SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

ROSLYN J. JOHNSON	)	
	)	**CIVIL ACTION NO: 2007 CA 0001600**
Plaintiff,	)	**Honorable Gerald I. Fisher**
	)	
v.	)	
	)	
JONETTA ROSE BARRAS, ET AL.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANT JONETTA ROSE BARRAS'
MOTION FOR JUDGMENT ON THE PLEADINGS

Defendant Jonetta Rose Barras hereby files this Memorandum in support of her Motion for Judgment on the Pleadings.

I. UNDISPUTED FACTS AVERRED IN COMPLAINT AND ANSWER

A former high-ranking District of Columbia official, Plaintiff Roslyn J. Johnson, has brought this action challenging commentary by Barras – a well-respected journalist and decades-long D.C. government watchdog – about a matter of the utmost public concern: the D.C. government's admitted failures in the oversight of its hiring system. Johnson was fired in October 2006, after the District government determined she had inaccurately reflected her work history in applying for her job. The D.C. Inspector General documented that the government failed to verify Johnson's work history, sharply criticized the hiring practice that led to Johnson's employment, and found that Johnson should not have been hired for the position of Deputy Director of Programs for the D.C. Department of Parks and Recreation. In apparent retaliation for her own errors of judgment, Johnson brings this specious claim alleging that Barras and

others committed defamation (Counts I and II), false light invasion of privacy (Count IV), and intentional interference with contract (Count V) for reporting on these issues.

A. Inaccurate Resume That Plaintiff Avers She Submitted.

In applying for the position of Deputy Director in July 2005, Johnson submitted a resume that, her Complaint pleads, was inaccurate and required later updates and correction. Complaint, ¶¶ 11-15, 13-15. The Department of Parks and Recreation forwarded the erroneous resume to the D.C. Office of Personnel, where it was placed in Johnson's personnel file. Id., ¶¶ 15-17. On August 22, 2005, Johnson was hired as the Deputy Director of Programs for Parks and Recreation. Id., ¶ 20.

B. Commentary On D.C. Hiring Process, Government Investigation of Johnson.

Between May and August 2006, Barras wrote a series of articles in D.C.-area media about the improper hiring practices at Parks and Recreation, citing Johnson's employment as an example. Id., ¶ 33; Answer, Exs. B-G. These articles appeared on Barras' weblog The Barras Report (www.jrbarras.com), the DC Watch website (www.dcwatch.com), and in Barras' May 5, 2006 commentary on the WAMU radio public affairs program "D.C. Politics Hour with Kojo and Jonetta." Complaint ¶¶ 38, 47; Answer, Ex. A.

Barras reported, among other things, that she learned of public complaints about the hiring irregularities by viewing a public hearing before the D.C. Council Committee on Education, Libraries and Recreation. Answer, Ex. A, p. 7 and Ex. B. Barras informed readers and listeners that she had obtained a copy of the resume from the D.C. Office of Personnel and discovered that Johnson had submitted false information about her employment and compensation history. Answer, Ex. A, pp. 7-10 and Exs. B-G. Barras also reported that Johnson claimed to have submitted a second resume, but that it was not in the personnel file that the

government gave Barras. Id. She speculated that Johnson's motive in submitting the "inflated" resume was to obtain the position that she was not qualified for at a level of compensation to which she was not entitled. Id.

Meanwhile, at the conclusion of its investigation, the D.C. Office of the Inspector General, in its February 8, 2007 report "Audit of the Department of Parks and Recreation's Hiring Practices,"[2] confirmed that:

- On her resume, Johnson "failed to note that periods of her [previous] employment were part-time";
- Johnson "incorrectly cited her [previous] salary";
- The Office of Personnel did not properly determine whether Johnson met the minimum qualifications for the Deputy Director position; and
- The agency's hiring process was flawed, and Johnson should not have been hired.

Ex. A, pp. 13, 24-26. In the broadcast and publications at issue in this lawsuit, Barras had reported that government officials, including the Mayor's office, the Office of Personnel, and the Inspector General's Office, continued to investigate the circumstances surrounding Johnson's hiring. Answer, Ex. A, pp. 7-10 and Exs. C-G.

C. Allegations Arising Out Of Erroneous Resume Plaintiff Submitted.

Despite the findings of the D.C. government investigation and Johnson's own admissions, the Complaint alleges that Barras and others falsely accused Johnson of misrepresenting her employment and compensation history on her resume. Complaint ¶¶ 37, 47

[2] For the Court's convenience, the pertinent portions of the IG Report, which was attached to Johnson's Answer as Exhibit H, are attached hereto as Exhibit A. The IG Report refers to Johnson as "Employee A." Compare, e.g., Complaint ¶ 20 ("On August 22, 2005, Ms. Johnson was hired by DCOP to hold a temporary appointment pending the establishment of a registered (TAPER) position as Deputy Director of Programs") with Ex. A, p. 5 ("on August 22, 2005, DCOP hired Employee A on a non-competitive TAPER appointment as the Deputy Director.").

and 53. Barras reported that Johnson claimed there were additional resumes submitted, yet only one was on file with the government. See Answer, Ex. A, p. 8; Ex. B, p. 2; Ex. E, p. 1; and Ex. D, p. 2. Johnson nonetheless claims Barras was informed "that her interpretation of Ms. Johnson's personal information was inaccurate." Id. at ¶ 34. The Complaint further alleges that these statements "question[] her veracity and qualifications to act as a government official" Id. ¶ 81, constituting a defamation and false light portrayal. Moreover, while the D.C. Inspector General determined Johnson was unqualified for this employment and should not have been hired in the first place, Johnson claims the same journalism constituted an intentional interference with her "quasi-contractual relationship as an employee with the District of Columbia" and that "[a]s a direct and proximate result of the false and defamatory statements published by [Barras], Ms. Johnson has lost her employment with the District . . ." Id. at ¶¶ 90, 93.

II. STANDARD OF REVIEW

A party may move for judgment on the pleadings, where, as here, the pleadings have closed. Super. Ct. Civ. R. 12(c). The standard for disposition of a motion for judgment on the pleadings is identical to that of a Rule 12(b)(6) motion to dismiss. See District of Columbia v. Baretta, U.S.A., Corp., 872 A.2d 633, 639 (D.C. 2005). District of Columbia courts have long recognized that, notwithstanding the general rule that all facts and inferences are construed in favor of the plaintiff at this stage, legal conclusions are insufficient to state a claim for libel. Osparaugo v. Watts, 884 A.2d 63, 77 (D.C. 2005) (citation omitted). A complaint will be properly dismissed for failure to state a claim where it appears beyond doubt that the plaintiff can prove no set of facts that would entitle her to relief. Baretta, 872 A.2d at 639.

Given the chilling effect of this type of litigation on free expression, courts in the District favor early adjudication of defamation actions, especially where, as here, a public figure or public official is involved. "Libel suits, if not carefully handled, can threaten journalistic independence. Even if many actions fail, the risks and high costs of litigation may lead to undesirable forms of self-censorship." McBride v. Merrell Dow & Pharm., Inc., 717 F.2d 1460, 1467 (D.C. Cir. 1983).[3] See also Nader v. de Toledano, 408 A.2d 31, 42-43 (D.C. 1979) (early adjudication takes on a greater significance where a public official or public figure is involved in a libel action because of the potential threat to first amendment freedoms).

While a motion for judgment on the pleadings is limited to the allegations of the complaint and answer, and the exhibits to each, the Court may take judicial notice of matters of public records and consider them in support of a Rule 12 motion. See Bostic v. District of Columbia, 906 A.2d 327, 332 (D.C. 2006) (court "may take judicial notice of . . . matters of public record" when ruling on a motion to dismiss); see also In re Estate of Barfield, 736 A.2d 991, 996, n.8 (D.C. 1999) (In considering a motion to dismiss, "the trial court is entitled to take judicial notice of matters of public record, such as [plaintiff's] disciplinary history.").

Dismissal is proper here because, even assuming all allegations in Plaintiff Johnson's Complaint are true, she fails to present viable claims for defamation, false light or intentional interference with contract. These issues present purely legal questions for the Court, as a matter of law, to decide. Moreover, given the nature of this action – a public official's lawsuit against a

[3] The McBride court quoted with approval Washington Post Co. v. Keogh, 365 F.2d 965, 968 (D.C. 1966): "In the First Amendment area, summary procedures are even more essential . . . Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide-open, for self-censorship affecting the whole public is 'hardly less virulent for being privately administered.'" (internal quote edited; citation omitted)

journalist for coverage of the conduct of government affairs – swift and early dismissal of the claim is warranted, to curtail the "chilling effect" of this type of litigation.

III. ARGUMENT

The U.S. Constitution and District of Columbia law fiercely protect commentary that touches upon the fitness of public officers like Johnson. Under well-established precedent, Barras' political commentary is therefore protected from all causes of action, and the Complaint must fail because, taken as a whole: (1) the broadcast and publications containing Barras' political commentary are substantially true; (2) the statements are protected expressions of subjective opinion and fair comment on a matter of public concern; (3) the statements are protected by the fair report privilege that immunizes journalism about government proceedings; and (4) the Complaint fails to allege facts to support the actual malice that, as a public official, Johnson must state under strict First Amendment standards. The false light claim also fails because the statements involve a matter of general public concern and reflect public records; therefore, as a matter of law, the statements are not highly offensive or unreasonable. Finally, intentional interference with contract claim fails because Johnson has not met the essential elements for pleading that action as well.

A. The Complaint Fails To State A Claim Under Any Theory Because The Statements Are Protected As A Matter Of Law.

A defamation claim in D.C. will fail unless a plaintiff pleads and proves that the statements complained of are: defamatory; capable of being proven true or false; "of and concerning" her; false, and; made with the requisite degree of intent or fault. Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287, 1292-93 (D.C. Cir. 1988) (applying D.C. law). Pleading a false statement of fact – and not merely a pejorative one – is indispensable to a defamation claim: "That the truth carries a negative implication does not give the Plaintiff a meritorious

defamation cause of action." Coles v. Washington Free Weekly, Inc., 881 F. Supp. 26, 31 (D.D.C. 1995).

Similarly, a false light invasion of privacy claim is invalid unless the plaintiff alleges and proves publicity given to a matter concerning plaintiff that placed her in a false light and is highly offensive to a reasonable person. White v. Fraternal Order of Police, 909 F.2d 512, 522 (D.C. Cir. 1990) (applying D.C. law). As with public official defamation plaintiffs, all false light plaintiffs must also establish that the defendant had knowledge of or acted in reckless disregard as to both the falsity of the publicized matter and the false light in which the plaintiff would be placed. Id.

Additionally, the same defenses and privileges apply to libel and false light claims. Id. at 518 (truth, opinion, and constitutional privileges applicable to defamation and false light claims) (citing Restatement (Second) of Torts § 611, comment b (1977) and § 652G); Lane v. Random House, Inc., 985 F. Supp. 141, 148 (D.D.C. 1995) (false flight claim barred for same reasons defamation claim failed). In fact, a public official or public figure plaintiff like Johnson cannot prevail under any theory against a protected publication. See Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (Rev. Jerry Falwell's claim against a parody cartoon offensively depicting him in incestuous relationship held barred under any theory because of constitutional protections.).

1. Johnson's claims are all fatal as a matter of law as she cannot and does not dispute that the statements about her resume are substantially true.

The gravamen of Johnson's lawsuit is Barras' critical commentary about the D.C. government's failure to verify Johnson's inaccurate resume. See Complaint ¶¶ 47, 53-54, 81, and 92. Yet Johnson *admits* in her Complaint that the resume she initially submitted was not accurate, see Complaint ¶¶ 12-14, and that the erroneous resume remained in her personnel file

with the D.C. Office of Personnel. Id. ¶¶ 15-17. Additionally, the D.C. Inspector General found that the resume falsely stated Johnson's salary and work history. See Ex. A, pp. 24-26. Thus, the allegedly defamatory statements upon which Johnson brings her claims are protected, as they reflect a fact Johnson does not and cannot dispute is true.

Indeed, the D.C. Superior Court already rejected a remarkably similar claim where – as here – a public official alleged defamation based on a journalist's report on her submission of a false resume. Paul v. News World Commc'ns, No. 01CA917, 2003 WL 23899002 (D.C. Super. Ct. Sept. 15, 2003).[4] In Paul, the chief information officer of the Prince George's County Public School System alleged defamation over press reports that she had misrepresented some of the credentials on her resume. Ex. B at *7. The Honorable A. Franklin Burgess, Jr. found that the newspaper article was not entirely true and misstated the precise degree of the resume's inaccuracy. Nonetheless, the Superior Court held certain portions of the newspaper's report were substantially true and not actionable, as plaintiff herself admitted several items on the resume were in fact inaccurate. Id. at *12 ("While the Times' articles in some respects were literally untrue (e.g., and most importantly, in reporting that she had taken no courses at all), the gist of the defamation was true because no reasonable juror could conclude that Ms. Paul did not significantly misrepresent her credentials on her resume.").

