(a) Defamation Defenses

(1) Truth

As a defense, DFT claims that the statement was substantially true. If you agree, then you must find for DFT. However, unlike on most other issues, it is DFT, not PLF, who has the burden to prove, more likely than not, that the statement was true.

If the gist or essence of the statement is accurate, then the statement is true for purposes of this case. Minor inaccuracies do not make a statement false unless they change the statement's effect on the listener's understanding. If DFT has proven that the statement was substantially true, you must find for DFT.

(2) Conditional Business Privilege[1]

As a defense, DFT claims that the defendant had a legitimate [business] [official] interest in making the statement. DFT, not PLF, has the burden to prove a legitimate business interest.

For this defense, DFT must show that, more likely than not, making the statement was reasonably necessary to serve [DFT's] [the employer's] business interest in [determining the employee's fitness to do the job] [describe business interest]. If DFT proves this, then DFT had the right, or "privilege." to make the statement and you must find for DFT [unless PLF proves that DFT abused the privilege.]

<If PLF argues that DFT abused the privilege:> On the issue whether DFT abused the privilege, the burden of proof shifts back to PLF.[2] PLF must

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[1] See, e.g. *Sheehan* v. *Tobin*, 326 Mass 185, 190–191 (1950); *Foley* v. *Polaroid Corp.*, 400 Mass. 82, 95 (1987); *Sklar* v. *Beth Israel Deaconess Med. Center*, 59 Mass. App. Ct. 550, 558 (2003). *Dragonas* v. *School Committee of Melrose*, 64 Mass. App. Ct. 429, 438 (2005).

[2] *Foley* v. *Polaroid Corp.*, 400 Mass. 82, 95 (1987).

prove, more likely than not, DFT abused the privilege in at least one of four ways:

- DFT knew the information was false; or
- DFT had no reason to believe that the information was true; or
- DFT recklessly published the information unnecessarily, unreasonably, or excessively;[3] or
- In making the statement, DFT'sprimary motive was to hurt PLF and did not really intend to protect the employer's business interest. In other words, DFT's claim of a business interest was just a false. [4]

In deciding whether DFT abused the privilege, you may consider whether s/he/it disliked PLF or whether that dislike motivated DFT to make the statement, but that is not enough to meet PLF's burden to prove DFT abused the privilege. PLF must also show that DFT did not make the statement primarily to serve the employer's legitimate business interest. If DFT actually made the statement primarily to protect the employer's business interest in question, the fact that s/he spoke partly out of dislike for PLF or PLF's conduct does not abuse the privilege.[5]

If PLF has proven that, more likely than not, DFT abused his/her/its privilege, then you may find DFT liable for making the damaging statement.

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[3] *Sklar* v. *Beth Israel Deaconess Med. Center*, 59 Mass. App. Ct. at 558, and cases cited.

[4] *Dexter's Hearthside Restaurant, Inc.* v. *Whitehall Co.*, 24 Mass. App. Ct. 217 , 223 (1987). *Bratt* v. *International Bus. Machs. Corp.*, 392 Mass. 508 , 514 (1984), quoting from *Retailers Commercial Agency, Inc., petitioner*, 342 Mass. 515 , 521 (1961), or an "intent to abuse the occasion [giving rise to the privilege] by resorting to it 'as a pretence,' . . . or 'reckless disregard' of the rights of another." *Ezekiel* v. *Jones Motor Co.*, 374 Mass. 382 , 390 (1978).

[5] *Draghetti* v. *Chmielewski*, 416 Mass. 808, 813-814 (1994); *Dragonas* v. *School Committee of Melrose,* 64 Mass. App. Ct. 429, 439 (2005) , citing *Ezekiel* v. *Jones Motor Co.*, 374 Mass. at 390 n.4. See *Novecon Ltd.* v. *Bulgarian-Am. Enterprise Fund*, 190 F.3d 556, 567 (D.C. Cir. 1999) (court looks to "primary motive"). Compare Restatement (Second) of Torts § 603 comment a, at 292 (abuse of privilege if publication is "made *solely* from spite or ill will") (emphasis supplied).

