

SURVEY OF WEST VIRGINIA EMPLOYMENT LIBEL LAW

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GENERAL COMMENTS

West Virginia has a two-tiered court system consisting of circuit courts at the trial level with the right of only discretionary appeal to the West Virginia Supreme Court of Appeals. There is no intermediate court of appeals. Circuit court decisions are not reported. The Supreme Court of Appeals' decisions are published in Southeastern Reporter.

SIGNIFICANT DEVELOPMENTS SINCE THE 2009 SURVEY

None.

I. GENERAL LAW

A. General Employment Law

1. ***At Will Employment.*** West Virginia has long recognized the employment at-will doctrine. Wright v. Standard Ultramarine & Color Co., 141 W. Va. 368, 90 S.E.2d 459 (1955). The only exceptions to this general doctrine are a public policy exception and implied contract exception based upon employee handbooks. According to the West Virginia Supreme Court of Appeals, the general principle that an employee may be discharged at any time for any reason should be tempered when the reason for that termination contravenes a substantial public policy. See Harless v. First National Bank in Fairmont, 162 W. Va. 116, 246 S.E.2d 270 (1981) (employee discharged for attempting to make employer comply with consumer protection laws); Shanholtz v. Monongahela Power Co., 165 W. Va. 305, 270 S.E.2d 178 (1980) (discharge of employee for filing workers' compensation claim); Wiggins v. Eastern Associated Coal Corp., 178 W. Va. 63, 357 S.E.2d 745 (1987) (discharge of employee for complaining about unsafe mining practices).

The only other exception to the employment at-will doctrine was carved out in Cook v. Heck's, Inc., 176 W. Va. 368, 342 S.E.2d 453 (1986). In Cook, the Court held that an employee handbook may form the basis of a unilateral contract if there is a definite promise therein by the employer not to terminate employees except for specified reasons.

B. Elements of Libel Claim

In West Virginia, a libel plaintiff's status sets the standard for assessing the elements of liability. Essentially, private figures need only show that the defendant was negligent in publishing the false and defamatory statement. In contrast, public officials and public figures must establish that the defendant made the defamatory statement with knowledge that it was false or with reckless disregard of whether it was false. Moreover, West Virginia recognizes the concept of a "limited purpose public figure" when the libel plaintiff has voluntarily engaged in significant efforts to influence public debate on a matter of public concern.

1. ***Basic Elements.*** The essential elements of a defamation claim by a private individual are: (1) a defamatory statement; (2) a non-privileged communication to a third party (publication); (3) falsity; (4) reference to the plaintiff; (5) negligence at least on the part of the publisher; and (6) resulting injury. See Crump v. Beckley Newspapers, Inc., 173 W. Va. 699, 320 S.E.2d 70, 10 Media L. Rep. 2225 (1984); Rand v. Miller, 185 W. Va. 705, 408 S.E.2d 655 (1991); Crain v. Lightner, 178 W. Va. 765, 364 S.E.2d 778 (1987); Bryan v. Massachusetts Mut. Life Ins. Co., 178 W. Va. 773, 364 S.E.2d 786 (1987); Bell v. National Republican Congressional Committee, 187 F. Supp. 2d 605 (S.D. W. Va. 2002).

In order for a public official to sustain an action for libel, he must prove, by clear and convincing evidence, that: (1) the statements were false or misleading; (2) the statements tended to defame the plaintiff and reflect “shame, contumely and disgrace upon him”; (3) the statements were published with knowledge at the time of publication that they were false or misleading or were published with a reckless and willful disregard for the truth (malice); and (4) the publisher intended to injure the plaintiff through the knowing or reckless publication of the alleged libelous material. See Sprouse v. Clay Communication, Inc., 158 W. Va. 427, 211 S.E.2d 674, 1 Media L. Rep. 1695 (1975); Neal v. Huntington Publishing Co., 159 W. Va. 556, 223 S.E.2d 792 (1976); Pritt v. Republican National Committee, 210 W. Va. 446, 557 S.E.2d 853 (W. Va. 2001).

2. ***Fault.***

a. **Private Figure Plaintiff/Matter of Public Concern.** As indicated above, a private individual may recover for defamation by establishing mere negligence on the part of the publisher. Echoing the Restatement (Second) of Torts, the West Virginia Supreme Court of Appeals has thus held that the conduct of the defendant is to be measured against what a reasonably prudent person would have done under the same or similar circumstances. Crump v. Beckley Newspapers, Inc., 173 W. Va. 699, 320 S.E.2d 70, 10 Media L. Rep. 2225 (1984); Havalunch v. Mazza, 170 W. Va. 268, 294 S.E.2d 70 (1981); Restatement (Second) of Torts § 283. In Havalunch, the Court characterized a family restaurant, claiming defamation by a student newspaper’s slanderous review, as a private person able to recover against a media defendant upon a showing of simple negligence. Nevertheless, the Court ultimately concluded that the newspaper’s comment was protected by the doctrine of fair comment, a form of qualified privilege. See II.A.2, infra.

b. **Private Figure Plaintiff/Matter of Private Concern.** As indicated above, a private individual may recover for defamation by establishing mere negligence on the part of the publisher. See I.B.2.a, supra.