In this action, the substantial truth of Barras' report is even more readily apparent than the reporting that the Superior Court held protected as a matter of law in Paul. Indeed, nowhere in the Complaint does Johnson allege falsity as to Barras' reporting on the misstatement of her salary and work history in the resume on file with the Office of Personnel. On the contrary, the Complaint corroborates the truth of the statements. See Complaint ¶¶ 12-14 (Plaintiff pleads that

[4] For the Court's convenience, a copy of Judge Burgess' decision in Paul v. News World Communications is attached as Exhibit B.

the resume she submitted was not accurate), ¶¶15-17 (Plaintiff pleads that the false resume she submitted remained in her official personnel file). The IG Report further confirms the substantial truth of the allegedly defamatory statements, as it reflects that: Johnson submitted an inaccurate resume, including her failure to note that her past employment was part-time and her misstatement of her salary history; the Office of Personnel failed to determine whether Johnson met the minimum qualifications for the position of Deputy Director; and Johnson's submission of this resume was improper and the government's hiring process was flawed. Ex. A, pp. 13, 24-25.

Accordingly, the public-interest journalism by Barras that Johnson challenges here fully comports with the undisputed, true facts:

- Johnson had inflated her resume regarding employment and compensation history, and Barras detailed the nature of the discrepancies.[5]
- The D.C. government should not have found Johnson qualified for the position of Deputy Director.[6]
- Johnson was hired through a flawed hiring process because the position she obtained had not been opened for others to apply to, as is required.[7]
- The D.C. government was investigating the circumstances surrounding Johnson's hiring,[8] and it had concluded that Johnson misrepresented her work and salary history and was therefore improperly hired.[9]

[5] See Answer, Ex. A, p. 7; Ex. B, p.1; Ex. C, p. 2; Ex. D, p. 2; Ex. E, p. 1; Ex. F, p. 1; Ex. G, p.2.
[6] Id.
[7] See Answer, Ex. A., p. 9-10; and Ex. B, p. 3.
[8] See Answer, Ex. A., p.10; Ex. C, p. 2; and Ex. F, p. 2.
[9] See Answer, Ex. E. p. 1; Ex. F, p. 2; and Ex. G, p. 2.

While the Complaint suggests that Barras failed to acknowledge Johnson's claim about a second resume (Complaint ¶¶ 31-32, 34), the broadcast and publications reported that Parks and Recreation Director Kimberley Flowers and Johnson had made this claim, but that only the erroneous resume was contained within the D.C. Office of Personnel file. See Answer, Ex. A, p. 8; Ex. B, p. 2; Ex. E, p. 1; and Ex. D, p. 2. In any event, D.C. courts will not find a protected statement actionable simply because it did not present all facts that a plaintiff believes would ameliorate the gist or sting of a substantially true report.[10] Because it is clear from the pleadings that Johnson submitted an inaccurate resume, Barras' substantially true statements will not support any cause of action. Barras therefore is entitled to judgment as a matter of law.

2. Johnson also fails to state a claim because the statements concerning her are protected by the fair report privilege, which immunizes substantially accurate press reports on the process of government.

In addition to substantial truth, the common law recognizes that journalists must be free to fairly and with substantial accuracy report on official proceedings and records, even where the plaintiff claims the record is wrong. Phillips v. Evening Star Newspaper Co., 424 A.2d 78, 88 (D.C. 1980); see also Liberty Lobby, 838 F.2d at 1298-99. Journalists like Barras therefore enjoy a privilege that protects them from all liability for a report "of any official proceeding, or any action taken by any officer or agency of government." White, 909 F.2d at 527 (citing Restatement (Second) of Torts § 611, comment d (1977)). The D.C. Circuit has well expressed why this protection is so vital to an open society like ours:

> [T]he intended beneficiary of the privilege is the public, not the press. The privilege is not simply some convenient means for shielding the media from tort

[10] See Coles, 881 F. Supp. at 33 (rejecting libel-by-omission theory, D.C. federal court cites with approval Janklow v. Newsweek, 788 F.2d 1300, 1306 (8th Cir.1986)): "Courts must be slow to intrude into the area of editorial judgment, not only with respect to choice of words, but also with respect to ... omissions from news stories.")

> liability. Rather, the privilege springs from the recognition that in a democratic society, the public has both the right and the need to know what is being done and said in government.

Dameron v. Washington Magazine, 779 F.2d 736, 739 (D.C. Cir. 1985). Adhering to the Restatement, the District of Columbia applies the privilege where the report is "(a) accurate and complete, or a fair abridgment of what has occurred, and (b) published for the purpose of informing the public as to a matter of public concern."[11] Phillips, 424 A.2d at 88 (quoting Restatement (Second) of Torts § 611 (1977)).

Pursuant to this privilege, courts in D.C. have extended protection to press reports on virtually every form of government proceeding and record. See, e.g., White, 909 F.2d at 527 (applying privilege to internal police department letters); Coles, 881 F.Supp. at 30-31 (applying privilege to D.C. Taxi Commission hearing); and Harper v. Walters, 822 F. Supp. 817, 823-27 (D.D.C. 1993) (applying privilege to report prepared by the Office of General Counsel of the EEOC). The privilege has been extended to documents within personnel records of government employees. Reuber v. Food Chemical News, Inc., 925 F.2d 703, 712-14 (4th Cir. 1993) (extending fair report privilege to disciplinary letter contained with employee's personnel file).

In this action, the pleadings unequivocally reflect that Barras' statements fairly and accurately reflect matters contained in Johnson's D.C. Office of Personnel file and the Inspector General Report. See Ex. A, pp. 5-6, 11, 13, 24-26. Johnson admits that the resume in the Office of Personnel file inaccurately reflected her employment record, as Barras reported. And there can be no dispute that the Inspector General Report also reflects Johnson submitted an erroneous resume and that she should not have been hired. As Barras' reporting comports with the official

[11] The accuracy requirement relates to the accuracy of the reporting, not the truth of the alleged defamatory statement itself. Coles, 881 F. Supp. at 31 n.3. In other words, under the privilege, the press is not legally responsible where the government's recordkeeping is false.

government records and the findings of an official government investigation, her statements fall fully within the ambit of privilege. The Court therefore should dismiss the Complaint with prejudice.

3. The facts alleged are insufficient to support Johnson's claims because the statements are protected expressions of subjective opinion and fair comment on a matter of public concern.

In addition to Barras' reporting of the undisputed and substantially true facts about Johnson's resume, Johnson also bases this lawsuit on Barras' commentary about those facts. See Complaint ¶ 37 ("Ms. Barras repeatedly made allegations regarding Ms. Johnson's fitness and qualifications . . ."); ¶¶ 53-54 (alleging that the statements imply that Johnson was not qualified for the position and purposely submitted a false resume in order to obtain her position). This aspect of Johnson's claim must fail as well, for a statement of opinion, as opposed to statements of facts that are objectively verifiable as false, cannot sustain a lawsuit. Coles, 881 F. Supp. at 31 (citing Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990)). Whether a challenged statement is capable of being proven true or false is a question of law for the court. See Moldea v. New York Times Co., 22 F.3d 310, 316-17 (D.C. Cir. 1994). A "statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection." Coles, 881 F. Supp. at 32 (citation omitted).

Courts in the District and elsewhere routinely reject defamation claims commenting on an individual's professional qualifications or performance, holding that such statements constitute unverifiable opinion protected by the First Amendment. See e.g., Hargrow v. Long, 760 F. Supp. 1, 3 (D.D.C. 1989) (statement that plaintiff is "wholly incompetent" is a non-actionable statement of opinion); Myers v. Plan Takoma, Inc., 427 A.2d 44, 47-48 (D.C. 1983) (statement describing business owners as "shady" is protected opinion); Ollman v. Evans, 750 F.2d 970,

989-992 (D.C. Cir. 1984) (statements regarding professors' professional performance are protected opinion); Coles, 881 F. Supp. at 32 ("[r]easonable people could differ as to quality and thoroughness" of the plaintiff's performance). Moreover, as Judge Posner recognized in Haynes v. Knopf, Inc., 8 F.2d 1222, 1227 (7th Cir. 1993), speculation (like Barras') about another person's reasons for taking an action (like why Johnson submitted a false resume) are not verifiable; therefore, they are protected opinion: "[Plaintiff's motives] can never be known for sure (even by [plaintiff]) and anyone is entitled to speculate on a person's motives from the known facts of his behavior."

Similarly, to ensure that "unduly burdensome defamation law [will not] stifle valuable public debate", D.C. courts recognize the common law "fair comment" privilege. Coles, 881 F. Supp. at 32. The privilege "'afford[s] legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact.'" Id. (internal citation omitted). In D.C., the fair comment privilege applies "even if the facts upon which [the opinion] is based are not included along with the opinion." Id. (quoting Fisher v. Washington Post Co., 212 A.2d 335, 338 (D.C. 1965)).

In this action, Johnson not only challenges Barras' reporting of facts that Johnson admits are substantially true, but she also assails Barras' expressions of opinion that are protected by D.C. law and the U.S. Constitution. Residents of the District are entirely free – as they must be – to speculate on the motives and comment on the qualifications of people who hold public office. See Paul, 2003 WL 23899002 at *1 (citing Rosenblatt v. Baer, 383 U.S. 75, 85-86 (1966)) (D.C. Superior Court notes that the public has a special interest in the qualifications and conduct of public officials). Barras' broad commentary on the improper hiring practices within the District's government, and specific comments about Johnson's employment, clearly constituted Barras'

"honest expression of opinion on matters of legitimate public interest," Coles, 881 F. Supp. at 32, and reflected her perspective on the question unanswered in the D.C. Inspector General Report: "whether [Johnson] erred or intended to inflate the Company A salary provided on her first resume." Ex. A, p. 25. As Barras' speculations and opinions are all protected opinion, and constitute fair comment under D.C. law, Johnson's claims all must fail.

4. The facts are insufficient to support Johnson's claims because they fail to support the requisite actual malice element.

Johnson also fatally fails to plead facts sufficient to support liability under actual malice law – publication of a knowing falsehood, or with reckless disregard through subjective entertainment of doubt – as is required.[12] See Moss, 580 A.2d at 1029. Where actual malice is an element of a plaintiff's claim, it must be pleaded in the complaint. See McBride v. Merrell Dow & Pharmaceuticals, 717 F.2d 1460, 1461-62 (D.C. Cir. 1983). Conclusory statements that defendant acted with "knowledge of falsity" or "reckless disregard" as to falsity are insufficient to plead actual malice. See Robertson-Taylor Co. v. Sansing, 10 Media L. Rptr. 2495 (D.D.C. 1984).[13] The plaintiff must allege facts that charge that the defendant acted with "a high degree of awareness of . . . probable falsity." Id. (holding plaintiff's allegation that the allegedly defamatory statements were published "with reckless disregard for the accuracy thereof" was too conclusory to state a claim of actual malice) (citation omitted).

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[12] Johnson, as Deputy Director of Parks and Recreations for the District of Columbia was a public official as a matter of law and therefore must establish actual malice. "[T]he 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." Moss, 580 A.2d at 1029 (quoting Rosenblatt, 383 U.S. at 85-86).

[13] For the Court's convenience, a copy of Robertson-Taylor Co. v. Sansing is attached as Exhibit C.

While in several places Johnson alleges that Barras intentionally defamed her, nowhere does the Complaint plead facts that, if proven, would constitute actual malice. Instead, Johnson merely sets forth conclusory statements that Barras "acted with knowledge of the falsity of the statements," Complaint ¶ 59, and that Barras "knew or should have known that the Plaintiff had not committed said misconduct, was truthful, and was qualified to act in her position." Id. ¶ 82. These talismanic recitations of the legal standard do not meet the pleading standard for an actual malice claim. The Complaint should fail for this reason as well.

B. Johnson's False Light Claim (Count IV) Also Fails Because The Statements Involve Matters of Public Concern And Are Not Highly Offensive As A Matter Of Law.

As Johnson fails to state a defamation claim, her false light action fails as well. The same constitutional defenses applicable to defamation also apply to false light. Moldea, 22 F.3d at 319 ("[A] plaintiff may not avoid the strictures of the burdens of proof associated with defamation by resorting to a claim of false light invasion.") (citation omitted); Lane, 985 F. Supp. at 148.

