

OFFICE OF RESEARCH INTEGRITY

Position Paper #1

The Whistleblower's Conditional Privilege To Report Allegations of Scientific Misconduct

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Research Integrity

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Consistent with PHS regulations, ORI believes that whistleblowers possess a conditional privilege to disclose, in good faith to the proper institutional or ORI officials, allegations of scientific misconduct. Such a conditional privilege would protect whistleblowers from defamation claims even where the allegations ultimately prove to be untrue. However, whistleblowers who abuse the privilege by making bad faith allegations or by intentionally violating the confidentiality of accused parties may not be protected from defamation claims.

Introduction

In scientific misconduct cases, an individual who discloses misconduct to a proper authority is termed the "whistleblower".¹ Accused scientists in some cases may choose to retaliate against the whistleblower. Such retaliation may be manifested in a number of ways, including a civil suit against the whistleblower for defamation.

The Public Health Service scientific misconduct regulation aims to protect whistleblowers against a broad spectrum of retaliatory actions. Under the PHS regulation, covered institutions must undertake diligent efforts to "protect the positions and reputations of those persons who, in good faith, make allegations [of scientific misconduct]."²

The PHS regulation requires protection of good faith whistleblowers. On the other hand, institutions must also provide the individuals accused of misconduct "confidential treatment to the maximum extent possible."³ The regulation therefore does not condone a whistleblower's intentional *public* allegation of misconduct, such as disclosure to the media.

In addition to the PHS regulation which mandates protection for whistleblowers against general retaliation, common law suggests that such whistleblowers may be protected in civil defamation

suits. In particular, case law indicates that whistleblowers possess a conditional privilege to disclose, in good faith to appropriate authorities, "defamatory" allegations of scientific misconduct.⁴ The following commentary summarizes this conditional privilege.

First, the general law of defamation and conditional privilege will be reviewed. The discussion will then turn to the various reasons why scientific misconduct allegations may be conditionally privileged against defamation suits. Lastly, this paper will briefly address potential abuses and resulting loss of the conditional privilege.

The Law of Defamation and Conditional Privilege

A written or non-written communication is defamatory if it "tends to injure plaintiff in his trade, profession or community standing, or lower him in the estimation of the community."⁵ An allegation of scientific misconduct, whether or not substantiated by subsequent investigation, will tend to injure the reputation of an accused scientist. Therefore, a whistleblower's allegation of misconduct will often constitute defamation.

The truth of a defamatory statement furnishes a complete defense for the one who makes the statement. However, if the conditional privilege applies, it may not be necessary for the whistleblower to prove the truth of his allegation. The conditional privilege allows the whistleblower to allege scientific misconduct even if the allegation proves to be false;⁶ he must merely have a *good faith belief* that the allegation is true. "Good faith" encompasses, among other things, "an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage."⁷ See "Abuse of Privilege" discussion, below.

A whistleblower who discloses scientific misconduct is not liable for defamation if he can claim a conditional privilege. A conditional privilege may be invoked only if the allegation was made under certain conditions, and the privilege is not abused.⁸ The following section describes four special instances of defamatory disclosure in which a conditional privilege may be invoked. Any one of these kinds of defamatory disclosure will establish the conditional privilege.

1. Communication to One Who May Act in the Public Interest

A whistleblower may claim a conditional privilege if he reasonably believes that the facts he alleges affect a public interest of such importance that he should communicate the matter to a person authorized to respond to the allegation.⁹

Federal statute and regulations create a legal mechanism by which ORI is authorized to respond to misconduct allegations. PHS research grant applicants and awardees are accountable to the statutorily established Office of Research Integrity (ORI).¹⁰ When an allegation of scientific misconduct surfaces, the grantee institution which supervises the accused scientist must initiate an inquiry, and possibly a subsequent investigation, in accordance with the PHS regulation.¹¹ ORI may conduct its own investigation if necessary and impose sanctions in addition to those imposed by the institution if appropriate.¹²

Moreover, allegations regarding misconduct in PHS funded research clearly affect "important public interests," i.e., the advancement of scientific research, the public health, and conservation of public funds.¹³ This public interest requires that allegations of misconduct be brought to ORI or authorized institutional officials.

