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Where's The Power - Defamation and Wrongful Interference in the Restatement of Employment Law

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WHERE'S THE POWER? DEFAMATION AND WRONGFUL INTERFERENCE IN THE *RESTATEMENT OF EMPLOYMENT LAW*

BY
RUBEN J. GARCIA*

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I. INTRODUCTION

As described in the publication *Capturing the Voice of the American Law Institute*, the goal of a restatement of law is not just to restate the majority rules of law throughout the United States, but also to “ascertain the relative desirability of competing rules.”¹ According to the ALI’s guide for drafters, “[a] Restatement thus assumes the perspective of a common-law court, attentive to and respectful of precedent, but not bound by precedent that is

* Professor of Law, University of Nevada, Las Vegas. Thanks to Professor Ken Dau-Schmidt and Indiana University Maurer School of Law for organizing this Symposium, and thanks to the editors of the *Employee Rights and Employment Policy Law Journal*. Thanks also to Professor Matthew Finkin for his comments on this Article and work in this area. See, e.g., MATTHEW W. FINKIN, *PRIVACY IN EMPLOYMENT LAW* (4th ed. 2013); MATTHEW W. FINKIN, *Discharge and Disgrace*, 1 EMP. RTS. & EMP. POL’Y J. 1 (1997)

1. AM. LAW INST., *CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK* 5 (2d. ed. 2015)

inappropriate or inconsistent with the law as a whole.”²

This broad view of the function of restatements raises the question of what the purpose of the “law as a whole” is when it comes to workplace defamation and wrongful interference claims in the *Restatement of Employment Law (REL)*. As stated in comment (a) to *REL* section 6.01:

Defamation law provides a remedy to employees who suffer reputational harm, often causing the loss of employment or employment opportunities, because their employers or former employers published unprivileged false and defamatory statements about them, intentionally, recklessly, or negligently. The public, however, has a strong countervailing interest in open and candid communications between employers, by employers with licensing or regulatory authorities, and among employees of the same employer, concerning the skills, performance, capabilities, and character of employees and former employees.”³

This, the Reporters assert, is the reason for the qualified privilege of 6.02, “in addition to other privileges.” Those “other privileges,” though, remain a mystery. The qualified privilege applies only to communications between employers about employees.⁴

In this article, I argue that the *REL* misses the opportunity to address power relations between employers and employees as part of the “law as a whole” in the torts of the workplace. I argue that the omission shows the limits of restatements generally. As I will discuss below, however, there were other roads not taken by the drafters that might have acknowledged these power differentials in the final draft. I also argue that the normative choices that are made by the *REL* about the doctrine of compelled self-publication are based on questionable footings. “[A]cceptance of the doctrine [of compelled self-publication] would have a chilling effect on the free flow of information.”⁵ There should be no compelled self-publication if the employer tells the employee of its intent to repeat the defamatory statement to future regulatory bodies or employers. This highly unlikely scenario means that the doctrine is all but dead. But why? What incentives would employers have to give employees notice that they planned to defame employees to prospective employees?

2. *Id.*

3. RESTATEMENT OF EMP’T LAW § 6.01 cmt. a (AM. LAW INST. 2015).

4. *Id.*

5. *Id.* § 6.01 cmt. d (quoting *Cweklinsky v. Mobil Chem. Co.*, 837 A.2d 759, 765 (Conn. 2004)). I believe there is a difference between the free flow of information for workers and employers. The *REL* does not address this asymmetry.

Chapter Six of the *REL* deals with defamation, wrongful interference and misrepresentation. This article deals with the first two torts; misrepresentation is addressed by Professor Helen Norton in another essay in this volume. Our division of labor makes sense, because the torts of wrongful interference and defamation share several commonalities. This article will proceed first with the tort of defamation. Then, I will discuss the lesser known tort of wrongful interference, which is addressed in *REL* sections 6.03 and 6.04.