Johnson's claim for false light invasion of privacy also fails for the independent reason that, as a matter of law, the publications at issue here were not highly offensive or unreasonable, as this tort requires. White, 909 F.2d at 522. The United States Supreme Court has held that the First Amendment creates a privilege to publish matters contained in public records even if, under different circumstances, public discussion of those same matters might offend the sensibilities of a reasonable person. For example, in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) and Florida Star v. B.J.F., 491 U.S. 524 (1989), the United States Supreme Court has held that the First Amendment will not permit punishment under invasion of privacy theory for the broadcast or publication of the identity of a rape victim that was lawfully obtained from public court or police files, even where the records were mistakenly shown to journalists. Additionally, with

public officials, "the legitimate interest of the public ... may include information as to matters that would otherwise be private." Restatement (Second) of Torts § 652D, comment e (1977). The law therefore recognizes that publication of matters from public proceedings and records is not, as a matter of law, highly offensive regardless of the sensitivities of the subject of the proceedings.

In this action, Johnson fails to state a claim for false light invasion of privacy as the commentary at issue concerned her role as a public official and discussed the same information contained in her government public personnel records and the IG Report. As the precedent reflects, the invasion of privacy law that Johnson invokes provides her with no shield whatsoever to this type of discussion; instead, the public interest and public records inherent in Barras' reporting entitle her to the utmost protections of law. As Barras' reporting is not highly offensive as a matter of law, she has failed to state a claim for false light invasion of privacy.

C. The Complaint Also Fails To State A Claim For Intentional Interference With Contract Claim (Count V) Because The Facts Are Insufficient To Support Such A Claim As A Matter Of Law.

Just as a plaintiff cannot plead false light to evade dismissal of a defamation action, an evasive intentional interference with contract claim is invalid as well. See Jankovic v. Int'l Crisis Group, 429 F. Supp. 2d 165, 179 (D.D.C. 2006) (dismissing plaintiffs' claims for false light invasion of privacy and tortious interference with business expectancy "for the reasons their defamation claims cannot be maintained"). As Judge Posner of the Seventh Circuit explained:

> Any libel . . . can be made to resemble in a general way this archetypal wrongful-interference case, for the libel will probably cause some of the [plaintiff's] customers to cease doing business with [him] . . . But this approach would make every case of defamation . . . actionable as wrongful interference, thereby enabling the plaintiff to avoid the specific limitations with which the law of defamation – presumably with some purpose – is hedged about.

Brown & Williamson Tobacco Corp. v. Jacobson, 713 F.2d 262, 273-74 (7th Cir. 1983).

Additionally, the Complaint fails to contain allegations to support an intentional interference cause of action, as it does not allege the requisite elements: (1) the existence of a contract; (2) knowledge by the defendant of the contract; (3) intentional procurement of breach of that contract; and (4) damages resulting from a breach. See Altimont, Inc. v. Chatelain, Samperton & Nolan, 374 A.2d 284, 288 (D.C. 1977). First, Johnson has not and cannot plead facts demonstrating the existence of a legal contract for purposes of this tort. The IG Report verifies that Johnson was an at-will employee. Ex. A, p. 5.[14] In McManus v. MCI Commc'ns Corp., the D.C. Court of Appeals held that an at-will employee has no contractual relationship sufficient to support a tortious interference claim. 748 A.2d 949, 957 (D.C. 2000) (citing Bible Way Church v. Beards, 680 A.2d 419, 432-33 (D.C. 1996)); see also Riggs v. Home Builders Inst., 203 F. Supp. 2d 1, 24 n.14 (D.D.C. 2002) (holding that under District precedent, an "at-will employment is an insufficient basis for the type of contractual relationship necessary to serve as a basis for the intentional tort of interference with contract."). Second, the Complaint fails to state that Barras was aware of the existence of any alleged contract and only states that Barras "knew that Plaintiff was employed by the District of Columbia in her position." Complaint ¶ 90. Third, even assuming *arguendo* the existence of a valid contract between Johnson and the District, the Complaint nowhere alleges that her termination breached that contract. Finally, as Johnson has alleged no breach of a contract, she also has not alleged damages resulting from a breach.

[14] Johnson pleads in a deliberately murky and conclusory fashion that she had a "quasi-contractual relationship as employee with the District of Columbia." Complaint ¶ 90. Whatever Johnson hopes to persuade this Court her alleged "quasi-contract" entitles her to, it does not give her a tort action against a third party. A "quasi-contract" is merely" a remedy that allows the plaintiff to recover a benefit conferred on the defendant," Black's Law Dictionary 345 (8th ed. 2004), and does not impose a duty in tort on others.

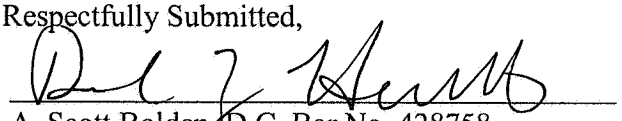
Johnson therefore has failed to set forth the essential elements of an intentional interference claim, and in light of her at-will employment, she can never successfully do so in a D.C. court. For these reasons, the Court should enter judgment on the pleadings in favor of Barras on Count V.

IV. CONCLUSION

The reasons set forth in Barras' Motion for Judgment on the Pleadings, individually and in the aggregate, demonstrate that Johnson has not set forth a cause of action. The constitutional and common law defenses Barras asserts, supported by the allegations of the Complaint and the documents appropriately considered by the Court on this Motion, further reflect that under no set of facts could Johnson ever state a valid cause of action. Finally – given that this action has been brought by a public official against a journalist for criticism of the conduct of office – this lawsuit reflects a transparent effort to chill discussion of an important public issue.

For the foregoing reasons, the Court should grant Barras' Motion, enter Judgment on the Pleadings, and dismiss the entire Complaint with prejudice.

Respectfully Submitted,



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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

ROSLYN J. JOHNSON	)	
	)	**CIVIL ACTION NO: 2007 CA 0001600**
Plaintiff,	)	**Honorable Gerald I. Fisher**
	)	
v.	)	
	)	
JONETTA ROSE BARRAS, ET AL.,	)	
	)	
Defendants.	)	
	)	

[PROPOSED] ORDER

Upon consideration of Defendant Jonetta Rose Barras' May 29, 2007, Motion for Judgment on the Pleadings, any oppositions and replies thereto, and the record herein, it is on this _____day of _____ 2007:

ORDERED, that Defendant Jonetta Rose Barras' Motion to for Judgment on the Pleadings is **GRANTED** and that all of the claims against Defendant Jonetta Rose Barras are **DISMISSED WITH PREJUDICE**.

Entered this _____ day of _____, 2007.

_____
The Honorable Gerald I. Fisher
District of Columbia Superior Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing, was served electronically via Case File Xpress and upon counsel for Plaintiff, Roslyn Johnson, and Defendants, DC Watch, Dorothy Brizill, Gary Imhoff and The District of Columbia on this 29th day of May, 2007.

Daniel Z. Herbst

Exhibit A

D.C. Inspector General Report, pp. 5-6, 11, 13, and 24-26

(Entire Report Filed with Defendant Barras' Answer as Exhibit H)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE INSPECTOR GENERAL

DISTRICT OF COLUMBIA OFFICE OF THE INSPECTOR GENERAL AUDIT OF THE DEPARTMENT OF PARKS AND RECREATION'S HIRING PRACTICES

CHARLES J. WILLOUGHBY
INSPECTOR GENERAL

OIG No. 06-2-21MA

February 8, 2007

FINDINGS AND RECOMMENDATIONS

TABLE 1: DCOP's PRE-EMPLOYMENT INQUIRY VERIFICATION

DPR EMPLOYEE	(1) Dates of Employment	(2) Salary or Other Compensation	(3) Titles Held and Nature of Duties Performed	(4) Reasons for Leaving Employment	(5) Job Performance	(6) Professional & Personal References
Employee A	No	No	No	No	No	No
Employee B	No	Yes	No	No	No	No[2]
Employee C	No	No	No	Yes	No	No
Employee D	No	No	No	No	No	No
Employee E	No	No	No	No	No	No

Table 1 shows that DCOP only checked 2 of a possible 30 suitability requirements for the 5 employees. The following subsections provide specific details on each of the five employees.

Employee A's Employment History - On July 20, 2005, DCOP offered Employee A an Associate Program Director position, grade MSS-301-16-1, non-competitive TAPER appointment at an annual salary of $101,813. However, on August 22, 2005, DCOP hired Employee A on a non-competitive TAPER appointment as the Deputy Director, MSS 301-16-2. To correct the error made during the initial offer, on August 22, 2005, DCOP changed Employee A's step and pay plan from MSS-301-16-2 to MSS-301-16-1. Our review of the Associate Program Director position description revealed that the position was classified as a DS-301-15 on December 17, 2001. DCOP reclassified the Associate Program Director position to the Deputy Director MSS-188-16 on July 29, 2005.

The vacancy announcement converting the TAPER appointment to a permanent MSS position (Deputy Director of Programs) was advertised on September 9, 2005, and closed on September 16, 2005. DCOP advertised the full-time MSS position as "agency only." The Selection Certificate provides that Employee A was "the only qualified applicant to apply." On October 2, 2005, Employee A's TAPER appointment was converted to a MSS-301-16-1 position at an annual salary of $105,885. On October 12, 2006, Employee A, an at-will employee, was terminated from District employment.

[2] DCOP performed only 2 of the 3 reference check requirements.

FINDINGS AND RECOMMENDATIONS

Qualifications Review - Employee A's Applicant Qualifications Rating Record[3] (AQRR) dated September 23, 2005, indicates that Employee A met the minimum qualifications for the Deputy Director of Programs position. The AQRR also provides that DCOP erroneously gave Employee A full-time credit for her part-time employment with a previous employer.

However, despite DCOP's error, the AQRR indicates that Employee A still met the minimum qualifications for the position based on her full-time employment with a previous employer. The Selection Certificate provides that DCOP rated Employee A as well qualified. Based on the requalification, Employee A met the minimum qualifications for the Deputy Director TAPER appointment.

Pre-Employment Inquiries - Our review of Employee A's OPF, MCF, and DPR Departmental Folders revealed that neither DCOP nor DPR adequately conducted pre-employment inquiries on Employee A. Specifically, we did not find any documentation to support that either DCOP or DPR performed any of the pre-employment inquiries as required by District personnel regulations.

With the exception of the salary for a previous (2002) employer, which was provided in Employee A's first resume, we were able to verify the information provided on both of Employee A's resumes.

Employee B's Employment History - On January 23, 2006, DCOP offered Employee B a Program Development and Evaluation Manager, MSS-301-13-3, non-competitive TAPER appointment at an annual salary of $71,043. DCOP classified the Program Development and Evaluation Manager position on January 22, 2004. Prior to the hire, DCOP requested that DPR provide Special Qualifications justification for Employee B because of the disparity between Employee B's previous salary at a previous employer and the DPR offer. On January 10, 2006, DCOP denied DPR's Special Qualifications request for Employee B. On January 17, 2006, through an e-mail, the DPR Director re-iterated to DCOP her request to hire Employee B at the grade MSS-301-13-3 level. On January 17, 2006, the DCOP Deputy Director instructed the HR Manager to hire Employee B at the MSS-301-13-3 grade level as requested by DPR. On March 6, 2006, DCOP hired Employee B on a TAPER appointment.

On March 22, 2005, to convert the TAPER appointment to full-time MSS, DCOP advertised the Program Development and Evaluation Manager position as "agency only." Subsequently, on May 12, 2006, at the request of DPR, DCOP cancelled the initial advertisement and re-advertised the position as "open to the public." DCOP officials stated

[3] The Applicant Qualifications Rating Record is a form prepared for each person who is appointed non-competitively or who applies under the D.C. merit staffing and employment plan to document the rating of eligibility for the position. The form is maintained in the merit staffing case files or in the OPF.

FINDINGS AND RECOMMENDATIONS

FINDING 2: INITIAL TAPER APPOINTMENTS

SYNOPSIS

DCOP did not comply with District personnel regulations when allowing DPR to hire Employee A, Employee B, and Employee C on non-competitive TAPER appointments. Additionally, DCOP did not document whether the appointees met the minimum requirements for the TAPER appointments prior to offering employment to the three individuals. These conditions occurred because DCOP had not developed and implemented consistent and up-to-date operational policies and procedures, had not provided initial and refresher training on TAPER appointments, and misinterpreted TAPER appointment regulations. As such, neither DCOP nor DPR can be assured that the best qualified applicants were selected and appointed to the TAPER positions or that District residents received proper consideration for the positions. Further, the public could perceive that DCOP/DPR afforded preferential treatment to each of the TAPER appointees.

