Second Circuit Affirms Dismissal of Defamation Claim by Postdoctoral Researcher

Avoids Deciding Plaintiff's Status – Or Does It?

By Henry R. Kaufman and Michael K. Cantwell

In a recent decision the Second Circuit Court of Appeals affirmed the dismissal of a defamation claim brought by a post-doctoral research associate against the senior scientist heading the laboratory in which she worked. *Chandok v. Klessig*, 2011 WL 108729, --- F.3d --- (09-4120-cv(L), 2d Cir. Jan. 13, 2011). The Court also affirmed the dismissal of the defendant's counterclaim alleging that the plaintiff's suit violated New York's statute against Strategic Lawsuits Against Public Participation ("SLAPP"), see N.Y. Civ. Rights Law §§ 70-a, 76-a.

The undisputed facts, as recited by the court and set forth in part below, were so uniformly unfavorable to the plaintiff that it is surprising she chose to give them a wider airing by making them the subject of a defamation claim.

In 2000, plaintiff Meena Chandok was hired as a postdoctoral research associate at Boyce Thompson Institute for Plant Research ("BTI"), an affiliate of Cornell University. She was assigned to work in a laboratory headed by defendant Daniel Klessig on a project whose goal it was to find and purify a nitric oxide synthase ("NOS"), that is, an enzyme that catalyses the production of nitric oxide. In October 2002, she reported to Klessig that she had identified the protein (dubbed "variant P" or "varP") and had used it to create a recombitant protein that possessed NOS activity.

Her results were widely publicized in the plant-biology community and reported in articles co-authored with Klessig and others that were published in two prestigious scientific journals (*Cell* in May 2003 and *Proceedings of the National Academy of Sciences* in May 2004). Her success in isolating NOS was also instrumental in the laboratory obtaining a $1 million grant from the National Institutes of Health to fund further NOS research (after two prior applications submitted by Klessig had been rejected).

Chandok's personal relationship with Klessig had deteriorated due to what she claimed was his demeaning behavior toward her. In March 2004, she resigned from the laboratory and took a job in another state. After she left, scientists in Klessig's laboratory were unable to replicate her results.

Klessig called Chandok on several occasions over the following months and asked her to return to assist the lab in replicating her research results, with Chandok declining each invitation. Subsequently BTI's human resources director sent Chandok an email request acknowledging the tension with Klessig but noting the importance of being able to reproduce results. Chandok agreed but explained that she would be unable to return, at least in the near term: "my current commitments are keeping me extremely busy. However, if the situation changes at a future point in time, I shall contact you."

Eight days later, Klessig contacted Chandok by email and registered mail, explaining that while he continued to believe that she had isolated the NOS as claimed, it was essential that others be able to reproduce the results. He offered to pay for Chandok's return and give her "strong recommendations for future job applications" in exchange for her assistance. He added that if she refused he would have "little choice but to assume your results are unverifiable." In such event, he stated he would (1) retract both the *Cell* and *PNAS* papers, (2) contact the Immigration and Nationalization Service and retract his letter of support for her permanent residency application, and (3) notify the president of BTI as well as the government agencies that had funded her work.

Chandok's response came in the form of a letter from her attorney stating that she stood by her research and would welcome any "legitimate third party inquiry" but would not "work with or for Klessig." She claimed that he was harassing her and stated that she would sue for defamation if he made the disclosures threatened in his letter to her.

After several further months of attempting – and failing – to reproduce Chandok's results, Klessig raised the issue of possible scientific misconduct with BTI's president, who appointed an investigative committee. The committee considered (1) the inability of Klessig's team to reproduce

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Chandok's results, (2) subsequent successful efforts to do so by Abgent, a laboratory hired by Chandok that used reagents she had supplied, and (3) the inability of Klessig's team to reproduce Abgent's results. The committee reported that the evidence was inconclusive, finding "no conclusive evidence of data alteration or fabrication, but also no conclusive evidence that Dr. Chandok achieved the results reported." It noted that the verification by Abgent was not independent because Chandok had supplied the reagents and it found "several egregious breaches of commonly accepted scientific practice by Dr. Chandok," including "failures to maintain records and to archive research results." It concluded that, on balance, the evidence did constitute "ground for good faith suspicion of scientific misconduct."

