

**THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
CASE NO. 3:09-cv-00044-JGH**

ROBERT E. SALYER,)
)
Plaintiff,)
)
vs.)
)
THE SOUTHERN POVERTY LAW)
CENTER, INC., 400 WASHINGTON)
AVENUE, MONTGOMERY, ALABAMA)
36104)
)
Defendant.)

**MEMORANDUM IN SUPPORT OF DEFENDANT’S MOTION TO DISMISS
PLAINTIFF’S FIRST AMENDED COMPLAINT**

The Defendant, The Southern Poverty Law Center, Inc. (“SPLC”), by and through counsel, asserts the following in support of its Motion pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss Plaintiff Robert E. Salyer’s (“Salyer”) First Amended Complaint:

1. On April 28, 2009, Salyer filed his First Amended Complaint seeking to include a claim for the tort of outrage, also known as intentional infliction of emotional distress. This claim should be dismissed because emotional distress damages are available under Salyer’s common law defamation claim raised in his initial Complaint and reasserted in the First Amended Complaint.

2. Under Kentucky law, the tort of outrage is considered to be a “gap-filler,” As such, where the alleged conduct:

amounts to the commission of one of the traditional torts . . . for which recovery of emotional distress is allowed, and the conduct was not intended only to cause extreme emotional distress in the victim, the tort of outrage will not lie. Recovery for emotional distress in those instances must be had under the appropriate traditional common law action.

Banks v. Fritsch, 39 S.W.3d 474, 481 (Ky. App. 2001); *see also Grace v. Armstrong Coal Co.*, Case No. 4:08-cv-109-JHM, 2009 WL 366239, at *3 (W.D. Ky. Feb. 13, 2009) (attached hereto as Exhibit A in compliance with LR 7.1(h)); *Cissell v. KFC Corp.*, No. 2006-CA-001596-MR, 2007 WL 3227571, at *2 (Ky. App. Nov. 2, 2007) (attached hereto as Exhibit B in compliance with LR 7.1(h)); *Carter v. Porter*, Civil Action No. 08-246-JBC, 2008 WL 4911142, at *5 (E.D. Ky. Nov. 12, 2008) (attached hereto as Exhibit C in compliance with LR 7.1(h)); *Burgess v. Paducah Transit Auth.*, Case No. 5:03VC-166-R, 2005 WL 1221821, at *11 (W.D. Ky. May 23, 2005) (attached hereto as Exhibit D in compliance with LR 7.1(h)); *Rigazio v. Archdiocese of Louisville*, 853 S.W.2d 295, 298-99 (Ky. App. 1993).

3. In the instant case, the conduct alleged as the basis of the outrage claim is the same conduct alleged as the basis for Salyer's defamation claim – a claim for which emotional distress damages are recoverable under long-standing Kentucky law. *See Louisville Press Co. v. Tennyly*, 49 S.W. 15, 17 (Ky. 1899) (holding that the mental suffering of the plaintiff constitutes an element of damage in a libel or slander action); *Compton v. Wilkins*, 176 S.W. 36, 38 (Ky. 1915) (holding that damages for mental distress and humiliation are recoverable in action for slander); *Cissell*, 2007 WL 3227571 at *2 (“Because the damages for Cissell’s claimed emotional distress were part of the recovery available to him under his claims of false imprisonment, slander, libel, and negligence, we find that the trial court properly held that he could not maintain an additional claim for the same damages under the tort of outrage.”); *Grace*, 2009 WL 366239 at *4 (stating that because emotional distress damages are available for the tort

of defamation, Grace's intentional infliction of emotional distress claim is inappropriate unless he has alleged that Armstrong took the alleged actions only to cause him extreme emotional distress).

4. Thus, given that emotional distress damages are available as an element of damages in a defamation claim, this Court, and Kentucky state courts, have granted motions to dismiss outrage claims brought in conjunction with defamation claims for failure to state a claim. *See Grace*, 2009 WL 366239 at *4 (dismissing on 12(b)(6) grounds an intentional infliction of emotional distress claim asserted alongside defamation claim); *Cissell*, 2007 WL 3227571 at *2 (upholding grant of defendant's motion to dismiss outrage claim because emotional distress damages were provided for under other claims including libel and slander); *Carter*, 2008 WL 4911142 at *5 (granting 12(b)(6) motion to dismiss outrage claim on grounds that emotional distress damages were available under traditional tort of malicious prosecution).

5. Salyer's outrage claim should likewise be dismissed pursuant to Rule 12(b)(6). He has made a claim for defamation for which emotional distress damages are available. As such, a claim for outrage will not lie unless the actions were taken only to cause Salyer extreme emotional distress. Salyer makes no such allegations in the Amended Complaint nor can he. The Amended Complaint merely restates the defamation allegations of his original Complaint for which he already claims emotional distress damages. (Compl. ¶ 7(b)). Thus, the emotional distress for which Salyer seeks damages in his outrage claim is incidental to the alleged defamation and clearly not inflicted only to cause Salyer emotional distress. *See Higgason v. Nazareth Health, Inc.*, No. 2003-CA-000529-MR, 2004 WL 1909363 (Ky. App. 2004) (dismissing plaintiff's outrage claim where emotional distress damages sought were incidental to wrongful discharge claim) (attached hereto as Exhibit E in complaint with L.R.7.1(h)); *Risazio*,

853 S.W.2d at 298-9 (dismissing claim of outrage where emotional distress was incident to the alleged assault and battery).

6. Given Kentucky's clear law that libel and outrage claims cannot co-exist absent a sole intent of causing extreme emotional distress, SPLC's Motion to Dismiss Plaintiff's claim of outrage set forth in the First Amended Complaint should be granted.

s/ Kimberly Bessiere Martin

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CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants:

NONE

s/ Kimberly Bessiere Martin

OF COUNSEL