IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

ROSLYN J. JOHNSON, Plaintiff, v. JONETTA ROSE BARRAS, *et al.,* Defendants.	No. 2007 CA 001600 B Judge Gerald I. Fisher Calendar 1

ORDER DENYING WITHOUT PREJUDICE MOTION TO DISMISS ALL CLAIMS AGAINST DEFENDANTS DOROTHY BRIZILL, GARY IMHOFF AND DCWATCH, DENYING DEFENDANT JONETTA BARRAS' MOTION FOR JUDGMENT ON THE PLEADINGS, AND DENYING DEFENDANT DISTRICT OF COLUMBIA'S MOTION TO DISMISS ALL CLAIMS AGAINST IT

Before this Court for consideration are the Motion to Dismiss All Claims Against Defendants Dorothy Brizill, Gary Imhoff and DCWatch, Defendant Jonetta Barras' Motion for Judgment on the Pleadings and Defendant District of Columbia's Motion to Dismiss the Claims Against It. Having reviewed the motions, Plaintiffs Oppositions, and the additional pleadings filed by the parties, it is this 18th day of September 2007, for the reasons set forth in the accompanying Memorandum, hereby

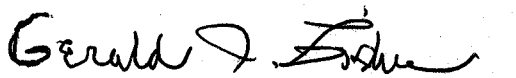
ORDERED that the Motion to Dismiss All Claims Against Defendant Dorothy Brizill, Gary Imhoff and DCWatch is **DENIED WITHOUT PREJUDICE** and Plaintiff shall have sixty (60) days to conduct discovery against these Defendants solely as to the issue of Defendant Jonetta Barras' agency. Based

upon the Court's consideration of the parties' motions to dismiss and the subsequent motions filed, it is further

ORDERED that parties have 20 additional days from the date of this Order to file replies to outstanding motions; and it is

ORDERED that Defendant Jonetta Barras' Motion for Judgment on the Pleadings is **DENIED**; and it is further

ORDERED that Defendant District of Columbia's Motion to Dismiss the Claims Against It is **DENIED**.



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Judge Gerald I. Fisher

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IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
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MEMORANDUM

I. Introduction

Plaintiff Roslyn J. Johnson is the former District of Columbia Deputy Director of the Department of Parks and Recreation. Defendant Dorothy A. Brizill is the Executive Director of DCWatch, a government watchdog organization in the District of Columbia. Defendant Gary Imhoff is the Vice President and Webmaster of DCWatch, which publishes articles via its website – www.dcwatch.com. Defendant Jonetta Rose Barras is a well-known District of Columbia journalist and political commentator.

In March 2007, Plaintiff filed a seven-count Complaint alleging that Barras published a series of defamatory articles in an online publication controlled, organized, and owned by Brizill, Imhoff, and DCWatch (hereinafter the "DCWatch Defendants"). Plaintiff claims that Barras' statements falsely misrepresented that Plaintiff had inflated her employment history and compensation when applying for

her job. She also asserts that Barras and the DCWatch Defendants knew or should have known that the statements were false and/or misleading.

In the same Complaint Plaintiff brought claims against the District of Columbia based upon the release of portions of her personnel records to Barras by the D.C. Office of Personnel, allegedly in violation of the D.C. Freedom of Information Act ("D.C. FOIA"), D.C. Code § 2-534 (2006 ed.).

The Complaint contains the following claims:

Count/Claim	**Defendant(s)**
I. Defamation	Barras
II. Libel	Barras
III. Defamation	DCWatch Brizill Imhoff
IV. False Light Defamation	Barras DCWatch Brizill Imhoff
V. Interference with Contract	Barras DCWatch Brizill Imhoff
VI. Negligence	District of Columbia
VII. Violation of D.C. FOIA	District of Columbia[1]

In response to the Complaint, the Defendants have filed the motions that are the subject of this Order and Memorandum.

[1] Plaintiff also sued, but later dismissed, TalkMedia Communications, LLC, on the same claims brought against the DCWatch Defendants.

Standard for Dismissal

When reviewing a Rule 12(b)(6) motion to dismiss, the Court must construe the pleadings in the light most favorable to the party not seeking dismissal. *Atraqchi v. GUMC Unified Billing Servs.*, 788 A.2d 559, 562 (D.C., 2002). Motions to dismiss should only be granted where it appears, beyond a doubt, that the non-moving party cannot prove any set of facts which would entitle it to relief on its claim. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see Casco Marian Development, LLC v. D.C. Redevelopment Land Agency*, 834 A.2d 77, 81 (D.C. 2003). If a motion to dismiss under Rule 12(b)(6) or a motion for judgment on the pleadings under Rule 12(c) is supported by matters outside the record, then the motion is to be treated as one for summary judgment pursuant to Rule 56, and the opponent must be given a reasonable opportunity to present all pertinent material.

