Appeal No. 11-cv-368





**DISTRICT OF COLUMBIA**
**COURT OF APPEALS**



STEVEN J. ROSEN,

Plaintiff-Appellant,

v.

AMERICAN ISRAEL PUBLIC
AFFAIRS COMMITTEE, INC., *et al.*,

Defendants-Appellees.

On Appeal from the Superior Court
Of The District of Columbia, Civil
2009 CA 001256 B
**(The Honorable Erik P. Christian, Judge)**

# BRIEF OF APPELLEES

William J. Carter, D.C. Bar No. 329637
Thomas L. McCally, D.C. Bar No. 391937
Allie M. Wright, D.C. Bar No. 499323
CARR MALONEY P.C.
2000 L Street, N.W.
Suite 450
Washington, DC 20036
(202) 310-5500
Email: wjc@carrmaloney.com
tlm@carrmaloney.com
amw@carrmaloney.com
Counsel for Appellees

## LIST OF PARTIES AND COUNSEL

| | |
|---|---|
| Plaintiff-Appellant: | Steven J. Rosen |
| Plaintiff-Appellant's Counsel: | David H. Shapiro, Swick & Shapiro, P.C. (Washington, DC) |
| Defendants: | American Israel Public Affairs Committee, Howard Kohr, Melvin Dow, Bernice Manocherian, Howard E. Friedman, Lawrence Weinberg, Robert Asher, Edward C. Levy, Jr., Lionel Kaplan, Timothy F. Wuliger, Amy Friedkin, Patrick Dorton, and Rational PR, L.C. |
| Defendants-Respondents' Counsel: | William J. Carter, Thomas L. McCally, Allie M. Wright, Carr Maloney P.C. (Washington, DC) |

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## STATEMENT OF THE ISSUES

The Appellant Steven J. Rosen ("Rosen") has set forth his Statement of Issues at page 1 of his Brief. The issues which he has set forth are:

I. Whether the Superior Court erred when it granted summary judgment and thereby dismissed Rosen's defamation cause of action, in view of the record evidence sufficient to establish at least a triable issue of fact on each of the elements of defamation?

II. Whether the Superior Court erred when it held AIPAC's statements (published in the March 3, 2008, *New York Times*) were not defamatory because its negative statements about Rosen's character and professional performance were "not provably false"?

Appellees here, American Israel Public Affairs Committee, Inc. ("AIPAC") and Patrick Dorton ("Dorton") (collectively "the AIPAC Defendants") believe that the Statement of the Issues should be as follows:[1]

> Whether the Superior Court properly granted summary judgment in favor of AIPAC and Dorton, and dismissed the defamation claim brought by Rosen, as there was no dispute as to any material fact, presenting a triable issue on the elements of defamation?

## STATEMENT OF THE CASE

Appellant Rosen filed a lawsuit on March 2, 2009 against 13 defendants alleging "Defamation (Libel and Slander)." (App. 46-66).[2] In response to the Complaint, all defendants filed a motion to dismiss on May 13, 2009. An Opposition was filed as well as a

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[1] Suit was originally brought by Rosen, Appellant here, against AIPAC, Howard Kohr ("Kohr"), Melvin Dow ("Dow"), Bernice Manocherian ("Manocherian"), Howard E. Friedman ("Friedman"), Lawrence Weinberg ("Weinberg"), Robert Asher ("Asher"), Edward C. Levy, Jr. ("Levy"), Lionel Kaplan ("Kaplan"), Timothy F. Wuliger ("Wuliger"), Amy Friedkin ("Friedkin"), Dorton, and Rational PR, L.C. ("Rational"). Rational was dismissed as a party at the initial scheduling conference on June 5, 2009. By Order dated October 30, 2009, the Honorable Jeanette J. Clark, Superior Court Judge, dismissed all remaining parties except AIPAC and Dorton. No appeal has been taken from that dismissal order, and therefore the Appellees before this Court are AIPAC and Dorton.

[2] "App. ____" refers to the Appendix filed in this matter.

reply, and on October 30, 2009, the Superior Court, Judge Jeanette J. Clark, entered an Order granting in part and denying in part the motion to dismiss. In that Order, all claims made by Rosen for defamation were dismissed, as were all defendants, except for one claim which was allowed to proceed against AIPAC and Dorton. (App. 75-90). As noted previously, one defendant had been dismissed at the Initial Scheduling Conference on June 5, 2009. (App. 28-30). The one issue of defamation remaining after the October 30th Order concerned a statement allegedly made by AIPAC which were reproduced in a March 3, 2008 article which appeared in the *New York Times*. (App. 245-248).

