

Defamation: Risk Exposure and Risk Management for Academics

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Faculty members, by the nature of their profession, are exposed to potential defamation liability claims as a consequence of statements made in their roles as tenure and promotion committee members, as well as other peer-review duties. The purpose of the paper is to help faculty members recognize, understand, and manage the risk exposure arising from the performance of their duties.

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I. Introduction

Tenured faculty members often serve on Promotion and Tenure Committees (P&TCs) to evaluate promotion and tenure applications of fellow faculty members. These committee members are entrusted to carry out their duties as described by a Collective Bargaining Agreement (CBA) in a union environment, or university-published Faculty Handbook (FH) in a non-union environment. As they carry out their assigned duties, committee members use their professional judgment to assess the applicant's performance and make recommendations to university administrators.

Because of the impact of their reviews, P&TC members have the potential to do great harm to the careers of others. Negative recommendations made by tenure committees can at least temporarily derail the applicant's career, resulting not only in lost wages but also loss of productivity while managing the appeal process, and impaired ability to compete in the market. These actions can harm the applicant's entire family, who faces unanticipated cash flow or credit problems, job search and moving expenses, and the stress of an unplanned or unwanted move.

Applicants have several courses of action when faced with negative P&T decisions. These decisions frequently lead to filing of grievances when CBA provisions have been violated, or to seeking an appeal as defined by the FH. If it appears that civil law has also been violated in the process, legal claims can also result.

The peer review role of faculty members provides them with the opportunity to make statements regarding the performance and competence of the applicant. In the process of making these statements, faculty are exposed to the risk of a lawsuit for personal injury torts. If negative statements are unsubstantiated or false, and are relied on during the deliberation process then disseminated through the chain of review, claims of libel can result. Other tort claims in addition to defamation may also arise. For example, applicants may allege that a faculty reviewer damaged the applicant's relationship with the university, resulting in a claim of tortious interference with a contractual relationship. Applicants may allege that negative statements were intended to inflict emotional harm, resulting in a claim of intentional infliction of emotional

distress. Further, the appearance of collaboration among faculty reviewers to inflict this harm can result in a claim of collusion.

The originators of negative statements may be mistaken as to the level of privacy that they enjoy with their communications. The use of communication technology further expands liability exposure, as negative statements may be disseminated indiscriminately, whether by accident or design. Email, both on university and personal accounts, is subject to discovery as evidence of the transmission and publication of negative statements.

Faculty members may expose themselves to P&T-resulting claims even without serving on a review committee. For example, faculty who submit negative statements to a P&TC that substantially influence committee members may also be vulnerable to litigation. P&TC members who disclose information to non-members may also face consequences of violating privacy laws related to human resource files.

Faculty members may proceed cautiously in recognition of the potential liability exposure. They may consult with university attorneys or union representation to ensure that their actions conform to law, the CBA, and university policies. However, these precautions are limited and may be defeated under a variety of circumstances, leaving the faculty member liable for certain actions.

Other faculty members may feel invulnerable to liability, assuming that the university will provide defense. They may be aware of university indemnification agreements that protect faculty while performing their regular duties. However, these agreements are subject to conditions that the faculty member may have violated either accidentally or intentionally, limiting or negating an indemnification claim.

Defending against legal claims is an unpleasant, expensive, time consuming, lengthy process for both the plaintiff and the defendant. In order for an academic to reduce the risk of being named a defendant in defamation case, standard risk management techniques should be employed. These risk management techniques include risk avoidance, reduction, shifting, sharing, and assumption.

This work focuses on the liability that academics face as they perform their duties on tenure and promotion committees. The purpose of the paper is to help faculty members recognize, understand, and manage the risk exposure arising from the performance of their peer-review duties. The remainder of the paper is organized as follows.

Section 2, Background, explains torts in general as well as the five elements that constitute defamation in general. Defamation per se, which specifically includes the accusation that an individual is unfit or incompetent to carry out the duties of their profession, is discussed. This section also discusses defenses against defamation claims, which include truth, qualified privilege, common interest, and First Amendment rights. However, each of these defenses can be defeated as described in this section by malice, negligence, unnecessary publication, as well as several other defenses and technical issues. Because tort law is enacted and adjudicated on the state level, the standard of proof varies among states, which is also discussed in this section.

Section 3, Case Review, describes relevant cases in both academia and in supervisory relationships outside of academia. The majority of tort cases brought in the United States are settled out of court, and these outcomes are not publicly available. Examples of publicly adjudicated cases which inform this study are described. These examples include but are not limited to:

- *Chrabaszcz v. Town of Johnston*, where a high school assistant principal sued for defamation having been wrongly accused of sexual harassment, award \$162,000
- *O'Brien v. Maynard*, where an EMT sued for defamation for false statements made by hospital staff regarding his professional performance, award \$45,000
- *Au v. Ma*, where two research professors sued for defamation after a former colleague contacted government agencies and school officials, accusing the two professors of falsifying data and other misconduct, award \$500,000 to each
- *Stream v. Slack*, where a professor was accused of plagiarism by another professor, award \$450,000
- *Egbe v. Maggio*, where a professor was accused of stalking and sexual harassment, award \$2.3 million

Section 4, Risk Management Techniques, will discuss standard techniques for faculty members who want to manage the risk of incurring liability as a result of their P&T peer review activities. Standard risk management techniques include risk avoidance, reduction, shifting, sharing, and assumption. Risk managers usually use a combination of techniques to manage risks. For purposes of the risks arising from peer review, risk reduction and risk shifting are most relevant.

Risk reduction is employed in situations such as these where the probability pre-adoption may be high and the potential financial loss is also high, warranting education and behavioral management. Risk shifting refers to the use of insurance to manage financial risk, and is most appropriate when the probability of loss is low, but the potential dollar loss is high. Risk shifting by relying on indemnification by the university can be effective, but only to the extent that indemnification policies have not been violated. Personally owned liability insurance designed to manage the financial risk resulting from the acts of the insured that cause harm to others may play some part in defense; however, coverage specifically excludes intentional acts such as defamation.

In Section 5, Conclusion, this work is summarized and implications for both P&T applicants and committee members are discussed. This work extends a more general earlier work that addressed this topic for households.