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Defamation in the Workplace: What's a Whistleblower to Do?

The defamation nightmare of false accusations of bad conduct made by co-employees or management is not only personally devastating but is also extremely difficult to prove. This article discusses defamation law and shows the reader exactly how heart-wrenching the struggle can be when an employee chooses to litigate a defamation claim.

By Nancy Richards-Stower

In the first issue of the *Employee Rights Quarterly*,¹ we learned about defamation issues surrounding reference checks. This article will deal with a different defamation nightmare, one suffered by all too many employees: false accusations of bad conduct made by co-employees, supervisors and corporate officers with ulterior motives. Each state has different defamation laws. Some are codified. Some exist under "common law." Most are reflective of the teachings of the *Restatement (Second) of Torts*. The *Restatement*, first published in 1934, is a treatise of legal theories, principles, rules, standards, and examples.

Sadly, a worker who is defamed on the job has fewer rights than the same worker who is defamed by a next-door neighbor. That is, the same horrible, false accusation spoken to neighbors over the fence, which would result in a successful defamation prosecution, can be made with impunity to co-workers at your job! Why? Because employers and co-workers can get away with more due to a *qualified privilege*.²

The Qualified Privilege

The qualified privilege arises where "society has an interest in promoting free, but not absolutely unfettered, speech."³ That is, in the workplace, society prefers to deprive workers of defamation rights and remedies in order to promote and encourage certain kinds of corporate communications. Thankfully, this unfair-to-the-worker privilege is only *conditional*, and not absolute, and may be overcome. The conditional privilege disappears when the employee proves that the defamer *abused* the privilege.⁴

Let's first briefly revisit the general tenets of defamation. The law of defamation arose hundreds of years ago as an alternative to clan duels and blood feuds, to induce the defamed person to resort to the courts for relief instead of "wreaking his own vengeance."⁵ Today, outside the workplace, you are defamed when another person negligently or intentionally communicates to a third person false information about you which would tend to harm your reputation.⁶ If the defamer

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states the falsehood only to you, it's not defamation. If he says it to someone else besides you, and it is about you, it is defamation. It never has to be said to you directly. Slander is the spoken form of defamation. Libel is the written form. As noted above, inside the workplace, the rights of defamation victims are shaved by the conditional privilege.

Sadly, a worker who is defamed on the job has fewer rights than the same worker who is defamed by a next-door neighbor.

What are the kinds of abuses which, if proven, vaporize the conditional privilege and allow the employee to obtain remedies for workplace defamation? For starters, if the speakers of the slander and writers of the libel (defamers) *know* the information they publish is false, and the information is defamatory, the privilege is extinguished. However, the defamers don't have to have actual, absolute knowledge of the falsity to lose their shields of conditional privilege. They also lose the benefits of privilege when they publish the defamation "in reckless disregard as to its truth or falsity."⁷

The Victim of Workplace Defamation

Most typically, the victim of workplace defamation is someone who challenges the practices of the employer, and sticks his neck out, like a "whistleblower." A whistleblower sees or learns about illegalities in the workplace and speaks out, either "in-house" or to an outside government authority or to the media. One very typical response to an employee's "whistling" is for the employer and the individuals "whistled at" to turn on the whistleblower. That is why so many of these exemplary citizens suddenly find themselves falsely accused of theft, industrial espionage, aberrant personal behavior, violations of workplace rules, etc. Throwing mud on the whistleblower is the response of choice by those who are identified by the whistleblower. Disparaging the whistleblower often benefits the employer by calling into question the whistleblower's honesty, morality, information and motives, and thus, the whis-

tleblower's disclosures. The mudslinging also serves to deflate the whistleblower who usually has used up most of his or her courage just to blow the whistle. Sometimes there's not much energy left to defend against false accusations, especially when one's legal rights depend on overcoming the conditional privilege.