Discovery proceeded, and on or about November 5, 2010, AIPAC and Dorton filed a motion for summary judgment with regard to the one remaining claim of defamation by Rosen. An Opposition was filed by Rosen, and a reply was filed by AIPAC and Dorton. No hearing was held on the motion for summary judgment. On February 23, 2011 the Superior Court, Erik P. Christian, Judge, entered an Order holding that there was no actionable defamation, and entered judgment in favor of AIPAC and Dorton. (App. 93-102).

Rosen noted his appeal on March 15, 2011. (App. 1).

## STATEMENT OF THE FACTS

In his Order entered on February 23, 2011, Judge Christian set forth the following pertinent facts:

> This matter involves a defamation claim brought against the American Israel Public Affairs Committee ("AIPAC") by its former Director of Foreign Policy Issues, Steven J. Rosen ("Rosen"). Before he was fired on March 21, 2005, Rosen had worked at AIPAC for almost 23 years. During his tenure as Director of Foreign Policy Issues, part of Rosen's job had been to "maintain relationships with [government] agencies, receive [foreign policy] information, and share it with AIPAC Board of Directors and of Senior Staff for possible further distribution." Compl. ¶ 18. On August 27, 2004, it was publicly disclosed

that the United States Department of Justice ("Justice Department") was investigating Rosen and another AIPAC employee for receiving classified information. As a result, on February 17, 2005, AIPAC placed Rosen on involuntary leave. He was ultimately fired on March 21, 2005.

According to Rosen, his February 17th suspension was AIPAC's response to implicit threats by the Justice Department that AIPAC itself could become the target of the investigation "if AIPAC did not act against [him]." Id. ¶ 22. Subsequently, according to Rosen, AIPAC fired him after federal prosecutors insisted that AIPAC abide by a Justice Department memorandum calling for "the firing of the corporate employees who allegedly engaged in the wrongdoing [and] condemning their actions publicly..." Id. ¶ 23. AIPAC complied with these directives in order to curry favor with Justice Department and avoid prosecution, even though its Board "knew absolutely that Steven Rosen had done nothing wrong, indeed, nothing which they had not known about and authorized." Id. A few months after his termination, on August 4, 2005, Rosen was indicted on espionage charges by a federal grand jury. See, Defs. Mot. Ex. 1.

In the wake of Rosen's termination, beginning in April 2005, AIPAC, through its Board and its spokesman, Defendant Patrick Dorton ("Dorton") made several statements concerning Rosen's termination to the press. On March 2, 2009, Rosen sued AIPAC, its Executive Director, individual Board members, and Dorton for defamation based on these statements.

On October 30, 2009, this Court, per Judge Jeannette Clark, dismissed all but one of Rosen's claims for defamation and dismissed all defendants except AIPAC and Dorton. See, Order Granting in Part and Denying in Part Defs.' Mot. to Dismiss (treating motion to dismiss as motion for summary judgment). The sole issue that remains in this case is whether a statement by Dorton (on behalf of AIPAC) in a March 3, 2008 New York Times article was defamatory. As the Times reported:

> The AIPAC spokesman on the Rosen [and the other employee] matter, Patrick Dorton, said at the time that the two were dismissed because their behavior "did not comport with standards that AIPAC expects of its employees." He said

> recently that AIPAC still held that view of their behavior.
>
> Compl. ¶ 24; Defs. Mot. Ex. 3. For the following reasons, the Court now concludes that this does not constitute actual defamation.[3]

The March 3, 2008 *New York Times* article, referred to in ¶ 24 of the Complaint, which formed the basis for the grant of summary judgment by the court below, and which is at issue here, contained a statement which Dorton originally spoke in 2005. As alleged in the Complaint "Patrick Dorton said at the time that the two men were dismissed because their behavior 'did not comport with standards that AIPAC expects of its employees.'" (App. 247). At deposition, Rosen testified as follows:

> A. This [March 3, 2008] "statement" was a repetition of precisely the same statement that had occurred over a four (4) year period, and it was that stream of statements which were identical to this statement. "[My attorney] did not single out this statement any less or any more than the others."
>
> Q. So it's your testimony that Mr. Dorton's statement in the March 2008 *New York Times* article is merely a repetition of prior statements?
>
> A. It is not only a repetition of prior statements; it's an allusion to the prior statements and their continuing validity.

