10 August 2012

Question:

Can a Teacher be charged with Libel for sharing online/electronic information about their students with fellow Teachers?

Answer:

"The defence of 'qualified privilege' permits otherwise libellous communications among those who share an interest in the statements provided that they are not acting dishonestly or with malice."

Explanations about cyber-libel: ... Article "Cyber-libel. Protecting yourself in an online world" - reproduced with permission from In Solidarity; Summer 2012, volume 19, Number 2:

Cyber-libel: Protecting yourself in an online world

Eric O'Brien, OPSEU Legal Counsel
l

Over the last few years, the internet has offered exciting new ways for unions to inform and mobilize members. But the internet also raises new challenges. Many sites allow for a high volume of virtually instant and very informal communications with members and the public. It can be difficult for locals and members to plan communications that can keep up with the pace and style of internet postings. It is not surprising that one of regular questions that OPSEU communications staff and legal counsel are asked is "do you think that this is libellous?"

"Cyber-libel" is an updated term for an old idea. Libel law has existed is some form for thousands of years. Unlike many areas of law, libel law does not protect property or persons, but instead is focused on protecting reputations. The legal definition of a libellous statement has three consistent elements: a statement in writing, that is published to a third person, and that would lower the reputation of an identified person or organization. When these same elements were applied to internet communications, the term cyber-libel was coined.

Libel is a form of defamation, and is enforced by means of a lawsuit in the courts. In the union context, libel claims can arise from union websites, blogs, or social media webpages. As one common example, if a member's postings accused a person of harassment or bullying (i.e. likely to lower that person's reputation), then a lawsuit could be filed by the affected person, whether he or she were a manager, employee or member of the public. The defendant in the lawsuit could be the author of the posting, as well as the individual member(s) who act as "publisher" and even the union itself.

It is much less certain that employers may directly pursue defamation actions against employees. The Supreme Court has determined that arbitrators, rather than the courts, have jurisdiction over matters arising under a collective agreement. [1] Consequently, employers may be required to issue discipline in response to libellous statements of employees rather than pursue libel lawsuits. On the same basis, employees who feel that they are victims of libel by employers are likely required to pursue a grievance rather than a lawsuit in defamation.

Authors and publishers of libellous statements can find themselves involved in complicated and uncertain lawsuits, and may be ordered to pay damages. The amount of damages would be based on a number of factors, including the seriousness of the libellous statement, the extent of the publication, and the conduct and motive of the author. In the realm of cyber-libel, where statements can be impulsive or exaggerated, and are instantly transmitted to a potentially wide and permanent audience, there are obvious and serious consequences that can result from careless communications. [2]

But the legal picture is not uniformly bleak. **Not all libellous statements give rise to a legal action, or are subject to damage awards. There are defences that may permit a publisher to make statements that otherwise could attract liability. For example, the defence of "truth" allows the publication of libellous statements if they can be proven as true. The defence of "qualified**

privilege" permits otherwise libellous communications among those who share an interest in the statements provided that they are not acting dishonestly or with malice. And in 2009, the Supreme Court of Canada established a new defence, the "responsible communication on a matter of public interest" that protects media outlets that diligently report on significant issues. [3] This defence could extend to online or union publications in future.

Even the briefest review of libel law illustrates how complex and unpredictable these issues can be. The key conclusion is that anyone who is concerned about liability for libel should consult with union staff and counsel who are experienced in this area of the law. (And as with doctors, it is not good news to learn that your case is "interesting.")

There are also a few practical steps that can be taken to limit exposure for libel:

Union websites that permit member postings should be password protected and limited to members only. This will help ensure that the audience is properly limited (as an added bonus it keeps confidential information away from employers).

Postings should be reviewed and approved by an administrator prior to posting. Administrators should think about the concepts of libel, and should ask for advice if in doubt.

Postings should focus to the greatest extent possible on "union issues" and should avoid allegations that are personal. Unions should be diligent in checking facts.

Complaints about internet postings should be considered carefully. Sometimes a quick apology or retraction will prevent future headaches.

Members should be wary of quick fixes. If a statement seems libellous, it is not a solution to add "allegedly" or to include a disclaimer that the opinions expressed are not the union's. Libel law also applies to jokes – even funny ones.

Once union publishers think about the principles of libel law, and take reasonable steps to limit their exposure, it is important to remember that libel claims are extremely rare. Hopefully, an understanding of libel law will serve to support rather than intimidate union authors and publishers. It is critically important that unions and other progressive voices are not silenced by threats of legal action. Effective use of the internet, even with the risk of cyber-libel, is just too good an opportunity to miss.

[1] Weber v. Ontario Hydro, [1995] 2 SCR 929

[2] Barrick Gold v Lopehandia, 2004 CanLII 12938 (ON CA); compare with Baglow v. Smith, 2011 ONSC 5131 (CanLII)

[3] Grant v. Torstar Corp., [2009] 3 SCR 640; Quan v. Cusson, [2009] 3 SCR 712

In solidarity,
John Innanen
Webmaster,
Faculty Union Local 237.