publishing company. After the first three months, the student is evaluated and her supervisor identifies certain areas for improvement, discusses the evaluation with her, and places it in her personnel file at the company. Over the course of the assignment, which spans several semesters, three more evaluations occur and are placed in the student's file. Her performance is uneven, and each of the evaluations indicates her weak areas. At the end of the assignment, the vice president of the company has to determine if the student will be offered a full-time position after graduation. To make this determination, he asks the supervisor to share with him the student's written performance evaluations. Based on the evaluations, the student is not hired for a full-time position.

The supervisor shares these evaluations with the school's cooperative education coordinator and the student's adviser. The adviser works with the student on some of her weak areas. Later, when asked to give a reference, the adviser prepares the reference outlining the student's strengths and weaknesses based on the adviser's own observations and on information contained in the supervisor's performance evaluations. This letter becomes part of the student's credential file, which is communicated to other employers. After a year, the student remains unemployed.

Does this scenario sound familiar? How appropriate are the supervisor's and the adviser's actions? How would the law look at this scenario?

To be defamatory, a statement must be false and must harm the person's reputation and lower him or her in the esteem of the community. "Harm to one's reputation" must result in some tangible harm to the person, e.g. loss of money, business, or employment. A substantially true statement may be defamatory if it is incomplete and misleading. Statements of pure opinion are defamatory if they are based on unsubstantiated facts.

The general rule is that no defamation is committed unless the statement is written or spoken to someone other than the person about whom the statement is made. This can be a communication within a company or institution or a communication outside of an organization. Some courts have held that if the communication is among managerial personnel of the same organization and concerns business issues, such as performance problems of employees, it is not a publication to a third person.

Qualified privilege: Additionally, in the employment context, the law provides a "qualified privilege" for making defamatory remarks. That is, while the remarks may still be untrue, if the conditions of the privilege are met, the communicator has a complete defense against the defamation claim. A qualified privilege to the communication exists as long as the speaker makes the communication in good faith and has a public or private duty, or legal, moral, or social obligation to do so, and as long as the person receiving the information has a corresponding duty or interest in the communication. Some courts have held that qualified privilege applies to personnel evaluation information or intra-company communications regarding an employee's fitness.

A statement loses its privileged character if the communicator is motivated by ill will, if there is excessive communication of the statement, or if it is made without grounds for believing it is true. The issue is not only the factual accuracy of the statement. An employee must also show that substantial evidence exists that the supervisor made his statements without believing them to be true or that he lacked grounds for belief in the truth of the statements. Reckless disregard for the truth includes a failure to verify in circumstances where verification is practical.

An employer may be protected by a qualified privilege concerning an employee when disclosing information is necessary to serve the employer's legitimate interest in an employee's fitness to perform. For example, qualified privilege applies when a current employer discloses the reason for an employee's discharge to a prospective employer, and when a supervisor is informed of his/her employee's improper conduct. The privilege may be lost if the defamatory communication reaches people who do not have a legitimate interest in the subject.

How qualified privilege applies: How does all of this apply to the co-op student's situation?

The first communication is made in the performance evaluations, which are sent from the supervisor to the vice president of the division so he can make a hiring decision. This is an intra-company communication given to an individual in the company who has a legitimate interest in the information. Unless the student can show that there was ill will underlying the evaluations-that the supervisor had an ax to grind with the student-this communication is qualified. Had the supervisor sent these performance evaluations unsolicited to others in the company who did not request the information or had no reason to obtain the information, qualified privilege would be lost due to excessive publication. If the supervisor made inaccurate statements, and verification for accuracy was practical, then qualified privilege would also be lost.

The second communication, from the supervisor to the adviser, was made outside of the company and outside of the employment context. Did the adviser have a good-faith reason to know this information? If the agreement between the school and the employer specifically states that reports will be made to the school regarding the student's progress, then the adviser has a contractual right to this information. It is not clear under the law whether the adviser should be receiving these reports if there is no agreement for him to do so. One could argue that there is an educational need to know; that is, the adviser needs to have this information to work with the student in her weak areas. I suggest that the student be told this communication will occur and advised of its purpose.

The third communication is a reference letter from the adviser to other employers. Reference letters, like performance evaluations, are used as part of the selection process for hiring decisions. It is not clear whether an adviser's reference to a prospective employer would be given the same qualified privilege as a prior employer's communication to a prospective employer. In any event, the reference letter is subject to the conditions of qualified privilege. Certainly, it was communicated to other individuals with a good-faith need to know. In fact, the student controlled who would receive it by placing it in her credential file. It would be different if the adviser were sending the letter to employers or providing employers with the information indiscriminately. The flaw is the use of the supervisor's performance evaluations as part of the letter. The adviser did not collect this information, nor did he make an attempt to verify its accuracy. The result could be a loss of qualified privilege.

The current situation: Twenty-six states have passed reference immunity legislation, which essentially provides protection from civil lawsuits against employers who provide references on former employees. Individuals other than employers who provide references must rely on the common law defenses-truth or qualified privilege-against charges of defamation.

Evaluations of an individual's performance, whether at work or in the classroom, are an integral part of the world of work and education. Communication of this information is necessary and appropriate. There is nothing illegal about using this information and communicating it to individuals who need it to make employment decisions. The only caveat is to make sure the information is correct and disclosed only to those individuals who need to know.

Reprinted from the NACE Spotlight, Volume 20, Issue 21