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Defamation Claims Against and By Public Safety Personnel

Part 1 (May)
• Introduction-
• Defamation Claims Against Public Safety Personnel
--No Civil Rights Liability
--Truth As A Defense
Part 2 (Last Month)
--Immunity and Privilege Defenses
--Damages
--Per Se Defamation
--Statute of Limitations
--Protected Opinion
• Defamation Claims By Public Safety Personnel
--Actual Malice Standard
Part 3 (This Month)
--Protected Opinion
--Jurisdiction
--Stigma Plus
• Resources and References

This is part 3 of a three-part article. To read part 1, click here.

To read part 2, click here.

--Protected Opinion

Viable claims for defamation must involve false statements of fact—not opinion. Opinions, even misguided, unpopular, or outrageous opinions, are protected by

the First Amendment. This is the case for defamation claims by public safety personnel, just as it is for such claims against them.

An Ohio police officer in *Jorg v. Cincinnati Black United Front*, #C-030032, 153 Ohio App.3d 258, 792 N.E.2d 781 (Ohio App. 1st Dist. 2003), for example, could not obtain damages for defamation based on a civil rights organization's actions in distributing a letter which accused the police department of "killing, raping, planting false evidence," and himself of using a "marine-style chokehold" to kill an unarmed suspect. Statements in the letter were opinions protected under the free speech provisions of the Ohio state constitution.

An average reader, the court held, "would be unlikely to infer that the statements were meant to be factual," since the entire letter "was a call to action and meant to cause outrage in the reader," and the particular statements were "clearly hyperbole, the opinion of the writer, and were offered to persuade the reader that an immediate crisis was occurring in the city." The court also noted that the letter did include reference to the outcome of a trial in which the officer was found not guilty on an assault charge and a mistrial was declared on an involuntary manslaughter charge.

On the other hand, the court in *New Times, Inc. v. Isaacks*, #02-01-023-CV, 91 S.W.3d 844 (Tex. App. Ft. Worth, 2002), ruled that a newspaper article which was a satire or parody that, if believed, conveyed a false or defamatory impression was not protected under the First Amendment as merely an opinion or rhetorical hyperbole, but could be the basis for a defamation claim if a reasonable reader could have believed that it was making statements of fact. (***In that respect, a poorly done—or very subtle-- satire or parody which a reader may well believe can run the risk of incurring liability by appearing to imply false underlying facts***). A District Attorney and a judge mentioned in the article could pursue a defamation claim against a newspaper for publishing an article with a made up story suggesting that they might prosecute and try a first grader for writing a book report about a children's story, since it contained an "implication of violence."

Ultimately, however, the Texas Supreme Court ruled in a later proceeding in the case that the plaintiff should receive nothing in damages because the paper's prompt labeling of the article as satire and clarification in the next edition's column, as well as its explanatory responses to readers, evidenced a lack of "actual malice" required for defamation of public officials and public figures. *New Times, Inc. v. Isaacks*, #03-10019, 146 S.W.3d 144 (Tex. 2004).

When specific wrongdoing is alleged, that is not opinion. See *Scott v. Cooper*, 640 N.Y.S.2d 248 (A.D. 1996), holding that statements accusing a police chief of official misconduct (including corruption, coverups and racial discrimination) were susceptible of defamatory meaning, and thus a councilman's statements were not "personal opinion."

Courts will normally not enjoin the publication of defamatory material. In *Evans v. Evans*, #D051144, 162 Cal. App. 4th 1157, 2008 Cal. App. Lexis 689 (4th Dist.), the appeals court ruled that the trial court's issuance of an injunction barring a deputy sheriff's ex-wife from publishing false and defamatory statements or confidential personal information about him or from initiating contact with the sheriff's department concerning him, except for the purpose of reporting criminal conduct under emergency circumstances violated her free speech rights under both the U.S. and California constitutions. The order was an unconstitutional prior restraint and was overbroad and vague.

False and defamatory statements cannot be enjoined before they are found, at trial, to be defamatory. The prohibition on the publication of confidential personal information would require a more specific description of the information at issue, although, if sufficiently described, its publication might violate a right of privacy under the California constitution. Finally, the wife had a constitutional right to petition the government that included contacting the sheriff's department in non-emergency circumstances, and the order prohibiting her from doing so was not justified by the evidence in the record.

In *Piccone v. Bartels*, #14-1989, 785 F.3d 766 (1st Cir. 2015), two employees of the U.S. Department of Homeland Security (DHS) sued a local police chief for slander and interference with advantageous business relations after he called another DHS agent to complain about their allegedly "unprofessional" behavior during an encounter. The grant of summary judgment to the defendant on both claims was upheld by a federal appeals court. The allegedly defamatory statements amounted to non-actionable opinions, and the chief fully disclosed the non-defamatory facts about the confrontation in a way that enabled the DHS agent contacted to form his own opinion.

