ALAN WILSON
ATTORNEY GENERAL

October 8, 2013

P. George Benson, President
College of Charleston
66 George Street
Charleston, South Carolina 29424

Dear President Benson,

You seek an opinion of this Office concerning the College of Charleston's (the "College") policies concerning allegations of sexual harassment or misconduct against employees. By way of background, you state:

> As you are aware, much attention has been paid in recent years to the prevention of sexual harassment and abuse on university campuses - and rightly so. Over time, the federal government has provided increasingly specific directions to universities on this topic, as our universities have been charged by Title IX of the Educational Amendments of 1972 with creating an educational environment free of discrimination on account of sex. These directions have come from the U.S. Department of Education and take a variety of forms (e.g., "Dear Colleague" letters).
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> More recently, the U.S. Department of Education and the U.S. Department of Justice were involved in an investigation of sexual harassment at the University of Montana. On May 9, 2013, the United States and the University of Montana announced that a Resolution Agreement had been reached, which was described by the federal government as a "blueprint" for all universities in complying with Title IX. While this blueprint is not always highly specific about the actions required of universities and their leaders, it does suggest a previously unprecedented level of activity is expected to address the very serious problem of sexual harassment at institutions of higher education.
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> At the College of Charleston, we periodically review the changing regulatory and legal environment relevant to the prevention of and the appropriate responses to sexual harassment and abuse. In the course of a recent review, we discovered a potential problem, which is the subject of this letter.
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> Specifically, in considering cases where a university faculty member is alleged to have engaged in sexual misconduct with one or more students, one particular scenario struck us as both possible and highly problematic:

- When substantial, corroborated, and credible evidence exists that a faculty member has been involved in sexual misconduct with one or more students, universities are highly likely to understand each such misconduct as such a serious violation of university policies that it will initiate termination procedures against those faculty.

- The evidentiary requirements for an administrative finding that university policies have been violated are different from those of a criminal arrest or prosecution. It remains entirely possible that substantial evidence of faculty sexual misconduct involving a student will be sufficient to justify termination proceedings. However, that same evidence might not be sufficient to justify criminal charges against (or to secure the conviction of) the faculty member, as the burden of proof in criminal cases is much higher than in civil cases or in administrative proceedings where employee termination is recommended. In addition, students sometimes will be unwilling to file criminal complaints.

- Faculty, and especially tenured faculty, are customarily guaranteed significant procedural safeguards offering them due process protections. These protections can take the form of multiple administrative reviews, including one or more administrative and/or evidentiary hearings before faculty peers, where witnesses can be cross-examined and evidence challenged, and where the faculty member is represented by legal counsel. The protections afforded by these safeguards are cumbersome, and termination proceedings involving a faculty member can take weeks or months to conclude.

- At any time, a faculty member faced with such charges can resign, possibly before all the available evidence can be gathered, an evidentiary hearing can be conducted, or a full administrative panel convened. Such a resignation can be described as a retirement or desire for a career change by the faculty member, rather than as occurring at the time of the sexual misconduct hearing.

- After resigning a faculty position, a former faculty member might seek out employment at a university, in a primary or secondary school setting, in a research lab with student interns, by providing individual music or art lessons, or in some other setting giving the former faculty member access to students in that new employment setting. The risk of sexual misconduct recurring in the new setting is both likely and significant. Taking actions to inform the public about the facts surrounding an employee's resignation would potentially serve an important public interest by allowing prospective employers to consider a significant detail of the individual's work history (e.g., a story could be prominently

published on the instructional website that explained the terms of the resignation and named the faculty member).

When a faculty member resigns before the completion of the termination process, as described in the preceding paragraphs, the university can be caught between two conflicting impulses. Intuitively, a university may feel a moral obligation to make public the facts about the allegations made against an employee at the time of his or her resignation because, absent an arrest and conviction, there is no way other than public disclosure of such facts to make reasonably certain the public is aware of the allegations. However, under South Carolina law and given the interpretation of the relevant laws by our courts, it is our best legal judgment that public disclosure of a faculty member's name and the facts of his or her resignation would create very significant legal risks for the State Agency as various claims are made; the tort of defamation could be particularly relevant. No State Agency would readily take on the financial risks inherent in such a civil action, no matter how strong the evidence against the former faculty member. In our opinion, the legal and financial risks for the State Agency would be particularly grave if the faculty member resigns prior to any full hearing, before evidence could be challenged or witnesses cross-examined.

With this information in mind, you ask three questions:

1) *[I]s it your opinion that our legal analysis is sound?* Are there significant legal risks under the tort of defamation, for example, if the name of a faculty member and the basic conditions of his or her resignation, as described in our scenario, are published or released in some public way, assuming that such statements are neither intentionally false nor malicious?

2) *[I]s there potentially an affirmative legal or moral duty to disclose to the public the name of such a former faculty member*, pursuant to the university following its procedures that provide due process, given the potential threat to public safety posed by such an individual, even if criminal charges are never filed?

3) If the College of Charleston's legal analysis is sound, *could you advise us specifically on how we might work with you and other elected officials to consider certain changes in state law?* We ask this final question because we believe that public disclosure of the name of a faculty member who resigned in the face of termination proceedings for cases involving sexual misconduct would serve a significant public purpose. This public purpose would include but not be limited to the protection of the public and, in particular, the protection of minor students and/or "of age" students. Modifying state law where the tort of defamation is concerned, for example, might protect universities from civil litigation when such public disclosures are made.

(Emphasis in original).

Law/Analysis

As a threshold matter, we note that any determination as to whether the College is liable for defamation is dependent on the facts and circumstances of each individual case. Thus, any such determination is beyond the scope of an opinion of this Office and is best resolved by a court. See Op. S.C. Att'y Gen., 2010 WL 3896162 (Sept. 29, 2010) ("This Office is not a fact-finding entity; investigations and determinations of fact are beyond the scope of an opinion of this Office and are better resolved by a court"). With this in mind, we will simply attempt to provide you with the legal principles a court would likely consider if faced with the issues presented.

As you indicate, the tort of defamation may be implicated by the publication or release of information indicating a former employee resigned amidst allegations of sexual misconduct. As explained by our State Supreme Court:

> The tort of defamation allows a plaintiff to recover for injury to his or her reputation as the result of the defendant's communications to others of a false message about the plaintiff.
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> In order to prove defamation, the plaintiff must show (1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. The publication of a statement is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.