In sum, Federal statute and regulations recognize the important public interest in detecting and deterring scientific misconduct, and create an administrative structure by which whistleblowers may communicate misconduct allegations to those authorized to take action. Thus, ORI considers a whistleblower's good faith allegation to ORI or an authorized institutional official to be conditionally privileged as a communication of matters affecting important public interests.

On the other hand, ORI believes that a whistleblower would not have a conditional privilege to publicly disclose misconduct allegations to unauthorized persons because this contravenes one of the requirements of the privilege⁽¹⁴⁾ and the regulatory requirement to protect the confidentiality of accused individuals.¹⁵

2. Common Interest

A whistleblower's good faith allegation of scientific misconduct may be conditionally privileged under a second rubric. A conditional privilege exists if the whistleblower reasonably believes that the recipient of the allegation shares a common interest in the subject matter communicated, i.e., scientific misconduct.¹⁶

The whistleblower and ORI (or the grantee institution) share a common interest in bringing scientific misconduct to light and preventing further misconduct. When the whistleblower discloses possible misconduct to ORI or an authorized institutional official, the shared information strikes a common interest. The whistleblower need only have a correct or *reasonable* belief that the recipient of the information shares a common interest and is entitled to receive the information. While one formulation of the conditional privilege suggests that the recipient must be *entitled* to know the "common interest" information, courts have phrased the privilege somewhat differently. One court, for example, stated that the conditional privilege applies to "statements concerning a matter of common interest to the publisher and recipient which is *furthered* by the communication."¹⁷ In any case, the common interest in prosecuting misconduct is furthered by the whistleblower's disclosure, *and* ORI is entitled to receive all information on scientific misconduct associated with PHS funds.

Whistleblowers and ORI share a common interest in the disclosure of scientific misconduct. Hence, ORI believes that the good faith whistleblower who reports misconduct to proper institutional or ORI officials possesses a conditional privilege and would not be liable for defamation.

3. Protection of a Common Interest

A third situation in which a conditional privilege for "defamatory" allegations exists is similar to (but narrower than) the "common interest" occasion considered above. One court described the privilege this way: "When one has an interest in the subject matter of a communication, and the person (or persons) to whom it is made has a corresponding interest, every communication honestly made, *in order to protect such common interest*, is privileged by reason of the occasion."¹⁸

To claim this privilege, the whistleblower's good faith allegation must be based on more than mere possession of a common interest; its objective must be to *protect* the common interest.¹⁹ The good faith whistleblower seeks to protect a common interest - the integrity of scientific research -

by disclosing misconduct. Thus, ORI believes that such disclosures, even though defamatory, are privileged.

Some courts have extended this conditional privilege to defamatory statements made pursuant to a duty.²⁰ Besides, or instead of, having a common interest in scientific integrity, persons with knowledge of possible misconduct may have a duty to "blow the whistle" under institutional policies and procedures. Even if this duty is not expressly imposed, a conditional privilege to allege misconduct may nonetheless exist. A defamatory communication may be made with respect to a duty that is "public, personal, or private, either legal, judicial, political, moral, or social...."²¹ The whistleblower who exercises his public or personal duty to protect a common interest - scientific integrity - may assert a conditional privilege in a defamation suit.

4. Protection of the Whistleblower's Own Interest

Lastly, the whistleblower may claim a conditional privilege to allege scientific misconduct if he has a reasonable belief that the facts alleged affect his own important interests, and that the recipient of the information can protect those interests.²² On occasion, the whistleblower's allegation of scientific misconduct may stem from a situation directly and adversely affecting his own interests. For example, one researcher's scientific misconduct may impinge upon another scientist's associated research. If the latter becomes a whistleblower in order to protect his own important research, a conditional privilege may be invoked.

