10/15/2012

To: Special Committee on Elections

From: Mike Heim, Senior Assistant Revisor

Re: Defamation, Public officials and related issues.

The First Amendment to the United States Constitution provides in part:

"Congress shall make no law...abridging the freedom of speech, or of the press...."

Several types of tort claims seek to impose civil liability for speech. For example, the tort of defamation (libel and slander) imposes liability for speech injurious to reputation; the tort of false light imposes liability for speech that creates a false impression about a person; and, the tort of intentional infliction of emotional distress imposes liability for speech causing the distress.

The United States Supreme Court, in a number of decisions, has established significant limits on the ability of public officials and in some cases private persons to impose tort liability on persons because of their speech.

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) is one of the most important First Amendment cases in the history of this country. The case involved a city commissioner in Montgomery, Alabama, who was in charge of the police department. He sued the New York Times which published an advertisement paid for by individuals upset with the police handling of civil rights protests in that city. The ad did not mention Sullivan, but did contain a number of inaccurate statements. A jury awarded Sullivan $500,000 in a libel action and the Alabama Supreme Court upheld the award. The United States Supreme Court reversed the decision and expounded significant constitutional limitations on tort liability involving speech and public officials.

Under New York Times, there are four requirements for liability to attach:

1. The plaintiff must be a public official or running for public office;
2. The plaintiff must prove his or her case by clear and convincing evidence;
3. The plaintiff must prove the speech was false; and
4. The plaintiff must prove actual malice that the person knew the statement was false or acted with reckless disregard for the truth.

See Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971) where the court applied the New York Times requirements to a plaintiff who was a candidate for public office.

As noted above, the plaintiff has the burden to show the statements by the defendant are false. There is an added difficulty here in regard to the distinction between fact and opinion. A statement in Gertz v. Welch, 418 U.S. 323 (1974) is revealing:

> "...under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas. But there is no constitutional value in false statement of fact....
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> Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate....And punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press."

What constitutes "actual malice" was dealt with in the case of St. Amant v. Thompson, 390 U.S. 727 (1968). The case involved a candidate for public office who made highly critical statements about the conduct of a deputy sheriff. The court overturned a defamation liability award for the deputy sheriff. The court said that actual malice could not be proven by showing the candidate failed to verify the accuracy of facts or even conduct any type of investigation. Actual malice required the person have a "subjective awareness" of probable falsity. In other words, it must be shown that the defendant had serious doubts about the accuracy of the statements but made them anyway.

The court has held that intentional fabrication of quotations, attributable to a person, is not enough, by itself, if the statements are substantially true. See Masson v. New Yorker, 501 U.S. 496 (1991).

A damage award for intentional infliction of emotional distress was overturned by the United States Supreme Court in Hustler Magazine Inc. v. Falwell, 485 U.S. 46 (1988). The November, 1983, issue of Hustler Magazine featured a clearly marked parody of Jerry Falwell, a nationally known minister and commentator on politics and public affairs. The parody included a picture of Falwell and his name and contained a description of his "first time" experience during a drunken incestuous rendezvous with his mother in an outhouse. The opinion, written by Chief Justice Rehnquist, framed the issue as whether a public figure may recover damages for emotional harm caused by the publication of a parody "offensive to Falwell, and doubtless gross and repugnant in the eyes of most." The court held against Falwell, stating:

> "...[I]t is quite understandable that most, if not all, jurisdictions have chosen to make it civilly culpable where the conduct in question is sufficiently "outrageous." But in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment....
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> Thus, while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the

First Amendment prohibits such a result in the area of public debate about public figures.

Were we to hold otherwise, there can be little doubt that political cartoonists and satirists would be subjected to damages awards without any showing that their work falsely defamed its subject....

Despite their sometimes caustic nature, from the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate....

From the viewpoint of history, it is clear that our political discourse would have been considerably poorer without them."

A more recent case, Snyder v. Phelps, 131 S. Ct 1207 (2011), dealt with intentional infliction of emotional distress. A jury held members of the Westboro Baptist Church liable for millions of dollars in damages for picketing near a soldier's funeral service.

In an opinion authored by Chief Justice Roberts, the court held that the messages on the Westboro's signs were matters of public concern and the picketing was done at a public place therefore "such speech cannot be restricted simply because it is upsetting or arouses contempt..."

The court stated:

"The jury here was instructed that it could hold Westboro liable for intentional infliction of emotional distress based on a finding that Westboro's picketing was "outrageous." "Outrageousness," however, is a highly malleable standard with "an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." *Hustler*, 485 U.S., at 55 (internal quotation marks omitted). In a case such as this, a jury is "unlikely to be neutral with respect to the content of [the] speech," posting "a real danger of becoming an instrument for the suppression of...'vehement, caustic, and sometimes unpleasan[t]'" expression. *Bose Corp.*, 466 U.S., at 510 (quoting *New York Times*, 376 U.S., at 270). Such a risk is unacceptable....

What Westboro said, in the whole context of how and where it chose to say it, is entitled to "special protection" under the First Amendment, and that protection cannot be overcome by a jury finding that the picketing was outrageous...."

The final case discussed is Hein v. Lacy, 228 Kan. 249 (1980), where the right of a public official to recover from a non-media defendant for defamation was measured by the New York Times actual malice standard. The court held that statements in a brochure distributed six days before the 1978 August primary election were substantially true. The brochure was distributed by the chairman of the American Party. Then State Senator Ron Hein was running for the Republican nomination for the Second Congressional District. The brochure stated Senator Hein had voted to decriminalize marijuana and to legalize homosexuality.

Other sources:

1. Professor Richard Levy, University of Kansas School of Law, who teaches constitutional law.
2. Constitutional Law: Principles and Policies by Professor Erwin Chemerinsky, 4th Ed. (Aspen Student Treatise Series) (2011).