Argoe v. Three Rivers Behavioral Health, L.L.C., 392 S.C. 462, 474, 710 S.E.2d 67, 73-74 (2011) (quotations and citations omitted).

In determining whether a person or entity is liable for defamation in any particular case, a court will look at a number of factors. "[A]n important initial step in analyzing any defamation case is determining whether a particular plaintiff is a public official, public figure, or private figure." Erickson v. Jones St. Publishers, L.L.C., 368 S.C. 444, 468, 629 S.E.2d 653, 666 (2006). This determination is a matter of law for the court to decide "on a case by case basis after a careful examination of the facts and circumstances ...." Id. "In defamation actions involving a 'public official' or 'public figure,' the plaintiff must prove the statement was made with 'actual malice,' i.e., with either knowledge that it was false or reckless disregard for its truth." Elder v. Gaffney Ledger, 341 S.C. 108, 113, 533 S.E.2d 899, 901 (2000) (citing New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964); Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997 (1974)). "In general, a public official is a person who, among the hierarchy of government employees, has or appears to the public to have 'substantial responsibility for or control over the conduct of government affairs.'" Erickson, 368 S.C. at 469, 629 S.E.2d at 666 (citation omitted). As for "public figures," the U.S. Supreme Court has distinguished between individuals considered public figures for all purposes and those considered such for limited purposes:

> In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

Gertz, 418 U.S. at 351, 94 S.Ct. at 3013 (1974).

Looking to the matter at hand, a court would likely conclude that a person is not a public official for purposes of a defamation action based solely on the fact that he or she is a professor or other mere employee of a public institution of higher education. See Goodwin v. Kennedy, 347 S.C. 30, 552 S.E.2d 319 (Ct. App. 2001) (although jurisdictions are split as to whether a public school *principal* is a "public official" for purposes of a defamation action, a high school *assistant principal* is not "public official" for such purposes). The question of whether a college or university professor or other employee is a public figure or limited public figure would of course depend on the facts and circumstances of each case and is thus beyond the scope of an opinion of this Office.

Different legal standards apply in cases where the plaintiff is a private figure. As our State Supreme Court explained in Erickson:

> A defamation action is analyzed primarily under the common law in cases in which the plaintiff is a private figure. A statement is classified as defamatory *per se* when the meaning or message is obvious on its face. A statement is classified as defamatory *per quod* when the defamatory meaning is not clear unless the hearer knows facts or circumstances not contained in the statement itself, and the plaintiff must introduce extrinsic facts to prove the defamatory meaning. In addition to those classifications, a statement may be actionable *per se,* in which case the defendant is presumed to have acted with common law malice and the plaintiff is presumed to have suffered general damages. Or a statement may be not actionable *per se,* in which case nothing is presumed and the plaintiff must plead and prove both common law malice and special damages. The determination of whether or not a statement is actionable *per se* is a matter of law for the court to resolve.
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> Under the common law, "[l]ibel is actionable *per se* if it involves written or printed words which tend to degrade a person, that is, to reduce his character or reputation in the estimation of his friends or acquaintances, or the public, or to disgrace him, or to render him odious, contemptible, or ridiculous." Essentially, all libel is actionable *per se,* while only certain categories of slander are actionable *per se.* Common law malice means the defendant acted with ill will toward the plaintiff, or acted recklessly or wantonly, *i.e.,* with conscious indifference of the plaintiff's rights.

Erickson at 465-66, 629 S.E.2d at 664-65 (citations omitted). "[S]lander is actionable *per se* only when it charges the plaintiff with one of five types of acts or characteristics: (1) commission of a crime of moral

turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; or (5) unfitness in one's business or profession." Id. at 466, 629 S.E.2d at 664 n.7 (citation omitted).

The publication of information by the College indicating a former employee resigned as a result of or in the midst of allegations of sexual misconduct is likely actionable *per se*. "As a general rule, words charging one with a crime are actionable per se." 20 S.C. Jur. Libel and Slander § 25; see also Davis v. Niederhof, 246 S.C. 192, 196, 143 S.E.2d 367, 369 (1965) (statement accusing person of stealing "is, of course, actionable, absent a sufficient defense); Porter v. News & Courier Co., 237 S.C. 102, 107, 115 S.E.2d 656, 658 (1960) (publication which could be reasonably understood as charging plaintiff with crime of larceny or breach of trust with fraudulent intent is libelous *per se*). In addition, words charging a woman with unchastity are actionable *per se* under statute. See S.C. Code § 15-75-10 ("If any person shall utter and publish ... any words of and concerning any female imputing to her a want of chastity, the person so uttering and publishing such words shall be liable for damages in a civil action ... without proving any special damage"). The same rule likely applies to words charging a man with unchastity. See Wardlaw v. Peck, 282 S.C. 199, 210-11, 318 S.E.2d 270, 278 (Ct. App. 1984) (stating court is not aware of any decision "holding that a false imputation of unchastity to a man is not actionable without proof of special damage" and "[t]here is no reason to distinguish between men and women in the application of this rule"). Thus, if such information is published it would likely be presumed that the College acted with common law malice and that the defendant suffered general damages.

However, there are numerous defenses available to a defendant in a defamation action. Of course, the truth of a statement is an absolute defense in a defamation action. See Weir v. Citicorp Nat. Servs., Inc., 312 S.C. 511, 515, 435 S.E.2d 864, 867 (1993) ("The truth of the communication is considered a complete defense"); Parker v. Evening Post Pub. Co., 317 S.C. 236, 245, 452 S.E.2d 640, 645 (Ct. App. 1994) (finding statements in article were "substantially true as a matter of law" and that "[t]his is an absolute defense"). For example, our Court of Appeals held a district superintendent's statement that he intended to recommend the termination of the plaintiff teacher, who was arrested and indicted for certain charges that were later dropped, was a true statement and thus could not support a defamation claim. McBride v. Sch. Dist. of Greenville Cnty., 389 S.C. 546, 562-63, 698 S.E.2d 845, 853 (Ct. App. 2010); see also King v. Charleston Cnty. Schl. Dist., 664 F.Supp.2d 571 (D.S.C. 2009) (statement by former supervisor of plaintiff to prospective employer in response to request for professional reference that plaintiff had been terminated for cause was true, thus causing plaintiff's defamation action to fail on this basis); Mzamane v. Winfrey, 693 F.Supp.2d 442 (E.D. Pa. 2010) (statements by school's founder that plaintiff headmistress was placed on leave of absence pending investigation of claims of mistreatment by students and that headmistress was later told her contract would not be renewed were true and not capable of defamatory meaning); Collins v. University of New Hampshire, 664 F.3d 8 (1st Cir. 2011) (upholding district court's finding that statement made by university provost in press release sent to all faculty and staff of college where plaintiff was tenured professor that anyone who sees plaintiff on campus should avoid contact and immediately notice police, even if it implied plaintiff was dangerous, was not actionable under defamation as it was substantially true based on plaintiff's prior conduct).

