SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

STEVEN ROSEN	*	**Civil Action No. 2009 CA 001256 B**
	*	**Judge Erik P. Christian**
PLAINTIFF,	*	**Calendar 12**
v.	*	
AMERICAN ISRAEL PUBLIC AFFAIRS COMMITTEE, INC., et al.	*	
DEFENDANTS.	*	

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Upon consideration of Defendants' Motion for Summary Judgment, Plaintiff's Opposition thereto, and the record herein, the Motion is granted.

I. Factual and Procedural Background

This matter involves a defamation claim brought against the American Israel Public Affairs Committee ("AIPAC") by its former Director of Foreign Policy Issues, Steven J. Rosen ("Rosen"). Before he was fired on March 21, 2005, Rosen had worked for AIPAC for almost 23 years. During his tenure as Director of Foreign Policy Issues, part of Rosen's job had been to "maintain relationships with [government] agencies, receive [foreign policy] information, and share it with AIPAC Board of Directors and its Senior Staff for possible further distribution." Compl. ¶ 18. On August 27, 2004, it was publicly disclosed that the United States Department of Justice ("Justice Department") was investigating Rosen and another AIPAC employee for receiving classified

information. As a result, on February 17, 2005, AIPAC placed Rosen on involuntary leave. He was ultimately fired on March 21, 2005.

According to Rosen, his February 17 suspension was AIPAC's response to implicit threats by the Justice Department that AIPAC itself could become the target of the investigation "if AIPAC did not act against [him]." Id. ¶ 22. Subsequently, according to Rosen, AIPAC fired him after federal prosecutors insisted that AIPAC abide by a Justice Department memorandum calling for "the firing of the corporate employees who allegedly engaged in the wrongdoing [and] condemning their actions publicly . . . ." Id. ¶ 23. AIPAC complied with these directives in order to curry favor with the Justice Department and avoid prosecution, even though its Board "knew absolutely that Steven Rosen had done nothing wrong, indeed, nothing which they had not known about and authorized." Id. A few months after his termination, on August 4, 2005, Rosen was indicted on espionage charges by a federal grand jury.[1] See Defs. Mot. Ex. 1.

In the wake of Rosen's termination, beginning in April 2005, AIPAC, through its Board and its spokesman, Defendant Patrick Dorton ("Dorton") made several statements concerning Rosen's termination to the press. On March 2, 2009, Rosen sued AIPAC, its executive director, individual board members, and Dorton for defamation based on these statements.

On October 30, 2009, this Court, per Judge Jeannette Clark, dismissed all but one of Rosen's claims for defamation, and dismissed all Defendants except AIPAC and Dorton. See Order Granting in Part and Denying in Part Defs.' Mot. to Dismiss (treating motion to dismiss as motion for summary judgment). The sole issue that remains in this

[1] The criminal case against Rosen was dismissed on May 1, 2009. See Pl.'s Opp. Attachment No. 23.

case is whether a statement by Dorton (on behalf of AIPAC) in a March 3, 2008, New York Times article was defamatory. As the Times reported:

> The AIPAC spokesman on the Rosen [and the other employee] matter, Patrick Dorton, said at the time that the two were dismissed because their behavior "did not comport with standards that AIPAC expects of its employees." He said recently that AIPAC still held that view of their behavior.

Compl. ¶ 24; Defs. Mot. Ex. 3. For the following reasons, the Court now concludes that this does not constitute actionable defamation.

II. Legal Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Kibunja v. Alturas, 856 A.2d 1120, 1127 (D.C. 2004). "Accordingly, if an impartial trier of fact, crediting the non-moving party's evidence, and viewing the record in the light most favorable to the non-moving party, may reasonably find in favor of that party, then the motion for summary judgment must be denied." Cormier v. D.C. Water & Sewer Auth., 959 A.2d 658, 663 (D.C. 2008) (quoting Weakley v. Burnham Corp., 871 A.2d 1167, 1173 (D.C. 2005)). In other words, "where there is a genuine issue of material fact in dispute, summary judgment cannot be granted." Young v. District of Columbia, 752 A.2d 138, 145 (D.C. 2000).

III. Discussion

A. Law of the Case

As a threshold matter, the law of the case doctrine does not bind this Court to Judge Clark's earlier ruling, which permitted Rosen's defamation claim based on the March 3, 2008, publication to survive summary judgment. First, Judge Clark did not rule

on the specific issue that the Court addresses here: whether the March 3, 2008, publication is not defamatory because it is not provably false.[2] Second, even if Judge Clark's order could be construed as deciding the issue by implication, this Court does not read Judge Clark's order as intending "to foreclose a different result if relevant new facts were established during discovery," as here.[3] Guilford Transp. Indus., Inc. v. Wilner, 760 A.2d 580, 593 (D.C. 2000). More importantly, the law of the case doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided," but it is "not a limit to their power." Id. (quoting Messinger v. Anderson, 225 U.S. 436, 444 (1912) (Holmes, J.). Now that discovery has concluded, and the Court has had the opportunity to review the relevant authority and its application to the record, it is apparent that Rosen's defamation claim should not be presented to a jury.

