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**Defamation Claims Against  
and By Public Safety Personnel**

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❖ **Introduction**

This three-part article addresses various issues arising in the context of defamation lawsuits against and by public safety personnel. Historically, defamation claims were divided into *slander lawsuits* over spoken defamation, which was more transitory, and *libel lawsuits* over printed/written defamation, which was more fixed and permanent. Today, and ever since the advent of broadcasting—radio, television, and movies, and since then the Internet with digital video files, podcasts, and

websites containing audio and video materials accessed by computers, smartphones, and other mobile devices, the distinction is far less relevant, although state law in some jurisdictions retain vestiges of what was once an elaborate series of rules concerning distinctions as to how slander and libel claims were pled in the courts.

***Defamation, as we shall see, is largely an arena of state rather than federal law, based on the U.S. Supreme Court ruling that defamation alone does not amount to a violation of federal civil rights.*** Given the many differences in the law of defamation in various states, this article cannot attempt to be comprehensive, but rather strives to provide an overview and a survey of general trends, highlighting some issues to look at. The reader is encouraged to then further explore the ins and outs of defamation law in their own jurisdiction. At the conclusion of Part 3 of the article, there appears a listing of useful and relevant resources and references.

### ❖ Defamation Claims Against Public Safety Personnel

***Defamation claims are filed based on false statements of purported fact that are made about an identifiable person to other people, harm an individual's reputation, and cause that person damages.***

Illustrating the fact that defamation claims are based on communicated false statements, rather than mere actions, is the case of [\*D'errico v. DeFazio\*](#), 763 A.2d 424 (Pa. Super. 2000), holding that a sheriff's actions in providing deputies to accompany an employer who was firing two employees and asking them to leave the premises did not constitute defamation under Pennsylvania law. The mere presence of deputies did not "communicate" anything that could damage the employees' reputations.

In appropriate cases when the statements made are false and cause specific harm, great damages can be caused and awarded. In [\*Schnupp v. Smith\*](#), #940602, 457 S.E.2d 42 (Va 1995), for instance, a police officer was held liable for \$300,000 in damages to a truck driver fired by his employer after the officer reported his suspicion that the driver had been involved in a drug transaction while driving a truck. In fact, the truck had been searched and no drugs had been found.

## --No Civil Rights Liability

In [\*Paul v. Davis\*](#), #74-891, 424 U.S. 693 (1976), the U.S. Supreme Court ruled that the plaintiff, previously arrested on shoplifting charges, whom the local police chief had named an “active shoplifter” in fliers and posters distributed to the public, suffered no deprivation of liberty resulting from injury to his reputation. Following this decision, the law of defamation was largely relegated to state law and ordinarily, without more, cannot be the basis for federal civil rights lawsuits under 42 U.S.C. Sec. 1983 and the Due Process clause of the U.S. Constitution. State law defamation claims, however, can be joined in federal or state court to federal civil rights lawsuits arising out of other claim such as false arrest or malicious prosecution.

Lower federal courts have applied that ruling to consistently reject attempts to assert defamation claims as a violation of federal civil rights. In [\*Behrens v. Regier\*](#), #04-14820, 422 F.3d 1255 (11th Cir. 2005), for instance, the court held that a Florida father, in being allegedly erroneously labeled as a “verified” child abuser, even if it did prevent him and his wife from adopting additional children, did not suffer deprivation of a constitutionally protected due process liberty or property interest. His claim was merely for defamation and injury to reputation, standing alone, cannot be the basis for a federal civil rights lawsuit.

The plaintiff claimed that several current and former employees of the Florida Department of Children and Families (DCF) erroneously labeled him a “verified” child abuser, and that this “stigmatizing information” resulted in his inability to adopt another child. He alleged that this violated his procedural and substantive due process rights under the Fourteenth Amendment. A federal trial court dismissed the lawsuit, finding that the plaintiff failed to allege the deprivation of a constitutionally protected liberty or property interest, and a federal appeals court upheld this result.

The man and his wife had both a biological daughter and an adopted son, and were hoping to add to their family through further adoption. One day, when the man was carrying his adopted son, he accidentally tripped over a child safety gate in his home, and the then nine-month-old child suffered a head injury. At a hospital emergency room, the DCF was notified of “possible child abuse,” and “put a hold” on the child, delaying the release of custody to his parents pending civil and criminal investigations.

The criminal investigation was closed based on a finding that the “child abuse” was unfounded and/or accidental, and a Florida court dismissed the civil proceedings,

finding that child abuse was not shown by a preponderance of the evidence. Despite this, the DCF “verified” the child abuse allegations against the man.