The devastation of such falsely accused workers is heartbreaking. Once they've been smeared with mud, much of it sticks, regardless of the truth. And while litigation is *always* difficult for plaintiffs, the difficulty is increased one hundredfold for whistleblowers who are still employed. Ratchet that up another 10 notches when the litigation involves defamation. Defamation is probably the hardest legal challenge an employee can make against the employer. Why? Because in order to sue for defamation, the focus of the litigation must be on the false defamatory statements. The very first pleading filed in court is the complaint. It tells the story of the lawsuit and must repeat with particularity the same false accusations that have already devastated the whistleblower. Then, throughout the litigation, the depositions, the testimony in court and the judge's instructions, the humiliating and false statements are repeated and probed and repeated again, along with the usual dissection of the whistleblower's personal life, medical history and moral beliefs.

Understanding the Heartbreak

Remember back to when you were falsely accused of something? Was it in school? Was it by a friend? A colleague? A spouse? Remember how helpless you felt? Remember how you came to conclude that no matter what evidence you provided, you knew the listener would always harbor some doubts? It is amazing how many of us can reach back to our childhoods and vividly recall such false accusations. One of mine was in second grade when my teacher made me move to

the back of the room because she thought I was looking onto my neighbor's test paper. I wasn't. And when I was accused, I became furious and loudly protested by telling my teacher that by calling me a cheater, she was a liar. In punishment for my protest, I had to stay after school. When my teacher's husband came to pick her up at the end of my detention she told him that "the little girl in the back of the room called me a liar today." My teacher's husband looked at me more in sadness than in anger. That was in 1959, 41 years ago, the year the Lincoln Memorial penny was first minted, and the tears still well up in my eyes when I recall it. I felt so wounded, and so helpless. She would always mistakenly believe I cheated! And I will remember the event forever. That is the point. False accusations sting forever.

For many such employees, reiterating the falsehoods in a public court setting is too devastating to warrant filing suit, even when that is the only way to clear their good names. For other employees, concern for their families, the prohibitive costs of litigation and their own emotional stability require a very careful analysis of the wisdom of filing a defamation lawsuit. But for some very brave whistleblowers, filing a lawsuit against the employer for workplace defamation is absolutely necessary to "set the record straight." For these employees, a second, equally or more important, reason to file a lawsuit, *is to inspire other whistleblowers to do the right thing*. These are my heroes.

For example, take the whistleblower lab worker who discovers that his pharmaceutical company is routinely violating genetic research protocols. He speaks up, and within weeks he is suspended following false accusations of wrongful behavior by his supervisor. If he doesn't stand and fight the assault on his reputation and career, what will the next lab worker do when his boss orders him to burn the test data on the rabbits that bore severely mu-

tant offspring after eating genetically altered grain from the same batch just shipped to a US military installation?

Steve's Sad Story

The plant's first shift employees looked on with curiosity as Steve, their manager, was escorted to the exit by two security guards. From the side window they could see that a police car was in the parking lot and two municipal officers stood by the marked cruiser. They couldn't hear the conversation, but watched as Steve, head down, was marched out of the building, his shoulders heaving in sobs. They watched as Steve walked to his car, got in, and rested his head on his steering wheel. A few minutes later, they saw Steve drive away. The police car followed. Later that afternoon, the plant superintendent appeared at the door of the production room and announced that Steve's employment "had been terminated." He added that, for the time being, he would be their acting supervisor, and to get back to work.

The employees looked at each other. A rumble of hushed conversation commenced. What had Steve done? Why the security guards? Why the police? Surely, he must have done something very, very wrong! Steve, meanwhile, began driving to nowhere in particular. He was afraid to go home. He was afraid to tell his wife, the mother of his twin six-year-olds and their new baby, that he had been fired. Instead, he drove to the Nicer Company plant, the site of his last job and asked the receptionist if he could visit with Mr. Simmons, who had been his boss. Mr. Simmons agreed to see him. As Steve sat down, he began to sob again. Steve explained that he had just been unfairly terminated and asked if there was any job available for him back at the Nicer Company. Mr. Simmons asked Steve why he had been fired.

Steve explained that he had been falsely accused of physical assault; that

Larry, a line worker whom he had supervised for over two years, had signed an affidavit accusing Steve of shoving him up against a wall only a month after Steve had reported their boss's request to falsify test data to their biggest customer. Larry had provided the affidavit to the human resources director, who promptly sent copies of it to the plant superintendent, the vice-president of operations, and the company's lawyer.

