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Defamation in Employment Investigations: Bahr v. Boise Cascade Corporation and O'Donnell v. City of Buffalo

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DEFAMATION IN EMPLOYMENT INVESTIGATIONS: BAHR V. BOISE CASCADE CORPORATION AND O'DONNELL V. CITY OF BUFFALO

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This paper looks at the kinds of statements that can be considered defamatory, the chilling effect that the tort of defamation has on the communication of important information, and also examines the similarities and distinctions between public and private defamation, focusing on the speech interests at hand. It then discusses the privilege defenses that courts have developed to alleviate the chilling effect of the tort, both in the public and private contexts. Finally, this paper considers how defamation and the privileges operate in the employment context.

Two recent Minnesota cases illuminate these points. *Bahr v. Boise Cascade Corporation*,[1] the central case study for this article, is a Minnesota Supreme Court case that explores a common challenge for employers: how to investigate allegations of harassment or other misconduct made by co-employees without incurring liability for defamation. The opinion in *Bahr* shows that adherence to an investigation plan that is designed to uncover information with minimal compromise to the privacy of employees will, in most cases, effectively insulate the company from liability. *Bahr*, however, also shows what appears to be a growing trend: naming individual co-employees or managers as defendants. In addition to presenting a potential disincentive to those who would otherwise report misconduct, this may provide multiple bites at the apple for plaintiffs looking for a deep pocket. In the other case, decided by the Minnesota Court of Appeals, *O'Donnell v. City of Buffalo,*[2] the court examined these ideas in the public official context, along with both constitutional and common-law privilege.

I. Basics of Defamation

Defamation is a common law tort that involves an act of harming the reputation of another by making a false statement to a third person.[3] The purpose of the tort action is to compensate the plaintiff for real harm

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[1] *Bahr v. Boise Cascade Corp., 766 N.W.2d 910 (Minn. 2009).review denied* (Minn. Apr. 15, 2008).

[2] O'Donnell v. City of Buffalo, No. A07-203, No. A07-606, Slip Op. (Minn. Ct. App. Feb. 5, 2008).

[3] *See* Black's Law Dictionary (8th ed. 2004) (defamation).

done to his or her reputation and, often, economic harm that results from third parties changing their relationships with the plaintiff based upon a false and negative statement. "In order for a statement to be considered defamatory, it must be communicated to someone other than the plaintiff, it must be false, and it must tend to harm the plaintiff's reputation and to lower her estimation in the community."[4]

In general, statements of pure opinion cannot give rise to a cause of action for defamation.[5] Speech must be sufficiently factual to be evaluated for truth or falsity in order to give rise to liability.[6] Additionally, only false statements are punished by the doctrine; truth, no matter how harmful, is a complete defense to defamation.[7] Conversely, a false statement cannot be excused on the basis of innocent intent or mistake.[8] Therefore, fear of liability for damages from defamation may have a chilling effect on communication of important information.

The doctrine of defamation has been shaped by a tension between the understanding, on the one hand, that language has real consequences and that false statements should not be freely permitted and, on the other hand, that free speech is accorded a high value in our legal system. Speech is the way that ideas are communicated and information is shared.[9] Since defamation necessarily implicates expressive conduct, certain doctrines have arisen to limit liability. Some of these limitations are encompassed in the elements of defamation.

A. Public and Private Defamation

There is an important difference between defamation in the public context and defamation in the private context. First Amendment concerns are most readily apparent when speech impacts matters of public concern or public figures. In *New York Times Co. v. Sullivan*,[10] the United States Supreme Court rejected the idea that, since defamation is a private tort action, it does not implicate state power. The Court noted that the label of "libel" did not necessarily take speech out of First Amendment protection.[11] Then, the court explicitly considered the broad tension between an individual's right not to be defamed and the importance

[4] Lee v. Metro. Airport Comm'n, 428 N.W.2d 815, 819 (Minn. Ct. App. 1988).

[5] *See*,53 C.J.S., Libel and Slander; *Injurious Falsehood* § 78 (2009).

[6] Milkovich v. Lorain Journal Corp., 497 U.S. 1, 20 (1990) (statement of opinion only actionable if it "reasonably implies false and defamatory facts").

[7] Frank J. Cavico, *Defamation in the Private Sector: The Libelous and Slanderous Employer*, 24 U. Dayton L. Rev. 405, 456 (1999) ("[I]f a defendant employer can demonstrate that the defamatory assertions are in fact true, the employer prevails, regardless of any adverse consequences to the employee's reputation or ability to obtain other employment.").

[8] *See* Black's Law Dictionary (8th ed. 2004) (defamation).

[9] *See generally* Cavico, *supra* note 7, at 459-61 (private); *see* New York Times Co. v. Sullivan, 376 U.S. 254, 267-72 (1964) (public).

[10] 376 U.S. 254 (1964).

[11] *Id.* at 269.

of speech on public issues: "Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that *it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials*."[12] Ultimately, after a review of First Amendment doctrine, the court determined that "the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct."[13]

By definition, private defamation, on the contrary, deals with the affairs of private individuals. As such, the balance of interests in permitting actions for defamation does not implicate the First Amendment. Nonetheless, even if private speech is not protected by the constitution, chilling private speech has negative consequences. For instance, the flow of information about the conduct of individuals is critical for conducting business.[14] This is clear in the types of behavior that are central to this article: sharing information regarding decisions to hire and fire. Both employers and employees have interests that are protected by free exchange of information.[15]

B. Defenses to Defamation

Since the falsity requirement is determined with reference to the statement rather than the speaker's mindset, it does not in itself insulate unintentionally false statements in the common law test. "Defamation at common law was generally regarded as a strict liability type of tort, principally because the prima facie case thereto did not include a requirement of fault."[16] Given the above-mentioned concerns about stifling speech on matters of public importance and public figures, both First Amendment law and tort law have developed concepts to encourage speech on matters of public importance. These concepts are embodied in two privilege defenses to the tort of defamation. The first defense, constitutional privilege, applies to defamation in the public context. The second defense, often referred to as the qualified privilege, applies to private defamation. In fact, both defenses are qualified privileges, and may be defeated by a showing that the defendant abused the privilege. Thus, each defense has a corresponding test for malice, in which the speaker's mindset is relevant to whether the speech gives rise to liability.