DISCUSSION

DCOP should not have allowed DPR to identify, select, and hire Employee A, Employee B, and Employee C on TAPER appointments because DCOP did not: (1) attempt to establish a list of eligibles[7] prior to making the TAPER appointments, (2) determine that the positions were continuing positions, and (3) determine that the position must be filled immediately. Additionally, prior to offering Employee A and Employee B TAPER appointments, DCOP did not assess whether the two appointees met the minimum qualifications for their respective positions.

Title 6 DCMR § 3899 provides that a TAPER appointment is "a time-limited appointment pending the establishment of a register when there are insufficient candidates on a register appropriate for filling a Management Supervisory Service position and the public interest requires that the vacancy be filled before eligibles can be certified."

[7] A "list of eligibles" and "register" are synonymous. Eligible applicants are placed on a Selection Certificate for the selecting agency's review. To develop a "list of eligibles," the personnel authority (DCOP) performs the following: (1) advertises the position; (2) receives applications; (3) evaluates applicants; and (4) develops a Selection Certificate.

FINDINGS AND RECOMMENDATIONS

Employee A received a verbal offer of employment on July 19, 2005, which on the next day was followed by a written offer for the Associate Program Director position (MSS-301-16). On August 22, 2005, Employee A was hired as the Associate Program Director. Based on our review of the Associate Program Director position description form, we determined that the position is officially classified as a DS-301-15 and not a MSS-301-16 as provided in the offer letter. Further, The Associate Program Director position offered to Employee A was not a continuing position at DPR and had not been classified by DCOP.

Employee B's position, Program Development and Evaluation Manager, was classified on January 22, 2004. Employee B was hired on March 6, 2006. The Program Development and Evaluation Manager position was a continuing position within DPR because it was classified approximately 2 years before DPR employed Employee B.

Employee C's offer letter was dated September 26, 2005. The DCOP Classification Department classified Employee C's position, Director of Partnerships, as a new position on September 30, 2005. As such, the position was not an on-going vacancy, and DCOP offered Employee C a position before the position was officially established.

Public Necessity of Position - Prior to offering Employee A, Employee B, and Employee C TAPER appointments, neither DCOP nor DPR documented the determination that "the public interest require[d] that the vacancy be filled" as required by 6 DCMR § 3899.

Qualifications Determination - DCOP did not document its assessment of Employee A's and Employee B's qualifications prior to their TAPER appointments. As such, DCOP had no assurances that the applicants met the minimum qualifications for their respective positions prior to offering them TAPER Appointments.

Title 6 of DCMR § 3812.2 provides that "[a] person appointed to a TAPER appointment shall meet the minimum qualifications standards for the position." Although District personnel regulations provide that MSS TAPER appointees must meet the minimum qualifications for the position prior to their appointment. Neither the personnel regulations nor DCOP operational policies and procedures indicate how DCOP shall demonstrate compliance with the requirement. DCOP uses an AQRR to document whether an applicant meets the minimum qualifications for a position.

Employee A received a TAPER appointment on August 22, 2005. DCOP performed an AQRR evaluation on September 23, 2005, when the position was being converted to MSS position. The AQRR evaluation was performed on Employee A approximately 1 month after she received her TAPER appointment. Employee B received her TAPER appointment on March 6, 2006. Employee B's MCF contained two AQRRs. One of the forms was undated

APPENDIX 2 - ANALYSIS OF DCOP'S INTERNAL INVESTIGATION REPORT

The Director of Personnel requested that the DCOP Program Administrator conduct an internal investigation into specific TAPER appointments DCOP allowed DPR to make for Applicant A, Applicant B, and Applicant C. Additionally, the Director of Personnel requested that the DCOP Program Administrator investigate the allegation that the DPR HR Specialist made inappropriate transactions in the District's personnel and payroll system (PeopleSoft Application). The allegation regarding the DPR HR Specialist was referred to the OIG's Investigations Division.

We reviewed the formal report that resulted from DCOP's internal investigation (Report) to become familiar with its contents and to address the findings and allegations made in the report. The following details provide the Report's conclusions and the results of our analysis of the Report on Employee A, Employee B, and Employee C.

Employee A - The Report provides that Employee A: (1) failed to note that periods of her employment were part-time; (2) incorrectly cited her salary; (3) did not meet the minimum qualifications for the Deputy Director of DPR; (4) should have been classified as Excepted Service instead of MSS; and (5) incorrectly received full-time credit from DCOP for part-time experience.

Our Analysis of Conclusions 1 and 5 - Based on our review of Employee A's first and second resume and District Government Employment Application (DC 2000), we determined that Employee A did not disclose whether the work experience listed on her resume was full-time or part-time and that DCOP gave Employee A full-time credit for part-time experience.

On July 6, 2005, the DPR HR Specialist e-mailed Employee A and instructed her to complete the following sections of the DC 2000: (1) Personal Data, (2) D.C. Employment History and Availability, (3) Residency, (4) Background Information, and (5) Signature section. The DPR HR Specialist also instructed Employee A to notate in the Work Experience section of the DC 2000 "See Resume." On July 6, 2005, Employee A provided DCOP/DPR her signed DC 2000 and first resume. At DCOP's request, on July 13, 2006, Employee A submitted a second resume to DCOP, which provided more details on her work experience.

DCOP accepted Employee A's resume in lieu of requiring that she complete the DC 2000 Work Experience section. The DC 2000 Work Experience section provides data entry fields for the average hours per week worked for each previous employer. Employee A's resume did not indicate whether her work experiences were full-time or part-time. DCOP is responsible for ensuring that the resume contains all the requisite information and that the DC 2000 is complete and properly signed. DCOP gave Employee A full-time credit for all the work experience listed on her resume. DCOP should not have assumed that all the work

APPENDIX 2 - ANALYSIS OF DCOP'S INTERNAL INVESTIGATION REPORT

experience listed on Employee A's resume was full-time. DCOP should have either disqualified Employee A's application and resume for incompleteness or made inquiries to determine what work experience was full-time or part-time.

Our Analysis of Conclusion 2 - Employee A's first resume provides that she was employed by Company A from 1999 to 2002 and earned $101,000 as the Regional Director. Additionally, the first resume indicates that she was a SAT tutor/teacher at Company A from 1998 to 2003; however, the resume does not indicate a salary for this employment. DCOP informed the DPR HR Specialist on July 12, 2005, that based on Employee A's DC 2000 and resume, she was not qualified for the salary grade MSS-301-16. In response to the request from DCOP and DPR, on July 13, 2005, Employee A submitted an enhanced resume, which expanded on her work experience. Employee A's second resume provided that her salary at Company A from 1999 to 2002 was $84,637 and not $101,000 as the first resume provided. Employee A's second resume also indicates that she was a SAT tutor/teacher at Company A in 2002 and did not provide a salary for this employment.

Employee A stated on the first resume that she took her earnings for a pay period and multiplied that amount by 12, (the number of months in a year). Employee A stated that she realized that this methodology was flawed because her Company A monthly pay varied from month to month depending on how many classes she taught, the day the class was taught, and other variables.

Employee A provided us with a 2002 W-2 and 1099 to support the 2002 Company A salary indicated on her second resume. Employee A started with Company B on September 2, 2002. Employee A's 2002 W-2 and 1099 indicate that she made approximately $63,450, or approximately $7,930 per month, for the 8-month period preceding her employment with Company B. Based on this analysis, Employee A would have made approximately $95,160 ($7,930 x 12 = $95,160) in 2002 had she worked the entire year for Company A.

We contacted the owner of Company A by phone and in writing to confirm Employee A's salaries and work status. The owner stated that Employee A made approximately $90,000 per year. However, despite repeated requests, the owner did not provide us with written confirmation for her Company A salaries. With the exception of the Company A 2002 salary provided on the first resume, we were able to verify the information contained on Employee A's first and second resume.

We could not determine whether Employee A erred or intended to inflate the Company A salary provided on her first resume. However, when Employee A submitted her first resume and DC 2000 her salary information for Company A appears to have been incorrect.

APPENDIX 2 - ANALYSIS OF DCOP'S INTERNAL INVESTIGATION REPORT

Employee A should have known exactly what she earned from Company A in 2002 and should have submitted tax information that would have definitively provided 2002 Company A salary. The DC 2000 provides the following:

> YOU MUST SIGN THIS APPLICATION. Read the following carefully before you sign. I understand that a false statement on any part of my application may be grounds for not hiring me, or for firing after I begin work (D.C. Official Code § 1-616.51 et seq.) (2001). I understand that the making of a false statement on this form or materials submitted with this form is punishable by criminal penalties pursuant to D.C. Official Code § 22-2405 et seq. (2001). I understand that any information I give may be investigated as allowed by law or Mayoral order. I consent to the release of information regarding my suitability for District of Columbia Government employment by employers, schools, law enforcement agencies, and other individuals and organizations, to investigators, personnel staffing specialists, and other authorized employees of the District of Columbia government. I certify that, to the best of my knowledge and belief, all of my statements are true, correct, and complete.

DCOP and DPR instructed Employee A to enhance her resume. As such, Employee A opines that DCOP should have replaced her first resume with the second resume. A DCOP staff member stated that they would not discard a previously submitted resume because it was a part of the employment file and history. DCOP gave Employee A an opportunity to change her resume. However, the Report holds Employee A accountable for the first resume. If the $101,000 salary, which was indicated on the first resume, was problematic, DCOP had approximately 4 business days to review, evaluate, and scrutinize Employee A's second resume before they offered Employee A the position and salary on July 19, 2005.

Our Analysis of Conclusion 3 - We determined that Employee A met the minimum qualifications for her position. Refer to page3, Finding 1 for specific details

Our Analysis of Conclusion 4 - DPR did not have an excepted service slot for Employee A; therefore, the Report's conclusion was baseless.

Employee C - The Report provides that: (1) Employee C was competitively converted from a TAPER Appointment to MSS, (2) DCOP did not verify the salary from Employee C's last employer, and (3) Employee C should be terminated because her appointment gives the strong suggestion of preferential treatment, which is in violation of DPM Chapter 18 §§ 1803.1(a)(2) and (6).

Exhibit B

Paul v. News World Communications,
2003 WL 23899002 (D.C. Super. Ct. Sept. 15, 2003)

Paul v. News World Communications
D.C. Super.,2003.

Superior Court of the District of Columbia,Civil Division.
Alberta PAUL Plaintiff,
v.
NEWS WORLD COMMUNICATIONS, et al. Defendants.
No. 01CA917.

Sept. 15, 2003.

MEMORANDUM AND ORDER

BURGESS, J.

*1 Before the Court are Defendants News World Communications, Inc.'s and Jabeen Bhatti's Motion for Summary Judgment, The Washington Post Company's Motion for Summary Judgment, Memorandums in Support, Replies, Exhibits and Statements of Material Facts. The Court will consider first whether Ms. Paul was a public official and then consider the other issues presented by the Defendants' contentions.

Summary Judgment Standards

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Colbert v. Georgetown Univ.*, 641 A.2d 469, 472 (D.C.1994). If a fair-minded jury could not return a verdict for Ms. Paul, even when the evidence is viewed in the light most favorable to her, the Defendant is entitled to summary judgment. *Hendel v. World Plan Executive Council*, 705 A.2d 656, 660 (D.C.1997).

The moving party bears the burden of proving that no genuine issue as to any material fact exists and that it is entitled to judgment as a matter of law. *See Atkins v. Industrial Telecomm. Ass'n, Inc.*, 660 A.2d 885, 887 (D.C.1995). Once the moving party meets its initial burden of production by making a prima facie showing, the burden of production shifts to the opposing party, which must then rebut that showing. *See Thompson v. Seton Investments*, 533 A.2d 1255, 1257 (D.C.1987). While all reasonable inferences are made in the opposing party's favor, that party must rebut material facts with specific evidence in support of a viable legal theory under its version of the facts. *Hill v. White*, 589 A.2d 918, 921 (D.C.1991); *Thompson, supra*, 553 A.2d at 1257.

In considering a motion for summary judgment, the Court considers the "pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any." Sup.Ct. R. Civ. P. 56(c). A party may not rely on conclusory allegations. *Moseley v. Second New St. Paul Baptist Church*, 534 A.2d 346, 349 (D.C.1987). If a party moving for summary judgment produces evidence satisfying its prima facie case, the party opposing summary judgment must set forth by affidavit or in similar sworn fashion specific facts showing a genuine issue for trial.

In the present case, the Defendants have supported their motion by deposition testimony and affidavits as required by the rule. A moving party satisfies its "initial burden by filing, along with [its] motion for summary judgment, supporting affidavits and a comprehensive memorandum stating the basis for the motion as to ... the complaint and identifying the materials in support of the motion." *Paul v. Howard Univ.*, 754 A.2d 297, 305 (D.C.2000). The plaintiff has responded with citations to deposition testimony as well as affidavits.