While the investigation was underway, Klessig requested that *Cell* and *PNAS* withdraw the papers and announced the pending retractions at a scientific conference. He also sent emails to fellow scientists involved in NOS research who had made contributions to Klessig's research. An article in *Science* magazine reported the retractions and quoted Klessig as characterizing the data reported in the articles as "shaky" and adding that it was important "the rest of the scientific community not base their research on this unreliable data that we are no longer confident in."

Klessig also sent letters advising government officials at the NIH and NSF of the inability to reproduce Chandok's results. The letters stated that the evidence "strongly suggests she falsified" some of her data.

In her suit, Chandok ultimately identified 23 separate statements that she claimed were false, defamatory and made with "actual and common law malice." Klessig asserted a counterclaim seeking damages under the anti-SLAPP statute, N.Y. Civ. Rights Law § 70-a et seq. Following discovery, he moved for summary judgment on the ground that some statements constituted constitutionally protected opinion, others could not be shown to have been made with actual malice, others were not actionable because published only to coauthors, and the remainder were either absolutely or qualifiedly privileged.

Finding that Chandok was a limited purpose public figure and that she could not prove falsity or malice by the requisite clear and convincing evidence, the district court dismissed the complaint. It also dismissed Klessig's counterclaim on the ground that Chandok was not a "public applicant" within the meaning of the statute.

Dismissal of Plaintiff's Claims

The Second Circuit affirmed both dismissals, although it dismissed the defamation claim on different grounds, declaring that it was unnecessary "to reach the questions of whether Chandok was a limited-issue public figure or whether Klessig's statements concerned a matter of public interest" because all the communications were qualifiedly privileged under New York state common law. (In light of the holding in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), that the mere receipt of a federal research grant does not render a plaintiff a limited purpose public figure, defendant's brief wisely advised the appellate court that it was free to affirm on any ground appearing in the record and offered up numerous alternative grounds, including the ones ultimately selected by the Court.)

The Court found that all the allegedly defamatory statements fell within either of two common law privileges: (1) the qualified privilege for communications on a matter as to which Klessig had a duty to speak and/or (2) communications to persons with whom he had a common interest in the subject matter.

With respect to the first, the Court held that Klessig had a legal and/or moral obligation to inform the agencies that had funded the research of his suspicion of Chandok's scientific misconduct. Similarly he had a moral duty to share his concerns about Chandok's reported results with BTI's administration, the coauthors on the *Cell* and *PNAS* papers and the editors of both journals. In addition, the statements to his institution and coauthors fell within the privilege for statements on a matter of common interest, as did his emails to various fellow scientists who shared his interest in NOS research.

Under New York law, these common law privileges may be overcome upon a showing of either constitutional or common law malice and in the latter case only if such malice was "the one and only cause for the publication." *Id*. at 12 (*citing Liberman v. Gelstein*, 80 N.Y.2d 429, 438, 590 N.Y.S.2d 857, 863 (1992)). Reviewing the evidence, the court held that Chandok had not introduced sufficient evidence to overcome either of the qualified privileges.

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First there was no evidence that could lead a rational juror to conclude that Klessig knew the allegedly defamatory statements to be false or that he had acted in reckless disregard for the truth, in light of the failed efforts of a team of scientists to reproduce Chandok's results as well as the findings of the committee that investigated the charges of scientific misconduct. There was also no evidence that could lead a rational juror to conclude that Klessig was motivated solely by spite or ill will, in light of the importance of NOS research, the need for independently verifying Chandok's results and the reputational interests of the various institutions and scientists that had collaborated in the unverifiable results.

By relying on the common law privileges, the Second Circuit maintained that it had avoided the necessity of deciding "whether Chandok was a limited-issue public figure or whether Klessig's statements concerned a matter of public interest." Arguably, however, such a decision was implicit in the Second Circuit's determination that only a preponderance of the evidence was needed to overcome the qualified privileges:

> Unlike situations in which the actual malice' standard is constitutionally imposed and must therefore be proved by 'clear and convincing' evidence, ... to defeat qualified privilege in New York, the plaintiff need only establish 'actual malice' by a preponderance of the evidence." (*quoting Albert v. Loksen,* Albert v. Loksen, 239 F.3d 256, 273 (2d Cir.2001) .