In light of the above case law, any statement by the College indicating it commenced termination proceedings against an employee, but the employee resigned before such proceedings could be concluded, would likely not be actionable where such statements are true and truth is raised as an affirmative defense. The law in this State is less clear, however, as to whether the publication of additional information indicating the basis upon which such termination proceedings were commenced, such as allegations of

sexual misconduct, may be defended on the basis of truth such that a defamation claim is not supported. While it may be true that such allegations of sexual misconduct were made against the employee, a statement further indicating termination proceedings were commenced based on such allegations would, as stated above, likely be understood as indicating the employee was guilty of sexual misconduct. Thus, the College would likely have the burden in a defamation case of proving, as an affirmative defense, that the employee actually was guilty of committing sexual misconduct. Therefore, we cannot say with any certainty that the defense of truth would insulate the College from liability for such a statement.

In addition, in certain situations a person's defamatory statements may be protected or immune from liability if the communication is privileged. As explained by our State Supreme Court:

> Privileged communications are either absolute or qualified. When a communication is absolutely privileged, no action lies for its publication, no matter what the circumstances under which it is published, i.e., an action will not lie even if the report is made with malice. When qualified however, the plaintiff may recover if he shows the communication was actuated by malice. One publishing under a qualified privilege is liable upon proof of actual malice. Actual malice can mean the defendant acted recklessly or wantonly, or with conscious disregard of the plaintiff's rights. Common law actual malice has also been defined as meaning "the defendant was actuated by ill will in what he did, with the design to causelessly and wantonly injure the plaintiff; or that the statements were published with such recklessness as to show a conscious indifference towards plaintiff's rights."

Hainer v. Am. Med. Int'l, Inc., 328 S.C. 128, 135, 492 S.E.2d 103, 106-07 (1997) (citations omitted).

"Absolute privilege is a narrow concept in South Carolina." Wright v. Sparrow, 298 S.C. 469, 474, 381 S.E.2d 503, 506 (Ct. App. 1989). An absolute privilege generally applies to statements made by members of legislative bodies in connection with their official duties and communications made in the course of judicial proceedings. See, e.g., Richardson v. McGill, 273 S.C. 142, 146, 255 S.E.2d 341, 343 (1979) ("A sound public policy has long recognized an absolute immunity of members of legislative bodies for acts in the performance of their duties"); Crowell v. Herring, 301 S.C. 424, 429, 392 S.E.2d 464, 466 (Ct. App. 1990) ("The common law rule protecting statements of judges, parties and witnesses offered in the course of judicial proceedings from a cause of action in defamation is well recognized in this jurisdiction"). Our State courts have on more than one occasion declined to extend an absolute privilege to statements made by executive officials in connection with their official duties based on the circumstances of the case. See Eubanks v. Smith, 292 S.C. 57, 63, 354 S.E.2d 898, 901-02 (1987) (declining to hold that city manager, as an executive official, was entitled to absolute privilege under facts of case); Wright v. Sparrow, 298 S.C. 469, 474, 381 S.E.2d 503, 506 (Ct. App. 1989) (declining to hold executive director of county board was entitled to absolute privilege by virtue of status of executive official under facts of case). However, the Supreme Court of the United States has expressly recognized that a federal executive official may be entitled to absolute immunity under certain circumstances. See Barr v. Matteo, 360 U.S. 564, 79 S.Ct. 1335 (1959) (press release issued by agency's acting director announcing his intent to suspend employees for conduct which had been publicly criticized was within scope of his official duties and thus protected by absolute privilege from libel claims of those employees).

On the other hand, "[a] qualified privilege, even if it does apply, does not prevent liability for defamation where the statement is made with actual malice." Eubanks, 292 S.C. at 63, 354 S.E.2d at 902 ; see also Erickson, supra (defining common law actual malice). Furthermore, a person may lose the protection of a qualified privilege if they abuse it. As our Supreme Court has explained:

> One who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published upon an occasion that makes it conditionally privileged, and (2) the privilege is not abused. " 'The essential elements of a conditionally privileged communication may be enumerated as good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only.' " An abuse of the privilege occurs in one of two situations: (1) a statement made in good faith that goes beyond the scope of what is reasonable under the duties and interests involved or (2) a statement made in reckless disregard of the victim's rights....

Fountain v. First Reliance Bank, 398 S.C. 434, 444, 730 S.E.2d 305, 310 (2012) (citations omitted).

Whether an occasion gives rise to a qualified privilege is a question of law for the court, while the question of whether the privilege has been abused is ordinarily one for the jury. Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 485, 514 S.E.2d 126, 134 (1999). However, "in the absence of a controversy as to the facts ... it is for the court to say in a given instance whether or not the privilege has been abused or exceeded." Woodward v. S.C. Farm Bureau Ins. Co., 277 S.C. 29, 32-33, 282 S.E.2d 599, 601 (1981). Furthermore, qualified privilege is an affirmative defense in a defamation action. McBride v. School Dist. of Greenville County, 389 S.C. 546, 562, 698 S.E.2d 845, 853 (Ct. App. 2010).

Our Supreme Court has explained that a qualified privilege generally exists under the following conditions:

> 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. The statement, however, must be such as the occasion warrants, and must be made in good faith to protect the interests of the one who makes it and the persons to whom it is addressed....