Thus, a personal motive does not necessarily deprive the whistleblower of a conditional privilege to allege misconduct. Rather, if the whistleblower has a correct or reasonable belief that making the misconduct allegation will guard his important interests, and the recipient of the information (e.g., ORI) can help to protect that interest, the whistleblower may claim a conditional privilege.²³

Although the specific facts of each whistleblowing case will determine whether the conditional privilege applies, the law set forth above would seem to grant such a privilege to the whistleblower who reports a case of scientific misconduct to ORI or a proper institutional authority in order to protect an important interest - either the public's interest in preserving the integrity of publicly funded research, ORI's interest in prosecuting scientific misconduct, or the whistleblower's interest in protecting his own important research activities.

Each of the four situations discussed above affords the whistleblower a conditional privilege to make a "defamatory" allegation of scientific misconduct. Each of these circumstances involves a socially important value - the protection of speech designed to further important public or private interests - which necessitates the conditional privilege.²⁴ Even if allegations sometimes turn out to be false, the conditional privilege serves to encourage good faith allegations of scientific misconduct, and accordingly, a corresponding reduction in misconduct. The social policy supporting the conditional privilege is not advanced, however, if the whistleblower abuses the privilege by making a bad faith allegation or an unwarranted disclosure (to the media, for example).

Abuse of Privilege

Although an allegation of scientific misconduct might otherwise be privileged, the whistleblower may be liable for defamation if he abuses the privilege. Abuse of the privilege may occur in several ways:

- the whistleblower knows that the defamatory matter is false (or he has reckless disregard for the truth);
- the defamatory matter is disclosed for some purpose other than that for which the privilege is given;
- the disclosure is made to a person not reasonably believed to be necessary for accomplishment of the privilege's purpose; or
- the allegation includes defamatory matter not reasonably believed to be necessary to accomplish the privilege's purpose.²⁵

These various abuses may be described collectively as "bad faith" or "malice." Whether or not a whistleblower abuses his conditional privilege will be a fact specific inquiry. Because the PHS regulation recognizes only good faith allegations of scientific misconduct²⁶ and seeks to protect the confidentiality of accused individuals,²⁷ ORI believes that an allegation which is not made in good faith or which violates the confidentiality of the accused should not be protected. For example, a whistleblower might abuse the privilege by making an allegation he knows to be false or by disclosing misconduct to unauthorized persons such as the media. Such bad faith disclosures constitute abuse of the conditional privilege and would not be protected against defamation actions.

Though bad faith whistleblowers may forfeit the conditional privilege, case law clearly instructs that the conditional privilege carries with it a presumption of good faith. In other words, the burden of showing bad faith falls on the plaintiff who brings suit for defamation.²⁸

Conclusion

The threat of retaliation poses a major deterrent for whistleblowers. The current scientific misconduct regulation directs covered institutions to undertake "diligent efforts to protect the positions and reputations of" good faith whistleblowers. 42 C.F.R. 50.103(d)¹³. On the other hand, the regulation also seeks to protect the confidentiality of accused scientists. 42 C.F.R. 50.103(d)³. Although the regulation does not specify the precise contours of its whistleblower protection, this paper shows that whistleblowers may be protected in defamation suits.

The common law has forged a conditional privilege for defamatory statements made under certain circumstances. ORI believes that good faith allegations of misconduct made to proper ORI and institutional officials fall within those situations, and thus, those allegations are privileged. However, allegations not made in good faith or made with intent to violate the confidentiality of the accused are not condoned by PHS regulations and may constitute abuse of the conditional privilege, leaving the whistleblower unprotected from defamation claims.