A. *Public Official*

A public official cannot recover damages for defamation unless she proves that the publisher acted with actual malice. *See, e .g., New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); *Beeton v. District of Columbia*, 779 A.2d 918, 923 (D.C.2001). The term "public official" has been defined as an individual who has a "position in government [that] has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees," and "at the very least" includes those in the government hierarchy "who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt v. Baer*, 383 U .S. 75, 85-86 (1966); *Moss v. Stockard*, 580

A.2d 1011, 1029-30 (D .C.1990). Whether an individual is a public official is a question of law for the Court to determine. *Id.* at 1029. In deciding this aspect of the Defendants' motion, the Court will take the facts in the light most favorable to Plaintiff.

*2 The Court concludes that Ms. Paul was a public official. Ms. Paul was the Chief Information Officer of the Prince George's County Public School System, which is responsible for educating over 120,000 children. Ms. Paul was interviewed and selected for this position by Iris Metts, Superintendent of the Prince George's County School System, and a press release and personnel profile were issued by the school system announcing her appointment. Her appointment was also reported in the Prince George's County Sentinel.

In her position, Plaintiff received a salary of $105,000 and a bonus of $10,000. She supervised eight departments, encompassing 149 employees (of which approximately 25 reported directly to her). While she had "budget authority to expend [only] $5,000," Ms. Paul had responsibility for overseeing a budget of public funds between $91 million and $104 million. Ms. Paul reported directly to Superintendent Metts, as did the two Deputy Superintendents and two other individuals.

Ms. Paul had wide-ranging duties and responsibilities in her position as Chief Information Officer. According to the job description acknowledged by Plaintiff as an accurate indication of some of her responsibilities, Ms. Paul was, among other things, required to "plan[ ], direct[ ], coordinate[ ], and maintain [ ] an IT (information technology) infrastructure, architecture, and program that support[ed] the Board of Education and the Superintendent's commitment to using IT effectively and efficiently in an integrated manner for both instructional and administrative functions." (Prince George's County Public Schools Job Description (Defts.' Ex. 8.))

Furthermore, her duties included "provid[ing] technology vision and leadership for developing and implementing IT initiatives" and "prepar[ing] the IT portions of the school system's operating and capital budgets." Plaintiff's other duties included: "oversee[ing] and manag[ing] the implementation of information technology systems, in the Prince George's County School system, under the direction of the Superintendent" (Paul's Statement at ¶ 9); preparing monthly reports on cost expenditures and projects for the Superintendent; advising Superintendent Metts about information technology matters for the school system; developing and recommending information technology policies; implementing these policies; ensuring Y2K compliance of the computer system; overseeing and coordinating the wiring of ninety schools in PG County through a TIMS grant; launching five regional computer laboratories for student use, teacher training, and community use; implementing the "Laurel Cluster" School Project (which involved securing laptops and training for ten schools in the cluster); overseeing information technology purchases, implementation, and related services including information security; bringing greater access to technology to public school children in Prince George's County; preparing budgets for presentation to the Board for approval; directing the daily operation of teams and units reporting to her office to assure efficient implementation; providing leadership in re-engineering and improvement of the school system's business processes and IT infrastructure; and serving as an advocate and an agent of change within the school district and working with divisions, departments, and offices to assist them in applying technology.

*3 According to Plaintiff's Deposition testimony (Paul Dep. at 990-92), she was also required to "design a new organizational structure for all Technology sectors" in the school system, "identify and secure funding for technology initiatives," "refine partnerships" between the school system and businesses and universities, "increase the department[']s revenue," and "[m]onitor and [a]pprove all Technology purchases in the district." Her "total responsibility was to identify the particular source, participate in lobbying, writing requests, to secure those fundings for the school system, making the system aware that a potential award would be coming and prepare the necessary documents for them to review and submit for first read." (Paul Dep. at 823.)

Ms. Paul made a number of public appearances at the direction and behest of the Superintendent. Ms. Paul acknowledges that she appeared on behalf of the Prince George's County School System on more than four occasions upon Superintendent Metts' request. Ms. Paul helped to raise significant funds for the school system. For instance, she represented the school system in a presentation to the Prince George's County state legislative delegation in support of the school system's funding request of an additional $60 million from the Maryland State legislature.

Finally, and importantly, Plaintiff had an integral place in shaping the policy decisions regarding information technology for the school system. As mentioned, it was her responsibility to provide technology vision and leadership for developing and implementing IT initiatives; to plan, direct, coordinate, and maintain the entire IT system; to develop IT policies and implement these policies; and to serve as an advocate and agent for change with respect to IT matters.

Accordingly, Plaintiff's position within the Prince George's County Public Schools was one of "such apparent importance that the public ha[d] an independent interest in [her] qualifications and performance of the person who holds it beyond the general public interest in the qualifications and performance of all government employees." Plaintiff had "substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt*, 383 U.S. at 85-86. Given this authority, Plaintiff was a public official within the meaning of *Rosenblatt*.

There exists significant precedent holding that an array of public school and other public employees with administrative responsibility are public officials within the meaning of *Rosenblatt*.[FN1] *See, e.g., Johnson v. Robinsdale Indep. Sch. Dist. No. 281*, 827 F.Supp. 1439, 1443 (D.Minn.1993) (public elementary school principal was a public official where he managed school employees and "appeared to have responsibility over the conduct of education" at the school "sufficient to trigger public official standards"); *Standridge v. Ramey*, 733 A.2d 1197, 1201-02 (N.J.Super.Ct.App.Div.1999) (public school athletic director was public official because his position involved "public visibility and responsibility for the conduct of governmental affairs" which included "managing and supervising" duties); *Beck v. Lone Star Broad Co.*, 970 S.W.2d 610, 614-15 (Tex.App.1998) (assistant superintendent for business services of a school district was a public official); *Jee v. New York Post*, 671 N.Y.S.2d 920, 923-24 (N.Y.Sup.Ct.1998) (public school principal is public official because she "appeared to have responsibility over the conduct of education at the school [which] was sufficient to trigger public official standards, even if she did not actually have the power that the public perceived [she had]"), *aff'd* 688 N.Y.S.2d 49 (App.Div.1999); *Purvis v. Ballantine*, 487 S.E.2d 14, 17 (Ga.Ct.App.1997) (school superintendent was a public official because he "routinely made personnel, administrative, and budgetary decisions affecting the schools system, which consisted of over 10,000 students"); *Kapiloff v. Dunn*, 343 A.2d 251, 258 (Md.Ct.Spec.App.1975) (high school principal was within the public figure-public official classification and his "suitability for the position was a matter of public or general interest or concern"); *Scott v. News-Herald*, 496 N.E.2d 699 (Ohio 1986) (school superintendent was public official because he was responsible for implementing policies adopted by the school board, was expected to serve as a role model for students, and exercised supervisory authority over individuals with more direct contact with children of the community); *Worrell-Payne v. Gannett Co.*, 134 F.Supp.2d 1167, 1171 (D.Idaho 2000) (director of housing authority who supervised $9 million budget and 30 employees was a public official); *Grzelak v. Calumet Publishing Co.*, 543 F.2d 579 (7th Cir.1975) (secretary to the director of public works held to be a public official).

FN1. The Court acknowledges a split of authority on whether lower level officials like principals, teachers, and coaches at public schools can be public officials. *See, e.g., Basarich v. Rodeghero*, 321 N.E.2d 739 (Ill.App.1974) (teacher is public official); *Richmond Newspapers, Inc. v. Lipscomb*, 362 S.E.2d 32 (Va.1987) (teacher not a public official); Nodar v. Galbreath, 462 So.2d 803 (teacher not a public official; *Johnson v. Southwestern Newspapers Corp.*, 855 S.W.2d 182 (Tex.Ct.App.1993) (athletic coach is public official); *Johnston v. Corinthian Television Corp.*, 583 P.2d 1101 (Okla.1978) (athletic coach is public official); *Milkovich v. News-Herald*, 473 N.E.2d 1191 (Ohio 1986), *cert. denied* 474 U.S. 953 (1985) (coach is not public official); *Moss* (same); *East Canton Educ. Ass'n, et al. v. McIntosh*, 709 N.E.2d 465, 474-75 (Ohio 1999). *See generally*, Annot., 44 ALR 2d 193, 318-323 (1996); Robert D. Sack, *Libel, Slander, and Related Problems* at 255 (Practicing Law Institute 2d ed., 1994). This authority, however, is not directly on point because Ms. Paul had responsibility at a much higher level in the administration of public schools than would a teacher in those schools.

*4 In *Johnson v. Robbinsdale Indep. Sch. Dist. No. 281*, 827 F.Supp. 1439, 1444 (D.Minn.1993), the court found a principal to be a public official because she managed teachers and other school employees and at least appeared to the public to be the person in charge of operating the school. In *Netherwood v. Am.*

Fed. & Mun. Empls., Local 1725, 757 N.E.2d 257, 263 (Mass.App.Ct.2001), the court found that a director of maintenance and transportation, was a public official because he was "clearly" in a managerial role based on his substantial responsibilities (for which he received "significant remuneration" of approximately $58,000), and because his decisions had "direct impact" on his department, as well as, the "safety and well-being" of children and faculty in the school district.

Although safety is not implicated in this case, the Court notes that Ms. Paul was "clearly" in a managerial position, she had wide-ranging and substantial responsibilities and duties, her decisions had a "direct" impact on both her department and on the well-being of the children, faculty, and administrators of the school district. Ms. Paul was expected to provide leadership in the school system. Considering the prominence of computers and information technology in our society and, increasingly, in school systems, the Court finds that the proper implementation of informational technology and the importance of providing adequate services to teachers, students, and others does affect the well-being of those individuals.

Information technology is not only integral to the functioning of our school systems, but also part of the work world on a global basis. Like the school officials in *Johnson* and *Netherwood* as well as the officials in many of the other cases cited above, Ms. Paul held a position of prominence within the school system. She was a public official and the way she ran the department was a subject of legitimate public interest.

The public official category is not limited to the "upper echelons of government." *See, e.g.*, Robert D. Sack, *Libel, Slander, and Related Problems* at 249 (Practicing Law Institute 2d ed., 1994). For the purposes of the actual malice standard, public officials include individuals " 'among the hierarchy of government employees' " and not merely supervisors, or those at the top of the hierarchy. *Moss*, 580 A.2d at 1029 (quoting *Rosenblatt*, 383 U.S. at 85-86). Therefore, a subordinate who has significant authority, such as Ms. Paul, can be a public official.

Indeed, in *New York Times Co. v. Sullivan*, the Supreme Court recognized that public official status is not limited to those at the highest level of authority, but also reaches "down into the lower ranks" of government. *See* 376 U.S. 254, 284 n.23 (1964). In *New York Times Co.*, the Court went on to note that there are no "precise lines" to define how far down into the lower ranks of government the "public official" designation extends. *See id .; Rosenblatt*, 383 U.S. at 85. The District of Columbia Court of Appeals has also held that a lower ranking individual may be a public official. *See Beeton*, 779 A.2d at 920-22 (holding that a corrections officer, who held a lower-ranking title of corporal, was a public official by virtue of her position despite the fact that she was a subordinate to her immediate supervisor and to the institutional major at the facility).

*5 Plaintiff, citing, *Moss* and *Gertz*, argues that she was not a public official because she worked under the direction of the Superintendent and because she did not have "substantial responsibility for or control over public affairs." Opp. at 16. Furthermore, Ms. Paul argues that "the true criteria for a public official, as set forth in *Moss* ... is [that] the position must invite public scrutiny absent the controversy involving the defamation." Opp. at 17 (citing *Moss*, 580 A.2d at 1030). The Court agrees with this standard but disagrees with Ms. Paul on its application in this case.

In *Moss*, the court determined that a part-time coach of a women's basketball team, earning $9,000, was not a public official, but rather a "subordinate employee in the department of a public educational institution with minimal control over or responsibility for policy matters." 580 A.2d at 1030. Applying the *Moss* standard of a "subordinate employee" with "minimal control over or responsibility for policy matters," Paul is, in fact, a public official. For instance, Paul, unlike the coach in *Moss*, admits that she had "supervisory responsibilities" for "developing policy for the organizational unit" and "overseeing and providing guidance to staff." *See* Paul's Statement of Material Facts at ¶ 22; Defts.' Ex. 8. Ms. Paul, unlike the coach in *Moss*, was paid a substantial amount for her duties ($105,000 base salary and $10,000 bonus) and her responsibilities included a number of important policy matters.

For instance, Paul supervised eight departments, encompassing 149 employees, and oversaw the expenditure of $91 to $104 million in public funds. Furthermore, Plaintiff was "directly responsible for the development, implementation, and operation of technology systems" in the school system. According to the job description, which Plaintiff admits was part of her responsibilities (Paul Statement of Facts at ¶ 22), a number of other policy matters were

implicated. All of these duties indicate at least a significant effect in shaping policy, and put Ms. Paul in a position that invited public scrutiny.