1. Public Defamation: Constitutional Actual Malice

In *New York Times Co. v. Sullivan*, petitioners challenged a civil judgment against them for defamation.[17] Petitioners had published an editorial that criticized the acts of certain public officials in Alabama, which,

[12] *Id.* at 270 (emphasis added).

[13] *Id.* at 265.

[14] *See generally* Cavico, *supra* note 7, at 465-74, for a discussion of various business interests related to sharing information regarding employees.

[15] *See id.*

[16] *See* Cavico, *supra* note 7, at 413.

[17] *See Sullivan*, 376 U.S. at 256.

Petitioners stated, constituted "an unprecedented wave of terror" against African Americans and civil rights workers.[18] The challenged Alabama law in that case, which governed liability for defamation of a public officer concerning his official acts, was based on the common-law strict liability standard for defamation.[19] Although Alabama law had several statutory prerequisites to a defamation action, once those were satisfied, "the defendant ha[d] no defense as to stated facts unless he c[ould] persuade the jury that they were true in all their particulars."[20] The Supreme Court held that Alabama's statutory regime did not adequately protect the freedom of speech and, effectively, permitted state courts to shut down relevant political discourse.[21] As a matter of first impression, the Court held that defendants have a qualified privilege to speech regarding public figures, which is based in constitutional protections for speech.[22]

Thus, in order for defamation of a public figure regarding his or her official conduct to be actionable, the plaintiff must show the privilege was abused. Such a showing requires that the plaintiff establish that the defendant acted with "constitutional actual malice," in a test that takes its name from the case where it was first famously applied: the *New York Times* standard for constitutional actual malice restricts an award of damages for defamation of public figures to instances where a speaker makes a statement with "with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[23] Under this test, unlike the common law, negligence as to the truth or falsity of such a statement is insufficient to make the speaker liable for damages[24] This test, however, arising from the First Amendment, only protects speech regarding public figures and matters of public importance.

2. Qualified Privilege & Common Law Malice

Even if a particular incident or person is not in itself a matter of public importance, however, free flow of communications still has a beneficial value in many contexts. Thus, another defense is available even in the private context. When the social value of communication is high, the law permits the application of qualified privilege: "[A] statement is qualifiedly privileged if it is made upon proper occasion, from a proper motive, and based upon reasonable or probable cause."[25] "The privilege results from a belief that statements

[18] *Id. at* 256-57.

[19] *See id.* at 261.

[20] *Id.* at 267.

[21] *See id.* at 265. *See also id.* at 279 ("A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions-and to do so on pain of libel judgments virtually unlimited in amount-leads to a comparable 'self-censorship.' Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.").

[22] *See* Sullivan, 376 U.S. at 279-80.

[23] *Id.* at 286.

[24] *See id.* at 288.

[25] Bolton v. Dep't of Human Servs., 527 N.W.2d 149, 155 (Minn. Ct. App. 1995), *rev'd on other grounds*, 540 N.W.2d 523 (Minn. 1995).

made in particular contexts or on certain occasions should be encouraged despite the risk that the statements might be defamatory."[26]

The privilege operates in much the same way as the constitutional privilege. If a defendant shows a proper occasion, motive and reasonable cause for the statement, the qualified privilege applies and insulates the speaker from liability for defamation unless the privilege is lost through abuse.[27] The plaintiff has the burden to prove abuse of the privilege, which occurs where the speaker has actual malice. In Minnesota, actual malice that defeats the qualified privilege is common law malice, which goes to the *intention* of the utteror, and occurs when a statement is motivated by ill will, spite, or for the purpose of injuring the plaintiff.[28] Actual malice "may be shown by direct proof of personal spite or by 'intrinsic evidence,' such as 'the exaggerated language of the libel, the character of the language used, the mode and extent of publication, and other matters in excess of the privilege."[29]

II. Employment Defamation and the Qualified Privilege

Employment defamation may arise both during employment, such as in an investigation or disciplinary action related to an employee's behavior, or after employment, when an employer is asked to comment on an employee's "work record or qualification."[30] Defamation claims are often brought in conjunction with wrongful discharge claims or after an employer has given a poor recommendation to a potential future employer.[31] A negative reference or employment action may cost an employee his good reputation or livelihood. Perhaps due to the significant impact of such statement, defamation that affects a person in his or her employment is defamation *per se*, meaning that the plaintiff need not prove special damages in order to prevail.[32]

While potentially damaging, free flow of such reputational information is highly sought by future employers.[33] In response, courts and legislatures have broadly recognized that the qualified privilege

[26] *Id.* at 155.

[27] *See id.* at 156.

[28] *See id*.

[29] *Id.* (quoting Bauer v. State, 511 N.W.2d 447, 451 (Minn. 1994)).

[30] Donald P. Duffala, Annotation, *Defamation: Loss of Employer's Qualified Privilege to Publish Employee's Work Record or Qualification,* 24 A.L.R.4th 144, 147 (1983) (defining "work record" as "any fact bearing on a person's former or present employment" and "qualification" as "any fact regarding a person's capability of functioning as an employee in his current or prospective employment").

