

Massachusetts High Court Extends Fair Report

Digital Media and Data Privacy Law Blog

on 03.15.2010

Posted in Fair Report Privilege

In late January, the Supreme Judicial Court of Massachusetts affirmed that the fair report privilege applied to information attributed to an anonymous source. The 6-1 decision in *Howell v. The Enterprise Publishing Company* dismissing the plaintiff's complaint held that so long as the reporter accurately reported what the confidential source reported to him or her, the privilege applied.

As reported by the First Amendment Center, the case involved claims for defamation, intentional infliction of emotional distress and invasion of privacy brought by the former superintendent of the town sewer department who, the defendant reported, had been fired for having pornography on his work computer and for alleged conflicts of interest.

The paper wrote a series of more than 10 articles about the scandal, many of which quoted anonymous sources who reported what happened at various closed-door meetings concerning the superintendent (Howell). For example, the paper reported:

A town official close to the investigation who spoke on condition of anonymity said the allegations against Howell include improper use of town equipment for personal business. The source declined to specify the type of equipment that was used but alluded to a possible criminal investigation by Abington police.

In a later article, the paper reported:

"These were images you wouldn't want your children to see," the commission member said. Commission members would not say who came forward with the allegations against Howell. "The point is, it happened. The board, acting on behalf of the town, was forced into action and would have been negligent if it had not acted. The potential is still very real for a sexual harassment lawsuit," the commission member said. The source added that Howell "thinks he did nothing wrong."
"

Massachusetts High Court Extends Fair Report Privilege

In dismissing Howell's claims, the Court engaged in a lengthy analysis of the history and policy considerations underlying the privilege. The Court identified two key policies supporting broad recognition of the fair report privilege. The first, the Court said, "protects the press when it reports on official actions and statements that members of the public could have witnessed for themselves, that is, when it acts as the public's eyes and ears." The second key policy is that of "public supervision," meaning the role of the media in serving as "a check on the power of government by giving the public the opportunity to be informed citizens and voters."

In the case of a report of government action (i.e., "official action") whose source is anonymous, the Court said

Reports of official statements are covered by the privilege so long as the reports fairly and accurately describe the statements, even though the statements themselves may contain defamatory material, or inaccurately report on official actions in a defamatory way. But an anonymous statement is not an official one. The privilege to report official actions would mean very little, however, if to qualify for its protection, the media were limited to reporting such actions solely on the basis of on-the-record statements by high-ranking (authorized to speak) officials or published official documents. Consequently, the privilege extends to reports of official actions based on information provided by nonofficial third-party sources. It should be of no moment that a reporter's source is, in fact, a high official, a low official, or a mere witness who overheard the proceedings, so long as it is official action that is reported. If, however, the source is an unofficial or anonymous one, a report based on that source runs a risk that the underlying official action will not be accurately and fairly described by the source, and therefore will not be protected by the privilege, or that the information provided will go beyond the bounds of the official action and into unprivileged territory.

Thus, the Court established that so long as a news report of official action based on material from an anonymous source fairly and accurately reports what the source said, it will be privileged.

Given the increasing prevalence of off-the-record or "background" sources in news stories concerning issues of public concern, this decision may be an important landmark in protecting the media from otherwise baseless lawsuits.