c. **Public Figure Plaintiff/Matter of Public Concern.** As indicated earlier, West Virginia law subscribes to the general rule, as announced by the United States Supreme Court in New York Times Co. v. Sullivan, 376 U.S. 254, 1 Media L. Rep. 1527 (1964), that a public official’s right to sue for libel is properly curtailed in view of First Amendment considerations militating that the media be permitted its constitutional right to freedom of the press where the speech involves an area of public concern. Thus, a public official can recover only if he proves that the statement was made with “actual malice” — that is, with knowledge that it was false or with reckless disregard as to whether it was false. See Long v. Egnor, 176 W. Va. 628, 346 S.E.2d 778, 13 Media L. Rep. 1855 (1986) (challenged memorandum of State Education Association did not constitute libel as a matter of law; statements of opinion are absolutely protected under the First Amendment); Sprouse v. Clay Communications, Inc., 158 W. Va. 427, 211 S.E.2d 674, 1 Media L. Rep. 1695, cert. denied, 423 U.S. 882, reh’g denied, 423 U.S. 991 (1975) (plaintiff, an unsuccessful gubernatorial candidate, proved that newspaper story was false or misleading and that it was published with the knowledge it was false or misleading); Hinerman v. Daily Gazette Co., 188 W. Va. 157, 423 S.E.2d 560, 20 Media L. Rep. 2169 (1992) (plaintiff met burden of establishing actual malice given the fact that newspaper intentionally avoided the truth in its investigatory techniques or omitted facts in order to distort the truth).

In a claim for defamation, West Virginia recognizes three categories of public figures: (1) “involuntary public figures”; (2) “all-purpose public figures”; and, (3) “limited purpose public figures.” See Wilson v. The Daily Gazette Co., 214 W. Va. 208, 588 S.E.2d 197 (2003).

In order to prove that a plaintiff is an “all-purpose public figure”, the defendant must produce clear evidence of the plaintiff’s general fame and notoriety in the state, and pervasive involvement in the affairs of society. In determining whether a plaintiff is an all-purpose public figure, a trial court may consider: (1) statistical survey data concerning the plaintiff’s name recognition; (2) evidence of previous coverage of the plaintiff by the media; (3) evidence that others alter or reevaluate their conduct or ideas in light of the plaintiff’s actions; and, (4) any other relevant evidence. See Wilson v. The Daily Gazette Co., 214 W. Va. 208, 588 S.E.2d 197 (2003).

In Wilson, the plaintiff, a prominent high school athlete, sued the defendant newspaper in connection with an article it published, claiming that the article defamed him by indicating that he had exposed himself in public during a post-game victory celebration. The West Virginia Supreme Court of Appeals concluded that the newspaper failed to prove that the plaintiff was an all-purpose public figure because the evidence merely showed that the plaintiff had achieved notoriety in limited circles, namely athletics, not that he had achieved general fame and notoriety in the community at large.

In order to prove that a plaintiff is an “involuntary public figure,” the defendant must demonstrate

by clear evidence that: (1) the plaintiff has become a central figure in a significant public controversy; (2) that the allegedly defamatory statement has arisen in the course of discourse regarding the public matter; and, (3) the plaintiff has taken some action, or failed to act when action was required, in circumstances in which a reasonable person would understand that publicity would likely inhere. See Wilson v. The Daily Gazette Co., 214 W. Va. 208, 588 S.E.2d 197 (2003).

In Wilson, *supra*, the Court concluded that the plaintiff was not an “involuntary public figure” because nothing in the record suggested that the plaintiff was a central figure in any purported public controversy involving sportsmanship that existed prior to the publication of the allegedly defamatory article.

In addition, West Virginia recognizes the concept of a “limited purpose public figure” under certain circumstances. Generally, West Virginia has adopted an approach which relies upon the twin rationales, identified in Gertz v. Robert Welch, 418 U.S. 323, 1 Media L. Rep. 1633 (1974). The most significant of the two is the concept that public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood by abandoning their anonymity. Secondly, public figures have ready outlets to respond to attacks. Accordingly, the West Virginia Supreme Court of Appeals has held that a libel plaintiff who might otherwise be considered a private figure plaintiff, is a limited purpose public figure if the defendant can prove the following: (1) that the plaintiff voluntarily engaged in significant efforts to influence public debate, or voluntarily assumed a position that would propel him to the forefront of a public debate, on a matter of public concern; (2) the public debate or controversy and the plaintiff’s involvement in it existed prior to the publication of the allegedly libelous statement; and (3) the plaintiff had reasonable access to channels of communication that would permit him to make an effective response to the defamatory statement in question. Syllabus Point 3, State ex rel. Suriano v. Gaughan, 198 W. Va. 339, 480 S.E.2d 548 (1996). In Suriano, the West Virginia Supreme Court of Appeals examined the case of a physician who sued the county education association and its president in connection with a newspaper advertisement and article, claiming that the article defamed him by indicating that the physician had denied health services to public teachers. The Court concluded that the physician was a limited purpose public figure because the issues involved were matters of public controversy into which the plaintiff had voluntarily thrust himself. See also Wilson, *supra*, wherein the Court held that the defendant failed to prove that the plaintiff was a limited purpose public figure because: (1) there was no evidence that the plaintiff voluntarily injected himself into a controversy involving sportsmanship; and, (2) there was no evidence of a controversy that existed prior to the publication of the articles. The Court also rejected the defendant’s argument that amateur athletes become “limited purpose public figures” simply by participating voluntarily in public sporting events.