--Jurisdiction

One issue that sometimes arises in defamation claims by public safety personnel is a jurisdictional one, specifically which jurisdiction a defamation claim may be brought in. This can be important, as different states have varying statutes of

limitations for defamation claims, ranging from one to six years, and different rules about the standard of proof and the type of damages available in such cases.

In *Revell v. Lidov*, #01-10521, 317 F.3d 467 (5th Cir. 2002), for instance, a former FBI associate director could not pursue, in federal court in Texas, a defamation claim against a New York university professor on the basis of his article, published on the Internet on the university's website, claiming that he was involved in a "conspiracy" to "cover up" an advance warning allegedly received by the U.S. government of the terrorist bombing of a flight over Lockerbee, Scotland in 1988. The publication on the website located in New York was not sufficient to give personal jurisdiction over the defendant to a court in Texas.

Jurisdictional issues can also arise as to a particular court's personal jurisdiction over a defendant who resides in another state. In *Young v. New Haven Advocate*, #01-2340, 315 F.3d 256 (4th Cir. 2002), cert. denied, #02-1394, 538 U.S. 1035 (2003), for example, a Virginia prison warden could not pursue, in a Virginia federal court, defamation claims against Connecticut newspapers for publishing articles, also posted on their Internet sites, concerning a Connecticut state policy of housing some prisoners in Virginia correctional facilities. There was no personal jurisdiction over the defendants solely on the basis of the posting of the articles on the Internet when there was no intention to reach Virginia readers. ***Of course, on the other hand, with some of today's media intended to have nationwide or even worldwide audiences, a plaintiff may be able to "forum shop" to select the most advantageous of forums in which to pursue their defamation claims.***

--Stigma Plus

While ordinarily defamation by a governmental entity or employee cannot be the basis for a federal civil rights claim, an exception is made under the "stigma-plus" doctrine. The stigma plus doctrine is a principle that enables a plaintiff, in limited circumstances, to seek relief for government defamation under federal constitutional law. According to this principle, defamation by a government official is actionable as a civil-rights violation only if the victim, the person defamed, suffers some loss of property interest such as continued employment in a government job, or damage to the ability to obtain other such employment.

To prevail on this doctrine, plaintiffs must plead (1) the utterance of a statement sufficiently derogatory to injure his or her reputation, that is capable of being proved false, and that he or she claims is false, and (2) a material state-imposed burden or

state-imposed alteration of the plaintiffs' status or rights. *Spinale v. USDA*, #08 Civ. 9324.621 F. Supp. 2d 112 (S.D.N.Y. 2009).

These principles have their origin in the U.S. Supreme Court case of *Paul v. Davis*, #74-891, 424 U.S. 693 (1976), (finding that reputation alone does not sufficiently constitute a constitutionally protected liberty interest to support a procedural due process claim) discussed in more detail in the first part of this three part article, and were further expounded in the subsequent case of *Siegert v. Gilley*, #90-96, 500 U.S. 226 (1991) (finding no constitutional claim when a supervisor at a prior job wrote a letter stating that he could not recommend the former employee because he was inept, unethical, and untrustworthy). A terminated public employee may, however, be entitled to a name-clearing hearing after the disclosure of stigmatizing information. This article will not discuss name-clearing hearings in any detail.

An example of these principles is *Hinkle v. White*, #14-2254, 793 F.3d 764 (7th Cir. 2015). In this case, as a man was finishing his elected term as county sheriff, his 14-year-old stepdaughter accused him of having sexually abused her while assisting her in applying chigger medicine. A city police officer interviewed the daughter, and a state child protective agency notified state police, resulting in an interview of the daughter by a state police investigator. The sheriff denied the accusation, and the girl's sister, another stepdaughter, said her sister was lying because the sheriff and her mother were too strict. The first stepdaughter recanted her accusations and a prosecutor decided not to press charges, but the accusation became widely known in the community.

The state police investigator allegedly talked about the case to a lot of people with whom he had no right to share the details of the investigation, and rumors flew, including a false story that the sheriff was an arsonist. The ex-sheriff filed a federal civil rights lawsuit against the state police investigator and his supervisor, claiming that their actions had denied him his right to liberty in his occupation of choice, in violation of due process.

A federal appeals court upheld summary judgment for the defendants, ruling that the plaintiff had failed to show that any liberty interest was interfered with. Even if the defendants defamed him, they did nothing that altered his legal status. Further, the defendants were not shown to have placed the plaintiff's name on a list that, under a state statute, would have ended his previously granted right to serve in positions of law enforcement management. His argument that the alleged defamation rendered him unqualified under state law to serve in law enforcement was negated by the fact

that he subsequently received a state license for work as a private investigator. There may have been stigma, but not stigma-plus.

Similarly, in *Ruggiero v. Phillips*, 739 N.Y.S.2d 797 (A.D. 2002), a police officer's report that a correctional officer was "disorderly" was insufficient to state a federal civil rights claim for injury to the correctional officer's reputation, based on the village's communication to the plaintiff's employer of the report. Defamation alone is insufficient to state a federal civil rights claim and a cause of action would only exist if the plaintiff could show stigma to his reputation, plus other injury. In this case, injury to reputation was all that was shown.