Standard for Summary Judgment

To prevail on a motion for summary judgment, the moving party must establish, based upon the pleadings, discovery, and any affidavits or other materials submitted, that there is no genuine issue as to any material fact and that it is therefore entitled to judgment as a matter of law. *Grant v. May Department Stores Co*., 786 A.2d 580, 583 (D.C. 2001); Super. Ct. Civ. R. 56(c). A trial court considering a motion for summary judgment must view the evidence in the light most favorable to the non-moving party and may grant the motion only if a reasonable jury, having drawn all reasonable inferences in favor of the non-

moving party, could not find for the non-moving party based upon the evidence in the record. *Grant*, 786 A.2d at 583 (citing *Nader v. De Toledano*, 408 A.2d 31, 42 (D.C. 1979)); *Bailey v. District of Columbia*, 668 A.2d 812, 816 (D.C. 1995).

1. The DCWatch Defendants' Motion to Dismiss All Claims

In their motion to dismiss the DCWatch Defendants seek immunity under the Communications Decency Act, 47 U.S.C. § 230. That statute states "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). The Act further provides "no cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." *Id.,* § 230(e)(3). Defendants argue that they are "provider(s) or user(s) of an interactive computer service" and they were not the "information content provider" of the allegedly tortious material.

Section 230 defines "interactive computer service" as:

> "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."

Id., § 230(f)(2). Plaintiff has proffered no authority explaining why Defendants are not precisely the kind of internet provider Congress intended to protect by the enactment of § 230. On the other hand, there are numerous decisions, including two by judges of the United States District Court for the District of Columbia, which conclude that web site operators are providers of interactive computer services within the meaning of § 230. *Blumenthal v. Drudge*, 992 F. Supp. 44, 49

(D.D.C. 1998) (Friedman, J.); *Ramey v. Darkside Products, Inc.*, No. 02-ca-730, 2004 U.S. Dist. LEXIS 10107 (D.D.C. 2004) (Kessler, J.); *see also, Universal Communications Systems, Inc.* 478 F.3d 413, 419 (1st Cir. 2007).

It is undisputed that the DCWatch Defendants did not create the material upon which Plaintiff bases her claims. And whatever limited role it may have had in editing Barras' articles or otherwise preparing them for publication is insufficient to constitute "creation or development" of the material within the definition of "information content provider." *See Blumenthal*, 992 F.Supp. at 52 (defendant not "information content provider" even though it had editorial control over content in gossip column); *Ben Ezra, Weinstein, and Co. v. Am. Online*, 206 F.3d 980, 985-86 (10th Cir. 2000) (defendant not "information content provider" even though it edited and altered stock quotations provided by third party). Therefore, to be successful, Plaintiff must prove that Barras, the author of the columns that contained the allegedly defamatory materials, was an actual or an apparent agent of DCWatch and therefore the DCWatch Defendants should be liable under the theory of *respondeat superior*.

The Amended Complaint does claim that an agency relationship existed between Barras and DCWatch. There is no allegation that Barras was a paid columnist of DCWatch and Defendants have cited two disclaimers appearing on the top and bottom of the webpage that display a link to the column written by Barras renouncing responsibility for Barras or any other contributor. [2] Even if

[2] The first disclaimer states "*Articles by DCWatch columnists are not edited for content. DCWatch is not responsible for the opinions expressed by our columnists -- some of them are barely responsible themselves."* The second reads "*Our columnists are true citizens of the nation's capital: they aren't paid; they have no power or influence; and they get no respect."*

Barras were a paid columnist whose articles were edited for content by DCWatch, it is unlikely agency can be established. *See Blumenthal*, 992 F. Supp at 44.

Given the intent of § 230 of the Communications Decency Act, subsequent decisions broadly construing the Act to protect internet service providers of all walks, and the seeming lack of an agency relationship between Barras and DCWatch, dismissal of all claims against the DCWatch Defendants ultimately may be appropriate. At this early stage of the proceedings, however, affording Plaintiff the opportunity to conduct discovery limited to this issue is appropriate. *Martin v. Malhoyt,* 830 F.2d 237 (D.C. 1987) . Accordingly, Plaintiff shall have sixty (60) from today to engage in discovery from the DCWatch Defendants solely as to the issue of Barras' agency.

2. Defendant Barras' Motion for Judgment on the Pleadings

Defendant Barras asks that the Court grant her Motion for Judgment on the Pleadings, claiming that Plaintiff has failed to state a claim for which relief can be granted. She argues that the two counts of defamation, the two counts of false light invasion of privacy, and the one count of intentional interference with contract should be thrown out because (a) the statements in question are substantially true; (b) the statements are protected by the fair report privilege; (c) the statements are protected expressions of subjective opinion; (d) the complaint fails to allege facts to show malice; and (e) with respect to the false light claims, no contract existed and the matters were of general public concern and therefore were not highly offensive or unreasonable as a matter of law.

