DEFAMATION CASES AFFECTING HIGHER EDUCATION:
THE INSTITUTION AS A DEFENDANT

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DEFAMATION

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Public and private universities regularly find themselves defendants in defamation actions that arise from a variety of circumstances. Professors and other university employees sue over statements contained in evaluations or notices of termination. A local government official sues over a statement in the student newspaper. An eccentric theoretician sues over a spoof publication authored by a university professor, criticizing the theoretician. An alumni sues over the inclusion in a directory of the false statement, "I have come to terms with my homosexuality and the reality of AIDS in my life." Although the university context may be ripe for defamation actions, the law applicable to universities does not differ materially from the law applied to newspaper publishers, other employers and everyday citizens. This outline first provides general information on the defamation tort. The outline then includes brief descriptions of a variety of cases involving colleges and universities.

Because the law of defamation often varies from jurisdiction to jurisdiction, the outline relies primarily on the Restatement (Second) of Torts as authority for the general legal principles discussed. In addition, many constitutional requirements apply whatever the jurisdiction. Legal research under the laws of the applicable jurisdiction, however, will be necessary to resolve specific defamation problems.
GENERAL PRINCIPLES

I. Elements: Defamation is a creature of state common law, despite the existence of First Amendment constitutional restrictions. Although specific elements may vary among jurisdictions, the tort generally contains the following elements:

A. A statement of fact;
B. That is false;
C. And defamatory;
D. That is published to a third party (other than the plaintiff and defendant);
E. Not absolutely or conditionally privileged;
F. That causes actual injury (sometimes presumed by the nature of the publication depending on the plaintiff and the subject matter of the action);
G. Or causes special pecuniary harm in addition to generalized reputational injury.

Restatement (Second) of Torts § 588 (1977).

II. Defamatory Meaning: A statement is defamatory if it "tends to subject one to hatred, distrust, ridicule, contempt or disgrace." Keller v. Miami Herald Publishing Company, 783 F.2d 205 (11th Cir. 1986).

A. Question of Law or Fact: The trial judge determines whether the words are reasonably capable of defamatory meaning. If the court finds the words potentially defamatory, the jury determines whether they were in

**B.** In a jurisdiction that applies the Illinois innocent construction rule, the judge must first determine if the statement is reasonably capable of an innocent construction. If it is, the statement is not actionable. On the other hand, if the judge determines that no innocent construction of the statement is reasonable, then the jury must decide whether the statement was, in fact, understood as a defamatory reference to the plaintiff. See Smolla, *Law of Defamation* §4.08.

**C.** The alleged defamation must affect the plaintiff's reputation among a fairly significant group of people. In other words, it is not enough that the communication would tend to prejudice the plaintiff in the eyes of a single individual or a small group of the relevant community.

**D.** *Per se* and *Per quod:* Under early common law, a statement was considered slander *per se* and, therefore, capable of providing presumed damages if it accused one of criminal behavior, having a loathsome disease or conducting business in a dishonest fashion, or if it accused a woman of unchastity. The common law distinctions between libel and slander have generally been abolished. The various states,
however, apply a myriad of rules in determining whether a slander or a libel is per se. Some simply determine whether the statement is defamatory on its face. Others use the slander per se categories. The law of the particular jurisdiction must be researched to determine whether presumed damages will be permitted. See Smolla Law of Defamation, Ch. 7.

1. Private Person/Public Concern: Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), held that presumed damages were unavailable in a libel per se case involving a matter of public concern without a showing of Actual Malice, otherwise known as Constitutional Malice or Sullivan Malice. These malice concepts are discussed below.

2. Private Person/Private Concern: In Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985), a plurality held that presumed damages were available without a showing of Actual Malice if the plaintiff was a private person and the publication did not involve a matter of public concern.

III. Of and Concerning Requirement: To be actionable, the defamatory statement must be "of and concerning" the plaintiff. See Rosenblatt v. Baer, 383 U.S. 75, 82 (1966). The statement need not specifically name the
plaintiff, but the plaintiff must then prove that the
defamatory statement reasonably refers to him.

IV. **Publication:** Publication, as a result of an
intentional or negligent act, to a third party is an
essential element of the tort. Restatement (Second) of
Torts §577 (1977). "Publication" does not occur if the
statement is heard only by plaintiff.

V. **Opinion:** Another element of a defamation claim is that
the statement must be a false statement of fact.
Statements of pure opinion are not actionable. There is
no such thing as a false idea. Gertz, 418 U.S. at 339.
Once Gertz was read as providing blanket protection for
statements of pure opinion. The United States Supreme
Court in Milkovich v. Lorain Journal Co., 497 U.S. 1
(1990), however, severely limited the Opinion Defense.
Now if statements are capable of verification such as
"Harry is a liar," they are not protected by the
privilege.

