

MANDATORY SEC FILINGS DO NOT CREATE ABSOLUTE PRIVILEGE AGAINST DEFAMATION CLAIMS

Media Law & First Amendment Alert
November 5, 2018

Just because a company makes a statement about an employee in a required government filing does not mean the company is immune from a defamation claim, according to a recent decision from a New York federal court.

The ruling in *Fischkoff v. Iovance Biotherapeutics, Inc.*, 2018 WL 5074689 (S.D.N.Y. Oct. 17, 2018), involves a statement made to the SEC regarding the termination of an employee. In particular, the plaintiff moved to amend his complaint against defendant Iovance to assert a defamation claim based on the latter's SEC filings. The basis for the motion was Iovance's statement — repeated in its Form 10-Q and 10-K filings with the Commission — that “Dr. Fischkoff was terminated ‘for cause’ as that term is defined in his employment agreement.” Iovance defended the motion on the singular ground that plaintiff's proposed amendment was futile. Because of this, the Court noted that the liberal Rule 15 standard must make way for the more rigorous analysis required under Rule 12(b)(6), i.e., whether the pleading states “a claim upon which relief can be granted.”

Turning to the merits of the analysis, and referencing the Supreme Court's oft-cited decisions in *Iqbal* and *Twombly* on facial plausibility, the Court noted that while plaintiff's factual allegations must be accepted as true, such acceptance “does not apply to legal conclusions” which it is the court's “first task . . . to disregard.” Noting further that Iovance had not challenged the plaintiff's effort to plead the elements of his defamation claim, and that the plaintiff, in turn, had not challenged Iovance's obligation to make the necessary SEC filings, the *Fischkoff* Court found that the issue before it was whether Iovance's 10-Q and 10-K filings were entitled to absolute privilege under New York common law.

As framed by the Court, Iovance's argument was simply that its filings were entitled to absolute privilege because “New York courts consider the SEC a quasi-judicial body.” The Court, however, was quick to point out that statements historically accorded “absolute privilege” under the reasoning expressed by the New York Court of Appeals in *Rosenberg v. MetLife, Inc.*, 8 N.Y.3d 359 (2007), were those “made as part of[,] or preliminary to ‘a judicial or quasi-judicial proceeding.’” *Fischkoff*, 2018 WL 5074689 at *4 (citing *Rosenberg*, 8 N.Y.3d at 365) (emphasis in original). The *Fischkoff* Court observed that there was nothing in the proposed amended pleading

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or the SEC filings before it to suggest that Iovance's 10-Q or 10-K were submitted as part of a formal "proceeding," thus concluding that this foundational predicate was lacking.

The *Fischkoff* Court went on to observe that its conclusion was supported by the Court of Appeals' recent decision in *Stega v. N.Y. Downtown Hosp.*, 31 N.Y.3d 661 (2018), in which New York's highest court determined that statements made by a hospital employee to an FDA investigator were **not** entitled to absolute privilege. Highlighting New York's judicial policy of "confin[ing] absolute privilege to a very few situations," the *Fischkoff* Court noted that the Court of Appeals' decision in *Stega* "reaffirmed that 'absolute immunity applies only to a proceeding in court or one before an officer having attributes similar to a court.'" *Fischkoff*, 2018 WL 5074689 at *4 (citing *Stega*, 31 N.Y.3d at 219) (emphasis in original). As recognized in *Fischkoff*, the driving principle within New York's common law, which limits absolute immunity to statements made in the context of judicial or quasi-judicial "proceedings," is to ensure that a process exists "for the party alleging defamation to challenge the allegedly false and defamatory statements." In the absence of such a proceeding, a party looking to defend a defamation claim based on governmental filings or statements is unlikely to prevail on absolute immunity grounds.

Lessons for businesses required to make governmental filings:

1. Carefully evaluate statements made about particular individuals in governmental filings to determine whether they are necessary to comply with the company's obligations to faithfully and accurately report on the state of its business.
2. Independently assess whether such statements are being made in connection with an investigatory/governmental proceeding, and thus arguably susceptible to absolute immunity.
3. Avoid public statements or filings unless you can confirm they are correct. Consult with your attorney if you're not certain, or if you need to know whether the statement is immune to defamation claims.