

Understanding Gov't Contractor Defamation Privilege

By **Joseph Meadows and Jonathan Harrison**

Defamation cases involving politicians and celebrities naturally garner interest. Former "Apprentice" contestant Summer Zervos' case against President Donald Trump, California Rep. Devin Nunes' case against Twitter Inc., actor Johnny Depp's case against ex-wife Amber Heard, and diver Vernon Unsworth's case against Tesla Inc. CEO Elon Musk (the "pedo guy" case) are recent examples involving well-known public figures, entertainers and hot-button topics.



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Defamation cases involving government contractors are less well known, but they deal with the same legal defamation issues, all borne out of the First Amendment. And government contractors, unlike others, sometimes enjoy unique legal protections from defamation.

Absolute and qualified privileges, as well as contract defenses, can protect government contractors when they say or write something negative, be it about an employee, former employee, contracting officer or competitor.



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Defamation is defined as "[the] act of harming the reputation of another by making a false statement to a third person. ... A false written or oral statement that damages another's reputation." [1]

When government contractors make negative statements about others, those statements may be defamatory but may also be protected, or privileged, from defamation and related state law claims as a matter of law. The privilege can be absolute or qualified, or both.

Absolute Privilege from Defamation in Two Instances

Absolute privilege shields a defendant from defamation liability regardless of knowledge of the statement's falsity or intent to harm.

Government contractors may enjoy absolute privilege from defamation in two instances: (1) when their statements are made pursuant to government contract obligations or government-imposed duties; and (2) when their statements are made in response to government inquiries in connection with an official investigation or proceeding.

These protections derive from the public interest in meaningful government investigations and from common law executive and judicial privileges. [2]

In *Becker v. Philco Corp.*, the contractor accused two employees of suspected security breaches in a report to the government. The employees sued for defamation.

The U.S. Court of Appeals for the Fourth Circuit held that the contractor was absolutely privileged from liability. Because the contractor had a contractual obligation to report actual and suspected security breaches, "an action for libel will not lie in the circumstances against a private party fulfilling its governmentally imposed duty to inform." Indeed, a federal employee would be accorded the same protection in similar circumstances. [3]

In *Mangold v. Analytic Services Inc.*, the contractor provided negative statements and information about a military contracting officer in response to government investigator questions in an abuse-of-authority investigation. The officer sued for defamation. Again, the Fourth Circuit held that the contractor was absolutely privileged from liability. Notably, the contractor did not otherwise volunteer information beyond the scope of the investigation.[4]

Similarly, in *Scharpenberg v. Carrington*, the U.S. District Court for the Eastern District of Virginia held that a contractor was absolutely privileged from defamation. The contractor had responded to an official fraud inquiry by investigating whether one of its former consultants had indeed overbilled the government and then reporting back to the government in the affirmative.

That the fraud inquiry did not detail how any such investigation should be carried out was irrelevant. The court said, "Mangold did not set forth restrictions on how a government contractor must comply with an official government inquiry, but only that the contractor is immune from liability for responses to the inquiry." [5]

In contrast, government contractors do not enjoy an absolute privilege when they voluntarily initiate investigations. Here, they are neither acting pursuant to contract or duty, as in the *Becker* case, nor responding to official government inquiries, as in *Mangold*.

In *McCray v. Infused Solutions LLC*, the contractor sent a termination warning notice to an employee about her poor behavior, blind copying other contractor employees. She sued for defamation and the District Court for the Eastern District of Virginia rejected the contractor's defense of absolute privilege.

The warning notice was neither sent to the government nor required by the government. Moreover, the notice was not connected to an official investigation, but rather was part of routine employee discipline activities.

Still, the court ruled in favor of the contractor under a qualified privilege, finding insufficient evidence of malice to defeat the privilege.[6] So, when absolute privilege is not available, qualified privilege may be a viable government contractor defense to defamation.

Qualified Privilege from Defamation if Common Interests Exist

Qualified privilege shields a defendant from defamation liability so long as the statement is not made maliciously or the privilege is abused (e.g., over-publication). Government contractors may enjoy a qualified privilege from defamation if the relevant parties to the communication have a common interest in making and receiving the underlying statements.[7]

In *Spence v. NCI Information Systems Inc.*, a computer forensics specialist sued his former government contractor employer for defamation, arising from negative statements made by the contractor in a U.S. Air Force background check.

The U.S. District Court for the District of Maryland passed on the absolute privilege question, instead applying common law and statutory qualified privilege to grant summary judgment in favor of the contractor. The court found that NCI's statements about its former employee, Spence, to a prospective employer, the Air Force Office of Special Investigations, were subject to a conditional privilege as a matter of law.[8]

Contract Defense to Defamation if No Privilege Applies

Even if absolute or qualified privileges don't apply, government contractors may still be protected from defamation under contract.

In *Scharpenberg*, for example, the district court held that even if the contractor's statements were not privileged from defamation, they were nonetheless protected under contract. It turned out that the plaintiff's consultant agreement contained an ethics provision that allowed the contractor to disclose facts about the consultant's compensation. The court ruled that the contractor's disclosures about the consultant's alleged overbilling were consensual: They fell within the compensation scope of the contractual ethics provision.[9]

When government contractors are caught in the crossfire of security clearance or other investigations, they could be at risk of defaming others. But absolute and qualified privileges, as well as contract defenses, can protect them from liability.

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[1] Black's Law Dictionary 448 (8th ed. 2007).

[2] *Mangold v. Analytic Servs.*, 77 F.3d 1442, 1449 (4th Cir. 1996); *Becker v. Philco Corp.*, 372 F.2d 771, 774-76 (4th Cir. 1967). See *Murray v. Northrop Grumman Info. Tech. Inc.*, 444 F.3d 169, 175-76 (2nd Cir. 2006) (citing other government contractor immunity cases).

[3] *Becker*, supra at 774, 776.

[4] *Mangold*, supra at 1449-50. See *Kolakowski v. Lynch*, 2013 U.S. Dist. LEXIS 164722, *7-8 (E.D.V.A. Nov. 5, 2013) (applying *Mangold* absolute privilege in context of routine FBI background check, as "an official investigation").

[5] *Scharpenberg v. Carrington*, 686 F. Supp. 2d 655, 660 (E.D.V.A. 2010). See *Liverett v. DynCorp Int'l LLC*, 2018 U.S. Dist. LEXIS 53607, *13-14 (E.D.V.A. Mar. 28, 2018) (applying *Becker* and *Mangold* absolute privilege).

[6] *McCray v. Infused Sols. LLC*, 2018 U.S. Dist. LEXIS 88645, *21-23, 27-28 (E.D.V.A. May 25, 2018). See *Fields v. Sprint Corp.*, 2017 U.S. Dist. LEXIS 147654, *15 (E.D.V.A. May 11, 2017) (rejecting absolute privilege because court "does not believe that a policy encouraging individuals to speak freely about a controversy gives them unfettered right to create the controversy"), *adopting report and recommendation*, 2017 U.S. Dist. LEXIS 147498, *3 (E.D.V.A. Sept. 12, 2017).

[7] *McCray*, supra at *23 (citing cases); *Cosby v. Legal Servs. Corp.*, 2006 U.S. Dist. LEXIS 96837, *32-33 (D.S.C. May 11, 2006) (granting qualified immunity to government contractor investigator).

[8] Spence v. NCI Info. Sys., 2009 U.S. Dist. LEXIS 16415, *16-17, 21-23 (D. Md. Feb. 27, 2009).

[9] Scharpenberg, *supra* at 661.