In the final section, I will offer my own vision of “the law as a whole” as it pertains to the torts of defamation and wrongful interference in employment law. In my view, “the law as a whole” puts the power of the at-will arrangement at the center and suggests some policy choices that the drafters could have made differently to better reflect the trends in the law and how legislative chambers might be guided in their individual states.

There are several reasons that American law protects reputation that are unique to the workplace. In an employment-at-will environment, defamation provides a minimal check on the power of the employer to injure the employees. Also, there is a dignitary interest in preventing the dissemination of false information. There are also economic interests to be protected which are also protected by economic torts.

In the workplace, the tort of defamation and the attendant privileges serve different purposes. Defamation liability can serve the important purpose in a tight labor market to ensure that workers are not unfairly prevented from obtaining other opportunities. While the need for the *REL* has been debated, now that the final *REL* has been published, it remains to be seen what its impact will be on all areas of employment law.⁶ The impact of the *REL* may be relatively slight on defamation and wrongful interference torts for the various structural reasons that I will discuss below.

6. See *Labor Law Group – U.C. Hastings Symposium on the Proposed Restatement of Employment Law*, 13 EMP. RTS. & EMP. POL’Y J. 1 (2009); Symposium, *Papers from the American Bar Foundation – The Labor Law Group Conference on the Proposed Restatement of Employment Law*, 16 EMP. RTS. & EMP. POL’Y J. 359 (2012); Symposium: *Assessing the Restatement of Employment Law*, 100 CORNELL L. REV. 1245 (2015); see e.g., Matthew Finkin, *Second Thoughts on a Restatement of Employment Law*, 7 U. Pa. J. Lab. & Emp. L. 279, 298 (2005); Michael Zimmer, *The Restatement of Employment Law is the Wrong Project*, 13 EMP. RTS. & EMP. POL’Y J. 205 (2009).

II. SECTIONS 6.01-6.02: THE TORT OF DEFAMATION

Black letter defamation law is set forth in section 6.01 of the *REL*:

- (a) Subject to the privilege stated in 6.02 and other applicable privileges, an employer publishing a false and defamatory statement about an employee is subject to liability for the harm the publication causes.
- (b) An employer who publishes a statement about an employee when the employer makes the statement:
 - (1) to any third party, including prospective employers, regulatory authorities, or employment agencies
 - (2) to employees or others within the employer's organization
 - (3) to the employee, if the employer knows or should know that the employee will have to disclose the statement to prospective employers or others, the employee asks the employer to promise not to disclose the statement to any third party, and the employer refuses to promise.

REL's approach to defamation is understandably tied to the *Restatement (Second) of Torts* and the *Restatement (Third) of Torts*. The limits of a *REL* generally will not be readdressed here. Professor Matthew Finkin, in particular, gave a detailed critique of the defamation and wrongful interference torts and also workplace privacy in the earlier drafts of the *Restatement*.⁷ Certain structural factors should have been considered that make defamation claims between employers and employees more difficult. There is also a paucity of litigation over these issues recently because of the increased reticence of employers to provide any references at all besides dates of service and last position held.⁸ These are the areas where the *Restatement* does not adequately capture the reality of the workplace today.

7. See, e.g., Matthew W. Finkin, *An Excursion Through Strange Terrain: Chapters 6 (Defamation) and 7 (Privacy and Autonomy)*, 16 EMP. RTS. & EMP. POL'Y J. 465 (2012); Reuel Schiller, "It is Not Wisdom but Authority Makes a Law:" *A Historical Perspective on the Problem of Creating A Restatement of Employment Law*, 13 EMP. RTS. & EMP. POL'Y J. 39 (2009); Lea VanderVelde, *The Proposed Restatement of Employment Law at Midpoint*, 16 EMP. RTS. & EMP. POL'Y J. 359 (2012).