Whether the issues are "substantially true" has not yet been established. Although Plaintiff admits the version of a resume she initially submitted to the D.C. Office of Personnel was in "draft" form and would later be "updated," the record fails to show any of the sweeping admissions of factual inaccuracies that Defendant Barras claims Plaintiff made. Plaintiff insists she did not intentionally place inaccurate information on the first resume and claims subsequent resumes she submitted countered the statements Defendant Barras maintains are "substantially true." Plaintiff's complaint contains sufficient allegations to survive a motion to dismiss, and at this early stage of the proceedings it is appropriate to afford Plaintiff the opportunity to develop the record through discovery so that it can be determined whether Barras' statements are "substantially true."

Without a full development of the evidence it is also impossible to assess all but one of the other reasons Barras advances for judgment in her favor on the pleadings. The one exception is the alleged failure of the complaint to demonstrate malice. Malice is "the doing of an act without just cause or excuse, with such a conscious indifference or reckless disregard as to its results or effects upon the right s or feeling of others as to constitute ill will. *Columbia First Bank v. Ferguson*, 665 A.2d 650, 656 (D.C. 1995). Viewing the Amended Complaint in the light most favorable to Plaintiff, it contains sufficient allegations of fact that, if true, to meet this definition of malice.

For these reasons, Barras' Motion for Judgment on the Pleading is denied.

3. Defendant District of Columbia's Motion to Dismiss Claims

D.C. requests that the court dismiss all charges against it because Plaintiff failed to serve notice as required by D.C. Code § 12-309, the D.C. FOIA does not afford a cause of action for the disclosure of information, and the District is immune from suit because the release of Plaintiff's information was a discretionary and not a ministerial function

a. Section 12-309 Notice

The District argues that Plaintiff's claim of negligence against the District in Count VI of her Amended Complaint must be dismissed because Plaintiff failed to comply with the six-month notice requirement of D.C. Code § 12-309. The District contends that Count VI of Plaintiff's initial complaint contained allegations that "clearly assert a violation of the D.C. FOIA[3]" and since Plaintiff is presently alleging that Count VI is based on negligence, she was required to serve notice on the District within six months after the damage was sustained in order to maintain an action against the District. This argument fails for two reasons. First, Count VI of Plaintiff's original complaint was captioned "Negligence—Defendant District of Columbia" and also set forth a claim that was founded on a negligence theory. Second, Plaintiff has supplied a copy of the timely served notice as an exhibit to its Opposition to the motion.

b. Whether the D.C. FOIA Provides a Cause of Action for Release of Information?

The District claims that the D.C. FOIA creates no cause of action for disclosing documents, only for withholding documents (Def. District of Columbia's

[3] Defendant District of Columbia's Reply to Plaintiff's Opposition to the District's Motion to Dismiss the Claims Against It, p. 3.

Reply to Plaintiff's Opposition to the District's Motion to Dismiss the Claims Against It, p. 1). Consequently, the District argues, Plaintiff has failed to state a claim upon which relief can be granted.

Claims seeking recovery for the release of information are referred to as "reverse FOIA" actions, and such actions can survive if it can be shown the government's decision to release was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Chrysler Corp. v. Brown*, 441 U.S. 281, 317 (1979). In our federal court, this standard has been applied as follows:

> FOIA exemptions allow agencies to withhold documents, but do not require withholding. See Chrysler, 441 U.S. at 293, 99 S. Ct. 1705 ("We simply hold here that Congress did not design the FOIA exemptions to be mandatory bars to disclosure."). Thus, some other law must require the agency to withhold the information for plaintiff to state a claim that agency action was not in accordance with law.

Tripp v. DOD, 193 F. Supp. 2d 229, 238 (D.D.C. 2002) (Sullivan, J.). Plaintiff correctly points out that in order to prevail she "must show that the release of Public Records at issue was unlawful, and not in accordance with an applicable government law." (Pl. Sur-Reply to Def. D.C. Reply to Opp. To Dismiss)(p. 3). As discussed above, Plaintiff has claimed that the District violated D.C. Code § 1-631.03 by releasing information that resulted in an unwarranted invasion of personal privacy. Plaintiff's identification of a law that prohibits the disclosure of information that would lead to an unwarranted invasion of privacy distinguishes her case from *Tripp* where the Plaintiff was seeking recovery purely through the FOIA.

At this juncture it cannot be determined whether § 1-631.03 was in fact violated as it is unknown what records were released and whether those records represented an "unwarranted invasion of personal privacy." Thus, it would be inappropriate to grant Defendant's Motion to Dismiss on the ground that she cannot establish a violation of the D.C. FOIA.

c. Whether Release of the Information Was a "Ministerial" or a "Discretionary" Function?

