

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 98-4820

WILLIAM SILVERSTEIN,)
Plaintiff)
)
v.)
)
MICROSYSTEMS SOFTWARE, INC.,)
THE LEARNING COMPANY, INC.,)
RICHARD GORGENS,)
DEBRA GORGENS, and)
LARRY MASON,)
Defendants)

MEMORANDUM OF LAW IN SUPPORT OF SUMMARY JUDGMENT

William Silverstein, the plaintiff in this action, hereby submits his memorandum of law in support of his motion for summary judgment on the libel counterclaim of defendants Microsystems Software, Inc. (“MSI”) and The Learning Company (“TLC”).

The Elements of the Claim

A claim for libel requires proof of the following elements:

- (1) A defamatory communication about the complainant,¹
- (2) Which was untrue,²

1. “A person is actionably defamed when he is exposed to public hatred, ridicule or contempt to a considerable and respectable class in the community.” *Tort Law*, Ch. 7, Defamation, at § 118, Vol. 37, *Massachusetts Practice*—the precise formulation used in paragraph 9 of the instant counterclaim.

2. *Nathan Friedman, et al. v. Boston Broadcasters, Inc.*, 402 Mass. 376 (1988). See also *Philadelphia Newspapers, Inc., et al. v. Hepps et al.*, 475 U.S. 767 (1986). These cases make it clear that it is the plaintiff’s burden to prove falsity, not the

(continued...)

- (3) With respect to which the party complained of was either:
- (a) in the case of a complainant that is not a public figure: negligent in ascertaining its truth³ or
- (b) in the case of a public figure: acting with actual malice, in the sense of knowledge that the communication was false or having reckless disregard of its truth or falsity,⁴
- (4) Which was published;⁵
- (5) Causing actual damage to the complainant.⁶

The complainants here can prove that communications about them were published, but cannot make any other part of the required showing: they cannot

2. (...continued)

defendant's burden to prove truth, contrary to older cases.

3. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

4. *New York Times Company v. Sullivan*, 376 U.S. 254 (1964), and *Curtis Publishing Company v. Butts*, 388 U.S. 130 (1967). Proof of malice must be by clear and convincing evidence, under *New York Times v. Sullivan*, 376 U.S. at 286-286 and *Gertz v. Robert Welch, Inc.*, *supra* 418 U.S. at 342 (1974).

5. *Brauer v. Globe Newspaper Co.*, 351 Mass. 53 (1966).

6. G.L. c. 231, § 93, prohibits the awarding of punitive or exemplary damages for defamation:

“ . . . In no action of slander or libel shall exemplary or punitive damages be allowed, whether because of actual malice or want of good faith or for any other reason. Proof of actual malice shall not enhance the damages recoverable for injury to the plaintiff's reputation.”

This is, of course, in line with the general rule in this Commonwealth that punitive damages are available only where specifically provided for by statute. See *Tort Law*, Ch. 13, Damages, at § 249, Vol. 37, *Massachusetts Practice*.

The limitation of defamation damages—in any and all circumstances—to actual damages was reaffirmed in *John J. Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 860 (1975).

show that the communications were defamatory, that they were untrue, that there was negligence, much less malice, on the part of William Silverstein, or that they suffered any actual damages from those communications.

The complainants are (or, in the case of MSI, were) major software companies, with wide distribution of their products at both the consumer and business level. MSI's prize product—now sold by TLC—was Cyber Patrol, sold to keep children and employees alike out of objectionable web sites, which was referred to by name in Justice O'Connor's partially-concurring, partially-dissenting opinion in *Reno v. ACLU*, 521 U.S. 844, 890 (1997).⁷

In clear recognition of this, they pled their counterclaim as public figures, explicitly alleging that William Silverstein's statements were "made and published recklessly or with actual malice" in paragraph 9 of their counterclaim.

Proof of malice, in the defamation context, may be necessary to keep a public figure claimant in court once the claimant has succeeded in proving falsity, but it cannot substitute for such proof.

Even with regard to a private figure plaintiff, proof of malice cannot turn a true statement into libel. *Shaari v. Harvard Student Agencies, Inc.*, 427 Mass. 129 (1998), held that even a private figure plaintiff cannot rely on malicious intent

7. In addition to being run by end-users on their own machines, Cyber Patrol is run by America On Line (AOL) on its servers, with parents being able to assign their childrens' sessions to pre-defined age-groupings with progressively fewer types of sites blocked.

by a defendant to make a true statement actionable if it was made with respect to a subject of public concern.