3. ***Falsity.*** West Virginia law has adopted the U.S. Supreme Court’s analysis regarding the requisite falsity necessary to prove defamation. So long as the communication is “substantially true,” minor inaccuracies are overlooked and the communication is not defamatory. See State ex rel. Suriano v. Gaughan, 198 W. Va. 339, 480 S.E.2d 548 (1996) (newspaper advertisement was substantially true and thus protected speech); Kinney v. Daniels, 574 F. Supp. 542 (S.D. W. Va. 1983) (letter written by chief of hospital’s medical service about a physician in the context of a health care peer review procedure was substantially true).

4. ***Defamatory Statement of Fact.*** Echoing the Restatement (Second) of Torts § 559 (1977), West Virginia’s courts have held that statements may be described as defamatory if they tend to harm the reputation of another as to lower him in the estimation of the community, to deter third persons from associating or dealing with him, or if they tend to “reflect shame, contumely and disgrace” upon the plaintiff. See Crump v. Beckley Newspapers, 173 W. Va. 699, 320 S.E.2d 70, 10 Media L. Rep. 2225 (1984); Sprouse v. Clay Communications, Inc., 158 W. Va. 427, 211 S.E.2d 674, 1 Media L. Rep. 1695 (1975), *cert. denied*, 423 U.S. 882 (1976).

Direct defamatory statements are not an absolute prerequisite to recovery, however, West Virginia law permits defamation to be accomplished through inference, implication, innuendo, or insinuation. See Crump v. Beckley Newspapers, 173 W. Va. 699, 320 S.E.2d 70, 10 Media L. Rep. 2225 (1984).

Moreover, a statement of opinion may be actionable if it implies the existence of facts known to the publisher but undisclosed to the recipient which would inevitably lead to a false, but defamatory conclusion in the recipient’s mind. In other words, if a statement of opinion implies the allegation of undisclosed defamatory facts as the basis of the opinion, it may be actionable. See Havalunch v. Mazza, 170 W. Va. 268, 294 S.E.2d 70 (1981), citing Restatement (Second) of Torts, § 566 (1977). See also Long v. Egnor, 176 W. Va. 628, 346 S.E.2d 778, 13 Media L. Rep. 1855 (1986) (statements of opinion are absolutely protected under the First Amendment).

5. ***Of and Concerning Plaintiff.*** In an action for libel, the defamatory words must refer to some ascertained or ascertainable person and that person must be the plaintiff. If the words used really contain no reflection on any particular individual, no innuendo can make them defamatory. An innuendo cannot make the person certain who was

uncertain before. See Argabright v. Jones, 46 W. Va. 144, 32 S.E. 995 (1899). See also Neal v. Huntington Publishing Co., 159 W. Va. 556, 223 S.E.2d 792 (1976) (fact that a defamatory statement refers to a particular person could be proven by extrinsic evidence).

6. **Publication.** Traditional defamation law has always required the injured party to prove publication of the defamatory statement. West Virginia also has enacted an anti-dueling statute, which remains viable to date. Known as the “insulting words” statute, this claim is supplemental to traditional common law defamation claims, and provides a cause of action for insulting words which are published only to the victim and which would not provide recovery under defamation law unless proof of special damages was offered. See Mauck v. City of Martinsburg, 167 W. Va. 332, 280 S.E.2d 216 (1981) (law under insulting words statute to be interpreted in accord with defamation law in all other respects).

a. **Intracorporate Communication.** Although West Virginia law would likely recognize the concept that dissemination of the defamatory statement within the corporation does not constitute publication, the Supreme Court of Appeals’ decisions usually frame this issue in terms of the existence of a qualified privilege within the corporation. See Mutafis v. Erie Ins. Exchange, 174 W. Va. 660, 328 S.E.2d 675 (1985), citing Mauck v. City of Martinsburg, 167 W. Va. 332, 280 S.E.2d 216 (1981). See also Moore v. American Express Co., 663 F. Supp. 97 (S.D. W. Va. 1987) (no publication under West Virginia law where communication remained entirely within the corporation). The Court in Mutafis ruled that the facts supported a finding that the defendant insurance company had violated the state Unfair Trade Practices Act’s prohibition against defamatory statements, including insertion of such statements into corporate files. Although recognizing a defense of qualified privilege coexistent with the privilege under traditional common law defamation, the Court concluded that the statement was made without any factual foundation whatsoever and in willful and reckless disregard for its truth or falsity, thus no privilege could be claimed by the publishers.

b. **Compelled Self-Publication.** West Virginia law has not recognized a cause of action for compelled self-publication.

c. **Republication.** Although the writers are aware of cases decided in trial courts involving republication of material originally published by others, such as wire services, there are no reported cases in this general area except Sprouse v. Clay Communications, Inc., 158 W. Va. 427, 211 S.E.2d 674, 1 Media L. Rep. 1695 (1975), cert. denied, 423 U.S. 882, reh’g denied, 423 U.S. 991 (1976). In Sprouse, the defendant contended that it was under no duty to subject statements of plaintiff’s opponent for the office of governor to any test of truth. The court, while stating that “in general a newspaper is not liable for publishing in good faith statements of political candidates during an election campaign, . . . the evidence in this case reasonably implies . . . [that defendant] knew that the accusations made by Moore were false.” Sprouse v. Clay Communications, Inc., 158 W. Va. 427, 211 S.E.2d 674, 1 Media L. Rep. 1695 (1975), cert. denied, 423 U.S. 882, reh’g denied, 423 U.S. 991 (1976).