8. Alex Long, *The Forgotten Role of Consent in Defamation and Employment Reference Cases*, 66 FLA. L. REV. 719, 721 (2014) (citing Matthew W. Finkin & Kenneth G. Dau-Schmidt, *Solving the Employee Reference Problem: Lessons from the German Experience*, 57 AM. J. COMP. L. 387, 390 (2009), reporting results of a 2004 Society of Human Resource Management which found that only 53 percent of the respondents gave a reason for termination when asked about an employee)).

A. How Common Are Workplace Defamation Claims?

There are several reasons why these cases may not be very common. Most employees who are having difficulty finding a job are unlikely to bring a lawsuit even if they are defamed. Their first goal is finding a job. Thus, the sample size of available opinions might be smaller than in other areas of law, and may have decreased because of the increasing number of employers who no longer candidly give references. Indeed, this is one area where tort liability to third parties for negligent references becomes an issue.⁹ For that reason, the absence of ways in which third persons might be liable or responsible for the employer's actions is also notable.

An employer who is alleged to defame an employee has wide latitude to make statements of opinion consistent with the qualified privilege that the *Restatement* clearly sets out in section 6.02. This employer is only liable under this qualified privilege if the employer publishes the statement either 1) knowing it is false or with reckless disregard of its truth or falsity; or 2) knowing or having reason to know that the employer or recipient has no legitimate interest in the receiving the statement.¹⁰

Of course, there are factual disputes that make these cases difficult to win. The existence of providing what amounts to the same standard for defaming public figures (actual malice) as between completely nonpublic figures is justified on the need for the candid exchange of information.

B. Fact Versus Opinion

Unfortunately, the *Restatement* does little to clarify the difference between fact and opinion. The reporters' notes state: "A statement that implies a factual basis that is itself false may be actionable if the false basis damages the employee's reputation."¹¹ While it is impossible not to have cases on both sides of the fact and opinion lines, it is also possible that the current standard does not give adequate guidance on how to make the distinction.

Since employment law is relational, perhaps it should be presumed that most statements about employees are going to be factual in nature, or at least opinions based on facts. Thus, my

9. See, e.g., *Randi W. v. Muroc Joint Unified Sch. Dist.* 929 P.2d 582 (Cal. 1997).

10. RESTATEMENT OF EMP'T LAW § 6.02(b) (AM. LAW INST. 2015).

11. *Id.* § 6.01 cmt. e.

suggestions would be unless it clear that the employer predicated the statement on a personal *preference* apart from facts, the statement should generally be considered a statement of fact. This seems at the heart of the subjective/objective distinction in many of the cases.

There are many cases where the line is difficult to draw, as in the illustrative Second Circuit case *Ross v. Davis*.¹² There, the singer Diana Ross employed Gail Davis as a personal assistant for just over eleven months in 1982. According to the record developed for trial, Davis voluntarily resigned in late 1982, but there was no determination in the record of why this occurred.¹³ On October 11, 1983, Ross then disseminated the following letter which Davis alleged interfered with her employment prospects:

To whom it may concern:

The following [seven] people are no longer in my employment . . . [Gail Davis] . . . If I let an employee go, it's because either their work or their personal habits are not acceptable to me. I do not recommend these people. In fact, if you hear from these people, and they use my name as a reference, I wish to be contacted."¹⁴

Davis sued for libel alleging that the letter, read as a whole, falsely asserted that Ross fired her and she was fired for unacceptable work or personal habits. Davis claimed that Ross's letter was written with actual malice, that is with reckless disregard of the truth or falsity of the statement, and sought \$1 million in compensatory damages.¹⁵

The District Court granted summary judgment for Ross because the letter "expresses only Ross's personal dissatisfaction with [Davis], rather than a general lack of capacity or unfitness."¹⁶ The Second Circuit reversed and remanded the case back to trial, finding that the trial court should not have granted summary judgment because Ross's letter was susceptible to a defamatory meaning.¹⁷ Such cases call out for a different way of drawing the line between fact and opinion in employee defamation cases.¹⁸

12. 754 F.2d 80 (2d Cir. 1985).

