# Can't Say Something Nice?

Then maybe you shouldn't say anything at all—at least if what you're saying is defamatory.

By Brian J. Hunt, JD

The First Amendment protects free speech, but even that bedrock freedom has its limitations.

Defamation is a case in point. The law recognizes that certain types of defamation—those relating to an individual's want of character or inability to perform as a professional—actually may be cause for legal action against whoever makes the claim.

Of course, to ensure that speech is actually protected, the law requires that a strict burden of proof be met, and recognizes a host of protections for the speaker. *Coghlan v. Beck* is a perfect example.

Angelika Coghlan was managing partner of IT services company Catwalk Consulting and, from 2008-2010, president of the Chicago chapter of the National Association of Women Business Owners (NAWBO). In January 2010, Rebecca Busch, CEO of Medical Business Associates (MBA), submitted a post to NAWBO-Chicago's listserv, seeking IT services. Before publically posting the inquiry, Coghlan contacted Busch and solicited MBA's business. Catwalk and MBA eventually entered into a contract, which detailed a maximum price, the services to be performed and the deliverables to be provided.

The contract between Catwalk and MBA soured when MBA paid the maximum contract price but failed to receive the deliverables agreed upon, although Catwalk continued to issue invoices for its work. In March 2011, Busch notified Catwalk of MBA's intention to terminate the contract.

In April 2011, in advance of a NAWBO-Chicago board meeting, Valerie Beck, who had replaced Coghlan as NAWBO president in 2010, prepared a written statement claiming that Coghlan, (1). was a "corrupt director [who] must go," (2). "intercepted a listserv posting for her own benefit, which is indeed a classic conflict of interest," (3). "induced [Busch] to contract with her and to take out a loan for $100,000," (4). "pocketed the money," (5). "failed to give the deliverable that was contracted for," (6). "used bully tactics to try to gain yet more money," (7). was "using NAWBO to operate a fraud machine," (8). used "smokescreen tactics to conceal this wrongdoing," and (9). was an "offending director."

A document was attached to the letter, detailing the standards by which NAWBO board members are to abide, including the need to avoid conflicts of interest by placing the interests of the general membership and the board over their own professional and political interests as directors. As part of that standard, the document explained that board members should refuse to secure special services, favors, honoraria or exemptions that aren't available to the general membership.

Subsequently, Busch sent a letter to IBM, one of Catwalk's business partners from which MBA had secured the $100,000 loan for the work, complaining that, although Catwalk had been paid in full, it had failed to provide the contracted deliverables. Coghlan and Catwalk then filed suit against MBA, NAWBO-Chicago and Beck, alleging defamation per se.

In affirming the trial court's dismissal of the allegations of defamation per se, the Appellate Court began by noting that the plaintiff must present sufficient facts to show that the defendant made a false statement, the defendant made an unprivileged publication of that statement to a third party and this publication caused damages. A defamatory statement is one that harms the plaintiff's reputation to the extent that it lowers the person's standing in the eyes of the community or deters the community from associating with her. A statement is defamatory per se if the harm is obvious and apparent on its face.

The Illinois Supreme Court has recognized several statement categories considered defamatory per se, including words that accuse a person of committing a crime, claim a person is unable to perform or lacks integrity in performing her employment duties, and impute a person lacks ability or otherwise prejudices that person in her profession. However, a claim of defamation per se must be pled with heightened precision and particularity.

The Court also noted that only statements that can be proved true or false are actionable, while mere opinions are not. The Court therefore has to determine whether a statement can be interpreted as fact in the eyes of an ordinary reader, applying criteria such as whether the statement has a precise and readily understood meaning, whether the statement is verifiable, and whether the statement's literary or social context signals that it has factual content. However, even statements that fall into one of these categories aren't actionable if they're innocently constructed or substantially true.

The Court went on to state that a defamatory statement isn't actionable where it is subject to a qualified privilege. To determine whether a qualified privilege exists, a Court looks only to the occasion itself and determines as a matter of law and general policy whether the occasion created a situation where a privilege is warranted. For instance, a corporation has an unquestionable interest in investigating and correcting a situation where one of its employees may be engaged in suspicious conduct within the company. Once a defendant has established a qualified privilege, the plaintiff must prove that the defendant either intentionally published the materials while knowing the matter was false, or displayed a reckless disregard of the matter's falseness. Reckless disregard is defined as publishing the defamatory matter despite a high awareness that it is likely false, or having serious doubts that it is true. The burden of proof requires the plaintiff to present facts that actually infer malice.

With respect to the statement that Coghlan intercepted Busch's submission and contacted Busch prior to making that submission available to the entire membership, the Court concluded that it was substantially true and therefore nonactionable. However, the Court did note that an allegation of engaging in a criminal conflict of interest would impute the commission of a specific crime and therefore would be actionable as defamatory per se. That said, those circumstances didn't exist here. Rather, the Court concluded that Beck's allegation was nonactionable because it was mere opinion.

When it came to the statements that Coghlan pocketed the money, was a corrupt director, used bully tactics in an attempt to gain yet more money, failed to give the deliverable that was contracted for and was operating a fraud machine, the Court noted that these terms didn't have precise and readily understood meanings. It further noted that Coghlan substantially admitted in her pleadings that she had committed all of the acts at issue, and that Beck's characterizations, while arguably harsh, merely amounted to loose figurative language that no reasonable person would believe presented facts. What's more, Beck's statements couldn't be shown to be true or false and, therefore, amounted to mere opinion.

Lastly, Beck's statement that Coghlan failed to provide the deliverables contracted merely amounted to an allegation of breach of contract. As a result, the Court concluded that none of Beck's statements were actionable.

The law doesn't provide a remedy for every wrong. While Beck, as the president of NAWBO, may have needed to address Coghlan's conduct, objectively speaking it could have been done with a bit more discretion. At the same time, you have to question the wisdom of Coghlan's suit, which in effect publicized the comments she found so offensive in the first place. □

*About the Author: Brian J. Hunt is the founder and managing principal of The Hunt Law Group, LLC in Chicago. He was again selected as an Illinois Super Lawyer in Business Litigation in 2014. His practice focuses on the counseling and representation of CPAs and other business professionals, and the resolution of business disputes. Brian can be reached at 312.384.2301 or bhunt@huntlawgroup.com.*