A. Fair Comment: At common law, comment or opinion was
protected if it was based on true facts which fully
and fairly justified the comment or opinion. Gertz
made this determination unnecessary. Milkovich
breathes new life into the common law defense of fair
comment.

B. Mixed Facts and Opinions: Statements of mixed fact
and opinion are actionable. A statement is pure
opinion when the facts upon which the speaker relies are presented along with the commentary, and the facts are accurately reported. A statement constitutes one of mixed fact and opinion when the statement implies an allegation of undisclosed defamatory facts. Restatement (Second) of Torts §566, comment c (1977).


C. Opinion determination is almost universally a matter of law for the court to decide. See Ollman, 750 F.2d at 978.

VI. Truth/Falsity:

A. Truth as an Affirmative Defense: Falsity was presumed at common law if the slander was per se. The burden was on the defendant to prove the statement was true.

B. Public Officials/Public Figure: Since Sullivan, the burden has shifted to the Public Official/Figure plaintiff to prove falsity. A "public official is allowed the civil remedy only if he established that the utterance was false." Garrison v. Louisiana, 379 U.S. 64, 74 (1964).
C. Private Individual: *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), established that a private individual must also prove falsity of the published material when the publication at issue is of public concern. The court left open the issue of whether this requirement applies with non-media defendants.

D. Substantial Truth Defense: Generally, if the article, with the defamatory material removed, would have the same effect on the reader as that of the article taken as a whole, the article is not libelous. *Smolla, Law of Defamation* §5.08-5.11.

E. Warning-Libel by Inference: Some courts use language that indicates that, even in the absence of a false statement of fact, there may be liability if a defamatory inference is derived from a factually accurate news report. *Southern Air Transport v. ABC*, 877 F.2d 1010 (D.C. Cir. 1989).

VII. **Standard of Fault:** The standard of fault depends on whether a plaintiff is a public figure, public official or private individual and whether the subject matter is of public concern.

A. *Sullivan/Public Officials:* When the statement relates to the conduct of a public official, the plaintiff must prove Actual Malice; i.e., actual knowledge of falsity or reckless disregard of the truth.

1. The determination of who is a public figure is extremely complex. There are four categories of public figures:
   a. pervasive public figures;
   b. vortex or limited purpose public figures;
   c. public personalities; and
   d. involuntary public figures.

2. Various courts have found authors of best-selling books, political activists, stockholders of a private school, and attorneys who voluntarily inject themselves into public events to be public figures.

C. Private Individuals: *Gertz* delegated to the States the responsibility of determining "the appropriate standard of liability" for private figure plaintiffs. There can be no liability without some finding of fault.


2. Gertz requires a showing of Actual Malice before damages can be presumed from the publication itself and before punitive damages can be imposed.

VIII. **Actual Malice Defined:** Sullivan defined Actual Malice as "knowledge that it [the statement] was false or with reckless disregard of whether it was false or not." Gertz held that Actual Malice must be shown with convincing clarity — clear and convincing evidence.

A. *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968), required a subjective, good faith belief that the statements were true. To be liable, the defendant must entertain serious doubts, but publish anyway.

B. *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657 (1989), allowed Actual Malice to be inferred when
there is a high degree of awareness of probable falsity prior to publication.

1. Failure to investigate, even when a reasonably prudent person would have done so, is not sufficient to prove reckless disregard.

2. The purposeful avoidance of the truth does constitute Actual Malice after Harte-Hanks.

3. However, the public figure must prove more than an extreme departure from professional standards.

IX. Privileges: Certain statements are privileged and protected by the common law. There are absolute and qualified privileges. Absolute privileges cannot be overcome. Qualified privileges can be overcome, generally by the showing of Common Law or Express Malice or overpublication. Most jurisdictions recognize some form of the following privileges.

A. Absolute Privileges:

1. Consent by the plaintiff to publication of the defamatory statement.

2. Relevant statements in pleadings and during judicial proceedings themselves.

3. Quasi-Judicial Proceedings, such as workers compensation hearings.

4. Statements made by executive branch or federal officials in the course of their official duties.
5. Statements made during legislative proceedings, including testimony.


B. Qualified Privileges:

1. Statements made in prelitigation settlement efforts.

2. Irrelevant statements or writings in judicial, legislative or executive proceedings.

3. Fair and accurate reports of court proceedings, government records and other official actions of public interest.

4. Matters in which author and audience share a common right, duty or interest. [This privilege often protects the employer in the employment defamation context.]