[31] *See* Cavico, *supra* note 7, at 408.

[32] *See* Lee v. Metro. Airport Comm'n, 428 N.W.2d 815, 820 (Minn. Ct. App. 1988).

[33] *See* Cavico, *supra* note 7, at 467 ("In particular, employment references can promote the interests of the prospective employer, who wants to make a knowledgeable and well-reasoned hiring decision, as well as the interests of third parties, such as future fellow employees and customers, who want to work with and be served by careful, capable, and conscientious employees.").

applies to comments regarding work record and qualifications.[34] For instance, in recognition of the importance of truthful employment references,[35] Minn. Stat. § 181.967 provides some protection for employers who provide information to potential future employers about "acts of violence, theft, or illegal conduct."[36] Although the statute itself states that it will not protect false and defamatory information, it essentially codifies the qualified privileges: the employer will be liable only if it "knew or should have known the information was false" and "acted with malicious intent to injure the current or former employee."[37] Thus, the Minnesota statute effectively lowers the employer's burden to show that the statement was privileged.

Moreover, such statutory privileges have been extended to communications between an employer and a current or former employee. In 1986, the Minnesota Supreme Court held, "It is in the public interest that information regarding an employee's discharge be readily available to the discharged employee and to prospective employers, and we are concerned that, unless a significant privilege is recognized by the courts, employers will decline to inform employees of reasons for discharges."[38] This interest was codified in Minn. Stat. § 181.933, which requires employers to communicate a truthful reason for discharge to former employees upon a written request.[39] That statute gives employers strong protection against a defamation action based in such statements to the former employee.[40]

Further, the contours of the employer's qualified privilege in the context of investigations leading to disciplinary action are relatively well-defined. After surveying a number of employment defamation cases, one article found that the operation of qualified privilege is relatively uniform and that "employers will be afforded a qualified privilege to publish false and harmful accusations regarding employees if the employer (1) actually or reasonably believed, after a careful investigation, in the truth and accuracy of the matter, (2) the communications were directed specifically to serving a business interest of the employer-publisher, recipient, third party, or shared interest, or the public interest, and (3) the material was published with a proper motive, with a proper limited scope, and to appropriate parties only."[41]

There is robust caselaw in Minnesota examining the qualified privilege in cases where the employer disciplined an employee for misconduct. For instance, in *Wirig v. Kinney Shoes*, a terminated employee

[34] *See* Duffala, *supra* note 30, at 173("Generally, [a qualified privilege] attaches to publications made by an employer concerning a current or former employee.").

[35] *See, e.g.* Hornback v. Archdiocese of Milwaukee, 752 N.W.2d 862 (Wis. 2008); *see, e.g.* Sigler v. Kobinsky, 762 N.W.2d 706 (Wis. Ct. App. 2008) (employers may face liability where they do not share information regarding former employees who may pose a danger to coworkers or third parties in the future).

[36] *See* Minn. Stat. Ann. § 181.967, subd. 2-3 (2009).

[37] *See id.* at subd. 2.

[38] Lewis v. Equitable Life Ins. Soc'y, 389 N.W.2d 876, 889 (Minn. 1986).

[39] *See* Minn. Stat. Ann. § 181.933, subd. 1 (2009).

[40] *See id.* at subd. 2 ("No communication of the statement furnished by the employer to the employee under subdivision 1 may be made the subject of any action for libel, slander, or defamation by the employee against the employer.").

[41] Cavico, *supra* note 7, at 473.

brought a suit claiming, among other things, that her employer had defamed her when it terminated her during a staff meeting.[42] Wirig and two other employees had been accused by another employee of stealing shoes from her employer.[43] Without investigating the reports or engaging in any other consideration beyond a meeting between the store managers, the three managers decided to fire the accused employees during an all-staff meeting.[44] The Minnesota Court of Appeals both rejected the purpose of the communication—to use Wirig as an example to other employees—and found that the employer had not acted with probable cause since the employer did not reasonably investigate the accusations.[45]

Interestingly, the first prong of the qualified privilege test presumes either that an investigation has been completed[46] *or* that decision makers have decided to forgo an investigation.[47] At that point, it is easier to determine whether the employer has acted with due care than in an ongoing investigation. However, defamation plaintiffs sometimes allege harm not from the ultimate outcome of an investigation or an actual adverse employment action, but from statements made during the course of an investigation. For instance, in *McBride v. Sears & Roebuck*, the Minnesota Supreme Court considered allegedly defamatory statements made during an investigation into an employee who had been accused of shoplifting.[48] The allegedly defamatory statement in *McBride* was made when agents of the employer interrogated McBride, stating, "We know you have been taking things from Sears and not paying for it."[49] Thus, McBride alleged that she was defamed by the investigation itself.

Nonetheless, the court found that the qualified privilege applied: "Communications between an employer's agents made in the course of investigating or punishing employee misconduct are made upon a proper occasion and for a proper purpose, as the employer has an important interest in protecting itself and the public against dishonest or otherwise harmful employees."[50] *McBride* gave rise to a *qualified* privilege, which may be lost if it is abused.[51] The *McBride* court also acknowledged that this privilege is limited, but found that it applied in that case because the employer had shown that it had probable cause to believe that McBride had stolen the merchandise and McBride "did not attempt to establish actual ill will."[52] Other cases are not as clear cut as *McBride*: courts need to take a more nuanced approach to statements made (1)

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[42] *See* Wirig v. Kinney Shoe Corp., 448 N.W.2d 526, 532 (Minn. Ct. App. 1989), *rev'd on other grounds* 461 N.W.2d 374 (Minn. 1990).

[43] *See id.* at 529.

[44] *See id*.

[45] *See id*. at 533.