Bell v. Bank of Abbeville, 208 S.C. 490, 493-94, 38 S.E.2d 641, 643 (1946) (citations omitted); see also Murray v. Holnam, Inc., 344 S.C. 129, 140-41, 542 S.E.2d 743, 749 (Ct. App. 2001) ("A communication made in good faith on any subject matter in which the person communicating has an interest or duty is qualifiedly privileged if made to a person with a corresponding interest or duty even though it contains matter which, without this privilege, would be actionable").

Specifically, our state courts have held a qualified privilege may exist to protect communications "between officers and employees of a corporation ... if made in good faith and in the usual course of

business,"[1] communications made in furtherance of common business interests,[2] communications made if the publisher "correctly or reasonably believes that some important interest of his own or a third party is threatened,"[3] or communications made concerning a matter which a person has a legal, moral, or social duty to another who has a common interest or duty in the matter.[4]

Other cases addressing defamation claims under South Carolina law have addressed situations relevant to the questions at hand. In Bell v. Evening Post Pub. Co., 318 S.C. 558, 459 S.E.2d 315 (Ct. App. 2005) the plaintiff, an employee of Evening Post, argued the trial court erred in directing a verdict in favor of Evening Post on his defamation claim which was based on statements made by two of his supervisors to another employee, Meyers, during the course of an investigation into allegations of sexual harassment against the plaintiff made by another employee, Holmes. In addition to her allegations against the plaintiff, Holmes also reported the plaintiff was having an affair with Meyers. As a part of their investigation, the two supervisors went to Meyers' home, informed her of the allegations against the plaintiff, and asked if she knew anything about them. The Court of Appeals found the statements to Meyers were protected by the qualified privilege afforded to "communications between servants, business associates, officers, or agents of the same corporation ...." Id. at 560, 459 S.E.2d at 317. The court also found there was no evidence the supervisors failed to act in good faith in investigating the allegations of sexual harassment, and noted that "because sexual discrimination in the workplace is proscribed by law,

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[1] See Murray, 344 S.C. at 141, 542 S.E.2d at 749 ("Communications between officers and employees of a corporation are qualifiedly privileged if made in good faith and in the usual course of business") (citing Conwell v. Spur Oil Co. of Western S. Carolina, 240 S.C. 170, 125 S.E.2d 270 (1962)); see also Wright, 298 S.C. at 474, 381 S.E.2d at 506-07 (stating "[t]here is a basis for applying a qualified privilege to situations in which an employee's job performance is properly evaluated" and noting Supreme Court in Bell "recognized a qualified privilege attached to communications between an employer and employee when the occasion was a bona fide inquiry by the employer into alleged misconduct of the employee"); Day v. Morgan, CIV.A. 3:10-454-JFA, 2011 WL 3418854 (D.S.C. 2011) report and recommendation adopted, 3:10-CV-454-JFA, 2011 WL 3418521 (D.S.C. 2011) aff'd, 464 F. App'x 117 (4th Cir. 2012) (statements made by defendant employees of school district and elementary school to police and other district or school officials regarding plaintiff's conduct as elementary school employee were entitled to qualified privilege as they were made in course of business).

[2] See Cullum v. Dun & Bradstreet, Inc., 228 S.C. 384, 389, 90 S.E.2d 370, 372 (1955) ("the defense of qualified privilege is available to a mercantile agency in respect of reports on the credit and financial standing of an individual or business concern communicated confidentially, and in good faith, to a subscriber having an interest in the particular matter"); Abofreka v. Alston Tobacco Co., 288 S.C. 122, 125, 341 S.E.2d 622, 624 (1986) ("A qualified privilege may exist where the parties have a common business interest").

[3] Abofreka, 288 S.C. at 125, 341 S.E.2d at 524.

[4] See Manley v. Manley, 291 S.C. 325, 331-32, 353 S.E.2d 312, 315 (Ct. App. 1987) (assertions made by children, their father, and psychiatrist in connection with involuntary commitment of mother were qualifiedly privileged since children and father "had at least a moral duty to protect their mother from harming herself, their father and others," and psychiatrist "likewise had a legal duty to protect the mother and others from the mother"); Prentiss v. Nationwide Mut. Ins. Co., 256 S.C. 141, 147, 181 S.E.2d 325, 327 (1971) ("This court has defined qualified privilege as a communication made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, even though it contains matter which, without this privilege, would be actionable, and although the duty is not a legal one, *but only a moral or social duty of imperfect obligation*") (emphasis added).

Evening Post undoubtedly had an interest in investigating allegations of sexual harassment ...." Id. at 561, 459 S.E.2d at 317. Furthermore, the court found the statements made in the conversation with Meyers "were properly limited in scope to determine whether sexual harassment was occurring," there was "no indication in the record that the time and manner of the communication was improper or that the communication was directed to an improper party." Id. Finally, the court concluded Evening Post "did not act with malice, but only in a proper effort to protect its business interests and its employees," and thus held the trial court properly granted a directed verdict on the defamation claim. Id. at 562, 459 S.E.2d at 317.

In Murray, cited supra, the Court of Appeals held the lower court erred in granting summary judgment on the plaintiff's defamation claim in favor of the defendant, the plaintiff's employer. Murray, 344 S.C. 129, 542 S.E.2d 743. The facts in that case indicated another employee made unsubstantiated allegations accusing the plaintiff of stealing company property. As a result of these allegations plaintiff was terminated. In a subsequent meeting with at least six other employees, plaintiff's former supervisor, Smoak, made a statement indicating plaintiff had been terminated for misappropriating or misusing company property. The court found the trial judge did not initially err in concluding Smoak was protected by a qualified privilege as the statement was made between officers and employees of a corporation. Id. at 141, 542 S.E.2d at 749. However, the court found the evidence in the case presented a genuine issue of material fact as to whether the privilege was lost by the manner of its exercise, and thus held this issue should have been sent to the jury. Id. Likewise, the court held the evidence presented genuine issues of fact as to whether the statement was made with actual malice so as to overcome the privilege. Id. at 144, 542 S.E.2d at 751. In reaching this conclusion, the court quoted the following language from our State Supreme Court regarding malice:

> **That the appellant believed the charges to be true did not justify it in publishing them in an improper and unjustified manner or with improper and unjustified motives.** Proof that they were published in such manner and with such motives would constitute sufficient proof of malice, or malice in fact. It is not necessary that evidence must be offered of malignity or ill will, nor that those facts should be found. The time, place, and other circumstances of the preparation and publication of defamatory charges, as well as the language of the publication itself, are admissible evidence to show that the false charge was made with malice.