5. Fair comment on news of public interest or concern and statements directed to a government agency concerning a public issue.


7. Burden of Proof: If the defendant asserts a privilege as an affirmative defense, the plaintiff normally bears the burden of showing Express Malice.

X. **Damages:** There are three types of damages that a defamation plaintiff can receive: actual damages, presumed damages, and punitive damages.
A. Actual Damages: These are the compensatory damages for injury to reputation, mental suffering and pecuniary loss. Gertz does not require the showing of specific actual damages. Proof of actual damage is satisfied by proof of "mental anguish and personal humiliation."

B. Presumed Damages: Damages can be presumed for statements that are libelous or slanderous per se if the plaintiff shows Actual Malice.

C. Punitive Damages: Most courts allow punitive damages if Express and Actual Malice are shown. Remittitur is normally available if the award shocks the consciousness of the Court.

VARIOUS INTERESTING CASES AFFECTING UNIVERSITIES

1. Baker v. Lafayette College, 504 A.2d 247 (Penn. Super. Ct. 1986), aff'd, 532 A.2d 399 (Pa. 1987). Professor Melvin Baker sued Lafayette College for defamation and breach of contract after the college refused to renew his two-year contract. The case was largely based on various documents evaluating the professor's performance. Interestingly, the court dismissed the action to the extent it was based on formal evaluations, finding the professor had consented. In support of his breach of contract claim, the professor argued that the Faculty Handbook was part of his employment contract. The Faculty Handbook established
an evaluation process, which the court deemed part of his contract. Consequently, the court held that Professor Baker consented to a publication of the evaluations, whether favorable or not. Consent constituted an absolute defense.

2. *Ford v. Rowland*, 562 So.2d 731 (Fla. 5th DCA 1990), rev. denied, 574 So.2d 141, 142, 143 (1990). Although *Ford* did not involve a university, it illustrates the sovereign immunity defense that might insulate a public university from defamation liability. In *Ford*, a Port Authority Commissioner sued for defamation, among other things, based upon a poem written by a former Deputy Director of the Port Authority. The plaintiff commissioner was a public official/figure required to prove actual malice. Under Florida’s sovereign immunity statute, the Port Authority was not liable if its agent, the deputy director, acted in bad faith. Consequently, if the plaintiff ultimately established actual malice, she necessarily established that the deputy director acted in bad faith. The court, recognizing that the plaintiff could not establish liability without simultaneously establishing the tort immunity of the Port, dismissed her claim.
3. *Dilworth v. Dudley, et al.*, Case No. 95-C-072-S (W.D. Wis. April 27, 1995) (Shabaz, J.) (attached). The *Dilworth* case involved a book entitled *Mathematical Cranks*, which was published by the Mathematical Association of America. In it Defendant Dunwoody, a professor at DePauw University, identified the plaintiff as a "crank." DePauw's president was also named as a defendant. In dismissing the complaint, the court deemed the term "crank" rhetorical hyperbole - not a statement of fact capable of a defamatory meaning. Quoting *Underwager v. Salter*, 22 F.3d 720, 736 (7th Cir. 1994), the court stated, "[s]cientific controversies must be settled by methods of science rather than by the methods of litigation."

4. *McConnell v. Howard University*, 818 F.2d 58 (D.C. Cir. 1987). Some jurisdictions, including the District of Columbia Circuit, recognize a qualified privilege for universities from liability for alleged defamatory statements. To overcome that privilege, a plaintiff must show express malice. In *McConnell*, the court affirmed summary judgment in Howard University's favor on a defamation claim because the plaintiff professor failed to show any malice. The action arose out of dispute over the university's refusal to remove from

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1 This matter is currently on appeal to the Seventh Circuit Court of Appeals. No decision, however, had been rendered at the time this outline was prepared.

14
the professor's classroom a student who called him a "condescending, patronizing racist."

5. Wilson v. UT Health Center, et al., 973 F.2d 1263 (5th Cir. 1992), cert. denied, 113 S.Ct. 1644 (1993). In Wilson, the Fifth Circuit reversed the trial court summary judgment on the plaintiff campus police officer's defamation claim. The court found that the officer had offered sufficient evidence of Express Malice to present a jury question on whether the university's privilege to discuss an employee's discharge had been overcome. But see Garvey v Dickinson, 763 F.Supp. 796 (M.D. Pa. 1991) (granting summary judgment against plaintiff professor of drama because statement in letter of reference was conditionally privilege and malice could not be established because dean made remark about "hostile junior colleague" as obliquely as possible).
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WILLIAM DILWORTH,
Plaintiff,
v.
UNDERWOOD DUDLEY, ROBERT G. BOTTOMS and DONALD J. ALBERS,
Defendants.