It is questionable, in light of the authorities cited above, that any limitation of the absolute defense of truth to subjects of public concern even applies,

However, the allegations here of the violation by prominent employers of federal and state statutes designed to protect employees from mistreatment by their employers—rights considered important enough by the public’s representatives to warrant the creation of administrative agencies and the ability to sue not only for compensatory but also punitive damage remedies—certainly meet the test of public concern, when compared the other examples of matters of public concern cited in *Shaari* at page 133 of that opinion.

Shaari also reaffirmed, at page 134, that for purposes of First Amendment analysis, the organized news media do not have a monopoly on constitutional protection, but that the protections of Freedom of Speech and the Press extend equally to “the lonely pamphleteer,” (quoting from *Lovell v. Griffin*, 303 U.S. 444 (1938)). After all, if protection extended only to the newspaper and not to the source, the newspaper would never get to hear the story in the first place!

The result of the application of this black-letter law to this case is that the libel counterclaim cannot succeed.

First of all, MSI and TLC cannot show that William Silverstein’s statements were malicious falsehoods. They cannot, in fact, show either half of that phrase. Not only does the accompanying *Statement of Material Facts* show that there

were good grounds for William Silverstein's statements—*i.e.*, that they were not only not recklessly false but probably true—but the entry of judgment in his favor on his claims in this case should end their case.

First of all, entry of judgment for the plaintiff's claims should bar the entry in the same case of an opposite judgment for libel arising out of the same allegations. Those allegations cannot simultaneously be true and recklessly false.

The defendants try to argue that because Silverstein spoke of violations of the Americans with Disabilities Act on his website but only sued for handicap discrimination under chapter 151B, that the allegations are therefore different. However, the factual showings necessary to succeed on a claim of handicap discrimination under the federal and state statutes are the same!⁸ He sued under 151B because it had better remedial provisions, and referred to the ADA on his website because that statute is better known—but his entitlement to prevail under one renders his talking about the other non-defamatory.

8. The most significant point of divergence between the showings needed to prevail under federal and state discrimination law is as to rebuttal of an explanation of a nondiscriminatory reason as pretextual, with state law allowing pretext to be shown by proving the falsity of the proffered reason, and some federal courts requiring more than that. That distinction may not last, however, and may already be gone, at least in this Circuit, as Judge Bownes' decision in *Hodgens v. General Dynamics Corporation*, 144 F.3d 151, 1998 U.S. App. LEXIS 10279; 73 Empl. Prac. Dec. (CCH) P45,412 (1st Cir. 1998) brought the First Circuit into accord with *Blare v. Husky Injection Molding Systems, Inc.*, 419 Mass. 437 (1995).

That distinction is moot, here, however, as there is no debate over whether he was fired for taking leave for treatment or for some other reason, such as poor performance. The defendants' counterclaim explicitly says, at paragraph 5, that their reason for firing Silverstein is what he says it was—he was fired for “taking an unauthorized leave of absence” when he left for medical treatment sooner than they wanted him to.

Friedman v. Boston Broadcasters Inc., cited above, made it clear that where an expression of opinion is accompanied by the facts it is based on, the opinion itself is not actionable, and the analysis of whether there was a defamatory statement will focus solely on the facts alleged (402 Mass at 379-380). Whether the defendants' acts amounted to a violation of the ADA, the FMLA, chapter 151B, or the Workers Compensation law is a legal conclusion that falls within the category of opinion. As long as the underlying facts are set forth and are not defamatory, the addition of his legal opinion is protected under *Friedman v. BBI*.

However, the suggestion that a judgment entered on an offer of judgment does not mean that the allegations necessary to support the judgment are true has limits of its own,

The defendants offered to allow Silverstein to accept a judgment for \$125,000 plus interest—a recovery that he could have exceeded only by obtaining punitive damages on top of actual damages. If they thought that he had no hope of such a recovery, they would have offered considerably less. Actions speak louder than words.⁹

9. The inclusion of a disclaimer that the offer is not an admission of liability in the offer was surplusage. Even without that language, the offer could not have been introduced against them if it had been rejected—but the judgment that flowed from it is still a judgment. Rule 68 was intended to end cases, by acting as a shield for defendants being pursued by unreasonable plaintiffs. It was not designed as a sword to slash at plaintiffs who accept the offer, by allowing defendants to make offers that they then try to undo by forcing the plaintiffs to endure the very expense and delay they were purportedly trying to avoid by the offer—on all the same factual issues!