(3) Fair Report Privilege[6]

As a defense, DFT claims that the statement was a fair report of an official government matter on an issue of public concern. If so, DFT is not liable for making the statement. DFT, not PLF, has the burden to prove this defense.

For this defense, DFT must prove that, more likely than not, three things are true:

- The statement was a report about an official matter. By "official matter," I mean an official action, official statement, official proceeding or a meeting open to the public.;[7]
- The statement dealt with a matter of public concern; and,
- The statement was fair and accurate.

Fairness and accuracy are related, but they are not exactly the same thing.[8] I'll start by defining "fair."

A report is "fair," if DFT did not edit it in a way that misrepresents the official action in a misleading way.

To be "accurate" the statement must communicate a substantially correct account of the official matter. It may be a complete and correct report of

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[6] "The fairness and accuracy of a report is a matter of law to be determined by a court 'unless there is a basis for divergent views.'" *Butcher* v. *University of Massachusetts, Boston*, 483 Mass. 742, 756 (2019) (affirming summary judgment for the defendant editor), quoting *Howell* v. *Enterprise Publ. Co., LLC*, 455 Mass. 641, 651 (2010).

[7] In *Butcher* v. *University of Massachusetts, Boston*, 483 Mass. 742, 750 (2019) (police blotters), the Supreme Judicial Court said: "'Official statements' typically are either 'on-the-record statements by high-ranking (authorized to speak) officials,' or 'published official documents.' *Howell*, 455 Mass. at 658. Although other, less formal statements also may qualify, anonymous statements, id., and 'mere allegations made to public officials,' *id.* at 658 n.14, do not. See *Jones* v. *Taibbi*, 400 Mass. 786, 796 (1987) ("unofficial statements made by police sources are outside the scope of the fair report privilege"). 'Official actions' are those that involve the 'administration of public duties,' or 'the exercise of the power of government to cause events to occur or to impact the status of rights or resources.' *Howell,* supra at 654. Unlike official statements, 'if the unattributed statement reflects official action, the source of the statement is unimportant." *Id.* at 659 n.16.'"

[8] *Butcher* v. *University of Massachusetts, Boston*, 483 Mass. 742, 756 (2019).

the official matter, but it may also be a correct summary of the official matter. To be "accurate," the statement does not have to repeat the words of the official matter. It is enough if the gist of DFT's report of the official matter is correct enough to produce the same impression on the listener [reader] as a precisely true statement. A statement is accurate if it was at least a rough summary of the official matter and was substantially correct. [A report of an official action may include statements about the context and circumstances that gave rise to the government's action.[9]]

DFT does not have to prove that the official statement or report was itself accurate. Even if the official statement was false, DFT has a right to report fairly and accurately what the officials said, because the public has an interest in learning about government proceedings. DFT has the right to report statements made in an official matter even if DFT knew that the official statement was false.

If DFT proves these three things – that the statement was a report of an official matter, dealt with a matter of public concern, and was fair and accurate – then s/he/it had a right, or "privilege," to make the statement and you must find for DFT[10] [unless PLF proves that DFT abused the privilege].

<*Only if applicable:*> In this case, PLF alleges that DFT abused the privilege, so the burden of proof shifts back to PLF.[11]

To show that DFT abused the privilege PLF must prove the following three things, more likely than not:

- DFT knew that the official statement was false;

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[9] *Butcher* v. *University of Massachusetts, Boston*, 483 Mass. 742, 754 (2019).

[10] *Butcher* v. *University of Massachusetts, Boston*, 483 Mass. 742, 748 (2019), quoting Restatement (Second) of Torts § 611 (1981); *Wolsfelt* v. *Gloucester Daily Times*, 98 Mass. App. Ct. 321, 330 (2020).