(App. 226). Dorton was a public relations spokesperson hired by AIPAC's attorney, Nathan Lewin ("Lewin"). (App. 226). On or about March 15, 2005 Lewin, who was AIPAC's counsel, received a limited security clearance to "experience" evidence presented by federal prosecutors pertaining to the criminal matter involving Rosen. As part of the agreement by prosecutors to present that evidence to him, Lewin was prohibited from disclosing exactly what he was exposed to at that meeting. (App. 179). The information which he learned

[3] Footnotes omitted. The court noted in a footnote that the criminal case against Rosen was dismissed on May 1, 2009.

concerned conversations and conduct of Rosen and a co-worker in connection with disclosure of presumably classified information to a *Washington Post* reporter. Lewin concluded after his experience that AIPAC could not condone the activity associated with the conversations, and what he learned in his experience provided a ground to recommend termination of Rosen, an at will employee, with AIPAC. (App. 130-132; 261). Lewin advised AIPAC to terminate Rosen despite having previously been Rosen's main proponent and supporter. In a letter recommending termination, he stated:

> Because I am now satisfied from evidence regarding these conversations that, regardless of whether any criminal law was violated, Messrs. Rosen and Weissman engaged in an activity that AIPAC cannot condone, I must now recommend that AIPAC terminate the employment of Messrs. Rosen and Weissman....[4]

The March 3, 2008 *New York Times* article, as well as other articles detailing the criminal matter, explained in detail that the FBI had made recordings of meetings between Rosen's colleague and Lawrence Franklin, and "conversations in which Mr. Rosen and Mr. Weissman passed on information about the Middle East they had received from [Lawrence Franklin] to Mr. Kessler at the *Washington Post*." (App. 245-248). Lewin and Rosen testified in their respective depositions that it was the recording of Rosen and Weissman's conversation with Mr. Kessler that the prosecutors played for Lewin as part of his "experience." (App. 180-182; 237; 242, 425; 431). In this conversation, Rosen and his co-worker passed on allegedly classified information to the reporter in hopes that the reporter would write a story about the information. It was the way that Rosen and his co-worker pressed the reporter about the information they were relaying, that was of vital concern to Lewin. The March 3, 2008 article stated that Rosen and his colleagues "boastful tone [in the

[4] (App. 264).

recordings] may have been used to suggest that their knowledge reflected their great influence within the administration" making the conversation "potentially embarrassing" for AIPAC if disclosed to the public. (App. 247). Lewin testified that in the conversation he was played, the AIPAC employees were pushing their "hot" story to the reporter. The impression that it left on Lewin was that Rosen and Weissman were trying hard to "sell" the story and persuade a reporter to write it, notwithstanding the fact they believed their story was likely based on classified information and they thought they could be criminally punished for revealing the information. (App. 277-279).

Lewin testified that he knew that AIPAC could not condone this type of activity. He also knew that if these conversations became public, which at the time was a given, that AIPAC would have suffered irreparable damage to its reputation and good will. Further, AIPAC would not have been able to explain to its members or the public how it learned of the information and yet still decided to retain them as AIPAC employees. (App. 278-281; 292-293). Lewin ultimately realized termination was the only proper action. Accordingly, and without disclosing his "experience" as required under his agreement with the government, he advised AIPAC in writing to terminate Rosen. (App. 301-302).[5]

Rosen admitted in deposition that during the recorded conversation that his colleague told the reporter that he and Rosen hoped they would not get in trouble for conveying the information, to which, Rosen supposedly joked about "not getting in trouble" over the information. (App. 183-184). Rosen also noted that the United States had no Official Secrets Act, as did the British, that would make journalists liable to prosecution if they

[5] In fact, in a recently published article, Rosen admitted that Lewin's concerns were well-founded, indicating that the conversations played for Lewin had the potential effect of making Rosen look "very sinister" and "portray[ed] him as a secret agent rather than as a lobbyist." (App. 265-267).

publish classified material. (183-187; 314). Rosen testified that he thought the statement his co-worker made on the call meant his co-worker thought that they could get in trouble because maybe the information was classified. (App. 241).

The fact that Rosen thought he might be dealing with classified information presented a concern for AIPAC, as such dealings would be inappropriate conduct for its employees (App. 319-321). Soliciting receipt of U.S. classified information is not the purpose or aim of AIPAC, and as far as AIPAC knew, until the criminal case against Rosen, no employee had ever received classified information. (App. 250-252; 323). Rosen testified that he knew that AIPAC did not deal with classified information and that he was not supposed to seek it. (App. 317-319).

Lewin testified that if AIPAC did not condone the behavior of Rosen, that it could not have comported with standards that AIPAC expected of its employees. In Lewin's opinion, Dorton's statement revealed nothing different from what he had expressed in the letter which he sent with regard to Rosen's conduct. (App. 292-293; 306). In Lewin's opinion, the conversation was evidence that the men "knew they were engaging in conduct the government would consider criminal." (App. 281-282).