Ms. Paul further argues that because her activities were "subject to the approval of the Superintendent and [that Ms. Paul] had no authority to commit or execute actions without the approval of the Superintendent." Opp. at 17. This may be true in the sense that Ms. Paul reported to Ms. Metts and was subject to her authority. But given that Ms. Paul herself supervised eight departments, directly supervised 25 people, and was in charge of implementing policy on a school-wide basis, she had significant discretion within the scope of her authority. The fact that she did not have ultimate authority does not make her a "private" person for purposes of the First Amendment.

B. *Substantial Truth, Malice, Defamatory Meaning*

Defendants argue that some of the statements complained of are substantially there, others have not been shown to be made with malice, and others are not capable of a defamatory meaning. The Court will consider these arguments as it discusses the statements that are the subject of the Plaintiff's complaint.

1. *Substantial Truth*

*6 In deciding whether there exists a genuine issue of material fact on the issue of substantial truth, the Court is of the opinion that it is best to approach the issue first by stating what was the truth about Ms. Paul's credentials (that is, what would have been on the resume if the truth had been stated) and compare that to what was contained in the Times' August 7, article.

Before reviewing these facts, however, the Court deems it helpful to review the requirements for the position of Chief Information Officer at the Prince George's County School System as set forth in the Job Description attached as Exhibit 8 to Defendants' motion. According to the section entitled "Education and/or Experience," applicants for the Chief Information Officer position were to have obtained at least a master's degree with an "emphasis" on computer science, business administration or a "related field" and needed "at least ten (10) years experience in an area of technology application in either an educational or private sector setting" or an equivalent combination of education and experience "that provides the required knowledge, skills and abilities." The job requirements thus called for were an advanced degree, and experience or training in technology or administrative, or both.

Ms. Paul has a B.A. in history from Howard University. Although she testifies that she minored in secondary education, there is no evidence that she had a double major. Ms. Paul had a master of arts in teaching from Antioch College. She alleges that she attended the Antioch Graduate School of Education. There is no evidence, however, that she received a degree from that institution. Ms. Paul was Director of Instructional Technology for the Philadelphia Public Schools, and her title was "Director, Instructional Technology, Instructional Technology Department."

In 1981, Ms. Paul applied for admission to the doctoral program in policy sciences at the University of Maryland, Baltimore County ("UMBC"). She began taking classes that year and was accepted into the program in March, 1982, getting credit for the classes she had taken. The University offered a disciplinary concentration in "Education" and "Information & Instructional Systems Policy." Ms. Paul completed 48 credit hours in the doctoral program. The core curriculum, which all students were required to take, consisted of 18 credit hours, five classes and a seminar. Ms. Paul completed four of those classes; she did not complete the seminar.[FN2] Thus, she had 12 credits in the core curriculum. Ms. Paul was required to take nine credits in "disciplinary foundations courses" (economics, political science and sociology). She satisfied that requirement.

FN2. This and the following evidence about what Ms. Paul completed and what was required is taken from exhibit 2 to Plaintiff's affidavit and the revised transcript, Defendant's exhibit 20.

Ms. Paul's other courses reflect her concentration in "Education" and "Information & Instructional Systems Policy." Ms. Paul's grade point average was 2.94. Ms. Paul did not take or pass the core comprehensive examination or the field comprehensive examination. She did not prepare a dissertation proposal or write a dissertation. She did not receive a Ph.D.

*7 Ms. Paul's resume stated, with respect to Howard University, "B.A.-Political Science-Secondary Education." It stated that she received an M.A. in

"Education Administration" from "Antioch College." It stated, with respect to UMBC, "PHD/ABD Instructional Technology." With respect to her Philadelphia job, it stated: Director, Technology-Information Technology Dept., Philadelphia Public Schools."

There is no genuine issue of material fact as to following misstatements in the resume. Ms. Paul did not receive a degree in either Political Science or Secondary Education at Howard. Her major was History and at best for Ms. Paul, she minored in Secondary Education. She did not receive an M.A. from Antioch College in Education Administration. She received a Masters of Arts in Teaching. She had not completed her "PHD/ABD" in "Instructional Technology," as her resume indicated. She had, at best, completed her "PHD/ABD" in "Policy Sciences," with a concentration within that program in "Education" and "Instructional Systems Technology."

If "PHD"/ABD" is taken to mean "completed Ph.D. program except for dissertation," she had not completed her "PHD/ABD." To earn a Ph.D. in the Policy Sciences program, Ms. Paul had to meet five requirements: take and pass a certain number of courses; pass a core comprehensive examination; pass a field qualifying examination; submit and have accepted a dissertation proposal; and write and successfully defend a dissertation. At best for Ms. Paul, she had completed the course requirement.[FN3] Thus, she had not completed everything but the dissertation. When she left the University, she was not eligible to write a dissertation.

> FN3. As the Court notes above, it appears from her transcript that she did not take one required core curriculum course, or take the required seminar.

The Court next turns to the alleged defamatory article of August 7. The Court agrees with the Defendants that the gist of the defamation is that Ms. Paul misrepresented her credentials in her resume. That is the headline, and the subject of the lead paragraph. The nature of the representation, however, is the precise issue that needs to be addressed.

The article states that Ms. Paul "lists on her resume a doctorate in instructional technology from the University of Maryland. But Ms. Paul never took doctorate level courses there and was not awarded any degree." The article then states that Ms. Paul's resume lists a master's degree in educational administration at Antioch College, but that, according to officials there, her degree was in teaching. Finally, the article states that Ms. Paul's resume states that she was "director of technology in the information department of the Philadelphia school system...." It states that a spokesperson from that system states that she " 'directed learning support." '

Defendants argue that there is no genuine issue of substantial truth because it is undisputed that Ms. Paul misrepresented her credentials on her resume. The Court agrees with the Defendants that a reasonable jury could not find that Ms. Paul did not misrepresent her credentials on her resume. First, she did not have a dual a degree from Howard University in "Political Science-Secondary Education". Her one degree was in History. While a reasonable jury might ignore that the "secondary education" was a minor, it is clear that Ms. Paul misrepresented her degree from Howard. Second, it is clear that Ms. Paul did not have a degree in educational administration from Antioch College, though she said she did. Third, it is undisputed that in the Philadelphia school system she was not "Director, Technology-Information Technology Dept., Philadelphia Public Schools," as her resume states. She was director of instructional technology. There is a difference between a director of a department *of* a public school systems, and the director of a function (in this case, instructional technology), *within* a school system. Fourth, Ms. Paul's Ph.D. program at the University of Maryland was not in "Instructional Technology." It was in "Policy Sciences", with a concentration in Information and Instructional Systems Policy. Finally, it is clear that the date Ms. Paul lists for her "PHD/ABD" -1980-is inaccurate.

***8** The conclusion that Ms. Paul misrepresented things on her resume does not, however, necessarily solve the problem presented in the Defendants' favor. It is the nature, or extent, of the misrepresentation that really is at issue. As Defendants' acknowledge, the ultimate question is whether the defamation " 'would have had a different effect on the mind of the reader than that which the pleaded truth would have produced." ' *Masson v. New Yorker Magazine*, 501 U.S. 496, 517 (1991) (quoting R. Sack, *Libel, Slander, and Related Problems* 138 (1980)). "Minor inaccuracies do not amount to falsity so long as the 'substance, the gist, the sting, of the libelous charge be justified." ' *Masson*, 501 U.S. at 517 (quoting *Heuer v. Kee*, 15 Cal.App.2d 710, 714, 59 P.2d 1063, 1064 (1936)). Thus, the question is whether a reasonable juror could find that the false

misrepresentations reported by the newspaper, taken as a whole, would have a different effect on the mind of the reader than would the misrepresentations actually made in the resume.

In considering this issue, the Court confronts at the outset the question of precisely what were the newspaper's assertions regarding Ms. Paul's misrepresentations. Ms. Paul takes the position that the newspaper asserted that she had stated on her resume that she had a doctorate. The newspaper did indeed report that fact in the third paragraph of the August 7 article, and further stated that she had no doctorate. If the reader stopped at the third paragraph, he or she would be left with the impression that Ms. Paul had made a significant misrepresentation. Ms. Paul argues correctly that that defamatory statement was not true because she did not say on her resume that she had a doctorate.

Defendants argue, however, that the third paragraph cannot be taken in isolation. They point out that in considering the effect of a defamatory statement the entire article must be considered. That is true when the issue is whether a statement is capable of a defamatory meaning, *Klayman v. Segal*, 783 A.2d 607, 614 (D.C.2001), and the Court sees no reason why the entire article should not be considered when assessing what defamatory assertions the newspaper actually made.

If the reader read the entire article, he or she would discover that, on the carry-over page of the article, the newspaper reported that the resume stated " 'Ph.D./ABD,' " and that "ABD" "stands for 'all but dissertation.' " Reading the entire article, then, the reader would not be left with the impression that Ms. Paul stated on her resume that she had a Ph.D. Rather, the impression was that she had stated she had completed a Ph.D. program except for a dissertation. The article also asserted, on the carry-over page, that Ms. Paul had taken master's degree courses in "intercultural communications", not instructional technology.

For purposes of this motion the Court takes all reasonable inferences in favor of the Plaintiff. The gist of the defamatory allegation is that Ms. Paul said she had completed a Ph.D. except for her dissertation, when she had not even taken Ph.D. courses. Not only had she not taken Ph.D. courses, the courses she did take were in a different subject that that claimed. She stated she had a degree in educational administration when she did not, and said she was director of the department of instructional technology in the Philadelphia school system, which she was not.

*9 The truth, if stated on the resume, would have been that Ms. Paul had taken all of the required courses for her Ph.D., but was ineligible to complete her program because her grades were too low and she had passed neither of the two examinations required to go further. While her courses were not in Instructional Technology, she had concentrated within the Policy Sciences department in a discipline that involved instructional technology. She had a master's degree in teaching from Antioch, not educational administration. And, in Philadelphia, she was director of instructional technology *within* a department, not director *of* a department.

In the foregoing paragraph, the Court has not discussed the issue of whether Ms. Paul's assertion in her resume that she had a "PHD/ABD" was false. Since there is no issue as to the meaning of "PHD", this issue turns on the meaning of "ABD". The parties agree that "ABD" is an abbreviation for "all but dissertation." They disagree on the meaning of that phrase. The Defendants state that it means, in so many words, that the person has completed all requirements for the Ph.D. but the dissertation requirement. The Plaintiff argues that it means all course work required for the Ph.D. Thus, the Plaintiff argues that, even though she had not taken and passed the field and core examinations, which were required for writing a dissertation, and even though her cumulative grade average was too low to make her eligible to write a dissertation, she truthfully stated on her resume that she had completed all the requirements for a Ph.D. except for her dissertation.

The Court disagrees with the Plaintiff. When considering whether a statement is capable of a defamatory meaning, the Court considers "(1) context, (2)[the] plain or fair and natural meaning of the words used, and (3)[the] average or common mind or ordinary and common acceptance." *Klayman v. Segal, supra*, 783 A.2d at 614. Using the "ordinary meaning" of words is also the correct standard when determining the truth or falsity of statements. *Bresslet v. Coda*, 761 F.2d 827, 841 (1st Cir.1985). In the Court's opinion, the words "all but" carry the natural meaning of "everything except." In this case, they mean everything except the dissertation. Defendants' citation to several dictionaries supports this interpretation.[FN4]

FN4. The Court recognizes that dictionary definitions are not conclusive. *Ramunno v.*

> *Crawley*, 705 A.2d 1029, 1035 (Del.1997), but they can be used to support an interpretation of words. *See, e.g.*, *Schwartz v. American Medical Ass'n*, 23 F.Supp.2d 1271, 1276 and n.3 (D.N.M.1998). The Court also observes that several cases have noted that "ABD" includes all requirements with the exception of the dissertation itself, including examinations, all coursework, and all other degree requirements. *See, e.g.*, *O'Hara v. Indiana Univ. of Pennsylvania*, 171 F.Supp.2d 490, 491 (W.D.Pa.2001); *Scott v. Univ. of Delaware*, 455 F.Supp. 1102, 1106 (D.Del.1978); *Alcorn v. Valksman*, 877 S.W.2d 390, 393 (Tex.Ct.App.1994).

Plaintiff's interpretation is strained. Even though more than taking and passing all the courses is required to write a dissertation, she contends that a natural, ordinary meaning of the term "all but" is "some" or perhaps "a lot" of what is required, but not all. The Court is of the opinion that no reasonable mind could take the phrase that way.