B. The March 3, 2008, Publication Is Not Provably False

A publication 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." Howard Univ. v. Best, 484 A.2d 958, 989 (D.C. 1984). However, to be defamatory the published statement "must be more than unpleasant or offensive; the language must make the plaintiff appear 'odious, infamous, or ridiculous.'" Id. (quoting Johnson v. Johnson Publishing Co., 271 A.2d 696, 697 (D.C. 1970). It is the responsibility of this Court to determine as a matter of law whether a statement is "capable of bearing a defamatory

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[2] Judge Clark ruled on the sufficiency of Rosen's allegations regarding the malice element of defamation pertaining to public figures, and the applicability of the statute of limitations bar. Order of October 30, 2009, at 15 ("Plaintiff has alleged sufficient facts for a jury to consider whether Defendants acted with malice . . . [and] a jury would have sufficient facts to infer that the New York Times spoke to Defendant Dorton, and based on his comments, published the March 3, 2008 article.").

[3] Facts established during discovery in this case are not dispositive, but support the Court's conclusion that the statement contained in the March 3 Times article was not provably false. By the time the statement was made, AIPAC had a number of reasons to hold the view that Rosen's conduct did not comport with the standards it expected from its employees. See Defs. Mot. at 13.

meaning." Guilford, 760 A.2d at 594 (quoting Restatement (Second) of Torts § 614). If a statement is not capable of bearing a defamatory meaning, then a jury cannot decide in fact whether or not it was defamatory. See id.

Critically, as the United States Supreme Court explained in Milkovich v. Lorain Journal Co., "liability under state defamation law for a statement on a matter of public concern may be imposed only if the statement is provably false." 497 U.S. 1, 19-20 (1990). Statements of opinion may be actionable, but only "if they imply a provably false fact, or rely upon stated facts that are provably false."[4] Moldea v. New York Times Co., 22 F.3d 310, 313 (D.C. Cir. 1994). Put another way, "a statement of opinion is actionable only if it has an explicit or implicit factual foundation and is therefore objectively verifiable." Washington v. Smith, 80 F.3d 555, 556 (D.C. Cir. 1996). If, on the other hand, "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." Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1227 (7th Cir. 1993).

Rosen cites the following excerpt from the March 3 Times article as the basis for his defamation claim:

> The AIPAC spokesman on the Rosen [and the other employee] matter, Patrick Dorton, said at the time that the two were dismissed because their behavior "did not comport with standards that AIPAC expects of its employees." He said recently that AIPAC still held that view of their behavior.

As Judge Clark ruled, the portion of this excerpt which survives the statute of limitations bar to defamation is the last sentence, which states that Dorton "said recently that AIPAC still held that view of their behavior"—which is to say that AIPAC still held the view that

[4] Prior to Milkovich, courts had considered statements of opinion to be categorically non-defamatory. See Guilford, 760 A.2d at 596-97.

Rosen's behavior did not comport with the standards that AIPAC expects of its employees.[5]

That statement is not provably false. Rather, it is the characterization of an employer that does not rest on any objectively verifiable facts. Other courts have reached the same conclusion under similar circumstances. For example, in McClure v. Am. Family Mutual Ins. Co., the Eighth Circuit Court of Appeals considered circumstances in which two insurance agents were fired from an insurance company for engaging in lobbying activities "prejudicial to the company." 223 F.3d 845, 851 (8th Cir. 2000). Like here, the terminations were reported in the press, and the insurance company was sued for defamation for its public statements regarding the terminations, including statements to the effect that plaintiffs participated in "disloyal and disruptive activity," that they did not understand the "value of loyalty and keeping promises," that they were "acting against the best interests of the insurance buying public," and that they "were in direct violation of their [contractual] agreements" with the company. Id. at 853. Most similarly, the company also stated that plaintiffs had engaged in "conduct unacceptable by any business standard." Id.

In affirming summary judgment in favor of the insurance company, the Eighth Circuit concluded that these statements were not provably false because they were "the company's characterizations of activity that [plaintiffs] had undertaken . . . ." Id. Key to this conclusion was the court's determination that the statements were not "sufficiently precise or verifiable." As the court explained:

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[5] Rosen agrees that this statement is the only one at issue. See Pl.'s Opp. at 14 (Dorton's statement "that AIPAC still held that view of [Rosen's] behavior" "is new, and, in effect, very different from any of his earlier statements . . . .").

> A commentator who advocates one of several feasible interpretations of some event is not liable in defamation simply because other interpretations exist. Consequently, remarks on a subject lending itself to multiple interpretations cannot be the basis of a successful defamation action because as a matter of law no threshold showing of "falsity" is possible in such circumstances.