Steve had first learned of the false allegations of violent behavior only last week, when the human resources director called him into her office and asked him if he had ever assaulted any of his subordinates. As Steve was a very good and fair supervisor who had never assaulted or harassed any employee, his reaction was to erupt in anger and incredulity, yelling, "Of course not, never!" The human resources director had assured him that she would see to it that the company's investigation would be fair. However, Steve was never interviewed again. This morning, Steve had been called to the Human Resources Department. The director told Steve that he was being fired for breach of the company's "violence policy," that his personal belongings would be boxed and delivered to his house, and that he was required to promptly exit the building in the company of two security guards. When he walked towards his car, Steve was shocked to see two police officers watching him; he was further stunned when they ordered him immediately off the premises.

Steve leaned back in his chair, exhausted and embarrassed. He looked up at his old boss and begged for his old supervising job at Nicer Company. Mr. Simmons, who also knew Steve from church and community activities, believed Steve. While Mr. Simmons didn't have a management job available, he knew one was coming up in a few weeks, and he assured Steve that the upcoming vacancy would be his. In the meantime, Mr. Simmons

suggested to Steve that he go home, tell his wife what happened, and find a good lawyer. After Steve left, Mr. Simmons called the CEO, Mr. Nicer, owner of the company, to inform him that Steve would be rejoining the company. Mr. Nicer had liked Steve when he worked there before, but when he heard that Steve had been terminated for alleged violent behavior, he cautioned Mr. Simmons. Mr. Nicer explained that he had just been to an employment law seminar for executives and had learned that if a company knowingly hired into management a person "accused or known to be violent" who later assaulted someone in his new job, the company could be liable for damages (because of "negligent hiring"). Mr. Simmons sadly listened to Mr. Nicer's words. He also reflected that Steve's predicament could just as easily have happened to him.

Steve Returns Home

Steve didn't want to face his wife, Mary. He was so ashamed. He had never been fired before. When she first became pregnant, they had decided, after much discussion and soul-searching, that she would stay home to raise their children and that Steve would be the breadwinner until all the children were in school. When the twins were born, his wife gave up her job as an adjunct professor at the local community college. Now the twins were six and the couple had a new baby. Steve was afraid. Although he and Mary had a good marriage, he had not told Mary of the original accusation of violence because he didn't want to cause her concern. He had also assumed that the investigation would be fair, quick, and would exonerate him.

Steve drove up his driveway and parked, took a huge breath and slowly got out of his car. Mary came to the front door with the baby in her arms. She looked alarmed to see him home mid-day. "Steve, why are you home? What's wrong?" she asked. "Everything will be fine," Steve told her, "but we need to

talk." Just then the twins were deposited by the school bus at the front gate. Steve got up to meet them. "Hi Dad, Why are you home?" the twins called excitedly. For them, Dad being home was a real treat. "I'll tell you later, guys," Steve promised. As there was no one to call to care for the twins while they talked, Mary hurriedly gave them peanut butter sandwiches and milk and sat them down in front of a video in the den. She put the baby to bed with a bottle and turned and hugged Steve. "Tell me what is going on!" she pleaded.

Steve took her hands gently in his and gazed into her eyes and said, "Please tell me you will believe what I tell you."

"Of course," Mary responded as she began to cry, now petrified at what was coming. Was he ill? Did he have cancer? Was it her parents, were they all right? What was it? Steve heaved it out.

"I have been fired." And before Mary could inquire, he blurted, "I have been falsely accused of violence at work!" As Steve filled in the details, Mary looked at her husband. Her head began to swirl. She thought of the bills in the desk drawer. How would they survive? Would they keep their medical insurance? Just then, the twins ran into the kitchen to ask for more milk and found their Mom and Dad sobbing in each other's arms. Upset to see their parents crying, they began to cry, too. Mary rushed to the twins and gave them a big hug. "At least the baby is resting," she thought. Just then, the baby began to cry.

Steve Visits a Lawyer

The next day, Steve went to the library to use the computer and to search the Internet for some information about lawyers. He didn't have an attorney of his own. He had never been arrested, and he and Mary hadn't gotten around to having their wills made out. He came across a Web page for the National Employment Lawyers Association (NELA) at www.nela.org and

called its headquarters. He was provided a list of employment lawyers in his state. There weren't that many. He correctly concluded that employment law was a specialty area of practice. He contacted the lawyer whose office was closest to home. He made an appointment.

