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Can They Really Say That About Me?

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Can They Really Say That About Me? **Libel, Slander and other Communication Torts**
2020 University of Texas School Law Conference

In today's world of social media, what remedies, if any, do school officials and employees have for what is said about them? What risks do school officials and employees face and what immunities do they have when they say things about others?

Speakers:

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- Thomas J. Williams, Haynes and Boone, Fort Worth, Texas

I. General Principles/Overview

To prove a claim for defamation, a private-figure plaintiff must show: (1) the publication of a false statement of fact; (ii) that was defamatory to the plaintiff; (iii) that was made negligently; and (iv) damages, in some cases. *In re Lipsky*, 460 S.W.3d 579, 593 (Tex. 2015). A plaintiff who is a public official or public figure must show that an allegedly defamatory statement relating to the plaintiff was made with "actual malice," that is, with knowledge that the statement was false or with reckless disregard of whether it was false or not. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964); *Greer v. Abraham*, 489 S.W.3d 440, 443 (Tex. 2016) (public official); *Hearst Corp. v. Skeen*, 159 S.W.3d 633, 636 (Tex. 2005) (public figure);[1] *WFAA-TV, Inc. v. McLemore*, 978 S.W. 2d 568, 571 (Tex. 1998). This is a significantly higher burden than ordinary negligence. *See In re Lipsky*, 460 at 593. A plaintiff's status as a public official or public figure is a question of law for the court, *Neely v. Wilson*, 418 S.W.3d 52, 70 (Tex. 2013), and is determined by federal standards. *See Rosenblatt v. Baer*, 383 U.S. 75, 85–86 (1966); *Schofield v. Gerda*, No. 02-15-00326-CV, 2017 WL 2180708, at *12 (Tex. App.—Fort Worth May 18, 2017, no pet.) (mem. op.).

II. School Officials and Employees as Litigants – Public Officials and Public Figures

One of the primary issues that often arises when a school official or school employee brings a defamation lawsuit is whether that plaintiff should be considered a "public official" or "public figure" for purposes of the suit. Because a plaintiff who is either a public official or a public figure must show that an allegedly defamatory statement relating to the plaintiff's official conduct was made with "actual malice," a greater burden than to show ordinary negligence, the determination of this question can be critical to the outcome of the case.

[1] As *Skeen* illustrates, courts sometimes use the term "public figure" when "public official" might be more precise; the plaintiffs in that case were an elected District Attorney and two of his assistants, yet the Texas Supreme Court referred to them only as "public figures," not "public officials." The effect is the same, however; in either situation the plaintiff must meet the actual malice standard.

Public Officials

Not all governmental employees qualify as "public officials" for purposes of defamation litigation, and there is no specific test for determining whether an individual is a "public official." *Cloud v. McKinney*, 228 S.W.3d 326, 339 (Tex. App.—Austin 2007, no pet.). At the very least, however, the standard applies to government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs. *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966). Government employees will generally be considered public officials if the public has an independent interest in their qualifications and performance beyond the general public interest in the qualifications and performance of all government employees. *Id.*; *Cloud*, 228 S.W.3d at 339–40 (holding executive director of lottery commission to be public official). To determine whether a plaintiff is a public official, courts will generally examine the plaintiff's authority and exercise of that authority. *See Greer*, 489 S.W.3d at 446–47; *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 813 (Tex. 1976). Even if the plaintiff is a public official, the statements at issue are only actionable if they relate to the plaintiff's official conduct, which includes both performance of official duties and fitness for office. *See Greer*, 489 S.W.3d at 444 (relying on *New York Times*, 376 U.S. 254 at 279–80); *Foster*, 541 S.W.2d at 814–15.

Public Figures

Public figures for purposes of defamation litigation generally fall into two categories: (1) all-purpose public figures; and (2) limited-purpose public figures. *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998).[2] All-purpose public figures are those who have achieved such pervasive fame or notoriety that they have become public figures for all purposes and in all contexts. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974); *McLemore*, 978 S.W.2d at 571. An individual will be considered an all-purpose public figure only where there is clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society. *See Gertz*, 418 U.S. at 352. Limited-purpose public figures, on the other hand, are only public figures for a limited range of issues surrounding a particular public controversy. *Gertz* 418 U.S. at 345; *McLemore*, 978 S.W.2d at 571. Courts apply a three-part test to determine whether an individual is a limited-purpose public figure: (1) the controversy at issue must be public both in the sense that people are discussing it and people other than the immediate participants in the controversy are likely to feel the impact of its resolution; (2) the plaintiff must have more than a trivial or tangential role in the controversy; and (3) the alleged defamation must be germane to the plaintiff's participation in the controversy. *McLemore*, 978 S.W.2d at 571.

The following cases illustrate the applicability of these principles to plaintiffs who were employed or otherwise involved in education:

School Teachers

No Texas court has held that an "ordinary" school teacher is a public official subject to the actual malice standard as a matter of law. *See Poe v. San Antonio Express News*, 590 S.W.2d 537,

[2] There is a rare, third category of public figures: involuntary public figures who become public figures through no purposeful action of their own. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974); *Neely*, 418 S.W.3d at 71–72.

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