Even if it is not taken as meaning that the defendants were admitting that his allegations were true, it certainly does mean that they thought that a jury would have been entitled to have accepted his claims as true, and were saying to him that the real uncertainty remaining in the case is what would happen about punitive damages. and do you really want to run the risk that a jury won't be willing to award you punitive damages, and having, as a result, to give some of your recovery back to us to pay our legal fees,

If a jury was entitled to have accepted his claims as true, that would have to mean that the defendants understood that a reasonable factfinder could draw that conclusion from the evidence, after hearing from both sides.

If, as a matter of law, a jury would be entitled, to believe Silverstein's statements, Bill Silverstein must also have been entitled to do so as well. If Silverstein was entitled to draw that conclusion, then he couldn't be found to have published recklessly or maliciously—or even negligently.

Thus, whether on the basis of bar, stipulation, or review of the overwhelming factual support for his allegations contained in the *Statement of Material Facts*, it is clear that liability cannot be found against William Silverstein for libel.¹⁰

10. In addition to the “contradictory judgments” bar discussed above, there is also a bar by agreement. This Court entered judgment “against the defendants in the above-captioned case in favor of the plaintiff”—in language that was almost exactly the same as that of the defendants’ August 31, 1999 Offer of Judgment. (Copies of both are attached.) The plaintiff does not want to belabor the obvious, but a “case” consists of all claims of all parties—not just the claims of one party.

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There is one falsehood in the case: the *defendants* have falsely suggested in their counterclaim that the plaintiff made a allegation that he *never* made. In paragraph 8 of the counterclaim they allege that he said

that MSI, “owned by the The Learning Company,” fired him because of his alleged medical condition

This stitching together of separate phrases is an affirmative misrepresentation of his statements, implying that he had suggested that The Learning Company owned MSI at the time he was fired. On the contrary, the plaintiff’s web site contains a detailed timeline that shows that TLC bought MSI after he had been fired. It also contains a copy of the complaint, which says the same thing.

The bulk of Silverstein’s complaints on his web site describe his mistreatment at the hands of MSI. TLC is argued to be liable on principles of successor liability, and comes in for criticism on its own for not considering a job application he made after it bought MSI, but it is not the major focus of his criticism.

10. (...continued)

As there was no language included in the judgment (or in the Offer of Judgment it flowed from) to exclude any claim or counterclaim from its scope, that judgment disposed of the whole case, not just part of it.

The defendants argue that since Rule 68 cannot be used offensively by a claiming party to leverage an agreement for judgment in favor of that claim by the threat of costs, their offer cannot be taken to include their claim. There is no reason, however, why a defending party cannot offer to *surrender* their counterclaim in addition to paying money to the plaintiff, which is how this offer and judgment were worded.

This argument was presented to the motion judge on an emergency basis and not accepted, but the Court is always free, prior to entering final judgment, to reconsider that ruling under Rule 54(b), though it does not, as a matter of policy, do so often.

However, MSI is no longer doing business. After purchasing MSI at the end of 1997, TLC moved all of MSI's employees and business operations into another of its subsidiaries in January of 1998. Just as Fleet dropped the Shawmut name out of corporate pride, when it bought that bank, TLC was eager to put its own name on Cyber Patrol. By the time the counterclaim was asserted, MSI was an empty shell. If one goes to www.microsys.com now, what one finds is a sales pitch for Cyber Patrol, with the only company name visible being that of The Learning Company. The plaintiff is being countersued for damaging the reputation of a name that isn't even being used any more.

However, it gets worse. The defendants can't show that they were harmed by Silverstein's statements. They have given him nothing in response to his requests for evidence of harm, which can only mean that they never directly suffered any.¹¹ Instead, they appear to intend to rely on the correspondence the plaintiff's received about his web site, and in particular they want to see the individual responses to an on-screen survey he ran as a form of a mock jury, to see what visitors to his site thought of his claims. and how much he should be awarded.