When Steve arrived at the law office, he sat down at the conference table with the attorney and her paralegal and poured out his story. As requested, he had brought along an official copy of his personnel file and had drawn a "timeline" of factual events. The attorney agreed that from his story and the personnel file, it appeared Steve had a stellar employment record, and that the false accusation of violence was suspiciously timed to besmirch his character soon after he blew the whistle on his boss.

But what rights did he have? The lawyer explained. The false accusation of violence at the workplace constituted defamation if it was repeated to a third person. Larry's affidavit was in writing and thus constituted libel when it was sent to the human resource director. She re-published it by sending copies to the plant superintendent, the vice-president of operations and the company's lawyer.⁸

The attorney explained that Steve had a case of a libel against Larry, which carried no special defenses, because the allegations were false⁹ and were expected to damage his reputation. In court, the judge and jury would split the responsibility of deciding the fate of his defamation claims.¹⁰ Steve learned that his claims of libel against the director of human resources and the company were subject to a "conditional privilege" granted to employers and their managers. Because of this privilege, created to encourage the flow of necessary information in the workplace, if the director of human resources believed Larry's affidavit to be true, she and the company could be protected by the privilege if it was her job to notify the superintendent and vice presi-

dent of any matter which could lead to suspension or termination.¹¹ Her communication to the company's attorney was likely privileged under the attorney/client privilege if the attorney was alerted to provide legal advice.

Accordingly, in order for Steve to win a claim of libel against the director of human resources and the company for her actions, he would have to prove that when she sent copies of the letter to the plant superintendent and the vice president of operations¹² she abused the conditional privilege,¹³ i.e., that either she knew that the content of the affidavit was false, or that she sent the copies in reckless disregard as to the truth or falsity of the contents¹⁴ (unless she prefaced the re-publication to the others with a comment that the defamatory matter was merely a rumor or suspicion);¹⁵ or that she was in cahoots with the falsification of the test results or its cover-up and was maliciously and in bad faith re-publishing the false affidavit;¹⁶ or that she passed it on to others to whom the publication was unreasonable because they were not in the chain of command for disciplining Steve (for example, by posting the false affidavit on the company bulletin board).¹⁷ Similarly, if the director of human resources was directed by company policy to handle the investigation herself, passing on a report only after satisfying herself of the likelihood of the assault, she (and the corporation) could still be liable, despite the conditional privilege, if her publication to others preceded her investigation.¹⁸

Steve's Damages

How would you value Steve's reputation?¹⁹ What was the impact on his reputation when his co-workers observed him being escorted from the plant with the two security guards to a parking lot where two police officers ordered him away?²⁰ What are Steve's damages, assuming he can prove his case and vaporize

the conditional privilege? Simply put, Steve's damages would include all the losses which flowed from the false affidavit and its aftermath, including his lost pay, benefits and special damages like harm to his reputation and his own reaction to the loss,^{21&22} including his humiliation, emotional distress, and any physical reactions to the defamation, such as elevated blood pressure, insomnia, and gastric distress.²³ Steve can recover for these injuries even if in the same time frame factors other than the defamation contributed to his emotional and physical problems, since defamation need not be the sole cause of the injury, so long as it is a substantial cause.²⁴

Steve was most concerned about the effect of gossip. He learned that each repetition of the original defamation was harm attributable to Larry,²⁵ whether or not the director of human resources maintained her conditional privilege,²⁶ so long as Larry could have reasonably expected his allegations to be repeated. Any resulting rumors themselves would constitute compensable harm.²⁷ If the director of human resources abused or otherwise did not qualify for the conditional privilege, she and the company²⁸ would be responsible for his damages.

