

# Pitfalls on Termination: Employer May be Liable for Employees' Loose Talk

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Even though a Virginia bank properly terminated a bank teller and then warned bank employees not to discuss it, the bank still faced potential liability to the ex-teller for defamation when employees talked about it to members of the community.

In *Sewell v. Wells Fargo Bank N.A.*, the former teller, Adrienne Sewell, sued Wells Fargo for breach of contract, wrongful termination and defamation. She claimed the bank improperly fired her because she refused to sign documents accusing other bank employees of manipulating cash totals and falsifying bank records. She acknowledged refusing to sign the documents, claiming that because the records were true and correct and she would have been in violation of the law if she'd signed a statement saying otherwise. In her view, the bank manufactured a for-cause basis to fire her to avoid paying benefits that she would have otherwise been entitled to. Under the *Bowman* line of cases, it's impermissible to fire an employee for refusing to break the law.

The bank had a different view of the facts, contending in its motion to dismiss that Sewell was the supervisor of those tellers that had falsified the records. She was fired not for refusing to sign the documents but because she was ultimately responsible for the improper acts of those she supervised.

Judge Samuel G. Wilson of the U.S. District Court for the Western District of Virginia agreed with the bank in part. Virginia is an employment at will state and Sewell failed to identify any crime that would have resulted from her signing the requested statement. While he dismissed the wrongful termination claim, he allowed the case to go forward on defamation and breach of contract.

Under federal law, a motion to dismiss calls for a preliminary analysis of the plaintiff's claims. To survive, each count of the complaint must "plead enough facts to nudge their claims across the line from conceivable to plausible." If the plaintiff can meet this test, the court will allow a claim to go forward. Judge Wilson concluded that Sewell had sufficiently alleged that the bank had classified her termination as "for-cause" in order to avoid paying her certain accrued benefits including paid time off and favorable rates on health insurance.

The court also concluded that Sewell had met the test with respect to the defamation claim. In the period immediately following the termination, various employees told customers and members of the community that Sewell had been "fired for cause", that it was "because of money", and for "not following procedures," among other things. Sewell argued that in each of these instances the listener could infer that the bank had fired her for issues involving money or honesty. She claimed that these statements

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were factually incorrect and harmful to her reputation.

Wells Fargo vigorously defended the defamation claim on several theories, including that the alleged statements were not made within the scope of employment. What is particularly notable is that the bank's policy prohibited discussion of Sewell's termination. According to the complaint, one of the bank's employees introduced a supposedly defamatory comment with the introductory line: "I know I'm not supposed to tell you but..."

While the policy would be a factor to consider at trial, Virginia law holds that an act or action is within the scope of an employee's duties if "it was performed, although mistakenly or ill-advisedly, with the intent to further the employer's interest, or from some impulse or emotion that was the natural consequence of an attempt to do the employer's business." Since the statements were made within the context of normal employer to customer discussion, they fall within the scope of employment.

Judge Wilson's opinion serves as a reminder of an employer's vulnerability for the acts of its employees. Most employers do (or should) have a well-established and publicized policy against loose talk associated with employee terminations or other internal or personnel matters. Many companies limit those authorized to discuss employment matters and carefully scrub the permitted statements. No one can insure against all possible law suits but wise policies can minimize the risk.