CHAPTER 5

DEFAMATORY MEANING

5.1 IN GENERAL

As courts (and perhaps jurors) analyze an allegedly defamatory communication, they must determine whether the communication conveys a defamatory meaning. The law does not recognize as actionable every critical statement—the statement must carry a requisite "sting" to support the tort.

5.2 PER SE VERSUS PER QUOD DEFAMATION

Courts classify as "defamation per se" a communication whose defamatory nature falls into certain categories, such as certain criminal offenses, contagious diseases, unfitness for office, or prejudice to one's profession or trade.[1]

An action for "defamation per quod" arises if one must look *beyond* the statement itself to find the negative implication.[2] For instance, misstating a woman's address may not be defamatory on its face but could give rise to a defamation per quod action if the address houses a well-known brothel.

In 2014, an Eastern District of Virginia court explained that "there is only one cause of action in Virginia for defamation" rather than separate causes of action for defamation per se, defamation, and defamation per quod.[3] Later, the court noted that "ultimately Plaintiff will have to choose a theory of recovery."[4] Some practitioners still divide up their claims according to defamation theory.

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[1] *Shupe v. Rose's Stores, Inc.*, 213 Va. 374, 376, 192 S.E.2d 766, 767 (1972).

[2] *Freedlander v. Edens Broad., Inc.*, 734 F. Supp. 221, 226 (E.D. Va. 1990), *aff'd mem.* 923 F.2d 848 (4th Cir. 1991).

[3] *Sepmoree v. Bio-Medical Applications of Va., Inc.*, Civ. A. No. 2:14cv141, 2014 U.S. Dist. LEXIS 125890, at *9 (E.D. Va. Sept. 4, 2014).

[4] *Id.* at *18 n.11.

5.3 ELEMENTS (INCLUDING THE "STING")

5.301 In General. Most courts recognize a few basic principles in analyzing a statement's defamatory meaning or impact.

5.302 Acceptance as Truth. First, those receiving the communication must accept it as possibly true. Obvious humor or hyperbole likely lack defamatory meaning. More often, this issue arises in the context of protected opinion and whether a statement can be proven true or false.

5.303 Required "Sting." Second, only statements that generate a certain degree of defamatory "sting" will support a cause of action. For example, someone might accuse another of wearing a suit that had not been dry-cleaned for a few days. Even if the statement was knowingly false and intended to defame, the accusation does not have the type of "sting" that could support a defamation claim. As explained below, federal and state courts follow varying standards on defamatory meaning.

In 1904, the Virginia Supreme Court stated in *Moss v. Harwood*[5] that any written statement "which tends to injure one's reputation in the common estimation of mankind, to throw contumely, shame, or disgrace upon him, or which tends to hold him up to scorn, ridicule, or contempt, or which is calculated to render him infamous, odious, or ridiculous, is *prima facie* a libel."[6]

The *Restatement (Second) of Torts* states the following, which has been adopted in the Virginia Model Jury Instructions and followed by many courts: "[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]

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[5] *Moss v. Harwood*, 102 Va. 386, 46 S.E. 385 (1904).

[6] *Id.* at 392, 46 S.E. at 387.

[7] *Restatement (Second) of Torts* § 559 (1977); *see* Virginia Model Jury Instructions - Civil, No. 37.010 (liability issues (public figure/not defamatory per se or private figure/substantial danger to plaintiff's reputation not apparent) (2020) ("Did the statement tend to so harm the reputation of the plaintiff as to lower him in the estimation of the community, to deter others from associating or dealing with him, or make him appear odious, infamous, or ridiculous?"); *see also Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1092 (4th Cir. 1993); *Perry v. Isle of Wight Cnty.*, Civ. A. No. 2:15cv204, 2016 U.S. Dist. LEXIS 53362, at *5 (E.D. Va. Apr. 20, 2016); *Rodarte v. Wal-Mart Assocs., Inc.*, Case No. 6:12-cv-00055, 2013 U.S. Dist. LEXIS 64458, at *10-11 (W.D. Va. May 6, 2013); *Sewell v. Wells Fargo Bank, N.A.*, Civ. A. No. 7:11cv00124, 2012 U.S. Dist. LEXIS 113806, at *20 (W.D. Va. Aug. 14, 2012); *Whitaker v. Wells Fargo Advisors*, LLC, Civ. A. No. 3:11CV380-HEH, 2011 U.S. Dist. LEXIS 111938, at *7 (E.D. Va. Sept. 28, 2011); *Zuli Zhang v. Regan*, Case No. 1:10cv1329, 2011 U.S. Dist. LEXIS 40616, at *29 (E.D. Va. Apr. 14, 2011); *Baylor v. Comprehensive Pain Mgmt. Ctrs., Inc.*, Civ. A. No. 7:09cv00472, 2011 U.S. Dist. LEXIS 37699, at *20 (W.D. Va. Apr. 6, 2011); *Association for Supervision & Curriculum Dev., Inc. v. International Council for Educ. Reform & Dev., Inc.*,

In the Fourth Circuit's most extensive discussion of this issue, the court acknowledged both the *Restatement* and *Moss* standards of defamatory "sting."