By the time the March 3, 2008 article was published, AIPAC had learned far more than Lewin's conclusion that Rosen engaged in conduct which AIPAC could not condone. By that time, Rosen had been indicted. He was indicted in August 2005. (App. 102-108). There had also been three years of internal inquiries and sustained media attention to the FBI investigation and criminal prosecution resulting in numerous published articles. All of this information further clarified and supported the opinion of Lewin as well as any statement reflecting Lewin's opinion that Rosen had not acted in accordance with standards AIPAC

expected of an employee. (App. 325-327). He was alleged to have knowingly received classified information and disclosed it to others. Whatever the merits of that indictment might have been, a criminal indictment was not what AIPAC expected of any employee by any standard. (App. 328-329). Through that indictment, AIPAC further learned that Rosen had disobeyed an order of AIPAC's general counsel. On the morning of August 27, 2004, two FBI agents came to Rosen's home, and according to Rosen, there was an intense exchange of words eventually resulting in the FBI agent stating that Rosen better "get a lawyer by 10:00 a.m. [that day]." (App. 170-172). After that visit, Rosen called Friedman, AIPAC's general counsel, to report that the FBI had visited him. He was instructed to speak to no one and go directly to the AIPAC's offices to meet with general counsel. (App. 173-174). Rosen ignored those instructions. Before going to AIPAC's offices, he went to a restaurant to speak with an Israeli Embassy official, only to discover that FBI agents had followed him. (App.103-128; 175-177; 253 ).

By 2008, various media articles, the factual record stated in the indictment, and AIPAC's experience dealing with Rosen, provided AIPAC with further evidence that Rosen had not revealed the full extent of his relationship with Lawrence Franklin when the matter initially arose in 2004. (App. 334-337; 253-260). Rosen initially characterized Mr. Franklin as a "kook, a nobody, an insignificant figure" who "was much less important to [Rosen] than a lot of other people..." yet he found Mr. Franklin credible enough to take information from him to a *Washington Post* reporter on at least two occasions, as well as to an Embassy official. (App. 165-168; 178). AIPAC also learned that Rosen may have lied to the FBI when discussing his relationship to Franklin during his interviews with the FBI. (App. 119; 169-170; 326).

Additionally, prior to 2008, AIPAC learned of "sexual experimentation" by Rosen, that if disclosed to the public during his criminal prosecution, would have been "embarrassing both to Rosen and to AIPAC." Rosen admitted this potential embarrassment at deposition. (App. 156-158). The FBI executed a warrant at Mr. Rosen's office at AIPAC's headquarters, and as a result AIPAC discovered a large amount of graphic pornography on Mr. Rosen's office computer. Maintaining that material on AIPAC computers was in violation of AIPAC policy. (App. 140-154).

In the order entered granting in part and denying in part the motion to dismiss filed on behalf of AIPAC and all defendants, Judge Clarke noted that in their motion, the Defendants had argued that Mr. Rosen was a public figure. She stated that Rosen did not dispute that he was a public figure during the relevant periods concerning the lawsuit. (App. 88).

At deposition, Rosen was asked questions with regard to his claims for damages. He testified that he was not making any claim for damages to his emotional well-being. (App. 204-205). He was asked specifically about any claim for lost wages and testified that he was not making any claim that wages or gifts prior to 2008 were affected by the March 2008 statement. (App. 221-222). He later testified at deposition that he was not going to make a lost income claim before or after the March 2008 statement. (App. 322-323). He was asked whether he had a monetary damages claim to which he responded as follows:

> My primary claim is going to be based on AIPAC putting me in the zone of danger through knowingly false statements, with reckless disregard for the truth; putting me in the zone of danger of being convicted of a crime that I did not commit, which would have caused me to spend decades—potentially decades in prison, an innocent man; and that AIPAC's reckless disregard for the truth had materially increased the chance of—of a wrongful conviction.

(App. 224). Within one month of filing his defamation claim against AIPAC, the government dismissed its indictment against Rosen. This dismissal came after AIPAC spent nearly 4 million dollars funding Mr. Rosen's legal defense to remove him from the very zone of danger he asserts was the sole basis of his claim against AIPAC. (App. 188-189; 557; 591)

## STANDARD OF REVIEW

Where a trial court grants summary judgment, review by this Court is *de novo*. *Steward v. Moskowitz*, 5 A.3d 638, 646 (D.C. 2010); *New Econ Capital, L.L.C. v. New Mkts. Capital Grp.*, 881 A.2d 1087, 1094 (D.C. 2005). The evidence is to be considered in a light most favorable to the non-moving party, and this Court is to conduct an independent review of the record. *Id.* Summary judgment is properly granted only if there is no genuine issue of any material fact in dispute, and if the moving party is entitled to judgment as a matter of law. *Id., quoting. Jack Baker. Inc. v. Office Space Dev. Corp.*, 664 A.2d 1236, 1240 (D.C. 1995).