13. *Id.* at 81.

14. *Id.* at 81-82.

15. *Id.* at 82. She also sought \$1 million in punitive damages.

16. *Id.* at 83.

17. *Id.* at 84-86.

18. 29 U.S.C. §157 (2112).

C. *Effect on Unionized Workplaces*

In today's workplace, the ubiquity of the internet provides ample opportunity for employers and employees to make potentially actionable statements. Most of these issues have been adjudicated in the National Labor Relations Board. This is because section 7 of the National Labor Relations Act provides protection for concerted activity among employees for statements that are critical of the employer.

An employer might find this speech harmful to its business and decide that she should sue the employee for libel or slander. The *Restatement* does not address this scenario. The definition of labor dispute in federal law is very broad. Labor dispute, as defined by the Supreme Court, applies to more than just strikes and picketing.

In general, there is little attention to the unionized sector in the *Restatement*. This is understandable as reflecting the share of the economy that unions represent (6.7 percent in 2015),¹⁹ but the obstacles facing unionized workers are even greater. Imagine that a unionized worker loses his job because the number of absences exceeds the number allowed under the contract. When a new employer calls to ask for a reference, the employer says that his attendance had always been poor." If reference to the contract is necessary to determine the tort, the tort claim against the employer for defamation may also be preempted.²⁰

This chapter of the *Restatement* would have been helped by a section discussing the claims of employees covered by collective bargaining agreements. As is true often in the silo approach to teaching labor law and employment law, there is not always sufficient attention to the interaction between federal statutory law and state common law regimes.

D. *"The Forgotten Role of Consent"*

Since it relies heavily on the *Restatement of Torts* in these chapters, the *REL* runs the risk of compounding certain questioned choices made by the *Restatement of Torts*. In his article, *The Forgotten Role of Consent in Defamation and Employment Reference Cases*, Alex Long discusses the influential role that section 583 of the

19. Bureau of Labor Statistics, U.S. Dep't of Labor, News Release, Union Members 2015 (Jan. 28, 2016), <https://www.bls.gov/news.release/archives/union2_01282016.pdf>.

20. See *IBEW v. Hechler*, 481 U.S. 851, 862 (1987).

Restatement (Second) of Torts has played in the development of the defense of consent in defamation cases.²¹ In short, the defense of consent by defendants is used more successfully in the employment defamation cases than in other intentional tort cases because of the *Restatement*.

As Professor Long argues, waiver – affected by the power differentials that I have discussed herein – has taken hold in the *Restatement of Torts* and “fundamentally misstated the law in a manner that has negative consequences for employees who have been the victim of defamatory references.”²² Long points to comment “d” of section 583 of the *Restatement of Torts*, which states that an absolute privilege of consent applies when a plaintiff “agrees to submit his conduct to investigation knowing that its results will be published,” provided that investigators conduct a “fair and honest” investigation and publish their “honest findings.”²³ Long then discusses the infirm doctrinal footings of this doctrine and how they became entrenched in the *Restatement of Torts*.²⁴

Of course, anytime an employee provides the name of a former employer as a reference, he or she runs the risk of being subject to a defense of having consented to the defamatory statements by the former employer. True, there is still a requirement that the statements be “fair and honest” to assert the defense of consent, but the absolute nature of the defense all but negates the otherwise qualified privilege that is supposed to apply in defamation cases involving employees. The *REL* compounds this error by neglecting to specifically address the issue of consent or waiver in employment.

E. When the Employer is the Plaintiff

Because the scope of Chapter 6 deals explicitly with claims by the employee against the employer, some interesting trends were not addressed. One is the growing trend of strategic lawsuits against public participation (SLAPP) and the rise of anti-SLAPP statutes and litigation.²⁵ Here is where the determination that the matter involves a

21. Long, *supra* note 8.

22. *Id.* at 719.