The Second Circuit reached this conclusion despite the fact that *Liberman* is silent on the quantum of proof needed to overcome these qualified privileges, nor, to our knowledge, has the New York Court of Appeals addressed the issue. Certainly, the *Chandok* court did not rely on New York State case law to resolve the question, citing instead only its own prior decision, *Albert*, which in turn cited a 1993 decision, *Weldy v. Piedmont Airlines*, *Inc*., 985 F.2d 57 (2d Cir.1993), that attempted to predict how the New York Court of Appeals might ultimately rule.

The rub, however, is that both *Albert* and *Weldy* involved *private* figure plaintiffs and matters of *private* concern. Indeed, the plaintiff's status was critical to the decision in *Weldy*, which reasoned that the New York Court of Appeals would hardly choose to apply a more exacting standard of proof in a private-private case than the preponderance of the evidence standard applicable to a case involving a private figure plaintiff but a matter of public concern. *Weldy*, 985 F.2d at 65 ("we cannot imagine that New York would afford greater protection to private person/private matter statements, where first-amendment considerations are not implicated at all, than it did to the private person/public matter statements in *Chapadeau*, where there was, at least, some public interest involved").

Thus, in relying on *Albert* to apply a preponderance standard in this case, the Second Circuit must have either implicitly assumed that Chandok was a private figure or concluded, without any analysis, that the preponderance standard should apply to public figures as well when the actual malice is considered in the context of a qualified common law privilege. In any event, the questions that can be raised about the panel's adoption of the "preponderance" standard did not affect the outcome of the case since dismissal of the plaintiff's claims could be affirmed even under the lesser standard of proof.

Dismissal of the SLAPP Counterclaim

Having purported – in actuality somewhat questionably, as we have suggested – to have avoided a decision on the substantive constitutional issues presented, the Second Circuit panel then also dodged any hard thinking on the important issue of the reach of the New York anti-SLAPP statute – a statute enacted specifically to prevent and to sanction meritless claims against those who seek to question the activities of "public applicants and permittees." See N.Y. Civ. Rts. Law, §§70-a, 76-a. Relying centrally on a more than fifteen-year-old New York trial level decision (*Harfenes* v. *Sea Gate*), on scope issues that have never been considered by the New York Court of Appeals in the nearly twenty years since the SLAPP statute was enacted, the panel held that the statute was not applicable in the case.

The court reached this conclusion despite the facts that the plaintiff researcher, who had sought and received a $1 million federal grant to support her scientific research, the integrity of which was subject to significant federal and

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administrative regulation whose oversight the defendant was (in part) sued for invoking, was neither an applicant nor a permittee for purposes of the SLAPP statute, and that the defendant, who among other things had advised federal authorities of his concerns over fraud in the performance of the federally funded research, was not one who, under the statute, was "reporting on, commenting on, or challenging", such application or permission.

Already notoriously narrow and underused, in comparison to anti-SLAPP statutes in other jurisdictions (see especially Cal. Code Civ. Proc. §425), and despite the broad and supportive language of the New York Court of Appeals' only comment on the statute (in *Von Gutfeld*), decisions like the one reached by this Second Circuit panel will continue to minimize and marginalize the New York statute on the basis of no real controlling authority. At least in these authors' view, however, serious arguments could be made – in the absence of long-overdue action by the New York Legislature to accommodate the statute's judicially-narrowed reach with its far broader and more protective legislative intent – for a much more expansive judicial construction of the statute.

In particular, we see no reason that the dual application of the statute to governmental applicants as well as permittees, could not validly be construed to reach applicants for governmental funding and grants of all kinds, in which there is a substantial public interest in oversight and public comment, and not only to the narrow real-property type permits and public hearings to which the statute has typically been confined.

One final irony, in the panel's rejection of the SLAPP counterclaim, is that a central remedial section of the N.Y. anti-SLAPP statute, enacted in order to overcome any questions presented by the issue of the SLAPP plaintiff's public or private figure status, provides that in all suits governed by the SLAPP statute, the federal standard of actual malice is to be applied *and* the highest standard of "clear and convincing" proof is to be required. See N.Y. Civ. Rts. Law §76-a(2).

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