Steve drove home and knew he and his wife had a lot to discuss. If he didn't sue his defamers, his reputation in the eyes of his co-workers and future employers would not be rehabilitated. If he did sue, he faced a myriad of evidentiary challenges created by the "conditional privilege."²⁹

The Litigation Decision

Many times the only evidence the employee has before filing a lawsuit against his conditionally privileged employer is a suspicious timeline. Here, Steve blew the whistle on his boss and all of a sudden one of his own subordinates signed a false affidavit accusing him of violence. The director of human resources promised him

a fair investigation, but never interviewed him after their first meeting. Someone decided he would be fired. Someone had arranged for the guards who walked him to the door. Someone arranged for the police in the parking lot. He had been forced to re-publish the defamation³⁰ in his job interview with Mr. Simmons and knew he would likely be forced to explain the circumstances of his termination again and again in future interviews for employment or promotions.³¹

The questions are obvious. How do you value a person's reputation?³² What

are the possible interpretations of facts which could make the company's actions reasonable, and thus privileged? Can Steve prove that the company's reactions to the memo were extreme, calculated to punish him, and/or frighten other would-be whistleblowers? These are the questions which must be painstakingly pondered by the client and counsel before litigation commences. These are the questions which recur throughout the litigation. And remember, at each step of the way, Steve must relive the most humiliating event of his life. What would you do?

Endnotes

1. Halbert, Terry Ann, "Reference Check Gridlock: A Proposal for Escape," 1 *Employee Rights Quarterly* 34 (2000).
2. According to the Restatement (Second) of Torts § 593 (1977): "one who publishes defamatory matter concerning another is not liable for the publication if (a) the matter is published upon an occasion that makes it conditionally privileged; and (b) the privilege is not abused."
3. *Lester v. Powers*, 596 A.2d 65, 69 (Me. 1991).
4. "One who publishes defamatory matter concerning another upon an occasion giving rise to a conditional privilege is subject to liability to the other if he abuses the privilege." Restatement (Second) Torts, *supra*, at § 599.
5. Restatement (Second) of Torts, *supra*, at § 623, Special Note (4).
6. According to the Restatement (Second) of Torts, *supra*, at § 559: "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."
7. Restatement (Second) of Torts, *supra*, at § 600.
8. The Restatement (Second) of Torts, *supra*, at § 578 states: "Except as to those who only deliver or transmit defamation published by a third person, one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it."
9. Even if the statement is defamatory (harmful to one's reputation), it is not actionable unless the statement is false. Truth is a defense. See Restatement (Second) of Torts, *supra*, at § 581A.
10. Interestingly, the division of duties between the judge and the jury requires that the judge determine whether a communication is "capable of bearing" a "defamatory meaning," and the jury determines whether the recipient of the information understood that meaning. See Restatement (Second) of Torts, *supra*, at § 614. In addition, the judge decides if the defamation constitutes defamation per se, or whether special economic damages must first be proven before other remedies are allowable. Then the jury decides whether the publication did, in fact, impute to the employee some characteristic that was incompatible with the employee's profession. See Restatement (Second) of Torts, *supra*, at § 615.

11. The Restatement of Torts (Second), *supra*, at § 594 states: "An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that:

(a) there is information that affects a sufficiently important interest of the publisher; and

(b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of that interest.

The Restatement (Second) of Torts, *supra*, at § 596 states: "An occasion makes a publication conditionally privileged if the circumstances lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that there is information that another sharing the common interest is entitled to know."

12. In most jurisdictions, publications between and among corporate agents ("intra-corporate publication") does constitute publication for defamation purposes. According to the Restatement (Second) of Torts, *supra*, at § 577, comment (i): "*Communication by one agent to another agent of the same principal.* The communication within the scope of his employment by one agent to another agent of the same principal is a publication not only by the first agent, but also by the principal and this is true whether the principal is an individual, a partnership or a corporation ..."

13. The Restatement (Second) of Torts, *supra*, at § 599 states: "One who publishes defamatory matter concerning another upon an occasion giving rise to a conditional privilege is subject to liability to the other if he abuses the privilege."

14. The Restatement (Second) of Torts, *supra*, at § 600 states: "Except as stated in § 602, one who upon an occasion giving rise to a conditional privilege publishes false and defamatory matter concerning another abuses the privilege if he

(a) knows the matter to be false, or

(b) acts in reckless disregard as to its truth or falsity."

15. If the director of human resources knew or believed that Larry's affidavit contained lies, she would not abuse her privilege by republishing it if, according to the Restatement (Second) of Torts, *supra*, § 602:

"(a) [she] states the defamatory matter as rumor or suspicion and not as fact, and

(b) the relation of the parties, the importance of the interests affected and the harm likely to be done make the publication reasonable."