23. *Id.* at 759.

24. *Id.* at 753-71.

25. On Anti-SLAPP statutes, see Andrew Roth, *Upping the Ante: Rethinking Anti-SLAPP Laws in the Age of the Internet*, 2016 BYU L. REV. 741, David C. Thornton, *Evaluating Anti-SLAPP Protection in the Federal Arena: An Incomplete Paradigm of Conflict*, 27 GEO. MASON U. CIV. RTS. L.J. 119 (2016).

labor dispute can be important. By limiting discussion to the use of litigation by employees, however, this exercise of employer power in response to employee and former employee speech goes unaddressed. This will mean that the courts will lack guidance on how these claims should be evaluated.

Similarly, there have been many questions about what happens when an employee is the one badmouthing the employer, particularly on social media. An employer may feel its brand is tarnished by the former employee's actions and wish to bring a lawsuit against the employee. If the activities are found to be derived from a "labor dispute," then the higher standard of actual malice would apply. Under this standard, the employer must show that the employee made statements with reckless disregard of the truth or falsity of the statement.²⁶

III. THE WRONGFUL INTERFERENCE TORT (SECTIONS 6.03 & 6.04)

Sections 6.03 and 6.04 deal with the wrongful interference tort. The placement of this discussion in Chapter 6, rather than in the chapter concerning wrongful termination (Chapter 4) is confusing. As with the defamation tort, there is a question about how often this occurs. Either way, it usually comes up after a termination.

A. *The Tort of Wrongful Interference: The Sleeper Claim?*

Employees can bring the tort of wrongful interference when they believe an employer has interfered with their employment by intentionally causing another employer 1) to fire the employee or 2) not to hire the employee.²⁷ Although the reporters' notes make clear that damaging statements are not the only potential way to be liable for these torts, these are the most likely to lead to assertion of the wrongful interference tort. Professor Long has argued that these claims are often overlooked by plaintiffs in favor of defamation cases, which as discussed above are difficult to win.²⁸ Indeed, as comment "e" suggests, the employee's claim can be based on statements that

26. See *Linn v. Plant Guard Workers* 383 U.S. 53 (1966).

27. RESTATEMENT OF EMP'T LAW § 6.03 (AM. LAW INST. 2015). As comment a to section 6.03 describes, the tort in some jurisdictions includes "intentional interference with the performance of a contract" and sometimes includes "intentional interference with prospective business relationship or advantage."

28. Alex B. Long, *Tortious Interference with Business Relations: The "Other White Meat" of Employment Law*, 84 MINN. L. REV. 863 (2000).

are technically true and yet published with no “legitimate business justification for doing so.”²⁹

REL section 6.04 assures that an employer cannot wrongfully interfere with its own employment relationship. This kind of case is generally brought against managers who are not proper parties to a tort claim for wrongful termination because they are not an employer.³⁰ True, the manager’s privilege blocks most of these claims. Depending on the state, however, the privilege can be lost through showing that the manager used improper means and improper ends.³¹ As with the defamation cases, various obstacles exist to successfully bringing these cases for most workers. There is, however, the possibility of a large jury verdict in cases of highly compensated employees.³²

This is just another way of making sure that the dominant rule of employment at will is preserved. Once again, there is no dispute that only the state of Montana has modified the employment-at-will rule, but the focus of this section is really on those high-level employees like executives that might have a claim for wrongful interference. Again, many of these claims may be subsumed in whatever breach of contract claims there are, but the *REL* leaves none of that to chance.

B. The At-Will Backdrop

Like many of the torts in the *Restatement*, the effectiveness of this tort must be judged against the backdrop of employment at will. Scholars have discussed the tort of wrongful interference and how it works (or not) in an environment of employment at will.³³ Once again, the role that power plays in the workplace cannot be adequately taken into account by the *Restatement*. But there are other roads that could be taken that might serve to address power differentials and extant doctrinal obstacles.