[46] *See* Cavico, *supra* note 7, at 473.

[47] *See, e.g.*, *Wirig*, 448 N.W.2d at 532.

[48] *See* McBride v. Sears, Roebuck & Co., 235 N.W.2d 371 (Minn. 1975).

[49] *Id.* at 373.

[50] *Id.* at 374.

[51] *See generally supra* section I.B.2.

[52] *McBride*, 235 N.W.2d at 97-98.

prior to an investigation, such as an initial complaint, and (2) during the conduct of an investigation, before the result of the investigation is clear.

III. Case Studies – Qualified Privileges to Employment Defamation

Two recent employment defamation cases in Minnesota courts, *O'Donnell v. City of Buffalo* and *Bahr v. Boise Cascade Corporation*, clarify the application of the qualified privilege to employment defamation by (1) disaggregating potential defamation claims against co-workers from claims against the company, and (2) analyzing the propriety of statements made before and during an employment investigation, without the benefit of hindsight from a completed investigation. This paper reviews the cases chronologically, briefly outlining these developments as they appear in *O'Donnell* and treating *Bahr* in more detail. *O'Donnell* illustrates the operation of both the constitutional privilege and the qualified privilege in the context of public employment. The Minnesota Supreme Court's analysis in *Bahr* provides a sophisticated application of the qualified privilege to an employment defamation claim that arises out of a modern harassment complaint and the subsequent investigation.

A. O'Donnell v. City of Buffalo

In *O'Donnell v. City of Buffalo*, a former volunteer fire captain brought defamation claims against the City, the fire chief, and six firefighters based on allegedly defamatory statements made by the six firefighters and republished by the fire chief and the City.[53] The court found that O'Donnell was a public figure, and that the allegations of the six firefighters and subsequent investigation of those allegations were done in the course of his employment.[54] Thus, the court examined both the constitutional and common law privileges. The court distinguished the employer (the City and the fire chief) from O'Donnell's co-employees (the six firefighters) and analyzed each separately.

First, the court analyzed whether the defendants had abused the constitutional privilege, making the allegedly defamatory statements "either knowing that they were false or with reckless disregard for whether they were true."[55] The court found that O'Donnell had presented sufficient evidence in the form of affidavits and deposition testimony, not detailed in the appellate court's opinion, to show an issue of material fact as to whether the six firefighters "had no factual basis" for their statements and, thus, knowingly or recklessly made the false statements.[56] But the court held that since the City and fire chief "republished the letter *in order to investigate the allegations*," there was no evidence that they had knowledge of the truth or falsity of the statements.[57] The court did not conduct a searching examination of the state of mind of the City or

[53] O'Donnell v. City of Buffalo, No. A07-203, A07-606, slip op. at 1-2 (Minn. Ct. App. Feb. 5, 2008).

[54] *See id.* at 10.

[55] *Id.* at 3 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964)).

[56] *See O'Donnell*, No. A07-203, A07-606, slip op., at 11.

[57] *See id.* (emphasis added).

the fire chief; rather it inferred that they could not have had knowledge of the truth of the statements prior to an investigation.[58]

The court then analyzed the common law privilege. Although it had already held that the City and the fire chief were not liable for defamation, due to the constitutional privilege, it also considered whether they had a qualified privilege to republish the firefighters' allegations.[59] Restating the general rule of privilege as applied to the employment context, the court stated, "Generally, statements made during the course of an employer's investigation into misconduct . . . are privileged."[60] In its discussion of malice, the court suggested that constitutional actual malice would not satisfy the common law malice test under Minnesota law.[61] The court then found that O'Donnell had not presented more than conjecture or speculation as to the mindset of the fire chief (and, by imputation, the City).[62] Thus, O'Donnell's claims against his employer were barred by both constitutional and common law privilege.

Contrary to the rule stated above with regarding to employment defamation, in examining O'Donnell's claims against the six firefighters, the court stated, "Clearly, the six firefighters did not publish the letter [containing the allegedly defamatory statements] under circumstances that would give rise to the defenses of either absolute or qualified privilege."[63] Thus, since the court had already found that there was evidence of constitutional actual malice, it reversed the district court's entry of summary judgment for the firefighters.[64]

B. Bahr v. Boise Cascade Corporation

In contrast with the unusual factual scenario in *O'Donnell*, the problem considered by the court in *Bahr v. Boise Cascade Corporation*[65] arose from a common factual situation. In that case, the question was whether Bahr's co-employee abused the qualified privilege by making statements that *caused* the employer to conduct an investigation into alleged harassment, and whether Bahr's employer abused the privilege when it engaged in publication of potentially defamatory statements to non-management or supervisory employees *during* an investigation into his behavior.[66] These questions are central to the operation of qualified privilege in the context of a modern employment investigation.

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[58] *See id.* at 5-6.

[59] *See O'Donnell*, No. A07-203, A07-606, slip op.. at 11-12.

[60] *Id.* at 12.

[61] *See id*.

[62] *See id.* at 13.

[63] *Id*. at 14.

[64] *See id*.

[65] *Bahr v. Boise Cascade Corp*., 766 N.W.2d 910 (Minn. 2009).

[66] *See id.* at 920, 923.

Bahr contends with an important and increasingly common situation that is influenced by incentives that were not well developed at the time of *McBride* and *Kinney*. Title VII and the Minnesota Human Rights Act[67] (MHRA) place incentives on employees to report harassment or other instances of discrimination, and on employers to investigate and remedy potentially unlawful conduct. In most instances, employees who are subject to harassment by coworkers must report it to the employer and give the employer the opportunity to remedy the situation before the employer will be liable.[68] Moreover, employer liability for harassment also depends on whether employers are engaging in sufficient steps of monitoring and correcting behavior of employees, the incentives for thorough investigations increase.[69] When examining whether an employer has effectively responded to allegations of harassment and discrimination, courts often consider whether the employer disciplined (up to termination) employees who engaged in such conduct.[70] Correspondingly, such disciplinary investigations and actions have led to allegations of employment defamation. Employees who are suspended or consequently discharged may be motivated by lost wages in addition to reputational harms or emotional distress to bring suit against their employers, and the stakes are high for both parties.

