First Circuit Denies Rehearing En Banc of Decision

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On March 18, 2009, the First Circuit denied a petition for rehearing en banc of a case in which a panel of the First Circuit recognized that, under Massachusetts law, truth is not an absolute defense to a libel claim. The defendant raised a constitutional attack against the state statute that served as the basis of the panel's decision, but the First Circuit determined that the constitutional argument was not properly before the court. The outcome—in which common-law malice may defeat the truth defense—cannot easily be squared with the federal constitutional requirements for state defamation law.

The denial of rehearing en banc follows the First Circuit's February 13, 2009, decision upon rehearing the case in which it reversed and remanded a lower court decision granting summary judgment for a libel defendant because the allegedly defamatory statement at issue was true and because the plaintiff could not defeat the defense of truth by showing the defendant acted with "actual malice." With this rehearing opinion in February, the First Circuit reversed its own earlier decision in August 2008 in which it affirmed the district court's ruling.

In Noonan v. Staples, Inc., No. 07-2159, slip op. (1st Cir. Feb. 13, 2009), the plaintiff (Noonan) was a former employee of the defendant (Staples). Staples claimed that it fired Noonan "for cause" because Noonan allegedly "padded his expense reports." According to the First Circuit, the evidence demonstrated that Staples investigated Noonan's expense report filings and determined that he "deliberately falsified" some reports in violation of company policies. After terminating Noonan, a representative of Staples sent an e-mail to 1,500 to 1,600 people (the exact number could not be determined) that stated that Noonan's employment was terminated because he did not comply with the company's travel and expenses policies. Noonan subsequently filed a complaint against the company and claimed libel based on the e-mail and breach of contract based on the company's refusal to allow him to exercise stock options and to receive severance. Noonan did not dispute that he had made errors on his expense reports, but he claimed that the company's travel and expense report policies were not routinely followed by employees or enforced by Staples. The district court rejected the plaintiff's claims and entered summary judgment for Staples.

In reaching its decision to reverse the district court's decision as to the libel claim (the First Circuit affirmed district court on the breach of contract claims), the First Circuit first analyzed the evidence in the context of the essential elements of a libel claim. In setting out the governing law,

the First Circuit wrote:

> Since a given statement, even if libelous, must also be false to give rise to a cause of action, the defendant may assert the statement's truth as an absolute defense to a libel claim. Massachusetts law, however, recognizes a narrow exception to this defense: the truth or falsity of the statement is immaterial, and the libel action may proceed, if the plaintiff can show that the defendant acted with "actual malice" in publishing the statement. (citations omitted)

The court cited a Massachusetts statute, Mass. Gen. Laws ch. 231, § 92, which states: "The defendant in an action for writing or for publishing a libel may introduce in evidence the truth of the matter contained in the publication charged as libelous; and the truth shall be a justification unless actual malice is proved."

In its initial decision in August, the First Circuit agreed with the district court and found that "actual malice" as referred to in the statute meant constitutional actual malice—knowledge of falsity or reckless disregard for the truth. However, the First Circuit reversed itself in February and held that "actual malice" as referenced in the statute means common-law malice or ill will. That is, instead of focusing on the defendant's attitude toward the truth, the First Circuit decided in February that the court should focus on the defendant's attitude toward the plaintiff.

The First Circuit justified its holding based on the fact that Mass. Gen. Laws ch. 231, § 92 was passed before the development of the definition of "actual malice" by New York Times v. Sullivan and its progeny; indeed, the court cited a 1903 case interpreting the term as meaning of "actual malice" in the statute as "'malicious intention.'" Additionally, the court found that the "legal context" supported interpreting "actual malice" as "'ill will' or 'malevolent intent'" because (1) the statute deals not with public figures but with defenses under traditional tort law, (2) application of the "modern" meaning of "actual malice" would mean liability for true statements could only occur where the speaker utters a true statement but has serious doubts about or sincerely disbelieves its truth (the court found the statute was "not likely" meant to be limited to such an "odd result"), and (3) "in the public-figure context, the 'actual malice' test applies to statements of public concern, an area in which defamatory true statements are not actionable at all" (see Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986)).

Ultimately, the First Circuit found that the statements made in the e-mail about Noonan—that Staples fired Noonan after an investigation determined he had not complied with the company's travel and expense policy—were true or substantially true. However, the court found Noonan's proffered evidence that the sender of the e-mail harbored ill will toward Noonan raised a triable issue of fact regarding whether the sender acted with common-law malice toward the plaintiff. The

libel claim was allowed to proceed.

To understand Noonan and the Massachusetts statute that supposedly creates an exception to the truth defense, it is helpful to consider Shaari v. Harvard Student Agencies, Inc., 427 Mass. 129 (Mass. 1998). The First Circuit cited the case (see footnote 7) for the proposition that the actual malice exception "is not constitutional when applied to matters of public concern." In Shaari the plaintiff, the proprietor of a youth hostel, sued the preparer and publisher of Let's Go: Egypt & Israel over allegedly defamatory statements made in the travel guide about him—the guide stated that there were multiple sexual harassment claims against the plaintiff. The Massachusetts Supreme Judicial Court held that plaintiff was a private figure involved in a matter of public concern, and, as such, Mass. Gen. Laws ch. 231, § 92 could not be applied to the defendants without violating the First Amendment. As noted in Shaari, the body of law developed by the U.S. Supreme Court, particularly Philadelphia Newspapers, Inc. v. Hepps, requires that a private figure involved in a matter of public concern "cannot recover damages without also showing that the statements at issue are false." The Shaari court also stated that, in an earlier case, the Massachusetts Supreme Judicial Court held that the statute cannot, consistent with the First Amendment, apply to a public figure or public official. See Materia v. Huff, 394 Mass. 328, 333 n.6 (Mass. 1985). Noonan, Shaari, and Materia collectively mean that the only types of libel claims the statute may apply to, consistent with precedent, are private figure, private concern claims.

As noted above, the Noonan rehearing opinion acknowledges that Staples raised during rehearing the argument that the statute may never be constitutional. However, because, according to the court, Staples did not develop or raise that argument in its initial brief to the court, the First Circuit did not consider the constitutionality of the statute. The March order denied rehearing for the same reason and because Staples had not timely argued the matter at hand was an issue of public concern. Additionally, the court wrote that the constitutional issue was not "so clear" that the court should sua sponte strike down the statute without notice to the state attorney general.

The First Circuit also denied the defendants' request to certify the matter to the Massachusetts Supreme Judicial Court for resolution. At least for now, the statute is still good law in Massachusetts, and observers will have to wait and see if the statute survives constitutional scrutiny when applied to a private figure involved in a matter of private concern.