SEYFARTH SHAW

Management Alert

Texas Supreme Court Rules That There Is No Cause of Action For "Compelled Self-Defamation" In Texas

By Timothy M. Watson and John P. Phillips

***Seyfarth Synopsis**: Compelled self-defamation claims most commonly occur in the wrongful termination context, when plaintiffs allege they are required to defame themselves to prospective employers because they are required to tell such employers the reasons for their discharge. However, in a win for employers, the Texas Supreme Court recently ruled that Texas does not recognize such a claim, joining the majority of states and providing certainty to Texas employers.*

Recently, and as a matter of first impression, the Texas Supreme Court decided whether Texas recognizes a claim for compelled self-defamation—it does not. A typical defamation claim requires: (1) the publication of a false statement of fact to a third party; (2) that was defamatory concerning the plaintiff; (3) with the requisite degree of fault; and (4) damages, in some cases. Claims for compelled self-defamation generally occur in wrongful termination lawsuits, when plaintiffs allege that their former employer terminated them for false reasons and they were subsequently required to disclose the false reason to prospective employers, thereby harming their reputations. . The majority of courts to address the issue, however, have declined to accept the theory of compelled self-defamation, and the Texas Supreme Court found it to be incompatible with the at-will employment doctrine and unwise as a matter of policy.

In *Exxon Mobil, et al. v. Rincones*, following a failed drug test, a former refinery technician, Gilberto Rincones, brought suit against his employer, WHM Custom Services, Inc.; the owner of the refinery at which he had worked, Exxon Mobil; and the drug-testing administrator, DISA, Inc. In April 2010, Rincones failed a random drug test, testing positive for marijuana. Rincones alleged that he did not use illegal drugs, that the sample tested was not his, and that he witnessed "questionable" testing procedures. He submitted a urine test to a private doctor, which came back negative for marijuana use, although at a substantial higher screening threshold. After filing a discrimination claim with the Texas Workforce Commission, Rincones brought suit, asserting a claim of "compelled self-defamation" against his former employer based on the fact that he was forced to inform prospective employers that he had been terminated for a failed drug test.

The trial court granted summary judgment for WHM, Exxon, and DISA, finding that Rincones had failed to sustain his claims, and it issued a take-nothing judgment. On appeal, the Corpus Christi Court of Appeals reinstated Rincones lawsuit, reversing the trial court's judgment on multiple grounds, including "that Texas law recognizes a cause of action for defamation based on compelled self-publication in certain limited circumstances." The Texas Supreme Court reversed the Court of Appeals on all counts, reinstating the trial court's final take-nothing judgment against Rincones.

In reaching its decision, the Texas Supreme Court analyzed—for the first time—whether Texas recognizes the tort of self-defamation. The Supreme Court found that Texas does not, for the following reasons:

- First, the Supreme Court reaffirmed its prior rule "that if the publication of which the plaintiff complains was consented to, authorized, invited or procured by the plaintiff, he cannot recover for injuries sustained by reason of the publication."

- Second, the Court stated that if it recognized self-defamation, the Court "would risk discouraging plaintiffs from mitigating damages to their own reputations." In other words, self-defamation would allow any employee who disagrees with the reason for his termination to unilaterally create an actionable tort against his former employer, even if the former employer does not publish the reason for the termination.
- Third, the Supreme Court found self-defamation to be incompatible with Texas' employment at-will doctrine. In short, the employment at-will doctrine allows an employer to terminate an employee for any non-discriminatory reason; it does not require an employer "to be reasonable, or even careful, in making its terminations decisions." However, the self-defamation doctrine would require employers to conduct investigations and make accurate findings before taking any adverse employment action.
- Fourth, the Court determined that recognizing compelled self-defamation would "stifle workplace communication." Employers would be incentivized to adopt policies of only "name, rank, and serial number references," rather than engage in honest evaluation and communication about employee performance, for fear of being sued.

The supreme court explained that compelled self-defamation is not truly a stand-alone tort in any event, as the Court of Appeals mistakenly appeared to assume. Instead, it is best understood as an exception to the requirement in defamation cases that there be a publication of a false statement of fact to a third party. And the Court found that such a publication *by the plaintiff* cannot establish a defamation claim in Texas.

Consequently, Texas joins the majority of United States jurisdictions that have declined to recognize compelled self-defamation as a viable cause of action. The Texas Supreme Court's decision injects certainty into the tort of defamation, and it allows employers to continue to take appropriate disciplinary action, including termination, when employees engage in inappropriate conduct.

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