1. Factual Background

The events that underlie *Bahr v. Boise Cascade Corporation* take place at Boise Cascade Corporation's ("Boise") paper mill located in International Falls, Minnesota[71] In a community of 6,703 people, the paper mill has more than 800 employees and is the largest employer in the community.[72] LeRoy Bahr was employed as a stores keeper at the plant, along with individual defendant Stacey Rasmussen, and Rasmussen's uncle, Eural Dobbs, who worked as a supervisor.[73]

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[67] Minn. Stat. Ann. §§ 363A.01-.41 (2004).

[68] *See* Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998). The *Faragher/Ellerth* affirmative defense provides that an employer will not be liable for coworker harassment if it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided. The affirmative defense outlined in *Faragher* and *Ellerth* is also applicable to claims under the MHRA. *See* Frieler v. Carlson Marketing Group, Inc., 751 N.W.2d 558 (Minn. 2008).

[69] *See id*.

[70] *See, e.g.*, Monson v. N. Habilitative Servs., No. A05-1102, 2006 Minn. App. LEXIS 298, at *23-24 (Minn. Ct. App. March 28, 2006), *rev. denied* 2006 Minn. LEXIS 339 (Minn. May 24, 2006) ("Factors to consider when determining the adequacy of the employer's action include the amount of time elapsed between the notice of harassment and the remedial action, the options available to the employer, disciplinary action taken against the harasser, and whether or not the measures ended the harassment.").

[71] *Bahr*, 766 N.W.2d at 913.

[72] *See* International Falls Minnesota Community Guide, http://www.lakesnwoods.com/InternationalFalls.htm (last visited March 24, 2010).

[73] *See Bahr*, 766 N.W.2d at 913.

The evidence presented at trial revealed a history of tension between Bahr and Rasmussen.[74] That history escalated on September 27, 2001, when three stores keepers told Rasmussen that they had heard a rumor that he was involved in an extramarital affair with another employee, R.B.[75] Based on the reports of the stores keepers, Rasmussen concluded that Bahr had started the rumor; Rasmussen and Bahr were scheduled to work together that day[76] At that point, Rasmussen became agitated and said, "I have to work with that lazy, fat f***er," apparently referring to Bahr.[77]

Rasmussen then went to speak with R.B., who was already aware of the rumor and had been told that Bahr was the source.[78] R.B. then called Bahr, who denied starting the rumor.[79] During that call, another stores keeper, J.P, admitted that he had started the rumor.[80] Rasmussen was present during the calls, but testified that he did not learn at that time with whom R.B. spoke or who had actually started the rumor[81] Rasmussen testified that he learned that J.P. started the rumor "within a few weeks" thereafter.[82]

Later that same morning, Bahr, J.P., and another stores keeper confronted Rasmussen about the phone call.[83] Rasmussen testified that he felt harassed and threatened, and he told the other stores keepers that he was going to report them to Human Resources[84] Both J.P. and Bahr testified that they tried to speak with Rasmussen several times following this confrontation to "patch things up" and to ask Rasmussen whether he had reported the incident.[85]

The evidence suggests that Rasmussen did not make a report prior to October 18, 2007[86] On that day, Bahr attempted to talk to Rasmussen about whether Rasmussen had scheduled a meeting with Human Resources.[87] After that conversation, Rasmussen called his uncle, Dobbs, and told Dobbs that Bahr kept

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[74] *See id.*

[75] *See id.*

[76] *See id.*

[77] *See id.*

[78] *See id.*

[79] *See id.*

[80] *See id.* at 913-14.

[81] *See id.* at 914.

[82] *See id.*

[83] *See id.*

[84] *See id.*

[85] *See id.*

[86] *See id.*

[87] *See id.*

confronting him, that Bahr "'had approached him . . . in a threatening manner,'" and that he was constantly "'intimidated and harassed.'"[88] Dobbs, a supervisor, reported Rasmussen's statements to Barb Johnson, a Human Resources coordinator.[89] At Johnson's instruction, Dobbs met with Rasmussen again.[90] Rasmussen's account to Dobbs during that second meeting was similar to the first conversation, and Dobbs testified that Rasmussen was agitated and upset during the conversation.[91] After Dobbs reported Rasmussen's account to Johnson, Johnson instructed Dobbs to escort Bahr from the premises.[92] Dobbs did so, and Bahr was placed on "investigatory suspension."[93] When Bahr asked why he was being escorted off the property and suspended, Dobbs told Bahr that he could not talk to him.[94]

That afternoon, a second Human Resources coordinator, Betty Leen, met with Rasmussen and R.B.[95] During this interview, and another interview with Johnson, Rasmussen made the following allegedly defamatory statements:

- Bahr started the rumor about an affair between Rasmussen and R.B.;[96]
- Bahr "yells and shouts and he is almost to the point of physical violence;"[97]
- Bahr "will do as little as possible because he is mad at Boise;"[98]
- Rasmussen was "worried" that Bahr would "put something in" his lunch bucket or garage;[99]
- Bahr threatened Rasmussen "yelling" and "saying [you're] in deep shit!" and "'you're going to get your day!'"[100]

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[88] *Id.* at 914-15 (ellipsis in original).

[89] *See id.* at 915.