11. If they in fact saw or felt any harm to their reputations, the defendants were far better able to get their side of the story out than was the plaintiff, whose web site had, over a year, less than 10% of the hits the defendants' web sites get each day. They have never made any effort to dispute his public allegations except in court. In addition, when a reporter for the *Boston Globe* contacted their attorney, Michael Rosen, for a response to the plaintiff's allegations two years into his representation of the defendants in this dispute, he did not deny anything that the plaintiff said but said simply that it was only one side of the story.

Silverstein has given the defendants correspondence he had received with respect to his web site months ago, and will be giving them updates to that as well as the responses to the questionnaire next week—in time for them to use anything therein to meet this motion. It is unlikely that they will find much of use to them there, as all the survey responses show is that many of the respondents felt that the defendants should be punished with punitive damage awards.

However, that does not meet the standard of “hatred, ridicule or contempt” needed to show defamation. If it did, all parents who punish their children, all juries who award punitive damages, and all judges who punish parties for misconduct would be *ipso facto* acting out of improper motives—which cannot be presumed. There is an old saying “Hate the sin, love the sinner.”

So long as the defendants’ counterclaim is kept alive, the plaintiff is prevented from executing on the judgment the defendants agreed to, and can be forced, in order to get that execution, through the expense and delay of defending a libel counterclaim that can, after trial and appeal on the facts and issues that the Rule 68 offer and acceptance were designed to avoid having to litigate, provide the defendants with—*at most*—an award of nominal damages. The question that then arises is why they are doing this.

The answer was given in a proffered settlement agreement and a letter the next day that their counsel sent to Silverstein’s counsel about a week after the judgment entered on his claim: they want to make him enter into an agreement to remove from his web site all statements in support of his claims in the lawsuit,

and his agreement not to voluntarily speak about his employment with MSI beyond stating the dates of his employment there, and what his job and duties were there, punishable by a private fine of \$50,000 per violation.

The letter the next day called the draft agreement “open to negotiation” and explicitly used the term “penalty” in connection with the sanction for violations. All the plaintiff would have to do would be say something the defendants objected to three times and he could end up owing them more than they had agreed to pay them.

The impropriety of this becomes clear when it is recognized that injunctive relief is not available against defamation, only money damages, under the well-known authority of *Near v. State of Minnesota*, 376 U.S. 254, 279-280 (1964), which held unconstitutional under the First Amendment a state statute that had authorized injunctions against publication of defamatory material.

The defendants are thus trying to use their purported claim for damages to extract from the plaintiff—as the price of ending this lawsuit—his agreement to the functional equivalent of an injunction, knowing that they cannot obtain one by asking for one from a court. As such, it falls within the prohibition of malicious abuses of process, as the use of legal process for an ulterior purpose for which it was not designed or intended.¹²

12. See *Carroll v. Gillespie*, 14 Mass.App.Ct. 12, 26 (1982), quoting *Jones v. Brockton Pub Markets, Inc.*, 369 Mass. 387, 389 (1975), itself quoting from *Quaranto v. Silverman*, 345 Mass. 423, 426 (1963). See also *Gabriel v. Borowy*, 324 Mass. 231, 236 (1949).

It is not necessary to show that the counterclaim was groundless to find it to be an abuse of process, but such groundlessness is relevant to showing the ulterior motive,¹³ although here that ulterior motive was communicated explicitly.

Finally, the statutes that the plaintiff sued under all prohibit retaliation against a party who exercises rights under them. Complaining of their violation is part of such exercise. Unlike England, where litigation takes place in secret until resolved, litigation in this country takes place in public except for the strongest showing of need. Speaking about one's complaints in public is a form of exercise of those rights, particularly as such speech may assist others in exercising their own rights. The plaintiff's web site has become a resource for other individuals who have suffered similar treatment from their own employers. The defendants wish to silence him, which is directly prohibited by the anti-retaliation provisions of those laws.

The plaintiff therefore asks that this court dismiss the defendants' counterclaim as unsupportable, as a malicious abuse of process, and as prohibited retaliation under the Workers Compensation law, under chapter 151B, and under the Family and Medical Leave Act.

13. *Fishman v. Brooks*, 396 Mass. 643, 652 (1986).

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Respectfully submitted,

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October 1, 1999

Certificate of Service

The undersigned hereby certifies that he today served a a true copy of the foregoing by causing it to be deposited in the United States Mail, 1st class postage prepaid, addressed to:

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