Fighting Back Against Cybersmears

Insights
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Good, honest, and loyal employees are the greatest asset of any company. Unfortunately not all employees are great. Some are dishonest; others are vindictive. Not surprisingly, ex-employees who are fired due to dishonesty are the most likely ones to post a defamatory blog about their former employer.

The Internet creates ideal opportunities for disgruntled former employees to anonymously attack ex-employers, destroy individual reputations and spread lies about companies they worked for. The Internet is extremely effective when used for this wicked purpose. After all, the Internet is the world's largest publication. As the U.S. Supreme Court observed in *Reno v. ACLU*, with the Internet "any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox."

"Who Said That?"
What should employers do about cyberlibel? It may depend on when the libel occurred. The National Labor Relations Board has taken the position that employees who make comments about common workplace issues on the Internet are engaging in protected, concerted activity. If the Internet posts were made by the employee before the employment relationship ended, they may be protected, depending on the nature and veracity of the statements. If the statements were made after employment terminated, the protections of the National Labor Relations Act should not apply. So, an employer may have more freedom in how it chooses to respond.

Employers dealing with post-termination cybersmear might consider filing a civil action for defamation or trade disparagement. Employers who pursue this path must overcome some legal hurdles. For instance, many cybersmearers do their damage on the Internet anonymously. Consequently, you may need to subpoena the Internet service provider (ISP) to identify the blogger. This can be difficult. In *Krinsky v. Doe No.6*, the California Court of Appeal held that a plaintiff must make a prima facie showing that she has avalid claim against the anonymous defendant before she can even discover the defendant's identity.

Even if the identity of the blogger is known, there are difficulties. The acronym SLAPP stands for "strategic lawsuit against public participation," and refers to lawsuits aimed at silencing critics by threatening to sue them. The laws against such perceived wrongs are referred to as anti-SLAPP

statutes. There is no federal anti-SLAPP law, but a number of states have them – California's is the strongest. Cybersmearers can use such anti-SLAPP laws to counter defamation claims.

By way of example, California's statute allows defamation defendants to file special motions to strike if the case concerns an "act in furtherance of right of petition or free speech under the United States or California Constitution in connection with a public issue." If successful on such a motion, the lawsuit will be dismissed and the cybersmearers can recover their attorneys' fees and costs.

To successfully oppose an anti-SLAPP motion, an employer must provide evidence to establish it has a "probability of prevailing" on the merits of its causes of action. This is different than a traditional lawsuit where proof issues are reserved for trial.

In addition, the Communications Decency Act provides ISPs with immunity from lawsuits regarding the content of publications made by others. Thus, an employer is generally prohibited from suing the ISP as a means of stopping the cybersmear campaign.

Get Creative

In light of these and other issues, it may be difficult to pursue defamation claims against former employees who engage in cybersmear. But it's not impossible. When the publication involves a provably false statement of fact, you can generally overcome objections to subpoenas and anti-SLAPP motions.

You could also consider filing alternative claims. Unfair competition claims may be pursued when the ex-employee is trying to compete unfairly against the employer's business by spreading lies and falsehoods. Trademark, copyright infringement, and trade-secret claims may be available when the blogger makes reference to confidential or proprietary information in a cybersmear campaign. Furthermore, all 50 states have laws that prohibit electronic forms of stalking, harassment or cyberbullying.

There are a variety of other potential claims that may be considered. It can be a vicious cyber-world out there. An employer that is educated, prepared, and creative can often win when combating cybersmear by former employees.