MEMORANDUM AND ORDER

Plaintiff William Dilworth commenced this civil action claiming that the defendants have defamed him and interfered with his right to participate in science. He alleges that in 1992 the defendant Underwood Dudley asserted in the book Mathematical Cranks that plaintiff is a "crank".

On March 15, 1995 defendant Donald J. Albers, the Director of Publications and Assistant Executive Director of the Mathematical Association of America, moved to dismiss plaintiff's complaint for failure to state a claim for relief. This motion to dismiss has been fully briefed and is ready for decision. On April 25, 1995 defendants Underwood Dudley and Robert G. Bottoms joined the motion to dismiss.

A complaint should be dismissed for failure to state a claim only if it appears beyond a reasonable doubt that the plaintiffs

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can prove no set of facts in support of the claim which would entitle the plaintiffs to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In order to survive a challenge under Rule 12(b)(6) a complaint "must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984).

FACTS

For purposes of deciding defendants' motion to dismiss the allegations of plaintiff's complaint are taken as true.

Plaintiff William Dilworth is an adult resident of Beloit, Wisconsin. Defendant Underwood Dudley is a professor of Mathematics at DePauw University, Greencastle, Indiana and defendant Robert G. Bottoms is the President of the University. Defendant Donald J. Albers is employed as Director of Publications and Assistant Executive Director of the Mathematical Association of America (MAA), Washington, D.C.

In 1992 the MAA published the book *Mathematical Cranks*. In this book at page 45 defendant Underwood Dudley identified plaintiff as a crank. Defendant Bottoms paid defendant Dudley's salary as a university professor during this time. Defendant Albers abused the privileges of the MAA to print, publish, advertise and sell the book. In mid-1994 plaintiff learned that he had been identified as a "crank" in said book.
MEMORANDUM

Defendants move to dismiss plaintiff's constitutional claim for failure to state a claim for relief under federal law. To prevail on a claim that his constitutional rights were violated pursuant to 42 U.S.C. § 1983 plaintiff must allege that the defendants were acting under color of state law and deprived him of a constitutional right. *N.A.A.C.P. v. Hunt*, 891 F. 2d 1555, 1562 (11th Cir. 1990). Plaintiff has not made either necessary allegation and defendants' motion to dismiss plaintiff's constitutional claim will be granted.

Defendants move to dismiss plaintiff's complaint based on the Wisconsin two year statute of limitations. §893.57 (1993). The book *Mathematical Cranks* was published in 1992. Plaintiff, however, alleges that he was not aware of the alleged defamation until the middle of 1994. The cause of action accrues when the defendants' conduct is discovered or with reasonable diligence could have been discovered. *Hansen v. A.H. Robins, Inc.*, 113 Wis.2d 550, 335 N.W.2d 578 (1983). The Court finds that since plaintiff discovered the alleged defamation in the middle of 1994 his claim is not barred by the two year statute of limitations.

Defendants move to dismiss plaintiff's defamation claim. To state a defamation claim plaintiff must set forth a false statement that is capable of a defamatory meaning. *Prinzi v. Hanson*, 30 Wis. 2d 271, 276 140 N.W.2d 259 (1966). Whether a challenged statement is capable of defamatory meaning is a question of law for the trial

The only defamatory statement which plaintiff alleges in his complaint concerns Dudley's conclusion that plaintiff is a "crank." "Crank" does not constitute a statement of fact which is capable of defamatory meaning. It is no more than a rhetorical hyperbole and cannot be construed as a representation or misrepresentation of fact. "[E]ven the most careless reader must have perceived that the word (crank) was no more than rhetorical hyperbole, a vigorous epithet used by those who considered" plaintiff's position unreasonable. *National Association of Letter Carriers v. Austin*, 418 U.S. 254, 284-286 (1974). Accordingly, as a matter of law plaintiff has not stated a defamation claim. "Scientific controversies must be settled by methods of science rather than by the methods of litigation." *Underwager v. Saltor*, 22 F.3d 720, 736 (7th Cir. 1994).

Defendants' motion to dismiss plaintiff's constitutional and defamation claims will be granted.

ORDER

IT IS ORDERED that the defendants' motion to dismiss plaintiff's complaint is GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of the defendants and against plaintiff DISMISSING his complaint and all claims contained therein with prejudice and costs.

Entered this 27th day of April, 1995.

BY THE COURT:

[Signature]

JOHN C. SHABAZ
District Judge