7. **Statements versus Conduct.** West Virginia case law has not analyzed the issue of the publisher’s conduct constituting defamation.

8. **Damages.** Under West Virginia law a plaintiff may recover such compensatory damages or actual damages as he/she is able to establish at trial. See Sprouse v. Clay Communication, Inc., 158 W. Va. 427, 211 S.E.2d 674, 1 Media L. Rep. 1695 (1975), cert. denied, 423 U.S. 882, reh’g denied, 423 U.S. 991 (1976). Adopting language from Gertz, the Sprouse Court acknowledged that such damages would include impairment of reputation and standing in the community, as well as the more traditional elements of mental anguish, insult, indignity and humiliation. The determination of such intangible and subjective damages is the exclusive province of the jury, subject to the rule that awards in these areas not be excessive. The Sprouse Court concluded that a \$250,000 award for actual damages was not excessive.

a. **Presumed Damages and Libel Per Se.** West Virginia has traditionally followed the common law rule that imposed strict liability for certain false statements. Thus, a plaintiff had only to show that certain actionable statements were made in order to entitle him to general damages. See Denoff v. Fama, 102 W. Va. 494, 135 S.E. 578 (1926); Milan v. Long, 78 W. Va. 102, 88 S.E. 618 (1916) (general damages awardable where words are actionable per se; special damages, however, require a specific allegation of harm and proof thereof.); Hancock v. Mitchell, 83 W. Va. 156, 98 S.E. 65 (1919) (a writing charging one “with incompetence in his profession and office, neglect of duty and misconduct” is actionable without establishing special damage.) See also Mauck v. City of Martinsburg, 167 W. Va. 332, 280 S.E.2d 216 (1981) (confirming that a victim need not prove actual pecuniary damages for statements that are defamatory per se under the insulting words statute).

Cases suggest that West Virginia has adopted the rationale of Gertz v. Welch, 418 U.S. 323, 1

Media L. Rep. 1633 (1974). These cases suggest that a defamation plaintiff must always demonstrate the element of resulting injury from the publication of the defamatory statement. In Sprouse v. Clay Communications, Inc., 158 W. Va. 427, 211 S.E.2d 674, 1 Media L. Rep. 1695 (1975), cert. denied, 423 U.S. 882, reh'g denied, 423 U.S. 991 (1976), the Court adopted the Gertz Court's language regarding the necessity of proving injury by competent evidence, even though it need not be evidence which assigns an actual dollar value to the injury. Likening the damages in a defamation action to those of intentional torts, the Court ruled that a defamation plaintiff in West Virginia is entitled to have such elements as mental anguish, insult, indignity and humiliation considered by the jury in arriving at an award of actual damages. The Court therefore concluded that the \$250,000 award of actual damages was not excessive in Sprouse. See also Havalunch v. Mazza, 170 W. Va. 268, 294 S.E.2d 70 (1981) (citing Gertz in libel action against newspaper, holding that presumed damages and punitive damages may be recovered only upon a showing of malice).

In the employment context, West Virginia has similarly applied the requirement of proof of resulting injury from defamatory statements. See Miller v. City Hospital, Inc., 197 W. Va. 403, 475 S.E.2d 495 (1996) (essential element of private employee's claim against her former employer is resulting injury to reputation).

(1) **Employment-Related Criticism.** The cases interpreting West Virginia law concerning employment-related criticism apply a qualified privilege with respect to statements made by an employer or its agents regarding the employee-plaintiff's questionable behavior. See McKinney v. K-Mart Corp., 649 F. Supp. 1217 (S.D. W. Va. 1986) (employer's security guard had qualified privilege with regard to statement to another guard that plaintiff had experienced cash shortage); Mauck v. City of Martinsburg, 167 W. Va. 332, 280 S.E.2d 216 (1981) (letter by city manager regarding former employee's incompetence sent to appropriate city officials was protected by qualified privilege).

(2) **Single Instance Rule.** No such cases have been decided in West Virginia.

b. **Punitive Damages.** West Virginia cases concerning the imposition of punitive damages have related to media defendants, not private employers. According to the West Virginia Supreme Court of Appeals, in accordance with Gertz, punitive damages are not awardable unless the plaintiff has shown that the media defendant knew the reported information was false or had a reckless disregard for its truth. Havalunch v. Mazza, 170 W. Va. 268, 294 S.E.2d 70 (1981). The public policy behind permitting such awards permits punitive damages where the award of actual damages is insufficient to dissuade others in like circumstances from committing similar acts in the future. See Sprouse v. Clay Communications, 158 W. Va. 427, 211 S.E.2d 674, 1 Media L. Rep. 1695 (1975), cert. denied, 423 U.S. 882, reh'g denied, 423 U.S. 991 (1976) (reversing an award of \$500,000 in punitive damages as having a chilling effect upon the legitimate exercise of First Amendment rights). See also Hinerman v. Daily Gazette Co., 188 W. Va. 157, 423 S.E.2d 560, 20 Media L. Rep. 2169 (1992) (award of punitive damages upheld where newspaper failed to offer prompt, prominent, abject apology combined with offer to pay reasonable damages).