## SUMMARY OF ARGUMENT

The court below properly found that there was no dispute as to any material fact, and that AIPAC and Dorton were entitled to judgment in their favor as a matter of law. The trial court, in reaching its conclusion, noted that the only actionable statement, which was not barred by the statute of limitations, was the phrase "said recently that AIPAC still held that view of their behavior." That is, that AIPAC still held the view that Rosen's behavior did not comport with standards that AIPAC expected of its employees. The trial court found that the statement was not provably false but was rather a characterization of an employer that did not rest on any objectively verifiable facts. The trial court relied on decisions from the Supreme

Court of the United States, the District of Columbia Circuit, as well as from courts in other jurisdictions which had addressed similar cases, finding that the statement was clearly the subjective view of AIPAC as stated by Dorton, and was neither precise nor verifiable and did not implicate any discernable objective standard. The Court found that there was no possible way for a fact finder to tell what "standards" were at issue and that the statement was AIPAC's interpretation of Rosen's conduct as applied to its standards, whatever they might be. The court indicated as follows:

> Allowing Rosen's claim to go to trial would task the jury with identifying the standards referred to in the March 3 Times article, determining whether AIPAC had such express or implied standards, and determining whether Rosen's conduct was in accordance with those standards. As explained above, these would be impossible tasks. At the same time, inviting the jury to scrutinize and second-guess an employer's policies and business judgment would effectively convert this garden-variety claim for defamation into one for wrongful termination or discrimination. In contrast to those employment claims, the issue in this case is not the veracity of AIPAC's motivation for firing Rosen (that is, whether its motivation was pretextual). The issue is the objective truth of AIPAC's public statement of Rosen's firing. It is on this limited issue that the Court concludes that the statement is not provably false, and therefore not defamatory as a matter of law.

(App. 101).

Additionally, as set forth in the motion for summary judgment filed below, there are a number of other bases upon which the trial court could have granted summary judgment. Those were all briefed by both sides below, and provide a number of alternative bases for this Court's affirmance of the trial court decision.

First, the March 3, 2008 statement, as acknowledged by Rosen himself, was a repetition, and therefore, should have been held to be barred by the statute of limitations. Additionally, the statement made in the March 3, 2008 *Times* article was true and accurate,

and therefore non-actionable as defamation. By the time the March 2008 article was published, the facts available to AIPAC as set forth above clearly demonstrated that Rosen's actions did not comport with the standards AIPAC expected of its employees. The statement "that AIPAC still held the view of that behavior" did nothing more than affirm AIPAC's opinion that Rosen's conduct, as of March 2008, was still not what AIPAC expected of its employees. Alternatively, the statement could be found to be pure opinion, as it does not contain a provably false factual connotation and therefore is not defamatory.

Further, as Rosen was a public figure, which he did not deny, and as found by Judge Clarke in her Order in which she noted that Rosen did not take issue with nor dispute the fact that he was a public figure, in order to pursue his defamation claim he was required to prove malice. The facts set forth above clearly establish that AIPAC had reasonable grounds to believe that the March 2008 statement was true. Lewin's meeting with the Department of Justice at which he reviewed certain evidence, and his recommendation to AIPAC that AIPAC terminate the Plaintiff's employment provided a basis for AIPAC's reasonable statement that Rosen did not comport with conduct it expected of its employees. By 2008, AIPAC had read and reviewed the federal indictment, and obtained additional information through articles and pleadings filed in Rosen's criminal case, had concern over discrepancies in Rosen's story as communicated to AIPAC at the beginning of the investigation, and had knowledge of Rosen's admitted use of AIPAC computers in violation of AIPAC's written guidelines. Yet, even when confronted with this information, AIPAC demonstrated its complete lack of malice by funding Rosen's multi-million dollar legal defense, notwithstanding that it had no obligation to advance any legal fees to Rosen's attorneys.

Finally, summary judgment should have been granted in this case because Rosen admitted that he had no damages. His deposition testimony referenced above established that he was not making a claim for lost wages, nor for any alleged mental or emotional harm. His sole claim for damages was limited to an allegation that the article placed him in a "zone of danger" with regard to a wrongful conviction. That cause of action is not supportable given the facts and circumstances of this case.

## ARGUMENT

THE SUPERIOR COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF AIPAC AND DORTON AND DISMISSED THE DEFAMATION CLAIM BROUGHT BY ROSEN, AS THE ALLEGED STATEMENT WAS NOT PROVABLY FALSE AND THERE WAS NO DISPUTE AS TO ANY MATERIAL FACT, PRESENTING A TRIABLE ISSUE ON THE ELEMENTS OF DEFAMATION.

### I.

The Court Below Properly Granted Summary Judgment In Favor Of AIPAC And Dorton, As The Alleged Defamatory Statement Were Not Provably False, But Merely The Characterization By An Employer Which Did Not Rest On Objectively Verifiable Facts.