29. RESTATEMENT OF EMP’T LAW § 6.03 cmt. “e”.

30. *See id.* § 6.04 reporters’ notes.

31. *Id.* § 6.04 cmt. c, reporters’ notes.

32. Mark N. Mallery, Legal Issues Arising in Connection with Workplace Investigations, Paper for ABA Section of Labor and Employment Law 2nd Annual CLE Conference (Sept. 2008), <https://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2008/ac2008/042.authcheckdam.pdf>.

33. Alex Long, *The Disconnect Between At-Will Employment and Tortious Interference with Business Relations: Rethinking Tortious Interference Claims in the Employment Context*, 33 ARIZ. ST. L. J. 491 (2001); Joseph E. Slater, *The “American Rule” that Swallows the Exceptions*, 11 EMP. RTS. & EMP. POL’Y J. 53 (2007).

IV. OTHER ROADS NOT TAKEN

As with the rest of the *Restatement of Employment Law*, there are procedural issues that might have been addressed but were not. One of the anomalous procedural features is the separation in many states between judges deciding whether there a statement of fact or opinion on summary judgment and leaving to the jury whether the statements, read as a whole, support a defamatory meaning. This bifurcation can lead to many defamation claims being dismissed on summary judgment because the court is making an evaluation of the statement that might be better left to the jury.³⁴

Another question involves why certain other torts aiming to protect reputation were not discussed. One is the false light tort, where the plaintiff must show: 1) the plaintiff is placed in false light that would be highly offensive to a reasonable person; 2) the defendant had knowledge or reckless disregard of the false light in which plaintiff would be portrayed; and 3) the publication is distributed to large numbers of people.³⁵ Obviously, the elements themselves present obstacles to many types of false light claims by employees. Some cases, however, such as the *Ross v. Davis* case mentioned above, might well meet the threshold. Further, in the internet era, there are many instances where the dissemination might be distributed to large numbers of persons much more easily.

Finally, the tort of public disclosure of private facts may provide some relief. According to the *Restatement of Torts*, section 652D, the tort is defined as follows:

“One who gives publicity to a matter concerning the private life of another is subject to liability to the other in invasion of his privacy, if the matter publicized is of a kind that a) would be highly offensive to a reasonable person; and b) is not of a legitimate concern to the public.”³⁶

While this is less likely to be asserted in the context of a negative employment reference, it could apply in the context of negative reputational information. Like the tort of false light, the need for a wide dissemination of the embarrassing information also prevents greater use by plaintiffs.

As shown above, the free flow of information is a primary

34. This occurred in *Davis v. Ross*, 754 F.2d 80 (2d Cir. 1985) (discussed *supra* Part II).

35. RESTATEMENT (SECOND) OF TORTS § 652E (AM. LAW INST. 1977).

36. *Id.* § 652D. This tort is also referenced in the *Restatement of Employment Law* at section 7.05.

concern of the *Restatement*. The interests of employers are well protected by the qualified privilege. The question is whether recognizing the doctrine of compelled self-publication would also aid the free flow of information. The answer is most certainly yes, and yet the *REL* declines to do so.

Another vision of the torts of defamation and wrongful interference would be a way to enhance employment prospects for terminated employees. Defamation torts in the workplace function differently than they do in other contexts. Without special attention to the context of power relations in the workplace, the *REL* is not appreciably different than the *Restatement of Torts* on defamation and misrepresentation.

V. CONCLUSION

This article has aimed to discuss some of the issues that might come up in the interpretation of the defamation and the wrongful interference torts. While there are numerous ways in which the *Restatement* might have summarized these torts differently, the biggest questions are ones that the *Restatement* did not aim to answer. First, how does employer power affect trends in employment law that the *Restatement* aims to catalog? Second, what other trends and issues that were not discussed in the final *Restatement* could serve to rebalance existing power imbalances in the workplace? The answers to those questions await further discussion by scholars and the courts.