Endnotes

1. PHS' current misconduct regulation uses the term "misconduct in science." 42 C.F.R. Part 50, Subpart A. However, the National Institutes of Health Revitalization Act of 1993 has revised the statutory language by substituting the phrase "research misconduct." Pub. L. No. 103-43 (June 10,

1993), amending 493 of the PHS Act (42 U.S.C. 289b). Although the statutory term has been changed, this paper utilizes the terminology found in the current misconduct regulation.

2. 42 C.F.R. 50.103(d)(13). See also 42 C.F.R. 50.103(d)(2); PHS Policies and Procedures for Dealing with Possible Scientific Misconduct in Extramural Research, 1.6(a)(2)(ii), 56 Fed. Reg. 27384, 27387-27388 (1991).

In addition, Congress has recently directed the Secretary of the Department of Health and Human Services (DHHS) to promulgate a regulation protecting whistleblowers in scientific misconduct cases. NIH Revitalization Act of 1993, *supra*, n. 1. The forthcoming regulation will establish standards for preventing and responding to retaliation against good faith whistleblowers in the terms and conditions of their employment with regulated entities. Id., 163, 107 Stat. 142 (PHS Act 493(e)).

3. 42 C.F.R. 50.103(d)(3). See also PHS Policies and Procedures, supra, 1.6(a)(2)(i), 56 Fed. Reg. at 27387.

4. The conditional privilege in defamation suits is a privilege accorded by the common law of the individual states. Although slight variances in the application of the privilege may exist among states, the principles discussed herein are generally recognized. In addition, the PHS regulation may form a basis for adoption of the conditional privilege under state law.

5. Afro-American Publishing Co. v. Jaffe, 366 F.2d 649, 654 (D.C. Cir. 1966). A defamatory printing or writing constitutes libel, whereas a publication of defamatory matter by spoken words or any form of communication other than libel constitutes slander.

6. Persons subject to a defamation suit may be able to assert one of two privileges: Absolute or conditional ("qualified"). An absolute privilege applies only in legislative and judicial proceedings. Allegations of scientific misconduct usually occur in a pre-adjudicatory context, and thus do not trigger an absolute privilege. Nevertheless, the whistleblower may claim a *conditional* privilege.

7. Black's Law Dictionary 693 (6th ed. 1990).

Some courts have applied an objective standard in defining the "good faith belief" requirement of a conditional privilege. That is, the defendant must have a *reasonable* belief - one that a reasonable person might hold - that the defamatory statement is true. See Afro-American Publishing Co., 366 F.2d at 656 (The conditional privilege "is applicable only if the publisher believes the statements to be true, has reasonable grounds for this belief and says no more than reasonably appears to be necessary to protect the interest"); Reynolds v. Arentz, 119 F. Supp. 82, 87 (D. Nev. 1954) (quoting 53 C.J.S., Libel and Slander, 89, p.143) (A qualified privilege comprehends communications made "with reasonable or probable grounds for believing them to be true...."). Thus, a whistleblower's subjective (personal) belief in the truth of his allegations may not be sufficient in itself to trigger a conditional privilege.

8. "One who publishes defamatory matter concerning another is not liable for the publication if
- (a) the matter is published upon an occasion that makes it conditionally privileged and
 - (b) the privilege is not abused."

Restatement (Second) of Torts 593.

9. "An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that

- (a) there is information that affects a sufficiently important public interest, and

- (b) the public interest requires the communication of the defamatory matter to a public officer or a private citizen who is authorized or privileged to take action if the defamatory matter is true."

Restatement (Second) of Torts 598.

10. NIH Revitalization Act of 1993, 161.

11.42 C.F.R. 50.103(c)(3), (d). See also PHS Policies and Procedures for Dealing With Possible Scientific Misconduct in Extramural Research, 1.6(2), 56 Fed. Reg. at 27387.

12. 42 C.F.R. 50.104(a)(6),(7).