Id. (quoting Hunter v. Hartman, 545 N.W.2d 699, 707 (Minn. Ct. App. 1996) (citing Bose Corp. v. Consumers Union, 466 U.S. 485, 512-13 (1984))).

This Court finds the analysis of the McClure court to be persuasive. Like the statements made in McClure, the statement here is clearly the subjective view of Defendants, and it is neither precise nor verifiable. To begin with, the statement itself refers to AIPAC's viewpoint and does not purport to be objective truth: "AIPAC still held that *view*" that Rosen's behavior "did not comport with standards AIPAC *expects* of its employees." More importantly, however, the statement does not implicate any discernable objective standard.

First, there is simply no way for a fact-finder to tell what "standards" are at issue. Rosen argues that "AIPAC had no 'standards' whatsoever concerning the receipt, handling, and dissemination of 'classified' information obtained by its employees from U.S. Government sources," Opp. at 9, but it is not clear from the statement, or the context in which it was made, that the allusion to "standards AIPAC expects of its employees" refers in particular to standards concerning the receipt, handling, and dissemination of classified information. The referenced "standards" could just as easily refer to AIPAC's expectation that its employees not be charged with crimes, or the more subjective and amorphous expectation that its employees not cause it undue embarrassment.[6] Whether

[6] The March 3 Times article quotes other unidentified sources which suggest that disclosures involving Rosen were potentially embarrassing. In fuller context, the article states that:

AIPAC did or did not have written policies concerning these other standards of conduct is immaterial. The point is that there is no way to know from the statement.

Furthermore, the statement that Rosen failed to comport his behavior with AIPAC's standards is AIPAC's interpretation of Rosen's conduct as applied to its standards—whatever they may be. See McClure, 223 F.3d at 853 ("[R]emarks on a subject lending itself to multiple interpretations cannot be the basis of a successful defamation action because as a matter of law no threshold showing of "falsity" is possible in such circumstances.") (citations omitted). It does not contain or imply an objectively verifiable fact; rather, it is the employer's characterization of a former employee's conduct. See id.; Gibson v. Boy Scouts of America, 360 F. Supp. 2d 776, 781 (E.D. Va. 2005) (organization's statement that member was discharged because he was "unfit to be a Scoutmaster and in Scouts" not provably false); Osterberg v. Sears, Roebuck & Co., 2004 U.S. Dist. LEXIS 19093, *8 (D. Minn. Sept. 22, 2004) (employer's statement that employee was fired because of "ethical concerns and his disregard for company policies and procedures" not provably false).

> Aipac dismissed [Rosen and Weissman] in early 2004 after federal prosecutors in Virginia played part of surreptitiously recorded conversations for Nathan Lewin, a veteran Washington lawyer representing Aipac. The tapes were of conversations in which Mr. Rosen and Mr. Weissman passed on information about the Middle East they had received from government officials to [a reporter] at The Washington Post.
>
> Mr. Lewin, who has had a long history as a trusted counsel for various Jewish organizations, traveled back to Aipac's headquarters near Capitol Hill from Alexandria that day and advised the group to fire the men.
>
> The Aipac spokesman on the Rosen-Weissman matter, Patrick Dorton, said at the time that the two men were dismissed because their behavior "did not comport with standards that Aipac expects of its employees." He said recently that Aipac still held that view of their behavior.
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> Mr. Lewin would not discuss what he heard that day. But others familiar with the case said the defendants' boastful tone, which may have been used to suggest that their knowledge reflected their great influence within the administration, made the conversations potentially embarrassing.

Defs. Mot. Ex. 3.

Allowing Rosen's claim to go to trial would task the jury with identifying the standards referred to in the March 3 Times article, determining whether AIPAC had such express or implied standards, and determining whether Rosen's conduct was in accordance with those standards. As explained above, these would be impossible tasks. At the same time, inviting a jury to scrutinize and second-guess an employer's policies and business judgment would effectively convert this garden-variety claim for defamation into one for wrongful termination or discrimination. In contrast to those employment claims, the issue in this case is not the veracity of AIPAC's motivation for firing Rosen (that is, whether its motivation was pretextual). The issue is the objective truth of AIPAC's public statement concerning Rosen's firing. It is on this limited issue that the Court concludes that the statement is not provably false, and therefore, not defamatory as a matter of law.

WHEREFORE, it is this 23 day of February, 2011,

ORDERED, that Defendants' Motion for Summary Judgment is **GRANTED**; and it is

FURTHER ORDERED, that judgment as a matter of law is entered in favor of Defendants American Israel Public Affairs Committee, Inc., and Patrick Dorton.

SO ORDERED.

ERIK P. CHRISTIAN
J U D G E
(Signed-in-Chambers)

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