The man and his wife were subsequently unsuccessful in attempts to adopt another child, and believe that it was because his reputation was damaged by his classification as a “verified” child abuser, and the placement of his name on the Child Abuse Registry.

In rejecting the plaintiff’s due process claims, the federal appeals court noted that such claims may amount to defamation under state law, but are not actionable in a federal civil rights lawsuit, unless there is something more than the “stigma” caused by reputation damaging statements.

The appeals court agreed that there was no doubt that DCF “stigmatized” the plaintiff when it “verified” the child abuse allegations against him. But if it only defamed him--without depriving him of any “right or status” recognized under state law--then the damage did not rise to the level of a constitutional deprivation.

In this case, however, the plaintiff failed to show that Florida law granted prospective adoptive parents the right to adopt an unrelated child, and, in fact, Florida courts had previously held that “no such right exists.” And the fact that the plaintiff and his wife had previously been approved to adopt their son did not confer on them any right to adopt additional children. Accordingly, the plaintiff’s claim amounted to one for defamation, which cannot be the basis, standing alone, in a federal civil rights lawsuit.

In [\*Zherka v. Amicone\*](#), #10-37, 634 F.3d 642 (2nd Cir. 2011), the owner of a local weekly newspaper filed a defamation and First Amendment retaliation lawsuit in federal court claiming that a city mayor took action against him because of his publication of material critical of the town’s alleged corruption, fiscal mismanagement, and police brutality. Upholding the dismissal of the lawsuit, a federal appeals court ruled that state law defamation was not actionable in federal court and that the plaintiff had failed to show that the mayor’s criticism of him at a campaign event as a “convicted drug dealer,” “Albanian mobster,” “thug,” and person planning to open “drug dens” and “strip clubs” if the mayor was not re-elected, even if false, did not “actually chill” the newspaper’s exercise of its rights as required for a First Amendment retaliation claim against a public official.

Similarly, in [\*Brown v. Michigan City, Indiana\*](#), #05-3912, 462 F.3d 720 (7th Cir. 2006), the court ruled that a city did not violate a convicted child molester’s due process rights by barring him from entry or use of municipal park property, facilities, and programs after he was seen looking at others in the park through binoculars, with a camera in his possession. Essentially labeling him as a possible

present threat to children, which he claimed was defamatory, was also insufficient to state a federal civil rights claim. The action barring him, additionally, was rationally related to a legitimate governmental interest in protecting children.

While ordinarily, city residents are allowed to use the municipal park facilities and programs for free with a resident pass, the appeals court found that the plaintiff did not have a constitutionally protected property interest in his park pass. Accordingly, it did not violate his constitutional rights to bar him from the park under these circumstances.

The appeals court also ruled that any “defamation” by the city or its personnel implied by labeling him a possible danger to children in the park and therefore barring him from the premises was not combined with any change in his “legal status,” and therefore could not be a basis for a federal civil rights claim. Mere defamation by governmental employees, the court noted, even if stigmatizing, is insufficient for a civil rights claim.

Most importantly, even to the extent that it could be found that banning him from the park infringed on any of his constitutional rights, the appeals court reasoned, the imposition of the ban was rationally related to a legitimate government purpose of protecting children, who are, to some extent, under the care of the city while using municipal property and facilities, and this justified whatever slight infringement of the plaintiff’s rights might have occurred, particularly as the right to enter a public park was not a fundamental right.

To the extent that the plaintiff was entitled to any “due process” in connection with the city’s action, he received all the process that he was due by receiving advance notice of the meeting at which the ban on him was to be voted on. Had he chosen to attend, he would have also received an opportunity to be heard.

The court rejected his argument that he was treated unfairly, because the only other individual the city had banned from its parks had been observed in public with his hands in his pants while watching a female high school volleyball team, whereas he was not observed doing anything as threatening. The court found that it was legitimate to treat him more harshly on the basis of his existing prior child molestation conviction. Further, while the park district’s vote specifically barred the plaintiff from using the park, the rule adopted also appeared to have barred all other persons convicted of similar child molestation offenses.