> In Virginia, the elements of libel are (1) publication of (2) an actionable statement with (3) the requisite intent. *See generally*, *Gazette, Inc. v. Harris*, 229 Va. 1, 325 S.E.2d 713, *cert. denied*, 472 U.S. 1032 (1985). To be "actionable," the statement must be not only false, but also defamatory, that is, it must "tend[] 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." *Restatement (Second) of Torts § 559*. As one court put it, defamatory words are those that "make the plaintiff appear odious, infamous, or ridiculous." *McBride v. Merrell Dow and Pharmaceuticals, Inc.*, 540 F. Supp. 1252, 1254 (D.D.C. 1982), *rev'd in part on other grounds*, 230 U.S. App. D.C. 403, 717 F.2d 1460 (D.C. Cir. 1983). Merely offensive or unpleasant statements are not defamatory.[8]

In 2012, the Fourth Circuit again acknowledged these standards.[9] Later, courts in the Eastern and Western Districts of Virginia did the same.[10] And in 2015, the Virginia Supreme Court also applied the *Restatement* and *Moss* standards.

5.304 Required Overlap of Falsity and Sting. Third, the factual falsity of a statement and the "sting" of its meaning must overlap. As the Fourth Circuit noted, "[t]he falsity of a statement and the defamatory 'sting' of the publication must coincide—that is, where the alleged defamatory 'sting'

Civ. A. No. 1:10cv74, 2011 U.S. Dist. LEXIS 26783, at *17 (E.D. Va. Mar. 14, 2011); *Blagogee v. Equity Trs.*, LLC, Case No. 1:10-cv-13 (GBC-IDD), 2010 U.S. Dist. LEXIS 114233, at *18 (E.D. Va. July 26, 2010); *PBM Prods., LLC v. Mead Johnson Nutrition Co.*, 678 F. Supp. 2d 390, 400 (E.D. Va. 2009); *Smith v. James C. Hormel Sch. of Va. Inst. of Autism*, Civ. A. No. 3:08cv00030, 2009 U.S. Dist. LEXIS 114892, at *95-96 (W.D. Va. Dec. 8, 2009); *Vaile v. Willick*, Civ. A. No. 6:07cv00011, 2008 U.S. Dist. LEXIS 53619, at *8, *21 (W.D. Va. July 14, 2008); *Jordan v. Kollman*, 269 Va. 569, 575, 612 S.E.2d 203, 206 (2005).

[8] *Chapin*, 993 F.2d at 1092 (footnote omitted).

[9] *Shaheen v. WellPoint Cos.*, 490 Fed. Appx. 552, 555 (4th Cir. 2012); *Nigro v. Virginia Commonwealth Univ.*, 492 Fed. Appx. 347, 355-56 (4th Cir. 2012).

[10] *Dragulescu v. Virginia Union Univ.*, 223 F. Supp. 3d 499, 507 (E.D. Va. 2016); *Eramo v. Rolling Stone*, LLC, 209 F. Supp. 3d 862, 876-78 & n.2 (W.D. Va. 2016); *Sepmoree v. Bio-Medical Applications of Va., Inc.*, Civ. A. No. 2:14cv141, 2014 U.S. Dist. LEXIS 125890, at *9 n.5 (E.D. Va. Sept. 4, 2014); *Zarrelli v. City of Norfolk*, Case No. 2:13CV447, 2014 U.S. Dist. LEXIS 86648, at *24 (E.D. Va. May 22, 2014); *Cutaia v. Radius Eng'g Int'l, Inc.*, Civ. A. No. 5:11cv00077, 2012 U.S. Dist. LEXIS 19736, at *19-20 n.1, *25 (W.D. Va. Feb. 16, 2012).

arises from substantially true facts, the plaintiff may not rely on minor or irrelevant inaccuracies to state a claim for libel."[11]

In 2011, a court in the Eastern District of Virginia dismissed a defamation action because "the purported falsity and the defamatory 'sting' set forth in the Complaint do not coincide."[12]

In 2016, an Eastern District of Virginia court granted summary judgment in a former employee's case against her former employer because the effect of the admittedly false statement (that the plaintiff "up and left" rather than being terminated) "was no worse than the truth" and therefore could not support a defamation claim.[13]

5.4 DIFFICULTY OF DRAWING THE LINE

Courts sometimes struggle to determine whether certain negative statements cross the defamatory-meaning line and carry actionable "sting." It is often the same struggle in determining whether statements are protected opinion or actionable as factual assertions. In many instances, courts hold that a defendant's rantings about a plaintiff contain both actionable and nonactionable statements.

5.5 EXAMPLES OF COMMUNICATIONS CAPABLE OF DEFAMATORY MEANING

See Appendix 5 for examples of statements where Virginia courts have found defamatory meaning.

5.6 EXAMPLES OF COMMUNICATIONS NOT CAPABLE OF DEFAMATORY MEANING

Appendix 6 provides examples of statements where Virginia courts have not found defamatory meaning.

[11] *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1092 (4th Cir. 1993) (citation omitted).