II. PRIVILEGES AND DEFENSES

A. Scope of Privileges

1. **Absolute Privilege.** Generally, an absolute privilege which protects one who issues a defamatory communication is practically limited to legislative, judicial and quasi-judicial proceedings and other acts of the State. See City of Mullens v. Davidson, 133 W. Va. 557, 57 S.E.2d 1 (1949); Parker v. Appalachian Electric Power Co., 126 W. Va. 666, 30 S.E.2d 1 (1944); Porter v. Eyster, 294 F.2d 613 (4th Cir. 1961) (interpreting West Virginia law); Clark v. Druckman, 218 W. Va. 427, 624 S.E.2d 864 (2005) (absolute indemnity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior, so long as the act has some relation to other proceeding. See also Collins v. Red Roof Inns, Inc., 248 F. Supp. 2d 512 (S.D. W. Va. 2003) (holding that prior to the filing of a prospective judicial proceeding, a party to a dispute is absolutely privileged to publish defamatory matter about a third person who is not a party to the dispute only wherein: (1) the prospective judicial action is contemplated in good faith and is under serious consideration; (2) the defamatory statement is related to the prospective judicial proceeding; and, (3) the defamatory matter is published only to persons with an interest in the prospective judicial proceeding). But see Yoder v. Workman, 224 F.Supp. 2d 1077 (S.D. W. Va. 2002) (holding that a judge is not performing an act normally performed by a judge when publishing a press release on the court's website; therefore, the statements are not privileged).

West Virginia courts have also suggested that absolute privilege situations could include those situations where a plaintiff has consented to the defamation or instigated the publication of defamatory statements, where the broadcast of statements made by political candidates is involved, or where a petitioning of the government for redress of grievances protected by the First

Amendment is involved. See Crump v. Beckley Newspapers, Inc., 173 W. Va. 699, 320 S.E.2d 70, 10 Media L. Rep. 2225 (1984).

In the employment context, West Virginia has enacted a statute prohibiting any action for defamation based upon information furnished by an employer (or employee) to the State Bureau of Unemployment Compensation. W. Va. Code § 21A-10-11. This statute has consistently been interpreted to bestow an absolute privilege upon employers, thus providing protection even if the statement was false or maliciously made. See Thacker v. Peak, 800 F. Supp. 372 (S.D. W. Va. 1992) (rejecting plaintiff's argument that the privilege does not extend to an employer who discharges an employee for one reason but records another reason on his records).

W. Va. Code § 55-7-18a provides employers immunity from liability for disclosing information regarding former or current employees. Specifically, the statute provides that any employer or his or her designated agent who discloses job-related information that may be reasonably considered adverse about a former or current employee is presumed to be acting in good faith and is immune from civil liability for the disclosure or its consequences. The disclosure must be in writing and a copy must be provided to the employee at the time of the disclosure. The presumption of good faith may be rebutted upon a showing that the information disclosed was: (1) knowingly false; (2) disclosed with reckless disregard for the truth; (3) deliberately misleading; (4) rendered with malicious purpose toward the former or current employee; or (5) disclosed in violation of a nondisclosure agreement or applicable law. W. Va. Code § 55-7-18a(b).

2. **Qualified Privileges.**

a. **Common Interest.** In West Virginia, a qualified privilege exists where a person publishes a statement in good faith about a subject in which he has an interest or duty and limits the publication to those persons who have a legitimate interest in the subject matter. See Crump v. Beckley Newspapers, Inc., 173 W. Va. 699, 320 S.E.2d 70, 10 Media L. Rep. 2225 (1984); Swearingen v. Parkersburg Sentinel Co., 125 W. Va. 731, 26 S.E.2d 209 (1943).

Thus, West Virginia courts have often held that a qualified privilege extends to employer-employee relations. The focus in applying this privilege is whether the communication dealt with facts which affect a sufficiently important interest of the publisher and whether the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest. Stated another way, the test is whether the publisher limited the publication to the parties to whom he owes a duty or to parties who may be concerned with him in the protection of a legitimate interest. See Parker v. Appalachian Electric Power Co., 126 W. Va. 666, 30 S.E.2d 1 (1944) (letter from plaintiff's former employer to agent of Division of Vocational Rehabilitation discussing why employer would not rehire plaintiff protected by qualified privilege); Mauck v. City of Martinsburg, 167 W. Va. 332, 280 S.E.2d 216 (1981) (letter by city manager to former employee was protected by qualified privilege where sent only to those people who had lawful interest in the dismissal). See also Straitwell v. National Steel Corp., 869 F.2d 248, 16 Media L. Rep. 1329 (4th Cir. 1989) (news release protected by qualified privilege under West Virginia law); Rand v. Miller, 185 W. Va. 705, 408 S.E.2d 655 (1991) (physician hired by employer to make such medical report regarding prospective employee's health may have a qualified privilege); McKinney v. K-Mart Corp., 649 F. Supp. 1217 (S.D. W. Va. 1986) (employer's security guard had qualified privilege against defamation with regard to statements made to another security officer regarding cash shortage); Belcher v. Wal-Mart Stores, Inc., 211 W. Va. 712, 568 S.E.2d 19 (2002) (managers had qualified privilege against defamation with regard to statements made to a police officer in the course of an investigation of criminal activity by a customer).