The court below in its February 23, 2011 Order, granted summary judgment in favor of AIPAC and Dorton because the March 3, 2008 *New York Times* publication, which Rosen alleged defamed him, was not "provably false". Rosen in his brief does not address the decision of the lower court directly until page 21 of his brief, but instead spends the first 11 pages of the Argument portion of his brief dealing with the elements of defamation, and why he believes that his case should survive summary judgment, considering the grounds upon which a defamation cause of action is based. AIPAC and Dorton believe that the decision of

the Superior Court should be addressed first, because if this Court affirms the decision, it need go no further.[6]

As the trial court noted, a statement is defamatory if it tends to injure a plaintiff in his or her trade, profession or community standing, or lower that person in the estimation of the community. *Moss v. Stockard*, 580 A.2d 1011, 1023 (D.C. 1990). To be defamatory, a published statement must be more than unpleasant or offensive. The language must make the person allegedly defamed appear "odious, infamous, or ridiculous." *Howard University v. Best*, 484 A.2d 958, 989 (D.C. 1984), quoting *Johnson v. Johnson Publishing Co.*, 271 A.2d 696, 697 (D.C. 1970). As this Court stated in *Guilford Transportation Industries, Inc. v. Wilner*, 760 A.2d 580, 594 (D.C. 2000) the trial court's "threshold task" in an action for defamation is to determine whether the challenged statement is "capable of bearing a particular meaning," and "whether that meaning is defamatory", quoting the Restatement (Second) of Torts Section 614 (1).

The court below cited to the United States Supreme Court decision of *Milkovich v. Lorain Journal Co.*, 4987 U.S. 1, 110 S.Ct. 2695, 111 L.Ed. 2d 1 (1990) in which that Court stated that "liability under state defamation law for a statement on a matter of public concern may be imposed only if a statement is provably false". *Id.* 497 U.S. 19-20. This Court in

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[6] AIPAC and Dorton will address, in the latter part of this brief, the alternative bases upon which the Superior Court could have granted summary judgment, but chose not to do so. If this Court believes that the decision of the lower court should not be affirmed on the basis articulated in the February 23, 2011 order, it should nonetheless affirm the decision of the trial court, on the alternative bases which were presented to that court, and which will be presented again here in this brief. *Opton, Inc. v. Federal Deposit Ins., Corp.*, 647 A.2d 1126 (D.C. 1994). *See, Double H Housing Corp. v. David*, 947 A.2d 38, 42 (D.C. 2008); *Kingman Park Civic Ass'n v. Williams*, 924 A.2d 979, 987 n.10 (D.C. 2007); *Marinopoliski v. Irish*, 445 A.2d 339, 340 (D.C. 1982). *See, also Acquatex Industries, Inc. v. Techniche Solutions*, 479 F.3d 1320, 1328 (Fed. Cir. 2007); *Sadlowski v. United Steel Workers of America, AFLCIO-CLC*, 645 F.2d 1114, 1120 (D.C. Cir. 1981)

*Guilford Transportation Industries* discussed the Supreme Court decision in *Milkovich*, as well as the other principal cases relied upon by the judge below, *Moldea v. New York Times Co.*, 22 F.3d 310 (D.C. Cir. 1994); *Washington v. Smith*, 80 F.3d 555 (D.C. Cir. 1996) and *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222 (7th Cir. 1993). This Court relied upon those cases in deciding the *Guilford Transportation Industries* matter.

This Court noted that "statements of opinion can be actionable if they imply a provably false fact, or rely upon stated facts that are provably false." *Guilford Transportation Industries*, at 597; *Moldea*, 22 F.3d at 313. In *Washington v. Smith*, *supra*, the District of Columbia Circuit indicated that a "statement of opinion is actionable" only if it has an explicit or implicit factual foundation and is therefore objectively verifiable. 80 F.3d at 556. As this Court stated in *Guilford Transportation*, at page 597, if it is plain that a speaker is expressing a subjective view, an interpretation, a theory, conjecture or surmise rather than claiming to be in possession of objectively verifiable facts, that such a statement is not actionable, citing to the decision in *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d at 1227. The Superior Court judge below relied upon those exact quotations in reaching his decision.

Judge Christian noted that the only portion of the March 3 New York Times Article which survived the statute of limitations was that Dorton "said recently that AIPAC still held that view of their behavior", which was to say that AIPAC still had the view that Rosen's behavior did not comport with standards that AIPAC expected of its employees. Judge Christian noted that Rosen agreed that that statement was the only one at issue, citing to his opposition at page 14.