[12] *Whitaker v. Wells Fargo Advisors, LLC*, Civ. A. No. 3:11CV380-HEH, 2011 U.S. Dist. LEXIS 111938, at *11 (E.D. Va. Sept. 28, 2011).

[13] *Kuhar v. Devicor Prods., Inc.*, No. 1:15-cv-1533 (LMB/MSN), 2016 U.S. Dist. LEXIS 147257 (E.D. Va. Oct. 24, 2016)

5.7 JOB EVALUATIONS AND TERMINATIONS

Just as workplace criticism often implicates the opinion defense, statements about an employee's job performance frequently must be assessed to determine whether they contain the requisite "sting" to support a defamation action. For instance, it is difficult to imagine that a supervisor's criticism of a secretary's typing speed could support a defamation action, even if spoken with constitutional malice and circulated widely in the office, which might defeat any qualified privilege. Stating that someone is a slow typist simply does not contain the type of "sting" that Virginia law apparently requires.

Some courts find that statements about an employee's termination have the necessary sting, while others disagree. One key issue is whether being fired (or being severely criticized at work) meets the requisite standard. As one court explained it,

> allegations of unsatisfactory job performance do not in and of themselves so harm his reputation as to lower him in the estimation of the community or deter third persons from associating or dealing with him. "Merely offensive or unpleasant statements are not defamatory."[14]

This approach frequently makes sense. After all, baseball managers can be fired by one team but immediately begin managing another team. Even those targeted by Donald Trump's pointed finger and his trademark "you're fired" exclamation can become celebrities.

An Eastern District of Virginia court granted summary judgment to Exxon Mobil in a case brought by a former high-level executive. The executive had sued Exxon Mobil for defamation because a current employee communicated that the plaintiff had been terminated for doing "something very bad" and had engaged in "inappropriate" and "improper" business dealings. The court held that the statements were not defamatory. Citing the "odious, infamous, or ridiculous" standard, the court held that "[w]hile perhaps upsetting to Plaintiff, he is not able to show that these mild assessments of his termination diminished his reputation to anyone."[15]

[14] *McBride*, 871 F. Supp. at 892.

[15] *Marroquin v. Exxon Mobil Corp.*, Civ. A. No. 08-391, 2009 U.S. Dist. LEXIS 44834, at *21, *23 (E.D. Va. May 27, 2009).

About five weeks later, another Eastern District of Virginia court granted summary judgment to an employer sued by a former employee for sending an email to other employees stating that the plaintiff "has been placed on administrative leave as of April 9, pending an internal investigation."[16] Noting that "mere allegations of unsatisfactory job performance do not generally rise to the level of defamation per se," the court concluded that the plaintiff's "proposed interpretation" of the email "stretches" the meaning too much, because "it contains no mention of the subject of the investigation or the reason for the investigation," and "did not mention fraud, misrepresentation or government contracts."[17]

Two weeks later, another Eastern District of Virginia decision denied summary judgment in a former employee's defamation action against a bank that had allegedly advised other employees that the plaintiff "was fired for job abandonment."[18] Although acknowledging that a company's mere statement that it had terminated an employee is not defamatory, "[s]tating that [the plaintiff] abandoned her job is unlike stating a person resigned or quit" but instead "has a negative connotation on an employee as it portrays them as irresponsible and unprofessional."[19]

These three decisions decided within just a few months of each other demonstrate how difficult it can be to draw the line between actionable and nonactionable statements about an employee's termination.

5.8 ROLE OF COURT AND JURY

5.801 General Rule. The court decides as a threshold matter of law whether a statement is capable of a defamatory meaning.[20] If there is any

[16] *Mann v. Heckler & Koch Def., Inc.*, 639 F. Supp. 2d 619, 625 (E.D. Va. 2009).

[17] *Id.* at 635-36.

[18] *Wynn v. Wachovia Bank, N.A.*, Civ. A. No. 3:09CV136, 2009 U.S. Dist. LEXIS 62990, at *10 (E.D. Va. July 13, 2009).

[19] *Id.* at *27.

[20] *Goulmamine v. CVS Pharmacy, Inc.*, 138 F. Supp. 3d 652, 659 (E.D. Va. 2015); *AvePoint, Inc. v. Power Tools, Inc.*, 981 F. Supp. 2d 496, 506 (W.D. Va. 2013); *Shaheen v. WellPoint Cos.*, Civ. A. No. 3:11-CV-077, 2011 U.S. Dist. LEXIS 127164, at *10 (E.D. Va. Nov. 3, 2011); *Nigro v. Virginia Commonwealth Univ. Med. Coll. of Va.*, Civ. A. No. 5:09-CV-00064, 2010 U.S. Dist. LEXIS 56229, at *38 (W.D. Va. June 4, 2010) ("The issue of whether a statement is actionable is a matter of law to be determined by the court"); *Phi Kappa Psi v. Rolling Stone*, 94 Va. Cir. 214, 221-23 (Charlottesville 2016); *Taylor v. Southside Voice, Inc.,* 83 Va. Cir. 190, 192 (Richmond 2011); *Perk v. Vector Res. Grp., Ltd.*, 253 Va. 310, 316-17, 485 S.E.2d 140, 143-44 (1997).