b. **Duty.** See II.A.2.a, supra.

c. **Criticism of Public Employee.** West Virginia recognizes the privilege of "fair comment" which protects editorial opinion of public figures or employees. Moreover, West Virginia recognizes a media privilege in reporting official proceedings or public meetings, in accordance with the Restatement (Second) of Torts (1977). See Hinerman v. Daily Gazette Co., 188 W. Va. 157, 423 S.E.2d 560, 20 Media L. Rep. 2169 (1992) (recognizing that the publication must be accurate and complete or at least a fair representation of the occurrence reported).

d. **Limitation on Qualified Privileges.**

(1) **Constitutional or Actual Malice.** Unlike an absolute privilege, a qualified privilege may be defeated by a showing of actual malice. As interpreted by the Supreme Court of Appeals of West Virginia, this showing would include a showing that the publisher had intentionally published false, defamatory material, had published such material in reckless disregard for its truth or falsity, was published with a primary purpose unrelated to the purpose of the privilege or to persons who have no reason to receive the information, or a publication with a primary purpose unrelated to the purpose of the

privilege. See Crump v. Beckley Newspapers, Inc., 173 W. Va. 699, 320 S.E.2d 70, 10 Media L. Rep. 2225 (1984).

(2) **Common Law Malice.** No distinction between constitutional versus common law malice has been discussed by West Virginia courts.

e. **Question of Fact or Law.** Where the facts are not in dispute, the question of privilege is entirely one of law for the Court. See Higgins v. Williams Pocahontas Coal Co., 103 W. Va. 504, 138 S.E. 112 (1927); Thacker v. Peak, 800 F. Supp. 372 (S.D. W. Va. 1992); see also Belcher v. Wal-Mart Stores, Inc., 211 W. Va. 712, 568 S.E.2d 19 (2002).

f. **Burden of Proof.** While the defendant-employer bears the burden of proof on the existence of a qualified privilege, the burden remains with the plaintiff-employee to demonstrate that the privilege was lost through abuse. This question is a question of law for the Court. See Thacker v. Peak, 800 F. Supp. 372 (S.D. W. Va. 1992).

B. Standard Libel Defenses

West Virginia law permits the traditional defenses against defamation, including truth, opinion, consent and mitigation.

1. **Truth.** The traditional, common law defense of truth is modified in West Virginia by virtue of the West Virginia Constitution. In actions of libel at common law or under the statute of insulting words (but not actions for slander), a defendant must not only establish the truth of the statements made, but also that he published them “with good intent and for justifiable ends.” W. Va. Const., Article III, § 8. See England v. Daily Gazette Co., 143 W. Va. 700, 104 S.E.2d 306 (1958). If these three criteria are established, even if the communication complained of is defamatory and actual malice is present, the plaintiff cannot recover. See Crump v. Beckley Newspapers, Inc., 173 W. Va. 699, 320 S.E.2d 70, 10 Media L. Rep. 2225 (1984). This provision is not applicable to actions for slander. See McClagherty v. Cooper, 39 W. Va. 313, 19 S.E. 415 (1894). Thus, in actions for slander, truth alone is a complete defense. See McClagherty v. Cooper, 39 W. Va. 313, 19 S.E. 415 (1894); Burdette v. FMC Corp., 566 F. Supp. 808 (S.D. W. Va. 1983).

As indicated earlier, West Virginia has adopted the U.S. Supreme Court’s analysis regarding the issue of substantial truth/substantial falsity. So long as the communication is “substantially true”, minor inaccuracies are overlooked and the communication is not defamatory. See State ex rel. Suriano v. Gaughn, 198 W. Va. 339, 480 S.E.2d 548 (1996); Kinney v. Daniels, 574 F. Supp. 542 (S.D. W. Va. 1983).

2. **Opinion.** The West Virginia Supreme Court of Appeals has adopted the U.S. Supreme Court’s reasoning from Gertz v. Welch, 418 U.S. 323, 1 Media L. Rep. 1633 (1974), regarding the defamatory nature of a statement that constitutes opinion. As the Gertz Court held, there is no such thing as a “false opinion.” See Long v. Egnor, 176 W. Va. 628, 346 S.E.2d 778, 13 Media L. Rep. 1855 (1986) (statements in memoranda no more than an expression of opinion); Maynard v. Daily Gazette Co., 191 W. Va. 601, 447 S.E.2d 293 (1994) (“A statement of opinion that does not prove false assertion of fact is entitled to full constitutional protection . . .”). Therefore, West Virginia law affirms that statements of opinion are absolutely protected under the First Amendment and cannot serve as a basis for a defamation action.

However, the West Virginia Supreme Court of Appeals has also adopted the reasoning of § 566 of the Restatement (Second) of Torts, that permits a defamation action if an opinion implies an allegation of undisclosed defamatory facts as the basis for the opinion. See Havalunch, Inc. v. Mazza, 170 W. Va. 268, 294 S.E.2d 70 (1981) (student newspaper article humorously portraying restaurant as equivalent of truck stop is also protected by common law doctrine of fair comment).