[90] *See id.*

[91] *See id.*

[92] *See id.*

[93] *Id.*

[94] *See id.* Boise's Human Resources Department Manager, Jack Strongman, testified that, according to Boise's policy, Bahr should have been told why he was asked to leave. *Id.* at 915 n.2.

[95] *See id.* at 915.

[96] *See id.*

[97] *Id.*

[98] *Id.*

[99] *Id.* On another occasion, Rasmussen made substantially the same allegation, "that he was 'afraid of [Bahr] planting something' in his lunch or garage 'now that [Rasmussen] has stepped up for [himself].'" *Id.* at 916.

[100] *Id.*

Johnson and Leen's re-publication of Rasmussen's allegations occurred on several occasions between October 18 and October 25, 2007.[101] During the investigation, Johnson and Leen interviewed three other stores keepers about Rasmussen's allegations of harassment and that Bahr engaged in work slow downs[102] Further, Johnson asked Bahr about Rasmussen's allegations in the presence of a union representative.[103] Bahr denied all of Rasmussen's allegations.[104] Despite Bahr's denials and mixed results of the investigation, Bahr was presented with a written "last-chance" agreement, in which he was required to acknowledge Rasmussen's allegations of harassment.[105] Bahr was also suspended without pay for three days, although that suspension was removed from his record and his pay was refunded after a union grievance.[106]

2. Court of Appeals

The court of appeals reviewed the trial court's denial of defendants' motion for judgment as a matter of law (JMOL), in which defendants argued, *inter alia*, that their statements were protected by the qualified privilege.[107] The parties did not dispute whether the qualified privilege existed; the only dispute was as to whether Rasmussen and/or Boise had abused the privilege, acting with actual malice.[108] Explaining the common-law actual malice standard, the appeals court explained that malice is a state of mind, and requires "intent to cause harm through falsehood."[109] The court then outlined the ways in which a plaintiff my show actual malice: "[M]alice can be proven by extrinsic evidence of ill feeling, or intrinsic evidence such as exaggerated language, 'the character of the language used, the mode and extent of publication, and other matters in excess of the privilege.'"[110]

In order to determine whether Boise acted with malice, the court considered whether Dobbs or two HR employees, Johnson and Leen, acted with malice that could be imputed to the corporation. The court determined that even if Dobbs had ill will toward Bahr, he "did not author the allegedly defamatory

[101] *See id.* at 915-17.

[102] *See id.* at 916. Evidence of questions about work slow downs were suggested by Johnson's notes in which one employee said that "Bahr had said 'not to work so fast,'" but another employee "said that Bahr had never said anything to her about slowing down work." *Id.*

[103] *See id.* at 915-16.

[104] *See id.* at 916,

[105] *See id*.

[106] *See id.* at 916-17.

[107] *See* Bahr v. Boise Cascade Corp., No. A07-1353, 2008 WL 2966433, at *2 (Minn. Ct. App. Aug. 5, 2008).

[108] *See id.* at *5.

[109] *Id*.

[110] *Id*.

statements," and his state of mind could not be imputed to those who did.[111] Next, the court rejected Bahr's suggestion that Johnson and Leen showed malice by asking questions during the investigation about Bahr's work habits—a line of inquiry that Bahr contended was irrelevant to Rasmussen's harassment complaint.[112] It found that insufficient to show malice, since "[a]n employer has an important interest in protecting itself against employees whose conduct harms its operations."[113] Since the employer was acting to protect its interest as a corporation, therefore, its conduct did not show intent to harm Bahr.

Next, the court considered whether Bahr had shown sufficient evidence that Rasmussen had acted with malice. Bahr contended that Rasmussen's malice toward him could be shown by Rasmussen's comment that Bahr was a "lazy, fat f--ker" and by the "fabricated and exaggerated nature" of Rasmussen's claims.[114] The court summarily held that the insult was insufficient to show malice, since a personality conflict is not always sufficient to show ill will.[115] It further concluded that Rasmussen's allegedly exaggerated statements did not support a finding of malice, since malice cannot be demonstrated by mere falsity, and Bahr presented no evidence of exaggerated language.[116] Thus, the appellate court held that neither Rasmussen nor Boise acted with malice sufficient to overcome the qualified privilege.

3. Minnesota Supreme Court

In its review of the appellate court's decision reversing the district court's denial of defendants' motion for JMOL, based on its finding that the defendants did not act with malice, the Minnesota Supreme Court focused its inquiry on four statements that Rasmussen made to Dobbs[117] and again during interviews with Boise Cascade's Human Resources Department, and the company's re-publication of those statements during interviews.[118] With respect to the company, the court's analysis considered "(1) the manner in which the Boise Human Resources Department undertook the investigation, and (2) manifestations of ill will by Eural Dobbs."[119]

The Minnesota Supreme Court affirmed the appellate court's holding that Bahr had not produced sufficient evidence of Boise's malice to overcome the company's qualified privilege.[120] In its analysis, the court first

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[111] *Id*.

[112] *See id*. at *6.

[113] *Id*.

[114] *Id*.

[115] *See id*.

[116] *See id*.

[117] *See* Bahr v. Boise Cascade Corp., 766 N.W.2d 910, 920 (Minn. 2009).

[118] *See id*.

[119] *Id.* at 923.

[120] *See id.* at 926.

examined the formal investigation into Rasmussen's complaints.[121] The court's conclusion focused heavily on Boise's adherence to its Corporate Policy regarding harassment investigations.[122] Relevant to the court's opinion was that the company policy states that any harassment will trigger a "prompt and thorough investigation."[123] Based on this policy, the court found Bahr's claims that Leen fabricated additional complaints to spur an investigation were either false or irrelevant and not supported by the record.[124] The court found that limited republication of Rasmussen's allegations was also based on the corporate policy and made only to those employees "that the company could have reasonably believed would provide some information about the truth or falsity" of his claims.[125] Further, the court relied on the fact that Boise "interviewed Bahr twice during [the] investigation to obtain his version of events," and that uncontradicted testimony showed that no final disciplinary decision was made until the investigation was complete.[126] The court concluded that the formal conduct of the investigation did not show evidence of malice.