13. See, e.g., 42 C.F.R. 52.9.

14. See n. 9, supra.

15. See n. 3, supra.

16. "An occasion makes a publication conditionally privileged if the circumstances lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that there is information that another sharing the common interest is entitled to know."

Restatement (Second) of Torts 596.

17. Gray v. Allison Division, General Motors Corp., 52 Ohio App.2d 348, 370 N.E.2d 747, 750 (1977) (emphasis added).

18. Bell v. Bank of Abbeville, 38 S.E.2d 641, 643 (S.C. 1946) (emphasis added) (Defendant bank employee accused another employee of theft in the presence of bank president and director).

Defamatory communications which protect a common interest with either recipient(s) or third persons are conditionally privileged. See Restatement (Second) of Torts 595(1)(a).

19. See Restatement (Second) of Torts 595 (Protection of Interest of Recipient or a Third Person).

Protection of the common interest is not a necessary element of the plain "common interest" privilege discussed above. See Restatement (Second) of Torts 596 comment c ("Under the ['Common Interest' rule] it is not necessary to the existence of the privilege stated that the defamatory matter be published for the protection of the common interest. The rule is based on the fact that one is entitled to learn from his associates what is being done in a matter in which he has an interest in common with them").

20. The Fourth Circuit, for example, held that a conditional privilege exists "with respect to a statement where it concerns a matter as to which the person making it has a bona fide duty or interest and is made in good faith in the performance of the duty or the protection of the interest to a person having a corresponding duty or interest with relation thereto." Montgomery Ward & Co. v. Watson, 55 F.2d 184, 187 (4th Cir. 1932) (Manager, who had duty to investigate any charge of dishonesty among store's employees, charged plaintiffs with stealing). See also McMillion v. Armstrong, 378 S.W.2d 670, 673 (Ark. 1964); Louisiana Oil Corporation v. Renno, 157 So. 705, 708 (Miss. 1934).

21. Reynolds v. Arentz, 119 F. Supp. 82, 87 (D. Nev. 1954) (quoting 53 C.J.S., Libel and Slander, 89, p.143) (Defendant corporation representative, who had duty to promote adequate medical services for employees, made privileged defamatory statements concerning county nurse).

See also Kenney v. Gurley, 208 Ala. 623, 95 So. 34, 37 (1923) (Dean of school wrote that student had a venereal disease) (quoting Lawson v. Hicks, 38 Ala. 279, 285) (A conditional privilege exists "where the author of the alleged mischief acted in the discharge of any public or private duty, whether legal or moral, which the ordinary exigencies of society, or his own private interest, or even that of another, called upon him to perform").

22. "An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that

(a) there is information that affects a sufficiently important interest of the publisher, and

(b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest."

Restatement (Second) of Torts 594.

23. See Afro-American Publishing Co. v. Jaffe, 366 F.2d 649, 656 (D.C. Cir. 1966) ("Historically a [conditional] privilege has been marked out for the person who publishes an alleged libel in the bona fide prosecution of his own interests..."). See also Kenney v. Gurley, *supra*, n. 21.

24. See Gray v. Allison Division, General Motors Corp., 370 N.E.2d 747, 750 (1977) ("The concept of privilege holds that conduct which involves a specific interest of social importance merits protection and should be immune from liability").

25. See Restatement (Second) of Torts 599 comment a.

26. 42 C.F.R. 50.103(d)(13).

27. 42 C.F.R. 50.103(d)(3).

28. See, e.g., Bell v. Bank of Abbeville, 38 S.E.2d 641, 643 (S.C. 1946) (In the case of a privileged communication, "the presumption of malice is rebutted. The effect is to cast upon the plaintiff the necessity of showing malice in fact - that is, that the defendant was actuated by ill will in what he did and said, with the design to causelessly and wantonly injure the plaintiff"). See also Gray v. Allison, 370 N.E.2d at 750; Louisiana Oil Corporation v. Renno, 157 So. at 708; Kenney v. Gurley, 95 So. at 37.