3. **Consent.** Although no West Virginia cases are directly on point, the West Virginia Supreme Court of Appeals has suggested in dicta that consent to publication may constitute absolute privilege to defamatory statements. See Crump v. Beckley Newspapers, Inc., 173 W. Va. 699, 320 S.E.2d 70, 10 Media L. Rep. 2225 (1984), citing Walters v. Litkof, 559 F. Supp. 1231, 9 Media L. Rep. 1477 (D. Colo. 1983) (allegedly defamatory statements made in response to requests for comment and public participation).

4. **Mitigation.** One important partial defense in actions for defamation is that of mitigation. Three types of mitigating circumstances have been recognized in West Virginia. Intoxication of the defendant at the time of his use of slanderous words is a mitigating circumstance proper for jury consideration. See Crump v. Beckley Newspapers, Inc., 173 W.

Va. 699, 320 S.E.2d 70, 10 Media L. Rep. 2225 (1984). Another mitigating circumstance is provocation by the plaintiff, indicating the utterance of slanderous words. Finally, West Virginia recognizes that a retraction or apology, while not exonerating a defendant, is a mitigating factor. See Crumpp v. Beckley Newspapers, Inc., 173 W. Va. 699, 320 S.E.2d 70, 10 Media L. Rep. 2225 (1984), Milan v. Long, 78 W. Va. 102, 88 S.E. 618 (1916). West Virginia has provided that a defendant, after notice in writing of his intention to do so, may submit as evidence of mitigation showing that he made or offered an apology before the commencement of the action or as soon after as he had an opportunity to do so. See W. Va. Code § 57-2-4.

III. RECURRING FACT PATTERNS

A. Statements in Personnel File

No reported cases on this point.

B. Performance Evaluations

No reported cases on this point. It should be noted, however, that the West Virginia legislature recently enacted W.Va. Code § 55-7-18a, which provides employers immunity from liability for disclosing information regarding former or current employees. Specifically, the statute provides that any employer or his or her designated agent who discloses job-related information that may be reasonably considered adverse about a former or current employee is presumed to be acting in good faith and is immune from civil liability for the disclosure or its consequences. The disclosure must be in writing and a copy must be provided to the employee at the time of the disclosure. The presumption of good faith may be rebutted upon a showing that the information disclosed was: (1) knowingly false; (2) disclosed with reckless disregard for the truth; (3) deliberately misleading; (4) rendered with malicious purpose toward the former or current employee; or (5) disclosed in violation of a nondisclosure agreement or application law. W. Va. Code § 55-7-18a(b).

C. References

W. Va. Code § 55-7-18a provides employers immunity from liability for disclosing information regarding former or current employees. Specifically, the statute provides that any employer or his or her designated agent who discloses job-related information that may be reasonably considered adverse about a former or current employee is presumed to be acting in good faith and is immune from civil liability for the disclosure or its consequences. The disclosure must be in writing and a copy must be provided to the employee at the time of the disclosure. The presumption of good faith may be rebutted upon a showing that the information disclosed was: (1) knowingly false; (2) disclosed with reckless disregard for the truth; (3) deliberately misleading; (4) rendered with malicious purpose toward the former or current employee; or (5) disclosed in violation of a nondisclosure agreement or applicable law. W. Va. Code § 55-7-18a(b).

D. Intracorporate Communication

See I.B.6.a, supra.

E. Statements to Government Regulators

No West Virginia reported cases.

F. Reports to Auditors and Insurers

West Virginia's Unfair Trade Practices Act specifically prohibits any person or company from publishing, disseminating or circulating, either directly or indirectly, or otherwise encouraging any oral or written statement which is false or maliciously critical of or derogatory to the financial condition of any person and which is calculated to injure such person. W. Va. Code § 33-11-4(3). See Mutafis v. Erie Ins. Exchange, 561 F. Supp. 192 (N.D. W. Va. 1983), aff'd 775 F.2d 593, 12 Media L. Rep. 1279 (4th Cir. 1985) (assertion that a person is closely associated with the Mafia which was inserted into a business file without any factual foundation gives rise to private cause of action under W. Va. Code § 33-11-4(3)).

G. Vicarious Liability of Employers for Statements Made by Employees

1. **Scope of Employment.** Under West Virginia law, a corporation is not liable for defamatory statements published by one of its agents unless he was authorized thereto, or his acts were subsequently ratified. See Barger

v. Hood, 87 W. Va. 78, 104 S.E. 280 (1920); (agent and corporation who ratified defamation would both be liable); Miller v. City Hospital, Inc., 197 W. Va. 403, 475 S.E.2d 495 (1996) (plaintiff failed to meet her burden of providing specific facts to demonstrate publisher was authorized or was ratified by his employer).

a. **Blogging.**

No West Virginia reported cases.

2. **Damages.** Under West Virginia law, employers may be liable for damages for their employee's defamatory statements if authorized or ratified by the corporation. See Barger v. Hood, 87 W. Va. 78, 104 S.E. 280 (1920).

H. Internal Investigations

No West Virginia reported cases.

