



## FORMER EMPLOYEES LIABLE FOR CYBERSPACE DEFAMATION

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### Summary

In a decision published today, the California Court of Appeal clarified cyberspace defamation law, and held that former employees who publish defamatory statements on internet bulletin boards can be held accountable.

### Details

In this case (*Varian Medical Systems, Inc. v. Delfino*), two former employees of Varian Medical Systems posted derogatory messages about Varian and Varian executives on internet bulletin boards. The former employees criticized Varian products, implied that Varian had committed a crime, and portrayed Varian executives as incompetent, untruthful, mentally ill, and even willing to provide sexual favors in exchange for promotions. Varian sued for defamation. Although Varian did not specifically prove damages resulting from the alleged defamation, the jury found in its favor.

The former employees appealed, presenting the following questions to the appellate court:

- **Can a corporation be defamed?**

The former employees questioned whether the jury properly held that Varian, as a corporation, could be subject to defamation. After all, defamation is a false statement that harms a person's reputation and a corporation does not have a "purely personal reputation" as individuals do. The appellate court held, however, that a corporation has a "business reputation" and can therefore recover for defamation.

- **For purposes of defamation law, do statements about a public company constitute statements about a "public figure" or statements about "matters of public concern"?**

If a defamatory statement involves a public figure or an issue of public concern, then a plaintiff must show that the defendants made the statement with *actual malice* (i.e., knowing full well that the defamatory statement was false or not making appropriate efforts to determine whether or not it was false).

If a defamatory statement does not involve a public figure or an issue of public concern, then a plaintiff need only show that the defendants were *negligent* in determining whether or not the defamatory statement was false.

Here, the former employees claimed that Varian was a public figure in light of the fact that it was a publicly traded company. The appellate court disagreed, noting that Varian did not advertise or sell to the general public or have any pervasive involvement in society's affairs. Nor had Varian injected itself into a particular public controversy. Finally, the court ruled that a corporation should not lose its protection as private person simply by doing business with the public.

The former employees also claimed that their internet postings involved matters of public concern. Again, the appellate court disagreed. Although some of the defamatory statements, such as whether Varian discriminated or harassed women in the workplace, could be a matter of public concern, the defamatory speech, considered as a whole, was nothing more than a vicious personal vendetta.

- **Aren't statements made on the internet so ridiculous that they should not be considered defamation?**

Defamation requires a false statement of *fact* rather than *opinion*. Where “potentially defamatory statements are published in a public debate, a heated labor dispute, or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion.”

Here, the former employees argued that they should not be liable because internet message boards are so filled with “outrageous anonymous postings” that no reasonable person would consider typical postings to be true facts.

The appellate court disagreed for three reasons. First, it emphasized that in order for the internet to remain a viable tool for people to evaluate companies or otherwise meaningfully exchange ideas, it must be subject to defamation laws. Second, the mere fact that the audience might not have believed the former employees’ postings does not change the fact that the postings hurt Varian’s reputation to some extent. Finally, defendants’ postings were not “typical anonymous and outrageous postings.” Rather, again, they were vicious personal attacks.

- **Are statements made via the internet libel or slander?**

There are two types of defamation: (1) slander, which is *spoken* defamation, including “communications by radio or any mechanical or other means;” and (2) libel, which is *written* defamation. Because libel has historically been considered a greater wrong, any damages for statements that are libelous on their face are presumed and need not proven. On the other hand, slander requires proof of damages.

The employees argued on appeal that the internet postings were slander rather than libel because they were produced by “mechanical” means, and therefore Varian could not prevail because it had not proved damages.

The court held that “mechanical” means applies only to means of auditory communication (like television and radio) and not to means like the internet that produce written communications. Defamatory communications posted on the internet are therefore properly characterized as libel.

### **What this means**

This case makes it easier for employers to recover against former employees who make defamatory statements on the internet. Until now, it was unclear whether the relative informality of internet communication meant that internet speech would be held to a different standard. Now it is clear that defamation in cyberspace is no different than defamation in any written form – whether printed in a newspaper, posted on a traditional cork bulletin board or posted on an electronic bulletin board. If the written statement is defamatory without the necessity of explanatory matter, it is considered libel *per se*, and no proof of special damages is required.

Of course, choosing to sue one’s employees or former employees still raises a variety of practical questions: Can you determine who actually posted the defamatory statement? Do you wish to spend resources pursuing a lawsuit? Do you want to air your “dirty laundry” in court? But for those employers who do wish to pursue these internet defamers, the road has just become easier.

If you have any questions about this or any other topic, please contact [Matt Schenck](#) or [Corry Watrous](#) at (619) 237-5200 at [Paul, Plevin, Sullivan & Connaughton](#).

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