Judge Christian noted that the statement clearly set forth a subjective view of AIPAC and Dorton, and was neither precise nor verifiable. The statement referred to AIPAC's

viewpoint, and did not purport to be a statement of objective truth. The statement indicated clearly that "AIPAC still held that *view*" that Rosen's behavior "did not comport with standards AIPAC 'expects'" of its employee" (Emphasis supplied). Judge Christian found that the statement did not implicate any discernable objective standard. He stated that there would be no way for a fact-finder to tell what "standards" were at issue. He noted that Rosen argued that AIPAC had no standards concerning the receipt, handling and dissemination of classified information obtained by its employees, but went on to state that it was not clear from the statement made in the New York Times article or the context in which it was made, that the allusion to "standards AIPAC expects of its employees" referred in particular to standards concerning the receipt, handling and dissemination of classified information. The trial court said that the referenced "standards" could just as easily refer to AIPAC's expectation that its employees not be charged with crimes, or the more subjective expectation that its employees would not cause undue embarrassment.[7]

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[7] Judge Christian noted that the March 3rd *Times* article quoting unidentified sources suggested such embarrassment. The article stated that:

> Aipac dismissed [Rosen and Weissman] in early 2004 after federal prosecutors in Virginia played part of surreptitiously recorded conversations for Nathan Lewin, a veteran Washington lawyer representing Aipac. The tapes were of conversations in which Mr. Rosen and Weissman passed on information about the Middle East they had received from government officials to [a reporter] at the Washington Post.
>
> Mr. Lewin, who has a long history as a trusted counsel for various Jewish organizations, traveled back to Aipac's headquarters near Capitol Hill from Alexandria that day and advised the group to fire the men.
>
> The Aipac spokesman on the Rosen-Weissman matter, Patrick Dorton, said at the time that the two men were dismissed because their behavior "did not comport with standards that Aipac expects of its employees." He said recently that Aipac still held that view of their behavior.

The judge below correctly held that the statement made was a characterization by an employer, which did not rest on any objectively verifiable facts. The court noted that a number of cases from other jurisdictions have reached the same conclusion under similar circumstances. The trial judge relied upon the decision in *McClure v. Am. Family Mut. Ins. Co.*, 223 F.3d 845 (8th Cir. 2000). In that case, two insurance agents were fired from an insurance company for engaging in lobbying activities which were "prejudicial to the company". The terminations were reported to the press, and the insurance company was sued for defamation for its public statements regarding the terminations, including statements that the plaintiffs participated in "disloyal and disruptive activity," that they did not understand the "value of loyalty and keeping promises," that they were "acting against the best interest of the insurance buying public," and that they "were in direct violation of their [contractual] agreements" with the company. *Id.* at 853. The company also stated that the plaintiffs there had engaged in "conduct unacceptable by any business standard." *Id.* The 8th Circuit concluded that those statements were not provably false because they were the company's characterizations of activity that the plaintiffs had undertaken. The key to the conclusion was the court's determination that the statements were not "sufficiently precise or verifiable". The court stated as follows:

> A commentator who advocates one of several feasible interpretations of some event is not liable in defamation simply because other interpretations exist. Consequently, remarks on a subject lending itself to multiple interpretations cannot be the basis of a successful defamation action because as a matter of law no threshold showing of "falsity" is possible in such circumstances.

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> Mr. Lewin would not discuss what he heard that day. But others familiar with the case said the defendants' boastful tone, which may have been used to suggest that their knowledge reflected their great influence within the administration, made the conversations potentially embarrassing.

(App. 100-101; 247).

*Id.* citing, *Hunter v. Hartman*, 545 N.W. 2d 699, 707 (Minn. Ct. App. 1996) (citing *Bose Corp. v. Consumers Union*, 466 U.S. 485, 104 S.Ct. 1949, 89 L.Ed. 2d 502 (1949)).

The court below correctly found that the statement complained of by Rosen was akin to the statement discussed in *McClure*, which set forth a subjective view, and was neither precise nor verifiable. The trial court went on to note that there was no way for a fact-finder to tell what "standards were at issue" as discussed above. Further, the statement that Rosen failed to comport his behavior with AIPAC's standards is clearly AIPAC's interpretation of Rosen's conduct as applied to its standards, whatever they may be. In *McClure,* the court indicated that remarks made on the subject, lending themselves to multiple interpretations, could not be the basis of a successful defamation action, because there could be no threshold showing of falsity under the circumstances. *Id.* at 853.