[11] *Foley* v. *Polaroid Corp.*, 400 Mass. 82, 95. (1987).

- DFT repeated that false official statement for the purpose of doing maximum harm to PLF; and,
- DFT's sole or primary motive was to harm PLF.
- [If applicable, use instruction on "knowledge" or "purpose"].[12]

If PLF has proven that, more likely than not, DFT abused his/her/its privilege, then it was not a fair and accurate report of an official matter and DFT had no privilege to repeat the official statement.

(4) Consent

As a defense, DFT claims that the PLF consented to communication of the statement. DFT, not PLF, has the burden to prove this defense. To meet that burden, DFT must prove that, more likely than not, two things are true:

- PLF asked DFT to provide information about him/her/it; and,
- DFT honestly believed that the information was true.

For example, if I ask my employer to tell someone why the employer disciplined me, the employer has the right to provide the information because of my request. The employer has the right, that is, is "privileged," to provide the information as long as it honestly believes that it is providing true information. In deciding whether DFT honestly believed that the information was true, you should, of course, consider whether or not DFT had any reason to think that the information was false and all other circumstances.

If DFT has proven that PLF asked him/her/it to provide information and that DFT honestly believed that the information was true, then DFT is not liable for defamation and you must decide in DFT's favor.

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[12] *Butcher* v. *University of Massachusetts, Boston*, 483 Mass. 742, 748 (2019) ("The privilege is not absolute; it can be lost if a plaintiff shows that the publisher acted with malice."). See also *Yohe* v. *Nugent*, 321 F.3d 35 (1st Cir. 2003); *MiGi, Inc.* v. *Gannett Mass. Broadcasters, Inc.*, 25 Mass. App. Ct. 394, 396-397 (1998).

(5) Republication of a New Story

As a defense, DFT claims that it properly republished a story from a reputable news service. DFT, not PLF, has the burden to prove this defense.

To meet that burden, DFT must prove that, more likely than not, three things are true:

- DFT is a media organization that republished the statement from a reputable news media service;
- The nature of the statement was not improbable or inconsistent ; and,
- DFT had no reason to know of additional facts, outside the story, that would raise doubts about the story's accuracy.

It DFT proves these three things, then s/he/it has a complete defense and you must decide in DFT's favor.[13]

(6) Statute of Limitations

As a defense, DFT claims that PLF failed to bring this lawsuit within 3 years of learning about PLF's claim. I instruct you that PLF filed this case on [insert date]. Under our law, people must file their lawsuits within 3 years of discovering a claim. If they do not, the jury must find for the defendant.

DFT, not PLF, has the burden to prove this defense. To meet that burden, DFT must prove that, more likely than not, at least one of the following things is true:

- PLF first learned, or reasonably should have learned, that DFT's statement harmed him/her/it on or after [insert date three years before commencement of the action]; or,

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[13] *Appleby* v. *Daily Hampshire Gazette*, 395 Mass. 32, 38 (1985); *Reilly* v. *The Associated Press*, 59 Mass. App. Ct. 764, 779-780 (2003).

- The challenged statement received broad public circulation and DFT did not conceal it or communicate it confidentially.[14]

[*Insert definition of "reasonably should know", if applicable*]

<*single publication rule*> For these purposes, DFT made the statement on the date when he/she/it originally [communicated] [published] [posted] [broadcast] it. That date does not change simply because some people learned of the statement days or even years later by, for instance, receiving a copy of the original printed article, listening to a recording, or searching the internet to find the original statement.[15]

[14] *Wolsfelt* v. *Gloucester Daily Times*, 98 Mass. App. Ct. 321, 330 (2020) (upholding grant of summary judgment to defendant where the statement appeared on the website of a newspaper of general circulation).

[15] *Wolsfelt* v. *Gloucester Daily Times*, 98 Mass. App. Ct. 321, 325-326 (2020) (Extending "the single publication rule to articles posted to an online media's publicly available website.").