Id. at 142, 542 S.E.2d at 750 (quoting Fulton v. Atlantic Coast Line R.R., 220 S.C. 287, 67 S.E.2d 425 (1951)) (emphasis added); see also Eubanks, 292 S.C. at 62-63, 354 S.E.2d at 902 (City Manager's statement to press that plaintiff employees were involved in criminal wrongdoing and violations of the law, although he knew this was not true, indicated maliciousness).

In Moshtaghi v. The Citadel, 314 S.C. 316, 443 S.E.2d 915 (Ct. App. 1994), the Court of Appeals held the trial court erred in granting summary judgment in favor of The Citadel as to the plaintiff's slander action. In that case, the President of The Citadel made statements indicating the plaintiff, a professor, was unfit for his job by stating the plaintiff engaged in conduct that was illegal, dishonorable, and "a discredit to any Citadel man and all Citadel men ...." In rejecting The Citadel's arguments that the statements were substantially true and subject to a qualified privilege, the court found these matters were inappropriate for summary judgment as "[t]he employer-employee privilege does not protect unnecessary defamation." Id. at 324, 443 S.E.2d at 920. The court found inferences from the evidence created questions of fact and

that "[e]ven with a qualified privilege, [the President's] statements may have gone beyond the scope of that privilege." Id. Thus, the court concluded summary judgment was improper in this case.

In Miller v. City of West Columbia, 322 S.C. 224, 471 S.E.2d 683 (1996), our Supreme Court held the trial court properly denied the defendant's JNOV motion based on its conclusion that the defendant "uttered the defamatory statement with Constitutional actual malice." In that case, the plaintiff, Miller, was the Assistant Chief of Police of West Columbia and thus a "public official" for purposes of a defamation claim. An employee of the West Columbia PD, Davis, reported to the City Administrator that Miller had sexually harassed her. In the course of the investigation into the allegations, Davis took a polygraph examination which she failed. Miller agreed to take a polygraph as well, but only under certain circumstances. When Miller failed to take a polygraph under different circumstances offered by the City Administrator, the City Administrator stated, in front of others, "that he had no choice but to conclude that Miller had sexually harassed Davis and had lied about it," and further stated he was immediately suspending Miller and recommending his termination. These statements were the basis for Miller's defamation claim. On appeal, the Supreme Court found the results of Davis' failed polygraph examination "were not a basis upon which one could *conclude* that Miller had sexually harassed Davis." Id. at 228, 471 S.E.2d at 685. The Court also found the fact that Miller refused to take a polygraph under the City Administrator's conditions "did not give [the City Administrator] justification to *conclude* that Miller had in fact sexually harassed Davis, or to defame him in the presence" of others. Id. at 228, 471 S.E.2d at 686. Furthermore, the Court held statements made by the City Administrator indicating he had serious reservations about Davis' allegations supported the conclusion that his statements were "made with reckless disregard for the truth." Id. at 229, 471 S.E.2d at 686. Although Miller was based on the constitutional actual malice standard as opposed to the common law malice standard which likely applies to the questions at hand, this case is still instructive as the burden of proof placed on the plaintiff as a public official is higher than that placed on a private figure plaintiff to overcome a qualified privilege.

The Fourth Circuit Court of Appeals has issued several decisions addressing defamation claims under South Carolina law relevant to the matter before us. In Austin v. Torrington Co., 810 F.2d 416 (4th Cir. 1987), the Fourth Circuit held a former employer's comments to a potential employer indicating he would not recommend hiring his former employees were protected by qualified privilege as both employers had a common interest in same community. The Court found the statements were intended only to convey to the potential employer "information he could consider in his hiring decisions," and thus concluded the evidence, in light of the qualified privilege attached to the statements, would not support a finding of slander. Id. at 424. Furthermore, the Court held there was no proof at trial of actual malice on the part of the defendant, and thus reversed the jury verdict below finding the defendant liable for slander. Id. at 425-26. In another case, the Fourth Circuit issued an unpublished decision upholding the lower court's grant of summary judgment in favor of the defendant on the plaintiffs' defamation claim. See Weeks v. Union Camp Corp., 215 F.3d 1323 (4th Cir. 2000). In that case, the plaintiffs, employees of the defendant, argued they were defamed when the defendant informed all of its other employees about the incident giving rise to their termination. The Court held:

> Union Camp's statement to its employees regarding the termination of Webster and Weeks was conditionally privileged because it occurred within the context of a communication between agents of the same corporation; there is no evidence that anyone outside of Union Camp was present when Union Camp informed its employees of Webster and Weeks's termination. Moreover, there was a common

> interest to be upheld because rumors were emerging among the employees that Union Camp needed to quell.

Id. The Court also concluded the defendant's statement did not exceed its privilege by disclosing the information in an improper manner or with malice based on the fact the defendant needed to explain the incident to "quell rumors and uncertainty that was emerging among its employees," the fact the defendant only revealed the plaintiff's name to members of the individual team plaintiffs were members of as their team members "had a distinct interest in understanding what happened to their fellow team members," and the absence of any evidence indicating the defendant revealed more information than necessary to resolve the matter. Id.

Courts in other jurisdictions have also addressed defamation claims in situations similar to the one at hand. In Collins v. University of New Hampshire, 664 F.3d 8 (1st Cir. 2011), the First Circuit upheld the lower court's grant of summary judgment dismissing the plaintiff's defamation claim. The plaintiff, a university professor, alleged he was defamed by an email sent by the University Provost to all faculty and staff employed in the same department as the plaintiff stating that any who sees the plaintiff on campus "should avoid contact with him and immediately notify the UNH Police Department," and also informing them that plaintiff had voluntarily turned himself in on an arrest warrant and been released on bail. The First Circuit found that, under New Hampshire law, the email was protected by a qualified privilege:

> At most, as the district court found, the statement might have implied that Collins was dangerous. Yet even assuming that the email implied Collins was dangerous, and assuming this implication was false, the defendants were clearly privileged in making the statement. The email was sent on a lawful occasion, and the record shows that UNH officials made a good-faith decision to proactively publicize the incident. Given that Collins had been banned from campus for an incident involving violence against property and a threat of violence against another person, UNH had a justifiable purpose in instructing anyone who saw him to avoid him and inform the police. Finally, given Collins's behavior, the University had a reasonable ground for believing Collins could be dangerous. Moreover, there is no evidence in the record that the defendants acted with malice. Thus, no reasonable jury could have found that the privilege did not apply, and hence summary judgment was proper.

