

QUALIFIED, NOT ABSOLUTE, PRIVILEGE APPLIES IN A CASE WHERE DEFAMATORY STATEMENTS WERE MADE IN THE COURSE OF A FEDERAL GOVERNMENT INVESTIGATION

Media Law & First Amendment Alert
August 27, 2018

According to a recent decision from New York's highest court, a person providing a statement to an investigatory body is not completely immune from a defamation suit based on the statement, unless the subject of the statement has an opportunity to contest it.

A June 27, 2018 decision issued by New York's Court of Appeals in *Stega v. New York Downtown Hospital*, 2018 WL 3129383, involved a doctor's lawsuit against representatives of her former employer (a hospital), alleging that the representatives made defamatory statements to the Food and Drug Administration during its investigation. The hospital and its co-defendants sought to dismiss the lawsuit, arguing that the comments made to the FDA investigators were entitled to "absolute privilege" and were, therefore, immune from a claim of defamation. The Court of Appeals disagreed, and found instead that only a "qualified privilege" applies in the context of defamatory statements made during the course of such an investigation.

Background

Plaintiff Dr. Jeanetta Stega is a medical research scientist (gynecological and oncological research) who, in 2009, was employed by the defendant as its Vice President of Research and Chairperson of its Institutional Review Board ("IRB"). A private practice oncologist who had medical privileges at the hospital entered into an agreement with a drug company to conduct a clinical trial of a drug developed by the company to treat metastatic cancer. Dr. Farber, the oncologist, wanted the plaintiff to help him develop preparatory material for the clinical study, which would include a protocol and a patent application.

The plaintiff provided hospital officials with details about the project. No objections were raised by the hospital. The drug company paid the plaintiff for having drafted the preliminary documents, the services for which were provided after normal work hours. Those funds were placed in a bank account opened by the plaintiff in the name of "Stega Research Group."

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Dr. Farber then applied to the defendant's IRB for approval of the drug study, at which point the plaintiff recused herself from board deliberations but answered questions about the study, which the IRB board approved. Disputes arose between Dr. Farber and the drug company. The clinical study went awry. Tensions between Dr. Farber and the plaintiff escalated. Dr. Farber threatened both the drug company and the plaintiff with retribution.

Termination of the plaintiff's employment and commencement of the FDA Investigation

Defendant hospital claimed that the plaintiff took funds that belonged to the hospital and asserted a conflict of interest on her part wherein approval for the clinical study was sought from the IRB, on whose board she was a member. Plaintiff was placed on administrative leave and her employment terminated in February, 2012. She was also removed from the IRB board, along with the board's Vice Chairperson.

One month later, plaintiff filed a complaint with the FDA, expressing concerns with her removal (and that of the vice chairperson too) and the proper supervision of patients in research trials overseen by the hospital's IRB. An investigation by the FDA followed where it interviewed Dr. Stephen Friedman, who made statements about the plaintiff. The FDA issued a noncompliance report (establishment inspection report, EIR) to the hospital. While the FDA report did not expressly address whether the plaintiff had been properly terminated, its report did note that the inspection "...found certain improprieties documented by the hospital's management resulting in the removal of Dr. Stega."

Defamatory Statements

Dr. Friedman made statements about the plaintiff that were published in the FDA's inspection report (the EIR) and which came to her attention. Dr. Friedman alleged that the plaintiff created the Stega Research Group using her home address and that the funds from the drug company "were channeled to this group." Also, Dr. Farber did not want a prostate cancer patient participating in the lung cancer clinical trial. However, the plaintiff insisted, despite Dr. Farber's protests that the IRB would not approve this, to which the plaintiff is alleged to have said that "she is the IRB and wanted the patient entered." That EIR notes that Dr. Friedman felt that the IRB and their authorizations were "tainted" and fired the plaintiff as well as any members that had contact with her.

The Defamation Lawsuit

Plaintiff claimed that "her professional reputation has been significantly damaged by the publication of false, defamatory statements made about her by Friedman to the FDA inspectors."

An analysis of the distinctions between absolute and qualified privilege followed, where the Court noted that difference rests on the "occasion and the position or status of the speaker."

Dr. Friedman's statements were not protected by absolute privilege, held the Court (in reliance on another case) because "...for absolute immunity to apply in a quasi-judicial context, the process must make available a mechanism for the party alleging defamation to challenge the allegedly false and defamatory statements." Absolute immunity will apply in quasi-judicial proceedings "only if procedural safeguards enable the defamed party to contest what is said against her."

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Here, no such safeguards were present. What does apply to those defamatory statements though is qualified immunity, which protects statements if they were not made with ill will or spite or with “a reckless disregard of whether they were false or not.”

Words Matter

As to those statements, the Court rejected the defendant’s claim that their use of the word “channeled” funds did not constitute a defamatory statement, noting that use of the word “channeled” implies misappropriation of funds or a funds transfer occurring in a clandestine manner. Similarly, use of the word “tainted” by the IRB did not amount to “a pure expression of opinion” and was thus considered to be defamatory by the Court.

The Case Goes On

Instead of submitting an answer, the defendants filed a motion to dismiss. This court denied the defendant’s motion to dismiss the defamation claim against them, thereby allowing the lawsuit to continue, at which point the burden of proof will be on the plaintiff to show that the defamatory statements were made with malice.