The District maintains that the release of the information that was obtained by Defendant Barras was a discretionary function the exercise of which would not give rise to tort claims. "For a court to find than an act is discretionary, thus entitling the municipality to immunity, the court must determine that the act involves the formulation, as opposed to the execution, of policy." *Rieser v. District of Columbia,* 183 U.S. App. D.C. 375, 563 F.2d 462, 475 (D.C. 1977). Put another way, discretionary acts are ones which generally have broad public effect. Ministerial acts, on the other hand, will generally require no judgment and will arise where the employee seemed to have little or no choice. *Casco Marina Development, LLC v. District of Columbia Redevelopment Land Agency*, 834, A. 2d 77, 81 (D.C. 2003).

In *Aguehonde v. District of Columbia,* 666 A.2d 443 (D.C. 1995), the court articulated a two-prong test to determine whether a municipal act was discretionary or ministerial. The first prong looks at whether the action involved "the permissible exercise of policy judgment." *Id.* at 448. If there was no room for a permissible exercise of judgment, then it cannot have been a discretionary function. If there was a permissible exercise of judgment "then the action is

immune from suit, unless the government has adopted a "statute, regulation or policy [that] specifically prescribes a course of action for an employee to follow." *Id*.

There are two relevant sources of law that could cover the employee's actions. The first is exception 2 to the D.C. FOIA, which prohibits the release of "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." D.C. Code § 2-534 (a)(2). The second, a similarly phrased regulation, is from the D.C. Comprehensive Merit Personnel Act (D.C. CMPA), and precludes the disclosure of personnel records that would "constitute an unwarranted invasion of personal privacy." D.C. Code § 1-631.01.

While the District maintains that the employee was responding to a FOIA request when s/he disclosed Plaintiff's personnel records, there is nothing in the record to support this contention. Plaintiff alleges that the District has failed to show it comported with any proper protocol for the release of the records and, in addition, has refused to disclose precisely what records were disclosed to the public.

In addition to the possible violations f the FOIA and CMPA provisions, Plaintiff points to Title 6, Chapter 31 of the D.C. Municipal Regulations, which both prohibits the disclosure of any personnel records not required by statute, and compels the disclosure of certain information to the public (such as current

grade and salary as well as past salary within a government position). 6 DCMR § 3105.1.[4]

Citing *Barvick v. Cisneros*, 941 F. Supp. 1015 (D. Kan. 1996), the District also contends that there can be no "unwarranted invasion of privacy" in this case, because a governmental employee has no expectation of privacy relating to her qualifications for a job for which she has successfully applied, or to her prior work history, including past salaries. Whether that is a correct interpretation of that case and the District's proposition is true remain to be seen. In the case at hand, it has yet to be determined what information was released and what portions, if any, fall within the *Barvick* categories.

Lastly, the district asks this Court to deem the employee's actions to have been discretionary because the lack of clarity provided by either the FOIA or the CMPA as to what would constitute a "unwarranted invasion of personal privacy" provides the District with "discretion in interpreting how to apply that standard." [5] But the District fails to cite any cases which support its conclusion that simply because the employee was forced to make a choice (presumably on whether or not to disclose Plaintiff's records) that her actions are qualified as discretionary in nature. Clearly, more complex judgment than that is required:

> The inquiry into whether an action is discretionary goes beyond whether the act entailed a choice among alternatives. It seeks to ascertain whether

[4] Plaintiff contends this list is exhaustive and that any disclosure falling outside of the enumerated exceptions would be a violation of §3105.1. The District, however, interprets the regulation to read that the listed exceptions are categories of information that shall always be released to the public upon request, but are in no way exhaustive. It is unnecessary to resolve that conflict at the moment.

[5] Defendant District of Columbia's Reply to Plaintiff's Opposition to the District's Motion to Dismiss the Claims Against It, Page 10.

> the governmental action at issue allows significant enough application of choice to justify official immunity, in order to ensure fearless, vigorous and effective decision making."

Casco, 834 A.2d at 81 (internal citations omitted).

Until more is known about the protocol under which Plaintiff's personnel files were released, or about the nature of the content that was released, it is premature to decide whether Plaintiff can establish her case against the District. Without more information, it is not possible to discern whether the release of these documents was a ministerial or a discretionary function. The nature of the subject matter that was released, once discovered, could very well qualify as a "clearly unwarranted invasion of personal property" that would violate the FOIA exceptions. It would be inappropriate to deny Plaintiff the opportunity to determine if the District complied with FOIA protocol, and to determine if the release of these documents was a proximate cause of the harm that she suffered.

For these reasons, the District's motion is **DENIED**.