IV. OTHER ACTIONS BASED ON STATEMENTS

A. Negligent Hiring, Retention, and Supervision

A principal may be held liable to a third party for civil damages if the principal is negligent in the selection and retention of a contractor, and if such negligence proximately causes harm to the third party. Thomson v. McGinnis, 195 W. Va. 465, 465 S.E.2d 922 (1995). Accordingly, in West Virginia an employer is subject to liability for physical harm to third persons caused by the employer's failure to exercise reasonable care to employ a competent and careful contractor to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or to perform any duty which the employer owes to third persons. See Sipple v. Starr, 205 W. Va. 717, 520 S.E.2d 884 (1999) (adopting Restatement (Second) of Torts § 411).

B. Intentional Infliction of Emotional Distress

West Virginia's law regarding the intentional infliction of emotional distress (also referred to as the tort of outrage) is well-developed, especially in the employment area. The Supreme Court of Appeals has adopted the Restatement's general standard of liability requiring "extreme or outrageous conduct intentionally or recklessly causing severe emotional distress where the conduct is so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." See Hines v. Hills Department Stores, Inc., 193 W. Va. 91, 454 S.E.2d 385 (1994).

Generally, plaintiffs have joined an outrage claim to their defamation claim, although the Supreme Court has rarely concluded that the conduct was sufficiently outrageous to impose liability. See, e.g., Hines v. Hills Department Stores, Inc., 193 W. Va. 91, 454 S.E.2d 385 (1994), Tanner v. Rite Aid of West Virginia, Inc., 194 W. Va. 643, 461 S.E.2d 149 (1995); Tudor v. Charleston Area Medical Center, 203 W. Va. 111, 506 S.E.2d 554 (1997); Travis v. Alcon Laboratories, 202 W. Va. 369, 504 S.E.2d 419 (1998); Greenfield v. Schmidt Baking Co., 199 W. Va. 447, 485 S.E.2d 391 (1997).

C. Interference with Economic Advantage

West Virginia permits a cause of action for tortious interference with business relationships. First enumerated in Torbett v. Wheeling Dollar Savings & Trust Co., 173 W. Va. 210, 314 S.E.2d 166 (1983), the elements of this action are: (1) existence of a contractual or business relationship or expectancy; (2) an intentional act of interference by a party outside that relationship or expectancy; (3) proof that the interference caused the harm sustained; and (4) damages.

On several occasions, plaintiffs have joined tortious interference claims with defamation claims. See Bryan v. Massachusetts Mutual Life Ins., 178 W. Va. 773, 364 S.E.2d 786 (1987) (summary judgment properly granted; letter in question was truthful; and defendants had legitimate financial interests in business); Cutright v. Metropolitan Life Ins., 201 W. Va. 50, 491 S.E.2d 308 (1997) (summary judgment also affirmed).

D. Prima Facie Tort

No West Virginia reported cases.

V. OTHER ISSUES

A. Statute of Limitations

Actions for defamation, including both libel and slander, have a one-year statute of limitations by virtue of W. Va. Code § 55-5-12(c). See Snodgrass v. Sisson's Mobile Home Sales, Inc., 161 W. Va. 588, 244 S.E.2d 321 (1978); Duffy v. Ogden Newspapers, Inc., 170 W. Va. 318, 294 S.E.2d 121, 8 Media L. Rep. 1879 (1982); Cavendish v. Moffitt, 163 W. Va. 38, 253 S.E.2d 558 (1979).

In defamation actions, the period of the statute begins to run when the fact of the defamation becomes known, or reasonably should have become known to the plaintiff. Padon v. Sinns, Roelneck & Co., 186 W. Va. 102, 411 S.E.2d 245 (1991).

Other tort claims often joined with defamation actions take a two-year statute of limitations. See Courtney v. Courtney, 190 W. Va. 126, 437 S.E.2d 436 (1993) (intentional infliction of emotional distress); Garrison v. Herbert J. Thomas Memorial Hospital, 190 W. Va. 214, 438 S.E.2d 6 (1993) (tortious interference with business relationships).

B. Jurisdiction

Defamation claims are properly brought in the courts of law in the county where the defamatory statement is published. See Sprouse v. Clay Communications, Inc., 158 W. Va. 427, 211 S.E.2d 674, 1 Media L. Rep. 1695, cert. denied, 423 U.S. 882, reh'g denied, 423 U.S. 991 (1975) (for purposes of suing newspaper, venue is proper in any county in which newspaper is circulated).

C. Worker's Compensation Exclusivity

In West Virginia, the workers' compensation system is the exclusive recourse for employees of qualified employers who are injured in the workplace. W.Va. Code § 23-2-6. However, injuries that resulted from the employer's "deliberate intent" are excluded from this provision for employer immunity. W.Va. Code §23-4-2(d).

D. Pleading Requirements

In West Virginia, the rule appears to be that for a cause of action for libel and slander to be correctly pleaded, the exact words spoken or material published must be alleged with particularity. See Kondos v. West Virginia Board of Regents, 318 F. Supp. 394 (S.D. W. Va. 1920), aff'd, 441 F.2d 1172 (4th Cir. 1971) (interpreting West Virginia law). It is up to the Court to initially decide whether, as a matter of law, the challenged statements are capable of a defamatory meaning. Furthermore, since statements of opinion are absolutely protected under the First Amendment, the Court must initially decide whether the statement is one of fact or opinion. See Long v. Egnor, 176 W. Va. 628, 346 S.E.2d 778, 13 Media L. Rep. 1855 (1986).