Next, the Court noted that Dobbs' malice could be imputed to the company under the theory of vicarious liability if Dobbs' malice was "so mingled with his regular work and the scope of his employment that it must follow that the wrongful act is done in the course of his employment."[127] Ultimately, the court concluded that, since Boise's policies required an investigation of any harassment allegations "irrespective of Dobbs' feelings about Bahr," Dobbs' alleged ill will could not have motivated the company's conduct.[128] After a review of the evidence presented, the court held, "the only motivating force for Boise's statements revealed in the evidence is Boise's legitimate pursuit of the internal corporate investigation."[129]

However, the Minnesota Supreme Court determined that the appellate court erred when it concluded that Bahr had not shown legally sufficient evidence of Rasmussen's malice to sustain a verdict that Rasmussen was liable for defamation.[130] The court examined four pieces of evidence in the record and held that, in combination, that evidence was legally sufficient to support a finding that Rasmussen acted with malice.[131] Initially, the Court disagreed with the appellate court regarding the relevance of Rasmussen's comment that

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[121] *See id.* at 923.

[122] *See id.* at 924.

[123] *Id*.

[124] *See id*.

[125] *Id*.

[126] *Id*.

[127] *Id.* at 925 (quoting Freidell v. Blakely Printing Co., 163 Minn. 226, 232, 203 N.W. 974, 976 (Minn. 1925)). However, the court did not explicitly consider whether Boise was vicariously liable for Rasmussen's defamatory statements.

[128] *Bahr*, 766 N.W.2d at 925.

[129] *Id.* at 926.

[130] *See id.* at 922.

[131] *See id.* at 922.

Bahr was a "lazy, fat f---ker."[132] Although this evidence may not have been sufficient on its own to show malice, the court held that it was "direct proof of personal spite" and relevant to the question of malice.[133] The court also held that Rasmussen's reports regarding Bahr's work habits were evidence of malice, stating that statements regarding "other matters in excess of the privilege" are probative of malice.[134] Unlike Boise, the employer, Rasmussen did not have a legitimate interest in Bahr's work habits, thus his comments "could support the conclusion that Rasmussen's motivation . . . was a desire to get his co-worker in trouble . . . ."[135] Further, the court held Rasmussen's statement that Bahr "needed a wake up call" was similarly probative of his intent to cause trouble for Bahr, rather than to remedy the harassment he allegedly faced.[136]

Finally, the court examined Bahr's contention that evidence that Rasmussen knew of the falsity of his allegations at the time he made them. Contrary to the holding in *O'Donnell* and the appellate court in this case, the Minnesota Supreme Court rejected Rasmussen's argument that such evidence was irrelevant.[137] The court explicitly stated that the "higher" *New York Times* constitutional actual malice standard could also satisfy the common law malice required to defeat the qualified privilege.[138] Based on evidence presented by Bahr that Rasmussen was aware of J.P.'s admission that he had started the rumor on September 27, 2007, the Court concluded that there was a fact question as to whether Rasmussen had made some of his allegations of harassment knowing that they were false.[139] Taken together, the court held that the trial court properly denied Rasmussen's motion for JMOL based on the qualified privilege.[140]

IV. Impact of Bahr

A. Human Resources/Investigations

Large employers are likely to engage in more frequent disciplinary investigations, and have the most need for a sophisticated investigation process. *Bahr*, however, suggests that Minnesota courts are cognizant of

[132] *Id.* at 920-21.

[133] *Id.* at 921 (citing Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 258 (Minn. 1980), for the proposition that evidence of prior "hostile encounters between the plaintiff and defendant" are relevant to state of mind).

[134] *Bahr*, 766 N.W.2d at 921.

[135] *Id*.

[136] *Id*.

[137] *See id.* at 922.

[138] *Id*.

[139] *See id*.

[140] *See id.* The Court, however, remanded to the appellate court for determination of several other issues raised by Rasmussen. On remand, the appellate court rejected Rasmussen's additional contentions and affirmed the district court's holding. *See* Bahr v. Boise Cascade Corp., A07-1353, at *11 (Minn. Ct. App. Sept. 15, 2009) (Loislaw, Minn. Case Law).

the duties that employers have to investigate complaints and that, if an investigation is performed in accordance with a company's appropriate guidelines, employers will be able to avoid liability.[141] For a company creating investigation guidelines, one of the lessons of *Bahr* is that Human Resource investigations should be tightly controlled. Although by law, defamation only requires minimal publication, "the standard by which the defamatory meaning of the communication is to be determined as well as the size of the community" is relevant to both liability and damages.[142] As the Minnesota Supreme Court emphasized, the qualified privilege depends on whether publication of potentially defamatory material is limited to those with a need to know.[143] In an environment such as the Boise paper mill in International Falls, where a large proportion of the community is employed, the need for discretion is enhanced.