Plaintiff has produced an expert in linguistics. Defendants argue among other things that the opinion is deficient in that it does not "purport to show how most Ph.D.'s would understand the term [ABD]." Although not articulated by the Plaintiff, the Court assumes the Plaintiff's argument to be that "ABD" is a technical term used by those in academia and thus is susceptible to explication by an expert familiar with how it is used. Putting aside the point that the resume is addressed to a school system administrator, not a faculty, the Court will assume for purposes of argument that the opinion might be helpful if it met minimal standards of certainty.

***10** For example, opinions of language experts have been approved where they have opined as to the "accepted or proper construction of [language]," *see* *Slater v. Mexican Nat'l Railway Co.*, 194 U.S. 120, 130 (translation of foreign language), or as to the "accepted, conventional meaning" among those using the term. *See* *United States v. Dennis*, 183 F.2d 201, 229 (2d Cir.1950) (opinion of ex-Communist party member as to words used by members of party). The Plaintiff's expert does not offer an opinion that, within academia or elsewhere, it is common or acceptable practice to use "PHD/ABD" to mean "completion of course work toward Ph.D., but not completion of requirements for writing a dissertation." The expert does say that, "I have had ... relationships with people where they considered the course work to be the ABD qualification and so without the examination." Not only does this opinion fail to take into account the failure to achieve the necessary cumulative grade average to write a dissertation, it also does not opine as to an accepted or common meaning attributed to the term. At most, the expert appears to opine that "there are some instances where ABD could be construed as meaning course work exclusively." The Court is of the opinion that this opinion is insufficient to be of expert assistance to the jury in construing the term. Accordingly, the Court holds that the Plaintiff has introduced insufficient evidence to create a genuine issue of material fact on the meaning of "PHD/ABD."

Ms. Paul was trying to obtain job as chief officer for instructional technology for the Prince George's County School System. She listed various accomplishments that would qualify her for that job: her Howard and Antioch degrees, the type of Ph.D. course she undertook, her achievement of an "ABD" level in her Ph.D. program, and her responsibility as head of a department in Philadelphia akin to the one she was applying for. These representations clearly enhanced her qualifications for the job.

The job qualifications called for "at least a master's degree." Ms. Paul's resume put her well ahead of applicants with a master's degree because she represented that she had achieved everything required for a Ph.D. except for a dissertation. The job qualifications called for a master's degree with emphasis on computer science, business administration or a related field. Ms. Paul's resume listed a master's degree in educational administration, which not only is related to business administration but also is closely related to the job she was seeking in the administration of a school system. Her "PHD/ABD" was in instructional technology, which fit with the job requirement that the master's degree have an emphasis on computer science. The job requirements called for ten years experience in technology application in an educational or private sector setting. Ms. Paul's resume listed her most recent job as the director of the Philadelphia school system's "Technology-Information Technology Department." These representations significantly misstated her qualifications for the job by leading the reader to believe that she had achieved a higher level of learning and experience in the field (or related fields) for which she was applying than in fact she had achieved.

***11** The cumulative effect of Ms. Paul's admitted

misrepresentations, in the Court's judgment, could not leave a reasonable juror with any conclusion other than that she significantly misrepresented her credentials. Put another way, the cumulative effect of these misstatements would not lead a reasonable juror to conclude that they were minor or inconsequential ones. While the false statements in the article would lead also to the conclusion that she misrepresented her credentials, the effect on the reader would be the same. Because Ms. Paul made misrepresentations on her resume the cumulative effect of which amounted to a substantial misrepresentation of her credentials, the Times' inaccurate allegations about her misrepresentations, when considered along with the undisputed misrepresentations, were, for purposes of the law of defamation, substantially true.

In making the foregoing determinations, the Court has in mind that, ordinarily, if a Plaintiff proves that a statement is defamatory, falsity is a question of fact that must be submitted to a jury. *Wallace v. Skadden Arps, Slate, Meagher & Flom*, 715 A.2d 873, 877-78 (D.C.1998). Where a public official is involved, it is the Plaintiff's burden to prove falsity. *Philadelphia Newspapers v.. Hepps*, 475 U.S. 767, 776 (1986). In *Liberty Lobby, Inc. v. Dow Jones & Co.*, 267 U.S.App. D.C. 337, 342, 838 F.2d 1287, 1292 (1988), the court used the holding in *Philadelphia Newspapers* as authority for the proposition that "[w]here the question of truth or falsity is a close one, a court should err on the side of nonactionability." This Court considers *Liberty Lobby* persuasive authority on the issue presented, *see Hornstein v. Barry*, 560 A.2d 530, 537 n.15 (D.C.1989), and concludes that Plaintiff has not established a genuine issue of material fact on the issue of falsity.

Subsequent articles, to the extent that their defamatory sting is that Ms. Paul misrepresented her credentials on her resume, are resolved by the reasoning stated above. In the August 8 article, in which the Times reiterated in paragraph three its charge that Ms. Paul's misrepresented her credentials, the Times reports Ms. Paul's statements at her press conference. In this article, the Times makes clear in the sixth paragraph that the resume listing was "PHD/ABD" in instructional technology. It was substantially true that Ms. Paul did not have a "PHD/ABD" in instructional technology. The Times reports that while her resume listed her Philadelphia job as "director of information in the information technology department," she " 'actually directed learning support services' for the "department of instructional technology" ' (quoting a school system employee). While it is literally false that Plaintiff had the job of "directing learning support services," the qualification following the "or" made clear that another way of saying what she did was to direct "the department of instructional technology." ' To the extent that this was untrue, it actually favored Ms. Paul by implying that she directed a department. The newspaper reiterated its report from the previous day that she took no doctoral courses, but it also reported her providing the press an acceptance letter and transcripts showing that she obtained some 42 credits in the Policy Sciences department, covering, according to Ms. Paul, both policy sciences and instructional technology. To whatever extent the article falsely states or implies a misrepresentation in stating that she took Ph.D. courses, when she did not, the article removes much of the defamatory sting by reporting that, according to her, she did take such courses. In any event, the gist of the defamation-that she misrepresented her credentials-was true.

***12** Ms. Paul claims that the August 9 article misrepresented that she had "been accused of misrepresenting herself on her resume." The undisputed facts show that she had been accused of misrepresentation by members of the school board. To the extent that the Plaintiff claims a defamation in the assertion that she in fact misrepresented her credentials on her resume, the Court holds, for the reasons stated above, that the assertion was substantially true.

In the August 10 article, the Times reported that the Plaintiff stated on her resume "PHD/ABD" but that, according to a "staffer in the registrar's office, there was no record of Ms. Paul doing doctorate level work there." The newspaper also reported that Ms. Paul had stated on her resume that she had a "PHD/ABD" in "Instructional Technology," but that UMBC offered no such degree program there. The Times further reported that Ms. Paul had supplied a transcript indicating she took classes in a doctoral program in policy sciences, not instructional technology. Finally, the Times reported that the resume stated that the Plaintiff had a master's degree in education administration from Antioch College, but that college officials stated that she had a master's degree in teaching.

The Court's reasoning with respect to the August 7 article applies to this article as well. It was not true that Ms. Paul had taken no doctoral courses. It was true that there were no doctoral courses in instructional technology at the UMBC campus, and that the Ph.D. program she undertook was in policy sciences, not instructional technology. Finally, the

Times reported accurately that, despite what she put on her resume, she did not hold a master's degree in educational administration from Antioch. Given that Ms. Paul did not have a "PHD/ABD", she did not take a Ph.D. program in instructional technology, and she did not have a master's degree in educational technology, the defamatory sting-that she misrepresented her credentials-was substantially true.

Plaintiff attacks the August 21 article on the ground that it falsely asserted that her records showed that she was six credit hours short of the required courses for a doctoral degree and that a letter from UMBC said that Plaintiff did not complete required doctoral work. It is undisputed that Ms. Paul had 48 hours credit, but it is true that, at the time the article was printed, the records showed only 42 hours, six hours short of the required number. In any event, for the reasons stated, the gist of the defamation, that she had misrepresented her credentials, was true.

The foregoing disposes of the Plaintiff's claims insofar as they relate to defamation in falsely accusing her of misrepresenting her credentials.[FN5] While the Times' articles in some respects were literally untrue (e.g., and most importantly, in reporting that she had taken no courses at all), the gist of the defamation was true because no reasonable juror could conclude that Ms. Paul did not significantly misrepresent her credentials on her resume.

> FN5. The foregoing reasoning and conclusions also apply to the September 30 article reporting that plaintiff's resume listed wrong titles, dates, majors and unverified entries.

C. *Other Defamatory Statements*

*13 The Court next turns to those parts of the articles which are not claimed to be substantially true but as to which Defendants argue there has been no showing of malice.

1. *"Dumb White Man"*

Several of the articles reported that the chairman of the school board had called for an investigation as to whether the Plaintiff had called a subordinate a "dumb white man" at a staff meeting. Defendant Bhatti avers that she based her articles on a memorandum, dated July 25, that she obtained from a confidential source. She further avers that employees in the Plaintiff's department had told her that they were not surprised to hear the reported statement and that one employee who worked with the Plaintiff held the opinion that the Plaintiff did not like white people and was "rascist."

2. *Gutter Mouth, Abrasive Style, Lacking People Skills*

The phrases about which the Plaintiff complains appear in the August 7, articles as follows:
In interviews with The Times, four of Ms. Paul's staffers characterized her as enthusiastic and skilled at politics and finding funding but lacking in "people skills" and expertise in information technology. All of the staffers asked not to be identified, citing fear of retribution.
"Her political instincts and ability to scope out extra funding is vital," one staffer said.
"She has a real gutter mouth and a very abrasive style," another said.
"A lot of people outside [information technology] like what she has done for the department, but most of those who work close to her have a hard time," a third said.
"She doesn't understand large mainframe applications. Her experience is in a whole different parking lot," the fourth staffer said. "There is no way someone with her qualifications can get such a high position without knowing anything, unless she is a close friend of someone high up."

3. *"Dr. Paul"*

The references to "Dr. Paul" do not appear in the August 7 article. They appear in the August 8 article. After the Times reports that Ms. Paul lists a doctorate on her resume and that the resume read "PHD/ABD", which Plaintiff is reported to state means " 'all but dissertation," ' the Times reports:
"My resume clearly says 'ABD," ' Ms. Paul told reporters. "I never said I had a doctorate, but that I have completed my doctoral work. No one addresses me as Dr. Paul."
But two school board members said yesterday they "clearly remember Superintendent Iris T. Metts, who recruited Ms. Paul from the Philadelphia public schools, introducing her longtime friend as "Dr. Paul" at meetings last fall.
"I only remember it a few times," one board member said. "then it never happened again."

An information technology staffer who asked not to be identified said Ms. Paul was addressed as "Dr. Paul" when she arrived last September.
"After a few times, Paul said she didn't like being referred to as 'Doctor'. We thought that was kind of strange, but never figured out why until we heard later that she didn't complete her degree" the staffer said.

Analysis

***14** Defendants do not argue that the above statements are not capable of a defamatory meaning. They do not argue that they are privileged, or are substantially true. Instead, as to each of them, Defendants argue that the Plaintiff has not proved actual malice.

Plaintiff bears the burden of proving actual malice by clear and convincing evidence. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). To prove actual malice, Plaintiff must prove that the Defendants published the statement knowing that it was false or with a "high degree of awareness of ... probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

Defendants argue that Bhatti's affidavit, which reports her belief in the truth of the assertions and the sources on which she relied, is not contradicted, and the Plaintiff has come forward with no independent evidence of actual malice. The Court disagrees with the Defendants.

Bhatti has made at least two assertions under oath that are contradicted (affording Plaintiff all favorable inferences) by other sworn assertions. She has asserted that before publishing the August 7 article she talked to a person in the UMBC registrar's office who told her that Plaintiff had not taken any doctoral level courses and that UMBC had no record of Plaintiff's having taken any such courses. Mary Mertes, who works in the registrar's office, acknowledges a conversation with someone from the Times and acknowledges that she wrote Bhatti's name and (what turns out to have been) Bhatti's telephone number on the copy of Plaintiff's transcript she had printed out. Nevertheless, Mertes avers that she talked to a man not a woman. If the jury believes this testimony, it can conclude that Bhatti, who is a woman, did not talk to anyone in the registrar's office before publishing the August 7 article.

Further, Bhatti avers that, before the August 7 article was published, she spoke to the Plaintiff. Indeed, the August 7 article reports that conversation and reports things the Plaintiff said in it. Plaintiff, however, avers that she did not talk to Bhatti before the August 7 article.

While it might seem implausible that Mertes would write Bhatti's name and telephone number down without having talked to her, it is not impossible that that could have occurred. For example, a male could have phoned the registrar's office on behalf of Bhatti and given her name and number to Mertes. The Court cannot say that a reasonable jury could discredit Bhatti on this point.

