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## ALP: Can I tell other employees why I terminated one of their colleagues? What about potential employers who call for a reference on the former employee?

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It is always difficult to know how much to tell co-workers when an employee is terminated unexpectedly. Employers want their employees to know they did not act arbitrarily in making this important decision. Employers may also want to send a message that certain conduct will result in termination. On the other hand, the employer must ensure that its statements do not give the terminated employee grounds for a defamation lawsuit.

In the employment context, defamation can occur when the employer makes an untrue statement about an employee to a third person, for example to another employee. In any claim of defamation, truth is a complete defense. If the employer's statement includes nothing more than accurate, provable facts, the employer should prevail in a defamation lawsuit.

Courts have also applied a "qualified privilege" to protect employers (and individual managers) from defamation lawsuits when they discuss matters related to the business in good faith with another person who has a corresponding interest in the matter. So when a manager discusses an employee's performance with another manager for purposes of determining raises, promotions, disciplinary action, termination and so on, that discussion is protected by qualified privilege even if the manager's comments about the individual are inaccurate. Similarly, discussions with human resources about the employee's absenteeism or need for a leave of absence are protected by the qualified privilege – even if the discussion includes statements that are inaccurate and potentially harmful to the employee's reputation. Qualified privilege allows employers to conduct normal business activities without the threat of a lawsuit.

But the qualified privilege can be lost if it is abused. The privilege is abused if the matter is discussed with those who do not have an interest in the information being discussed or if the disclosure is made with malice. For example, if an employee's supervisor erroneously, but honestly, believes that the employee is taking leave because he is experiencing mental health issues and discusses the employee's medical condition with human resources, misstatements about the employee's medical condition are likely protected. On the other hand, when the human resource manager shares that inaccurate information with the employee's co-workers, qualified privilege is lost, because those co-workers have no need to know that information.

A potential problem may arise when employers make general statements about a matter that can be interpreted in more than one way. For instance, in a recent case, several retail employees were terminated for eating candy that had been returned to the store. When asked by other employees if the terminated employees had been fired for eating the candy, the manager replied, "there was more to it than that." One of the employees who heard this statement interpreted it to mean that the terminated employees had engaged in other acts of theft. – an inaccurate interpretation. This statement, according to the Kentucky Supreme Court, could have been reasonably interpreted by the jury as defamatory and the Court reinstated the jury's verdict on this claim.

You can avoid defamation lawsuits entirely by remembering these rules:

- When discussing an employee's performance or conduct, discuss it only with people who have a need for the information. Think carefully about who is in the room when you have the discussion. Ask any people who do not need to know about the incident to leave – this may include security personnel, an administrative assistant and so on.
- Decide in advance how you will respond to employees who ask about the termination. We suggest prohibiting managers and supervisors from making any statement about an

employee's termination. Instead they should say they cannot talk about the matter. Make sure they understand that this includes talking about it "off the record" or with assurances that the other person "won't tell anyone." Refer all inquiries to a single person – perhaps the human resources manager.

- If the termination is causing disruption at work or rumors are spreading about the situation, the employer may want to make a statement to stop these problems. In this case, consult an attorney first to determine what can and should be said.

Employers also have concerns about defamation lawsuits arising over recommendations to potential employers. Many companies have resorted to simply providing position titles and dates of employment when asked for a reference for a former employee. Although Kentucky law provides some protection to employers who provide accurate reference information to a prospective employer, we continue to recommend that employers provide only the minimum information (dates of employment and position held) to avoid potential lawsuits. We also recommend that employers provide this information only in writing and only when the request is also in writing. Reference requests and the company's response should be saved.

For more information regarding employee termination or defamation lawsuits, please contact any member of Frost Brown Todd's [Labor and Employment](#) practice group.

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