An interesting question that was not raised by the parties was whether escorting an employee off the grounds at the outset of an investigation might be actionable defamation. Although Minnesota courts recognize defamation by action,[144] Bahr did not allege this theory of defamation. Viewing the facts in the light most favorable to Bahr, the company did not seek information from him before escorting him from the building and, contrary to policy, Bahr was not informed of the reason for his suspension before escorting him from the building. In previous decisions, it has been established that the qualified privilege may apply to escorting an employee from the premises.[145] Such a privilege likely exists where there have been reports that an employee may pose a physical danger to coworkers, such as the reports made by Rasmussen. However, the question remains whether a company abuses the privilege where, as in *Bahr*, it escorts an employee on any such report without seeking a statement from the accused employee or even informing that employee of the substance of the accusation.[146]

B. Reporting Co-worker Misconduct

Bahr and *O'Donnell*, however, provide somewhat less comfort to employees. These two cases in isolation do not clearly establish a trend, but this line of case law will clearly incentivize plaintiffs to name co-employees in defamation suits. On the facts of the case, *Bahr*'s result, holding that Rasmussen may be found liable for defamation, appears fair. However, if this trend goes too far, it may create a troubling disincentive for employees to report harassment or other perceived problems for fear that they will be personally liable. *Bahr* provides some reassurance, suggesting that if an employee who limits his complaint

[141] *See Bahr*, 766 N.W.2d at 925.

[142] *See* Cavico, *supra* note 7, at 423.

[143] *See Bahr*, 766 N.W.2d at 923.

[144] *See* Bolton v. Dep't of Human Servs., 527 N.W.2d 149, 157 (Minn. Ct. App. 1995) (escorting employee from building conveys message that employee "was dishonest and was not to be trusted to leave the building unaccompanied").

[145] *See id*.

[146] *Cf.* Wirig v. Kinney Shoe Corp., 448 N.W.2d 526 (holding that statements made as a public firing and as a way to punish and embarrass an employee are not a proper motive to justify a claim of qualified privilege).

to harassment will likely be protected by the qualified privilege unless there is very strong evidence of malice.[147]

Whether a co-employee's privilege will extend to other complaints, however, is unclear. In *O'Donnell*, the court stated, "Clearly, the six firefighters did not publish the letter under circumstances that would give rise to the defenses of either absolute or qualified privilege."[148] It is unclear on what basis the *O'Donnell* court so concluded, and *Bahr* may cut against the appellate court's holding. Nonetheless, the current case law does not plainly establish when a co-employee (or a subordinate, in the case of *O'Donnell*) may have a qualified privilege to complain about another employee's performance.

If more plaintiffs follow the lead of *Bahr* and *O'Donnell*, courts may be faced with additional questions as to what kinds of complaints may properly fall into the qualified privilege. As this case law is established, one potentially key factor would be to focus on when the employee is privileged in the context of his or her employment.[149] Thus, if the employee complains *qua* employee—about a concern that legitimately impacts his or her conditions of employment—the privilege should apply. Had the court in *O'Donnell* applied this analysis, it may well have found that the six firefighters had a qualified privilege: while they were not subject to harassment, if their complaints had merit, O'Donnell's behavior posed a safety risk to them.

C. Vicarious Liability

Further, after *Bahr*, one open question is to what degree a single employee's actual malice can infect an employer's investigation. If more plaintiffs go the route of the *Bahr* and *O'Donnell* plaintiffs, naming a number of individuals in addition to the company as defendants, there is likely to be a robust discussion of vicarious liability in defamation cases. In *Bahr*, the court broke this discussion out from a general evaluation of whether the employer acted reasonably in responding to complaints.[150] As noted above, the *Bahr* court considered the actions of Dobbs and certain Human Resources personnel with respect to whether Boise had defamed Bahr.[151] However, the court did not consider whether Boise could be vicariously liable for Rasmussen's defamatory statements. This approach appears to import standards often used to evaluate employer liability for harassment under Title VII and related laws, where an employer is not liable for the harassment of a mere co-employee unless it has been otherwise negligent in preventing or responding to harassment.[152] Perhaps, under *Bahr*, if the employer thoroughly investigates the defamatory statement of an employee, it "cures" the defamation.

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[147] *See Bahr*, 766 N.W.2d at 910.

[148] *O'Donnell*, A07-203, A07-606, slip op. at 14. .

[149] *See supra* text accompanying notes 100-102.

[150] *See Bahr*, 766 N.W.2d at 925.

[151] *See id.* at 923.

[152] 42 U.S.C.A. § 2000e (West 2010).

This approach perhaps serves to better insulate the employer than the approach taken in *Smits v. Wal-Mart Stores*, where, based on the actions of several individual employees in contravention of company policy, Wal-Mart was held liable for defamation when the employees called 911 to report a potential shoplifter.[153] Whether *Bahr* overrules *Smits* is unclear. In that case, the employee was an assistant manager and was arguably acting within the scope of his official duties.[154] If so, *Bahr*'s analysis may have imputed his actions to the employer. However, the court in *Smits* did not explicitly analyze vicarious liability.[155] Employer liability is a fact-intensive question that will be determined on a case-by-case basis; however, *Bahr*'s rigorous application of vicarious liability will likely be beneficial for employers.

V. Conclusion

Bahr v. Boise Cascade Corporation provides useful tools for analyzing employment defamation claims that arise from modern corporate disciplinary investigations. The well-reasoned opinion also provides practical guidance for employers in designing disciplinary policies and suggests that employers would be well-served to keep in mind liability for defamation as well as liability for harassment and/or discrimination when they design investigation policies. The opinion also suggests a more nuanced approach to liability in defamation cases. Plaintiffs may have a cause of action against an individual within the company without imposing liability on the corporate defendant. On the other hand, when defending defamation claims made in the context of employment, employer defendants would be well-served to focus on whether malice can properly be imputed to the company, putting plaintiffs to their burden of proof on vicarious liability.

[153] 525 N.W.2d 554, 557 (Minn. Ct. App. 1994) (performing analysis of employee's actions and knowledge and conclusorily imputing liability on employer).

[154] *See id.* at 556.

[155] *See id*. at 557-59.