As to the conflict between the Plaintiff and Bhatti on the issue of whether they spoke to one another before the August 7 article was published, the Court cannot make a credibility determination. The Supreme Court in *Anderson* made clear that, while the clear and convincing standard must be kept in mind in determining whether Plaintiff has borne her burden of proof, the court cannot make credibility determinations based on affidavits. 477 U.S. at 255.

***15** The Court concludes that a jury could disbelieve Bhatti on two significant assertions (that she spoke to a person from the registrar's office and that she spoke to the Plaintiff) before she wrote the August 7 article. If Bhatti did not have these conversations, then her reporting what these people said to her could be viewed as a fabrication. Having disbelieved the Plaintiff on these parts, the jury would be free to disbelieve Bhatti entirely and therefore disbelieve Bhatti's assertions that she spoke to confidential informants and staff members in reporting the comments under consideration in this section of the Court's opinion. *See, e.g., Peckham v. Ronrico Corp.*, 171 F.2d 653, 658 (1st Cir.1948); *Wilson v. Pollet*, 416 P.2d 381, 384 (Alaska 1966). If the jury did disbelieve Bhatti on the fact that the basis for her information was sources she describes, it could infer that Bhatti fabricated the information. A fabrication of what someone says "is enough to show a " 'high degree of awareness of ... probable falsity." ' *St. Surin v. Virgin Islands*, 21 F.3d 1309, 1318 (3d Cir.1994) (quoting *Garrison v. Louisiana, supra*, 379 U.S. at 74).

It might be argued that it is implausible, even highly implausible, that Bhatti could have, or would have, fabricated interviews and put information in the newspaper that, in fact, had no sources. The Court,

however, may not make credibility judgments on a motion for summary judgment.

D. *Statements that are Incapable of a Defamatory Meaning*

The Court considers the following statements incapable of a defamatory meaning:
• "A school board member told The Times that her annual salary is about $110,000 and that she recently received a $20,000 bonus." (August 7.)
• "Paul had been on administrative leave pending the outcome of the probe." (September 2.)
• "If there had been any evidence to exonerate her, I'm sure the board would have been presented with it. There is no way she would have resigned if she had anything to hang her hat on." (September 2.)
• "I think she was hoping to use her friendship with Mrs. Metts to save her." (September 2.)
• "Ms. Paul could not be reached for comment for this article, despite repeated attempts over the three days." (August 21 .)
• Statements concerning plaintiff's bonus, sick leave, vacation and statements from and board of education member.

Whether a statement is capable of a defamatory meaning is a question of law. *Guilford Transp. Industry v. Wilner, supra,* 760 A.2d at 549. In *Guilford,* the court summarized the test for determining whether a statement is defamatory as follows:
In the District of Columbia, "a statement is defamatory" if it tends to injure [the] plaintiff in his trade, profession or community standing, or lower him in the estimation of the community." But not every uncomplimentary publication is libelous. "An allegedly defamatory remark must be more than unpleasant or offensive; the language must make the plaintiff appear 'odious, infamous or ridiculous." '

*16 *Id.* at 594 (citations omitted).

In light of this definition, the Court holds that the statements about the Plaintiff's salary, her benefits, her failure to respond to the Times' request for interview, and her having been placed on administrative leave are not capable of a defamatory meaning.

In the Court's judgment, the other two statements listed above are not actionable under the reasoning and holding of Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990). The statements under consideration are clearly statements of opinion. That point does not solve the issue, however, because in *Milkovich* the court held that opinion is not protected if it implies "an assertion of objective fact." Id. at 18. But a statement will receive constitutional protection if it "does not contain a provably false factual connotation." Id. at 20.

The statement that Plaintiff would have been exonerated had she produced evidence to support her case does not contain implied assertions of fact that are provably false. The statement is an opinion of the value or weight of evidence. "Any evidence to exonerate her" or "[a]nything to hang her hat on" imply something about the quality of the evidence. That is an evaluative judgment that is not provably true or false.

The other statement likewise is not provably true or false. It is simply the speaker's own subjective belief, and does not necessarily imply that the speaker possesses any facts on which his opinion is based.
... [I]f it is plain that a speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.

Guilford Transp. Industries, supra, 760 A.2d at 597 (quoting Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1227 (7th Cir.1993)).

E. *Invasion of Privacy Claims*

1. *False Light*

The elements of a claim of invasion of privacy false light are
1) publicity 2) about a false statement, representation or imputation 3) understood to be of and concerning the plaintiff, and 4) which places the plaintiff in a false light that would be [highly] offensive to a reasonable person.

Kitt v. Capital Concerts, Inc., 742 A.2d 856, 859 (D.C.1999) (citing RESTATEMENT (SECOND) OF TORTS § 652E (1977)). " '[A] plaintiff may not avoid the strictures of the burdens of proof associated with defamation by resorting to a claim of false light invasion." ' Klayman v. Segal, supra, 783 A.2d at 619, (quoting Moldea II, supra, 306 U.S.App. D.C. at 10, 22 F.3d at 319 (quoting Moldea I, 304 U.S.App.

D.C. at 420, 15 F.3d at 1151)).

Accordingly, to the extent the Court has upheld the Defendants' motion with respect to the defamation claims, it will sustain their motion on the invasion-of-privacy claim. Since the Defendants have not provided arguments against this claim any different than those advanced on the defamation claim (*see* Memorandum at 47-48), the Court will deny Defendants' motion to the same extent that it denies the motion on the defamation claim.

F. *Private Facts*

*17 To prove this claim, the plaintiff must prove, among other things, that there was publicity given to "private facts ... in which the public ha[d] no legitimate concern." *Wolf v. Regardie*, 553 A.2d 1213, 1220 (1989). Because the Plaintiff was a public official, the Court is of the opinion that the statements to which Plaintiff takes objection were not statements of "private facts ... in which the public ha[d] no legitimate interest." The following comment is applicable to the Plaintiff: "Plaintiff cannot claim a reasonable expectation that [her] professional conduct is protected from outside scrutiny. To the contrary, such conduct, while in the employ of the government, is open to and even appropriate for public scrutiny." *Shewmaker v. Minchew*, 504 F.Supp. 156, 163-64 (D.D.C.1980), *aff'd*, 666 F.2d 616 (D.C.Cir.1981). Accordingly, this claim must be dismissed in its entirety.

Accordingly, it is hereby ORDERED that Defendants News World Communications, Inc. and Jabeen Bhatti's Motion for Summary Judgment is GRANTED IN PART AND DENIED IN PART, and it is

FURTHER ORDERED that the complaint is DISMISSED WITH PREJUDICE as to all statements alleged to be defamatory and to constitute an invasion of privacy (false light) except those discussed in Part C above.

D.C. Super.,2003.
Paul v. News World Communications
Not Reported in A.2d, 2003 WL 23899002 (D.C.Super.), 32 Media L. Rep. 2391

END OF DOCUMENT

EXHIBIT C

Robertson-Taylor Co. v. Sansing, 10 Med. L. Rptr. 2495 (D.D.C. 1984)

represents such a broad restraint on the parties and the press that it will "cut off the full and timely flow of information to the public." While the Court does not adopt the Post's interpretation of its December 22, 1983 Order, the Order will be modified to the extent necessary to more clearly express the Court's intent that *only* discovery information may not be released.

The modifications will be in keeping with the policy behind the liberal discovery rules. The Court has every intention of creating a climate of free exchange with respect to the ongoing pretrial discovery in these proceedings. The Court notes that Plaintiffs' Steering Committee changed its position with respect to the December 22, 1983 Order following the Application by the Washington Post Company. As a party to the proceedings, the PSC is in a position to challenge the validity of the Court's order. However, litigants do not have "an unrestrained right to disseminate information that has been obtained through pretrial discovery." *Seattle Times Co. v. Rhinehart*, 104 S. Ct. 2199, 2207 (1984). Because information discovered at the pretrial stage is not considered within the public domain, "restraints, placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information." 104 S. Ct. at 2208. The Supreme Court also found it significant to note that "an order prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny." *Id.* It is for this reason that, "continued court control over the discovered information does not raise the same spectre of government censorship that such control might suggest in other situations." *Id.* In this case, the Court will exercise its duty and discretion to oversee and limit the discovery process.

The Order entered December 22, 1983 shall remain in effect with the following modifications. The parties and their counsel are prohibited from disclosing *discovered* information or opinions derived from discovery. Only information and documents obtained and produced in the discovery process may not be divulged. The Post and press remains unencumbered by the Order.

Should any party wish to divulge discovered information, that party is directed to notify the Court. Upon such notification, the question of continued nondisclosure with respect to particular information will be considered. Further, the parties shall have thirty (30) days from the date of this Order in which to present to the Court any information or documents already discovered which any party seeks to divulge.

An appropriate Order accompanies this Memorandum.

ROBERTSON-TAYLOR COMPANY v. SANSING

U.S. District Court
District of Columbia

ROBERTSON-TAYLOR COMPANY, a Florida corporation, v. JOHN SANSING and WASHINGTON MAGAZINE, INC., a Maryland corporation, No. 84-1614, October 22, 1984

REGULATION OF MEDIA CONTENT

Defamation—Determining public official/public figure (§11.20)

Defamation—Standard of liability—Actual malice (§11.301)

Failure of mail order firm which, because it depends upon advertising through mails and on access to media, is limited purpose public figure, to demonstrate that magazine acted with actual malice warrants federal district court's grant of magazine's motion to dismiss, even though plaintiff alleges that magazine should have investigated its charges further, since mere proof of failure to investigate is not, standing alone, sufficient to demonstrate actual malice.

Libel action against magazine. On defendants' motion to dismiss.

Granted.

Lee H. Harter, San Francisco, Calif., and Q. Russell Hatchl, Washington, D.C., for plaintiff.

Peter F. Axelrad and David E. Beller, of Frank, Bernstein, Conaway & Goldman, Baltimore, Md., and Michael H. McConihe, of Hanson, O'Brien, Birney & Butler, Washington, for defendants.

Full Text of Opinion

Pratt, J.:

This is an action for defamation and/or product disparagement arising out of an article written by Defendant John Sansing and appearing in defendant's magazine *The Washingtonian* in June, 1983. Before us is defendants' motion to dismiss on the grounds that plaintiff must prove malice, that the facts set forth in the complaint demonstrate that plaintiff cannot prove malice and that plaintiff therefore has failed to state a claim for which relief can be granted.

We have examined plaintiff's six page complaint and find that defendants are no where charged with having acted with malice.[1] The lone reference most closely approaching an allegation of malice is the single sentence stating "Mr. Sansing's decision to assert in the Sansing article that Mr. Braswell ws the promoter behind the marketing of Medi-Tec 90 was made by Mr. Sansing with reckless disregard for the accuracy thereof . . . ." Complaint, §27. The factual allegations in support thereof set forth what defendant Sansing knew and the extent of his investigation and research. Complaint, §§13-26. It is conceded by plaintiff that mere proof of failure to investigate, standing alone, cannot establish reckless disregard of the truth and that reckless disregard of the truth must be proved by clear and convincing evidence that defendant acted "with a high degree of awareness of . . . probable falsity" of the published statements. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 332 (1974); Plaintiff's Opposition, pp. 1, 2. There are no facts alleged, which charge that defendants acted with such awareness.

In summary, the most that plaintiff claims is defendant's failure to pursue his investigations at greater length. While such may indicate defendants' negligence, it is a far cry from clear and convincing proof of actual malice. No where is it claimed that defendants, in fact, had "serious doubts as to the truth" of the publication. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). There is no allegation that defendants acted other than in good faith.

We are aware that, in considering a motion to dismiss, the factual allegations of a complaint must be construed in a light most favorable to plaintiff and accepted as true. 5 Wright & Miller, Federal Practice and Procedure: Civil §1363 (1969). This we have done and conclude that under the allegations set forth in the complaint, plaintiff can prove no set of facts which would support its claims for relief. Plaintiff has failed to state a claim for which relief can be granted and, in the interests of judicial economy, this litigation should not be permitted to proceed further.

Accordingly, it is by the court this 19th day of October, 1984,

ORDERED that defendants' motion to dismiss be and the same hereby is granted and this action shall stand dismissed.

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[1] Plaintiff has conceded that it must prove actual malice. Plaintiff's opposition, p. 1. Plaintiff is a mail order house which depends on advertising through the mails and its access to the media. As such it is a public figure, at least for a limited purpose. The publication concerned a matter of legitimate public interest. The rule of New York Times v. Sullivan, 376 U.S. 254 [1 Med.L.Rptr. 1527] (1964) is clearly applicable.