Id. at, 19-20.

Similarly, in Sweet v. Tigard-Tualatin School Dist., 124 Fed.Appx. 482 (9th Cir. 2005), the Ninth Circuit upheld the lower court's grant of summary judgment dismissing the plaintiff's defamation action. The plaintiff, a high school psychologist, claimed she was defamed by an email from the principal to staff members of the high school alerting them that the plaintiff had made threats against school district officials. The Ninth Circuit noted that under Oregon common law a defamatory is protected by a qualified privilege if "(1) it was made to protect the interests of the defendant; (2) it was made to protect the interests of the plaintiff's employer; or (3) it was on a subject of mutual concern to the defendant and the person to whom the statement was made." Id. at 487 (citations omitted). The court held the statements in the emails were subject to a qualified privilege because the principal sent them to school employees "because of his potential concern for their safety," and because maintaining their safety was in

the interest of the school district. Id. at 487-88. Noting that a plaintiff bears the burden of proving a defendant abused a qualified privilege, i.e., by showing the defendant acted with "actual malice," the court found the lower court properly granted summary judgment on this claim based on the following:

> Before sending the first e-mail to the staff, Kubiaczyk called together his administrative team and verified the facts concerning the alleged threats with both Hagen–Gilden and Helton, the primary source of information regarding the incidents. He therefore took reasonable steps to ascertain the truth of the information communicated and did not act with "actual malice."

Id. at 488.

Moreover, our Legislature in 1996 created statutory protections for certain communications made between an employer and a prospective employer concerning current or former employees:

> (C) Unless otherwise provided by law, an employer *who responds in writing to a written request* concerning a current employee or former employee from a prospective employer of that employee shall be immune from civil liability for disclosure of the following information *to which an employee or former employee may have access*:
>
> (1) written employee evaluations;
>
> (2) official personnel notices that formally record the reasons for separation;
>
> (3) whether the employee was voluntarily or involuntarily released from service and the reason for the separation; and
>
> (4) information about job performance.
>
> (D) This protection and immunity *shall not apply where an employer knowingly or recklessly releases or discloses false information.*

§ 41-1-65(C), (D) (Supp. 1996) (emphasis added).

As the language of § 41-1-65(C) indicates, the protection afforded such communications is limited in several ways. First, only information those matters specifically referenced in § 41-1-65(C) are protected. Second, protection from civil liability only applies to the disclosure of such information if given in a *written response* to a *written request* from a prospective employer. Finally, subsection (D) indicates the protection afforded by subsection (C) is qualified in that it "shall not apply where an employer knowingly or recklessly releases or discloses false information." Thus, subsection (D) essentially places a plaintiff suing an employer or former employer for the release of information under subsection (C) in the shoes of a "public official" or "public figure" plaintiff, i.e., he must prove such information was released with constitutional actual malice. Consistent with the rule of statutory construction that any legislation is not to be interpreted as changing the common law unless such an intent

is explicitly indicated by the language of the statute,[5] the protections afforded an employer releasing information under § 41-1-65(C) to a prospective employer supplement, but do not supplant, the protections already provided to employers providing information concerning an employee or former employee to a prospective employer under the common law. Thus, to the extent an employer discloses information regarding an employee or former employee which is not specifically covered by § 41-1-65(C), the employer may, under certain circumstances, be entitled to qualified immunity under the common law.

To the extent your letter makes note of due process considerations, we note a public employee who, under any given circumstances, is entitled to due process prior to termination forfeits any claim that he was deprived of a protected liberty interest in his continued employment if he resigns before such procedures sufficient to comply with due process can be concluded. S.C. Code § 8-17-380(b) provides that tenured academic employees may only be dismissed for cause. Furthermore, our State Supreme Court has held that "[a] tenured professor has a property interest in continued employment which is safeguarded by due process." Ross v. Medical Univ. of S.C., 328 S.C. 51, 66, 492 S.E.2d 62, 70 (1997) (citations omitted). The Court went on to explain that a tenured professor's due process rights entitle them to the following before they are discharged:

> All the process which is due is a pretermination opportunity to respond and a post-termination procedure. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). "Some kind of hearing" is required prior to the discharge of an employee who has a constitutionally protected property interest in employment. However, a full evidentiary hearing is not required prior to termination. Id.; Arnett v. Kennedy, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974). Instead, a tenured employee is entitled to 1) oral or written notice of the charges against him, 2) an explanation of the employer's evidence, and 3) opportunity to present his explanation. Loudermill, supra.
>
> > [T]he pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true *and support the proposed action....* The essential requirements of due process ... are notice and an opportunity to respond. *The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.*
>
> Loudermill, 470 U.S. at 545–46, 105 S.Ct. at 1495, 84 L.Ed.2d at 506 (emphasis added).

[5] See Doe v. Marion, 361 S.C. 463, 473, 605 S.E.2d 556, 561 (Ct. App. 2004) ("A rule of statutory construction is that any legislation which is in derogation of common law must be strictly construed and not extended in application beyond clear legislative intent. Therefore, a statute is not to be construed in derogation of common law rights if another interpretation is reasonable.") (citations omitted); State v. Prince, 316 S.C. 57, 66, 447 S.E.2d 177, 182 (1993) ("it is presumed that no change in the common law is intended unless the Legislature explicitly indicates such an intention by language in the statute").

Id.

