In the law of defamation, particularly in reference to Employment Practices Liability (“EPL”) lawsuits, a developing issue is whether actions speak at least as loud as words. A trend may be developing wherein plaintiffs are bringing Dramatic Pantomime or Defamation by Conduct claims. The reason for these claims appears to be that plaintiffs are limited in their quest for damages by the current laws governing certain types of EPL lawsuits. In response to these limitations, the plaintiffs’ bar began filing tortious interference, emotional distress and, in particular, traditional defamation claims. For example, an employer provides a poor employment recommendation for an ex-employee (who had filed an EPL claim against the employer) to the plaintiff’s prospective employer. Now, plaintiffs’ lawyers are attempting to expand the scope of the defamation claims beyond their traditional confines. Plaintiffs are bringing claims for defamation by conduct and inference only, where no spoken word or writing has taken place, which allegedly caused injury to the plaintiff. These claims are commonly known as Dramatic Pantomime or Defamation by Conduct claims.

In brief summary, the traditional law of defamation as outlined in the Restatement (Second) of Torts Section 558 defines the tort as a false statement made as an unprivileged communication published to a third party in a negligent, reckless or intentional manner on the part of the publisher, which results in quantifiable damages to the plaintiff. The Restatement Second further defines defamatory communication in two categories: “(1) Libel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words, (2) Slander consists of the publication of defamatory matter by spoken words, transitory gestures or by any form of communication other than those stated in Subsection (1).” Restatement (Second) of Torts, § 588, emphasis added. Comment a to Section 559 of the Restatement Second explains that “the word ‘communication’ is used to denote the fact that one person has brought an idea to the perception of another.” Id. § 559 cmt. a, at 156. Further discussion in the Restatement indicates that a particular act may fall within the definition of defamatory communication. Id. § 565 cmt. a, at 170.

In many states, the law of defamation is already confusing. One author has described it this way:

There is a great deal of the law of defamation which makes no sense. . . . One heritage of [the] haphazard development [of the law of defamation] is the set of arbitrary and illogical rules which surround both [libel and slander] . . . . No very comprehensive attempt ever has been made to overhaul and untangle this entire field of law, and, unhappily, there seems to be none in prospect.


The development of the law for actions by dramatic pantomime will certainly add to this confusion.

Defamation by conduct claims are beginning to be addressed by courts across the country in the EPL context. These claims typically arise out of traditional employment situations. For example, a recent decision in Massachusetts gives us an insight into the type of claims we are seeing as part of the trend. In Phelan v. May Department Stores Co., 819 N.E. 2d. 550 (Mass. 2004), the Massachusetts Supreme Court overturned the decision of the Appeals Court, which reversed the trial judge’s grant of a JNOV in favor of the defendant, on the basis that the jury verdict in favor of the plaintiff’s defamation by conduct claim was not supported by the evidence. The Supreme Court began by recognizing that, although not explicitly recognized in prior Massachusetts case law, “defamatory publication may result from the physical actions of a defendant, in the absence of written or spoken communication.” Id. The court analyzed the claim, applying the same objective test applicable to traditional defamation: an “inquiry into a reasonable recipient’s understanding of the words rather than the speaker’s intent . . . to prove that words are defamatory and that they concerned the plaintiff.” Id.

After applying the test to the facts of the case, the Supreme Court reversed the Appellate Court and reinstated the JNOV. Specifically, the court found that there was not sufficient evidence to support the jury’s verdict, despite the plaintiff’s testimony that he had been defamed through the conduct of his employer “by holding him under guard for more than six hours and repeatedly escorting him through the office in view of his coworkers.” Id. The court disagreed with the Appellate Court’s finding that “[t]he defendants’ conduct . . . [was] reckless in excessively and unnecessarily imputing to him a crime.” Phelan v. May Department Stores Co., 806 N.E.2d. 393 (Mass. Ct. App. 2004). The Supreme Court found that the plaintiff’s testimony was insufficient to overcome the threshold issue in a defamation action, whether a communication is reasonably susceptible of a defamatory meaning by someone other than the plaintiff. The court held that the employer’s
conduct was subject to different interpretations and did not constitute clear and unambiguous defamatory conduct. Phelan v. May Department Stores Co., 819 N.E. 2d. 550, 555 (Mass. 2004). The Supreme Court, however, defined the situation in which conduct could be considered defamatory, specifically where the facts include “chasing, grabbing, restraining, or searching such as would [convey] a clear and commonly understood meaning.” Id. Although the plaintiff did not prevail in Phelan, the case represents the type of fact scenario the courts will entertain to extend the traditional forms of defamation law to incorporate conduct.

The current consensus of the courts continues to be that the traditional definition of defamation claims, involving the spoken or written word, is still favored. Usually, even where there are claims of defamatory conduct, there is some companion statement made in conjunction with the allegedly defamatory action. Thus, the conduct becomes a part of the existing circumstances surrounding the communications about the plaintiff. In instances where no statement is involved, the dramatic pantomime claims that have been allowed are most often in circumstances where someone has been physically removed from an area by the use of some show of force by the employer. The courts in Massachusetts, Maryland, New York and Pennsylvania currently entertain defamation by conduct cases where drastic and obvious physical actions have been taken by the employer against an employee. No court to date, however, has explicitly ruled that the mere act of termination itself, without more, is actionable defamation by conduct on the part of the employer.

Given the potential trend of dramatic pantomime claims, employers and insurers alike must be on the lookout for further developments. There is little question that the plaintiffs’ bar will continue to raise their voices to persuade the courts to not only look at, but to hear, their dramatic pantomime claims as viable causes of action. If they are successful, a new cliché may develop with regard to EPL claims that “actions speak at least as loud as words.”

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1 For example, plaintiffs are typically limited under employment practices liability lawsuits to seeking the following damages: enjoining an employer from engaging in unlawful employment practices, pursuing reinstatement, and the award of back and front pay. E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 280 (2002); see also Faragher v. City of Boca Raton, 524 U.S. 775, 804 (1998). Some EPL claims under Title VII were expanded to include compensatory and punitive damages under some circumstances, but such awards are still limited as they are subject to a statutory cap. See EEOC v. Rose Casual Dining, L.P., 2004 U.S. Dist. LEXIS 435 (E.D. Pa. 2004); Kulp v. Dick Harrigan VW, Inc., 1994 U.S. Dist. LEXIS 408 (E.D. Pa. 1994) (citing 42 U.S.C. § 1981a). In addition, plaintiffs cannot sue the individuals for whom they work unless it can be shown that the employee aided and abetted the employer in the allegedly discriminatory conduct. Courts have further limited claims against individuals by the imposition of liability on supervisory employees only, on the theory that they can share the discriminatory intent and purpose of the employer. Destefano v. Henry Michell Company, 2000 U.S. Dist. LEXIS 4290 (E.D. Pa. 2000).

2 The Massachusetts Supreme Court relied on the Restatement (Second) of Torts in its determination that conduct can be considered a defamatory communication, specifically referencing Section 559 cmt. a, at 156 (“The word ‘communication’ is used to denote the fact that one person has brought an idea to the perception of another”); Section 563 cmt. a, at 162 (“communicating”, “whether by written or spoken words or otherwise,” is that which recipient understands it to convey); Section 565 cmt. a, at 170 (particular act may fall within definition of defamatory communication); Section 568 cmt. d, at 180 (publication of defamatory matter may be made by conduct and may be treated as libel, rather than slander).