16. The Restatement (Second) of Torts, *supra*, states at § 603: "One who upon an occasion giving rise to a conditional privilege publishes defamatory matter concerning another abuses the privilege if he does not act for the purpose of protecting the interest for the protection of which the privilege is given."

17. The Restatement (Second) of Torts, *supra*, at § 604 states: "One who, upon an occasion giving rise to a conditional privilege for the publication of defamatory matter to a particular person or persons, knowingly publishes the matter to a person to whom its publication is not otherwise privileged, abuses the privilege unless he reasonably believes that the publication is a proper means of communicating the defamatory matter to the person to whom its publication is privileged."

18. The Restatement (Second) of Torts, *supra*, at § 605 states: "One who upon an occasion giving rise to a conditional privilege publishes defamatory matter concerning another, abuses the privilege if he does not reasonably believe the matter to be necessary to accomplish the purpose for which the privilege is given."

19. If the jury believes that no substantial harm flowed from the defamation, it could award merely nominal damages.

That can occur when the jury determines that the defamation was insignificant, or that the plaintiff was already of such bad character that the defamation didn't impact his reputation. *See* the Restatement (Second) of Torts, *supra*, § 620.

20. When the defamation is not "per se," it is still actionable if it results in "special damages", i.e. economic damages. In Steve's case, the special damages would be lost pay and lost benefits for the period of his unemployment, and possibly continuing, if his new job pays less salary and/or provides fewer benefits. In some jurisdictions, "special damages" include the loss of the companionship and association of friends, should the same be found to have monetary value, even indirectly. *See* Restatement (Second) of Torts, *supra*, § 575, comment b.
21. *See* the Restatement (Second) of Torts, *supra*, at § 621.
22. Because violence is incompatible with proper management, both written and oral false accusations of violence constitute defamation "per se," because the allegations pertain to Steve's profession. Regarding libel per se, the Restatement (Second) of Torts, *supra*, at § 569, comment e, states in pertinent part:

"Thus, to constitute [libel per se] it is enough that the defamatory utterance imputes any misconduct whatever in the conduct of the other's calling."

Regarding slander per se, The Restatement (Second) of Torts, *supra*, at § 573 states: "One who publishes a slander that ascribes to another conduct, characteristics or a condition that would adversely affect his fitness for the proper conduct of his lawful business, trade or profession or of his public or private office whether honorary or for profit, is subject to liability without proof of special harm."
23. *See* the Restatement (Second) of Torts, *supra*, at § 623.
24. *See* the Restatement of Torts (Second), *supra*, at § 622A, comment b.
25. According to the Restatement (Second) of Torts, *supra*, at § 576, comment b: "If the person who repeats the defamation is privileged to repeat it, the repetition does not prevent the original defamation from being the legal cause of the resulting harm."
26. Apart from the issue of conditional privilege, a "republisher" of the original defamation is generally equally liable as the original defamer. *See* Restatement (Second) of Torts, *supra*, at § 578.
27. *See* Restatement (Second) of Torts, *supra*, at § 576, comment e.
28. Through agency principles so long as the director of human resources was acting within the scope of her employment. *See* Restatement (Second) of Torts, *supra*, at § 577, comment (i).
29. Obviously, it would be helpful if he had some evidence that the director of human resources knew the allegations to be false.
30. Any harm that flows from the oral "self-publication" of the defamation would be recoverable as damages. An interesting question is whether Steve's own "publications" of the reason for his termination during job interviews would constitute the "publication to a third person" necessary to maintain a defamation action had his boss falsely accused him of violence, and fired him on the spot *without telling anyone else* of the false allegations. The answer is yes in some jurisdictions, no in others.
31. Most job applications ask for the reasons an applicant left prior jobs. Applications for unemployment compensation always ask the reason for the termination when benefits are requested for that job loss.

32. The damages recoverable in defamation actions include any economic harm suffered as the result of the defamation (special damages), impairment of reputation and standing in the community, personal humiliation, mental anguish, mental suffering, and emotional distress.

Note, however, in some jurisdictions, including Maine, emotional distress damages flowing from defamation are barred by the worker's compensation statute. (See the recently decided *Cole v. Chandler et al.*, 2000 ME 104, 752 A.2d p. 1189 (2000).)