The Court has also recognized that a public employee who does not enjoy tenured status may be entitled to due process protections when terminated under certain circumstances. See Eubanks v. Smith, 292 S.C. 57, 354 S.E.2d 898 (1987). In Eubanks, the Court addressed claims by three former employees of the City of Myrtle Beach, two of whom were ultimately terminated and one who resigned in the midst of the threat of termination, that the City deprived them of a protected liberty interest pursuant to 42 U.S.C. § 1983 and in violation of due process based on the City Manager's press release indicating they were guilty of "some criminal misconduct and that disciplinary action would be taken." In describing the due process rights afforded to public employees when a public employer makes statements damaging their reputation, the Court stated:

> "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." A protected liberty interest is implicated when a public employer, in terminating an employee, makes charges against him that damage his standing in the community or otherwise imposes a stigma on the employee that forecloses other employment opportunities. When an employee's liberty interest is implicated, due process requires that the aggrieved employee be given notice of the charges and a hearing to afford him an opportunity to clear his name. The employee's protected liberty interest is not the right to remain employed but is merely the right to clear his name.

Id. at 60-61, 354 S.E.2d at 900 (citations omitted). As to the plaintiff who resigned, the Court specifically held he "*was not entitled to any due process hearing because he resigned as an alternative to being terminated.*" Id. at 62, 354 S.E.2d at, 901 (emphasis added). The Court concluded the plaintiff who resigned was afforded the required due process regarding the deprivation of his asserted liberty interest. Id. at 62, 354 S.E.2d at 901.

Likewise, no due process violations are implicated where termination proceedings are brought against an employee of the College and the employee is given a chance to appear at a hearing and clear his name, but declines to do so by resigning before such a hearing can take place. The employee's decision to resign as an alternative to termination effectively waives any due process claim based on his employer's actions. In the context of a defamation action brought by such an employee against the College for a statement indicating the employee was guilty of sexual misconduct, although a hearing which comports with due process may provide additional information or evidence which could either support or impeach the veracity of such a statement, we fail to see how an employee who forfeits the opportunity to take advantage of such a hearing could cite the lack of a hearing in support of his defamation claim. Assuming the College had a qualified privilege to make such a statement, a court analyzing such a defamation claim would focus on whether the College made the statement in an improper manner or with improper motives sufficient to constitute common law malice; the fact that the plaintiff declined to take advantage of the due process afforded to him would be irrelevant as to such issues.

Furthermore, we note that the College is an agency of the State covered by the Tort Claims Act (TCA), S.C. Code §§ 15-78-10 et seq. See § 15-78-30(a), (e) (definitions of "agency" and "State" for purposes of TCA include state-supported schools, colleges, universities); see also § 59-101-10

(designating College of Charleston as a State college or university); § 59-101-20 ("The State is authorized to acquire all property of the College of Charleston, real, personal, or mixed, and to operate the college as a state-supported institution of higher learning"). Under the TCA, state agencies "are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein." § 15-78-40. However, § 15-78-60 provides that a state agency is not liable for loss resulting from "employee conduct ... which constitutes actual fraud, *actual malice*, intent to harm, or a crime involving moral turpitude; ...." § 15-78-60(17) (emphasis added). In Gause v. Doe, 317 S.C. 39, 451 S.E.2d 408 (Ct. App. 1994), the Court of Appeals held the trial court properly held the plaintiff police officer's defamation claim against his employer, the Myrtle Beach Police Department, was barred by the TCA, stating:

> Under the SCTCA, a governmental entity is not liable for a loss that results from "employee conduct outside the scope of his official duties or which constitutes actual fraud, *actual malice,* intent to harm, or a crime involving moral turpitude." S.C. Code Ann. § 15-78-60(17) (Supp.1993) (emphasis added).
>
> In a case involving the defamation of a public official, the plaintiff must prove the defendant acted with actual malice. Sanders v. Prince, 304 S.C. 236, 403 S.E.2d 640 (1991). To meet this standard, the plaintiff must show either that the defendant knew the statement was false or that the defendant made the statement with reckless disregard of its falsity. Id. (citing New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)).
>
> The SCTCA clearly excludes a governmental entity's liability for an individual's loss stemming from a state employee's conduct that constitutes actual malice. We therefore agree with the trial court that the SCTCA bars Gause's slander claim against the MBPD because Gause must prove the MBPD employee's conduct constituted actual malice in order to recover on this claim.

Id. at 41-42, 451 S.E.2d at 409. Thus, if an employee or former employee of the College happens to be considered a public official or public figure, a defamation claim against the College may be barred under the TCA.

Even if an employee or former employee is not a public official or public figure for purposes of a defamation claim, the amount of damages that may be recovered from the College in any tort action is limited by § 15-78-120. Pursuant to subsection (a) of § 15-78-120, no person may recover more than $300,000 from the College under the TCA for loss arising from a single occurrence. § 15-78-120(a)(1). The total amount that may be recovered from the College arising from a single occurrence regardless of the number of claims or actions involved is $600,000. § 15-78-120(b)(2). Furthermore, under the TCA no person may recover punitive damages or attorney fees with the exception of a reasonable attorney's fee imposed as a sanction for frivolous filings. § 15-78-120(b), (c).

Conclusion

Based on the above analysis, we agree that the College could potentially be held liable in a defamation action for publishing information indicating the College initiated termination proceedings

against an employee based on allegations of sexual misconduct, but the employee resigned before such proceedings could be concluded. In any defamation case, an important initial step is determining whether the plaintiff is a "public official," "public figure," or "private figure." Public officials and public figures are generally afforded less protection in a defamation action in that they must prove the defendant acted with constitutional actual malice, i.e., with knowledge or reckless disregard as to the falsity of the statement. For a court to find that a plaintiff is a public official or public figure, it must generally be shown that the plaintiff has "substantial responsibility for or control over the conduct of government affairs" or has assumed "special prominence in the resolution of public questions." Thus, a court is unlikely to find that a person is a public official or public figure based solely on his position as a professor or other mere employee with the College. In any event, such a determination must be made based on the facts and circumstances of each case and is thus beyond the scope of an opinion of this Office.

Assuming a former employee of the College is a "private figure" for purposes of a defamation claim, a statement merely indicating the College intended to terminate the former employee for cause and that the employee resigned before termination proceedings could be concluded, if true, would likely not support a defamation claim where the affirmative defense of truth is raised. On the other hand, a statement indicating the College intended to terminate the former employee based on allegations of sexual misconduct would likely be construed as suggesting the employee was guilty of sexual misconduct. Thus, such a statement would like be actionable *per se*, i.e., it would be presumed the College acted with common law malice (recklessly or wantonly, or with conscious disregard of the plaintiff's rights) and that the plaintiff suffered general damages.

