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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2007-016329 04/25/2008

HON. THOMAS DUNEVANT, III

CLERK OF THE COURT
S. Brown
Deputy

JOHN GILDING MICHAEL W PEARSON

v.

JOHN S CARR, et al. DAVID N FARREN

**UNDER ADVISEMENT RULING**

(Defendant Carr's Renewed Rule 12(b)(2) Motion To dismiss For Lack Of Personal Jurisdiction, Defendant Carr's Motion For Summary Judgment Based On Truth As An Absolute Defense, Defendant Carr's Motion for Summary Judgment Based On Opinion and Defendant Carr's Motion For Judgment Based On Absence Of Malice)

Personal jurisdiction

The Court looks to the language of the blog: Defendant Carr wrote, "Resist the urge to vomit, and instead email the FAA Administrator at [URL] and weigh in on her tacit approval of this grossly inappropriate personnel move … the promotion of this miscreant, and his transfer back … to the scene of the crime" [ellipses in original]. One view of this communication with the FAA Administrator is to oppose Plaintiff's promotion and transfer, if not his continued employment in any capacity. Whether the blog was targeted specifically at Plaintiff's Arizona employment is a closer question. The statements of co-Defendants Johnston and Marks, whether or not they engaged in a conspiracy with Defendant Carr, are not admissible under Rule 801(d)(2) because they were not made in furtherance of the alleged conspiracy. "Statements are not admissible if they are declarations of past acts or if mere opinion of one conspirator but must be made to aid the prosecution of the conspiracy." *Sheet Metal Workers International Ass'n v. Nichols*, 89 Ariz. 187, 194 (1961). Defendant was aware that Plaintiff was working in Arizona –

the blog says that he moved back to the house in the Phoenix area that he never sold, and that he must have known the transfer to Los Angeles would be only temporary – and Plaintiff's return to Arizona, "the scene of the crime," ignited his passion. In light of the principle that the Arizona courts may exercise jurisdiction over a nonresident to the maximum extent authorized by the federal Constitution, *A. Uberti & C. v. Leonardo*, 181 Ariz. 565, 569 (1995), the facts indicate sufficient targeting of Plaintiff's Arizona activities to establish jurisdiction.

Therefore, IT IS ORDERED denying Defendant's Motion To Dismiss For Lack Of Personal Jurisdiction.

Motions for summary judgment

The Court emphasizes that it addresses only the statements made by Defendant himself. *Lewis v. Oliver*, 178 Ariz. 330, 337 (App. 1993), holds an FAA employee whose position "has a direct effect on air transportation, something in which the general public has an intense and justified interest," to be a public official. Plaintiff attempts to distinguish Lewis, who inspected planes, from his own (former) position as a supervisor and trainer of air traffic controllers. However, the public's interest in proper training of air traffic controllers and the integrity of the air traffic control system is no less intense or justified.

Plaintiff's reliance on his "exoneration" by the FAA is not well-founded. As the FAA itself acknowledged, the findings of the Administrative Law Judge and the EEOC order upholding that decision are final and binding upon all parties. That the FAA subsequently made contrary factual findings, is of no legal consequence because the EEOC's findings are the only ones with the effect of *res judicata*. To the extent that the contents of the blog are consistent with the findings of the ALJ and/or the EEOC, they are conclusively deemed truthful as a matter of law. These findings include all of the Findings of Fact enumerated in section IV of the ALJ's initial decision and factual statements in Section V of the initial decision, including that in numerous instances Plaintiff's testimony was "not credible" or "lack[ed] credibility." This encompasses the allegation that Plaintiff was untruthful characterized by the ALJ as "not credible". Therefore, any claims based on these statements fail. There are, however, allegations made in the blog that were not addressed by the EEOC, in particular the suggestion that Linda Petersen's death resulted from Plaintiff's actions. The blog creates a connection: "Linda was a suffering soul, and after all the issues with fighting the FAA for years she succumbed to depression. … [She] drove home, her mind no doubt racing. She had heard nothing about her case, and every day at work she was probably forced to mentally relive the way the FAA had treated her. She arrived at her driveway just as she arrived at the end of her hope. Linda Peterson [sic] drove up to her garage, raised the door, drove in, and closed it. She left her car running. Her housekeeper found her the next day. [Continuing in Part Two:] After Linda Peterson took her own life, the facility came apart. Many of Linda's co-workers were witnesses

in her EEO case and were intimately familiar with what had happened over the years. Linda's co-workers and friends were on the one hand livid over the fact that the FAA had done nothing to stop the harassment, and on the other racked with guilt, as anyone in their situation would be. You can imagine the thoughts … that maybe if some of them had stood up to the harassment they had received from the same supervisor, Linda might still be alive. That maybe if they had come forward, or said something, or done something … it was awful." This passage at least arguably asserts that years of harassment by Plaintiff caused Petersen's depression and that, but for the harassment, she would not have killed herself. (While her depression is blamed on the FAA as an entity, the reported reaction of the co-workers that standing up to her supervisor – Plaintiff – when he treated them in the same manner might have prevented her suicide indicates that her treatment at the hands of Plaintiff was the decisive factor.) Whether this was true – or if untrue, whether Defendant could properly have believed it to be true – is for a jury to decide.

It is not sufficient to avoid a defamation suit to dress a statement in the garb of opinion. The test is whether the opinion can "reasonably [be] interpreted as stating actual facts about the public figure involved," *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988), or is instead "imaginative expression" or "rhetorical hyperbole," *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990). Here, whether the statements made by Defendant fall into the latter category rather than the former, and is for a jury to decide. *Yetman v. English*, 168 Ariz. 71, 80 (1991); *contrast Turner v. Devlin*, 174 Ariz. 201, 209 (1993) (distinguishing "subjective impressions, unprovable as false," of public official's conduct from actionable allegation of fact). Neither does a prefatory "some say," even if truthful, immunize Defendant. While good faith reliance on a source believed to be credible is a defense, "[l]iability for repetition of a libel may not be avoided by the mere expedient of adding the truthful caveat that one heard the statement from somebody else." *Flowers v. Carville*, 310 F.3d 1118, 1128 (9th Cir. 2002). Again, it is for the factfinder to decide whether Defendant had reason to doubt the accuracy of what the unnamed "some" said. As for malice or the absence thereof, that turns on Defendant's state of mind, and as such is better suited for a jury.

Therefore, IT IS ORDERED Defendant Carr's Motion for Summary Judgment Based On Truth As An Absolute Defense, Motion For Summary Judgment Based On Opinion and Motion For Summary Judgment Based On Absence Of Malice are granted, except with respect to the allegation that Plaintiff was responsible for the death of Ms. Petersen and any other allegations based on material posted by Defendant outside the EEOC record.