See also [\*Gill v. Texas\*](#), #04-10497, 153 Fed. Appx. 261 (Unpub. 5th Cir. 2005), holding that an arrestee’s “conclusory allegations” that police officers made “slanderous” statements about him which resulted in “lost friendships, lost livelihood, lost time, and physical injuries” were not sufficient to state a claim for

violation of his federal civil rights, and [\*Mensah v. Darby Borough Police Department\*](#), #05-2193, 145 Fed. Appx. 742 (3d Cir. 2005), ruling that a police department's alleged retention of "fictitious" criminal information about a woman could not be the basis for a federal civil rights lawsuit. Even if this claim were true, the filing of false information at most states a claim for libel or defamation, a state law claim, not a violation of constitutional rights.

In accord is [\*Pasdon v. City of Peabody\*](#), #04-2314, 417 F.3d 225 (1st Cir. 2005), concluding that a plaintiff's federal civil rights lawsuit seeking damages for the release by police of allegedly false information concerning his conduct to the press, which had their origin in his ex-wife's claim that he had violated the terms of a restraining order was properly dismissed on the pleadings. It essentially asserted a claim for defamation, which cannot be pursued as a federal civil rights cause of action.

***The level of damages caused and the egregiousness of the false statements made do not suffice to convert a defamation claim into a federal civil rights claim.*** In [\*Pendleton v. City of Haverhill\*](#), #97-2376, 156 F.3d 57 (1st Cir. 1998), an arrestee's loss of employment with private employer after officers made post-acquittal negative statements to newspapers did not convert an ordinary defamation claim into a federal civil rights claim. The arrestee was also a "limited-purpose public figure" in relation to a state law defamation claim, since he had previously "thrust" himself into public controversy in the media over his qualifications to be a public school teacher.

Similarly, in [\*Holley v. Schreiber\*](#), 758 F.Supp. 283 (E.D. Pa 1991), the court ruled that even if an officer did falsely tell a black man's "white female friends" that he was a "pimp" or involved in prostitution activities, this was no violation of his constitutional rights.

## **--Truth As A Defense**

***If the statements made are true, no matter how stigmatizing and damaging, that truth is an absolute defense to a state law defamation claim.***

The court in [\*Carlton v. Nassau County Police Dept.\*](#), 306 A.D. 2d 365, 761 N.Y.S.2d 98 (A.D. 2nd Dept. 2003) ruled that a county police department could not be liable to an arrestee for defamation for making published statements that he had been taken into custody for alleged theft of services in not paying a disputed bill. The fact that



the statements were true barred liability for libel or slander, even if they did damage to the arrestee's reputation. Truth is an "absolute defense" to defamation claims.

Similarly, a police release of details about a man's criminal record to the press after he was fatally shot by a police officer could not be the basis for a federal civil rights claim for harm to his reputation, nor did false statements allegedly made about the circumstances of the shooting support a claim for intentional infliction of emotional distress brought by the decedent's family, although a claim for negligent infliction of emotional distress brought by members of the decedent's family who witnessed the shooting was viable. The decedent did not suffer specific harm to his employment, education, professional licensing or insurance opportunities based on the statements made about him, and under New York law had no protectable liberty interest in his reputation which survived his death. [\*Sylvester v. City of New York\*](#), # 03 Civ. 8760, 385 F. Supp. 2d 431 (S.D.N.Y. 2005).

In one interesting case, a court found that a person with an extensive history of drug and burglary convictions spanning 25-years was "libel-proof" on a statement he was a drug dealer. [\*Finklea v. Jacksonville Daily Progress\*](#), #12-87-0021, 742 S.W.2d 512 (Tex.App. 1987).

And in [\*Yohe v. Nugent\*](#), #01-2131, 321 F.3d 35 (1st Cir. 2003), the court concluded that an arrestee could not pursue a defamation claim against a police chief for statements to reporters which were either true or had not been proven to be false. Additionally, the chief's statement that the arrestee had received training in the army as a sniper, even if it were shown to be false, was not defamatory, and his statements of pure opinion could not be the basis of a defamation lawsuit.

**Defamation cases are civil lawsuits, not criminal proceedings, so a preponderance of the evidence standard applies rather than the "beyond a reasonable doubt" standard applicable in criminal cases.** Accordingly, even if an individual has been acquitted in a criminal proceeding, the question of whether statements made about their possible involvement in the crime are true can still be litigated in the defamation lawsuit. Illustrating this is [\*Simpkins v. Town of Bartlett\*](#), 661 A.2d 772 (NH 1995), in which drug evidence from a house excluded at a criminal trial because of the illegality of a search was properly introduced into evidence in a civil defamation lawsuit brought by a resident against a police chief who allegedly told his employer he was a "drug dealer." The New Hampshire Supreme Court declined to apply the exclusionary rule in civil defamation suits.

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## **AELE Monthly Law Journal**

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