However, a statement indicating a former employee committed sexual misconduct may, under certain circumstances, be protected by a qualified privilege. One who publishes a defamatory statement is not liable if the statement is made on an occasion giving rise to a qualified privilege and the privilege is not abused. Qualified privilege is an affirmative defense which a defendant may generally establish by demonstrating the statement was made in good faith to a person or persons on a matter in which they share a common interest or duty. Once established, a qualified privilege may be overcome by proof from the plaintiff that the privilege was abused, i.e., the defendant acted with common law actual malice or that the statement exceeded the scope of the privilege. The statement may exceed the scope of the privilege if published to persons other than those to whom the privilege applied or if the statement contains matters unnecessary to protect the common interests or duties of the parties involved. Stated differently, the fact that the College believes the allegations against an employee or former employee to be true does not "justify it in publishing them in an improper and unjustified manner or with improper and unjustified motives." However, whether an occasion gives rise to a qualified privilege is a question of law for the court, while the question of whether the privilege has been abused is ordinarily one for the jury. Thus, the questions of whether a qualified privilege exists and has been abused clearly depend on the facts of each individual case; as such, these questions are beyond the scope of an opinion of this Office.

With that being said, we note our state courts have specifically held that a qualified privilege may exist to protect communications between officers and employees of a corporation if made in good faith and in the usual course of business, communications made in furtherance of common business interests, communications where the publisher correctly or reasonably believes that an important interest of his own or a third party is threatened, and communications concerning a matter over which a person has a legal, moral, or social duty to another who has a common interest or duty in the matter. Furthermore, the Fourth Circuit has held that under South Carolina law a former employer's comments to a potential

employer indicating he would not recommend hiring his former employees were protected by a qualified privilege as both employers shared a common interest in the same community. Thus, we believe the College

Based on the above common law principles, we believe a court could find the publication of a statement by the College indicating its intent to terminate an employee based on allegations of sexual misconduct is protected by a qualified privilege to the extent it is not made with common law actual malice and is not made to persons who do not have a common interest in the matter. To avoid exceeding this qualified privilege, we advise that any such statement should, first, be based on substantiated allegations which the College has reason to believe are true. The statement should only be made to persons necessary to protect a common interest shared by the College and those individuals receiving the statement. Based on the circumstances surrounding each individual case, the proper persons to receive such a statement may include other officers or employees of the College who supervise or work with the professor or employee against whom the allegations are made, individuals who have a relationship with the professor or employee by virtue of their status as a student at the College, and potential employers who contact the College for information for purposes of determining whether to hire that professor or employee. Furthermore, any such statement should not include any defamatory information beyond that which is necessary to protect the common interest or duty shared by the College and recipient(s).

In addition to the common law defamation principles above, the Legislature has created statutory protections for certain the disclosure of certain information concerning a current or former employee between an employer and a prospective employer pursuant to § 41-1-65(C). That section protects an employer from civil liability for a *written response* to a *written request* from a prospective employer disclosing the following information to which the *employee or former employee has access*: written employee evaluations; official personnel notices that formally record the reasons for separation; whether the employee was voluntarily or involuntarily released from service and the reason for separation; and information about job performance. However, § 41-1-65(D) provides that the protection afforded such communications is limited in that it "shall not apply where an employer *knowing or recklessly releases or discloses false information*." (Emphasis added). Thus, where the College discloses information about an employee to a prospective employer in accordance with § 41-1-65(C), the employee or former employee that is the subject of such disclosures can only recover in a defamation action if he proves the College acted with malice. The standard of malice the employee or former employee is required to prove is akin to that which a public official or public figure plaintiff must prove to establish defamation, i.e., constitutional actual malice.

To the extent your letter makes note of due process considerations, we believe such considerations are irrelevant to the questions at hand. Although a public employee may have a protected liberty interest if he enjoys tenured status or based on certain actions of the public entity that employs him, no violation of due process occurs where the employee is afforded notice and opportunity for a hearing at which he can clear his name prior termination, but the employee resigns before such a hearing can take place. The employee's decision to resign as an alternative to termination effectively waives any due process claim based on his employer's actions. In the context of a defamation action brought by an employee against the College for a statement suggesting the employee is guilty of sexual misconduct, we fail to see how an employee who declines to take advantage of the opportunity for a hearing could cite the lack of a hearing in support of his defamation claim. Although such a hearing could provide additional information or evidence which could either support or impeach the veracity of such a statement, whether or not such a hearing takes place would not alter a court's analysis as to whether the statement was

defamatory. Assuming the statement is protected by a qualified privilege, a court would still focus on whether the College made the statement in an improper manner or with improper motives sufficient to constitute common law malice.

In any event, the College is an agency of the State covered by the TCA which provides "the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty." § 15-78-200. The TCA expressly provides that a state agency is not liable for "employee conduct outside the scope of his official duties or which constitutes … actual malice …." § 15-78-60(17). Our Court of Appeals has held the "actual malice" standard referred to in § 15-78-60(17) is akin to constitutional actual malice standard which a public official or public figure is required to prove in a defamation action; thus, the court held the TCA excludes a governmental entity from being held liable under such a claim. Thus, in the event a former employee or employee of the College happens to be a public official or public figure, a defamation claim against the College would be barred under the TCA. In the more likely case in which the plaintiff is a private figure, the amount of damages that may be recovered from the College in defamation claim is limited by § 15-78-120 to $300,000 for loss arising from a single occurrence, or a total of $600,000 for loss arising from a single occurrence regardless of the number of claims involved.

As to your final question, there are a number of ways in which the Legislature could modify State law in order to provide employers more protection from defamation claims under the circumstances presented if the Legislature finds it desirable to do so. For instance, changes could be made to § 41-1-65 to make the circumstances under which an employer is entitled to qualified immunity for the release of information concerning an employee's or former employee's job performance, reasons for separation, etc. less rigid. With respect to public employers, the TCA could be amended to provide more protection for the publication of information as to the circumstances surrounding an employee's resignation or termination. However, the determination as to how such changes should be made, if at all, is entirely within the Legislature's discretion and judgment. Thus, we must ultimately defer to them on such a question.

Sincerely,

Harrison D. Brant
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General