See also, *Heller v. Fulare*, #04-265J, 2006 U.S. Dist. Lexis 69162, 2006 WL 2792215 (W.D. Pa. 2006), on remand from 454 F.3d 174 (3d Cir. 2006), ruling that during a state police investigation, several police employees' claims of injury to their reputations must fail because there were no adverse personnel actions, such as a loss of pay or benefits, changed working conditions, demotions, or terminations.

Defamatory statements that are intended to or are clearly likely to cause dangerous harm to an individual, however, such as a false accusation that an officer is "dangerous," may give rise to a variety of viable claims. In *Bailey v. Major Tommy Wheeler*, #15-11627, 843 F.3d 473 2016 U.S. App. Lexis 21194 (11th Cir. 2016), a police officer filed a written complaint with his chief, reporting that fellow officers and county sheriff's deputies had been racially profiling minority citizens and committing other constitutional violations. As a result, he claimed, among other retaliatory actions, a be-on-the–lookout advisory ("BOLO'") to all law enforcement in Douglas County, Georgia, described him as a "loose cannon." "Consider this man a danger to any [law enforcement officer] in Douglas County and act accordingly," the BOLO alarmingly warned and ominously instructed. He had previously been terminated as an officer, but appealed that decision, again repeating his allegations.

The BOLO was issued the day after the termination appeal hearing by a major with the county sheriff's office. After the BOLO was issued, his car was allegedly followed by both police and sheriff's vehicles. He was later allowed to return to work as an officer. He sued the major in his official and individual capacities for defamation and retaliation in violation of his First Amendment rights.

Rejecting defenses of qualified immunity on the First Amendment retaliation claim and official immunity by the defendant major on the defamation claim, the appeals court found that the plaintiff's alleged facts would support a reasonable inference

that the police department communicated with the Sheriff's Department about the plaintiff's complaints prior to the issuance of the be-on-the-lookout advisory (BOLO), that the Sheriff's Office and the major knew about the termination-appeal hearing, and that the major issued the BOLO at least in part in retaliation for plaintiff's complaints, in violation of the First Amendment.

The court also ruled that the plaintiff's constitutional right to be free from retaliation that imperiled his life was clearly established at the time that the BOLO was issued. The allegations satisfied the showing of a deliberate intention to do wrong—that is, actual malice. "Our First Amendment demands that a law enforcement officer may not use his powerful post to chill or punish speech he does not like. If he does so, he may not hide behind the veil of qualified immunity."

❖ Resources

The following are some useful resources related to the subject of this article.

- Defamation. AELE Civil Case Summaries.
- Defamation. AELE Correctional Case Summaries.
- Defamation. AELE Employment Case Summaries.
- Defamation. Wikipedia article.
- Defamation—Public Official vs. Private Person. Minc Legal Resource Center.
- Defamation, Public Officials, and the Media. Nolo Legal Encyclopedia.
- Police Plaintiffs: Defamation. AELE Civil Case Summaries.

❖ Relevant Monthly Law Journal Articles

- Defamation Claims Against and By Public Safety Personnel - Part 1, 2018 (5) AELE Mo. L. J. 101.
- Defamation Claims Against and By Public Safety Personnel - Part 2, 2018 (6) AELE Mo. L. J. 101.

❖ References: (*Chronological*)

1. Stigma Plus Whom? Evaluating Causation in Multi-Actor Stigma-Plus Claims by Linnet Davis Stermitz, 84 The University of Chicago Law Review 1883 (2017),
2. New York Times v. Sullivan at 50: Despite Criticism, the Actual Malice Standard Still Provides "Breathing Space" for Communications in the Public Interest by John Bruce Lewis, 64 DePaul University Law Review No. 1, 1 (Fall 2014).
3. Procedural Due Process and Reputational Harm: Liberty as Self-Invention, by Eric J. Mitnick, 43 University of California, Davis Law Review 79 (2009).
4. Is The New York Times "Actual Malice" Standard Really Necessary? A Comparative Perspective by Geoffrey Bennett and Russell L. Weaver, 53 Louisiana Law Review 1153 (1993).
5. Protecting Public Employees and Defamation Defendants: A Two-Tiered Analysis as to What Constitutes "A Matter of Public Concern" by Nadine Renee Dahm, 23 Valparaiso University Law Review No. 3, 587-627 (Spring 1989).

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- The purpose of this publication is to provide short articles to acquaint the reader with selected case law on a topic. Articles are typically six to ten pages

long. Because of the brevity, the discussion cannot cover every aspect of a subject.

- The law sometimes differs between federal circuits, between states, and sometimes between appellate districts in the same state. AELE Law Journal articles should not be considered as "legal advice." Lawyers often disagree as to the meaning of a case or its application to a set of facts.

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