The trial court found that the statement made concerning Rosen in this case did not contain or imply an objectively verifiable fact but was rather a characterization of an employee's conduct. In *Gibson v. Boy Scouts of America,* 360 F. Supp. 2d 776, 781 (E.D.Va. 2005) the court found that an organization's statement that a member was discharged because he was "unfit to be a scout master and in scouts" was not a provably false statement, and therefore not actionable. In *Osteburg v. Sears Roebuck & Co.*, 2004 W.L. 2186407 (D.Minn. Sept. 22, 2004) the court held that an employer's statement that an employee was fired because of "ethical concerns and his disregard for company policies and procedures" was again not provably false. The court below correctly found that allowing Rosen's claim to go to trial, thereby tasking the jury with identifying the undefined standards referred to in a March 3 *Times* article and then to determine whether AIPAC had such expressed or implied standards, and then determine whether Rosen's conduct was in accordance with the

standards, would present an impossible task for a jury. At the same time it would invite the jury to scrutinize and second-guess an employer's policies and business judgments effectively converting the claim for defamation into one for wrongful termination or discrimination. Judge Christian noted that in contrast to employment claims, the issue before him was the objective truth of AIPAC's public statement concerning Rosen's firing, not AIPAC's motivation for firing Rosen as to whether its actions were pretextual.

In *Washington v. Smith, supra*, a basketball coach brought a defamation action against the author of an article in a magazine which was critical of her coaching, as well as against the editor and publisher. The District of Columbia Circuit held that statements in the article that the coach "usually finds a way to screw things up" and that the coming season "will be no different" were not actionable under District of Columbia law. The court found that the statements were not "objectively verifiable and false". *Id.* at 557.

This Court in *Guilford Transportation Industries, Inc. v. Wilner, supra,* found that statements complained of by a plaintiff in a defamation action were not "provably false" such that they would support a case against the author of a column on the opinion page of a newspaper. The court below found the same with regard to Rosen's claim.

At pages 22 through 28 of his brief, Rosen argues first that the reasons underlying his dismissal are matters of provable fact, that the motives and beliefs of AIPAC executives are "provable facts", that the statement made as referred to in the Times article is a mixed statement of facts and opinion, and is therefore actionable, and that generalized statements about a terminated employee can be shown to be "provably false" and actionable. It is clear that the matters set forth in the Times article and attributed to AIPAC as statements, are not matters of "provable" fact, nor are they statements of mixed fact and opinion. The only

actionable statement, based upon the application of the statute of limitations, is that [Dorton] said that "AIPAC still held that view of their behavior". That reference was to Rosen and Weismann as they "did not comport with standards that AIPAC expects of its employees". The discussion contained in Rosen's brief at pages 22-28 smacks more of a discussion of a wrongful termination claim. than a defamation claim. In fact, it is clear that the statement made by Dorton expressed a subjective view. No facts were stated or implied.[8]

Rosen's argument earlier in his brief, in seeking to establish that statements made were defamatory, illustrates exactly the problem articulated by the court below, and upon which it granted summary judgment. In order to make his argument that the statements made were defamatory, he needed to first attempt to define the "standards" with which he did not comport. He sought to do so by trying to establish that the statement that he did not comport with standards was false. because there were no written "standards" which were applicable to his behavior in the first place. He overlooked the fact that there is no reference made in the alleged defamatory statement to "written standards". There is only a subjective statement made that his actions did not comport with the standards that AIPAC expected of its employees. He cited various deposition testimony references to establish that there were no written "standards" at AIPAC with regard to how classified information was to be dealt with.

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[8] The case relied upon by Rosen in his brief, *Fuste v. Riverside Healthcare Ass'n, Inc.*, 265 Va. 127, 575 S.E.2d 58 (2003) is not supportive of his position. There, an employer stated that two physicians had "abandoned their patients" and the court found that the term "abandoned" had a particular connotation in the context of a doctor's professional responsibility to a patient making the statement that the doctors had "abandoned their patients" demonstratively true or false. That is not the case here. Here the actionable statement was that AIPAC still held the view that Rosen did not comport with the standards that it expected of its employees. This statement did not have the same special connotation as the phrase construed by the Virginia Supreme Court in *Fuste*.

Again he missed the point. There is no reference in the statement that is made to standards involving classified material, let alone written standards.

The statement made was entirely subjective. It is akin to the statements made in the cases from other jurisdictions cited by the Superior Court judge and quoted above, such as in *Gibson v. Boy Scouts of America, supra,* and *Osteberg v. Sears Roebuck and Co., supra.* A general subjective statement, which does not contain or imply an objectively verifiable fact, but merely sets forth a characterization of an employee's conduct, cannot be actionable defamation. The court below was correct in its ruling, and this Court should affirm.

## II.

## Aipac And Dorton Presented To The Court Below A Number Of Alternative Grounds, Upon Which Summary Judgment Could Have Been Granted, And Upon Which This Court Can Affirm The Decision Granting Summary Judgment In Their Favor

As set forth in Argument I, AIPAC and Dorton believe that this Court should affirm the decision of the Superior Court, in which Judge Christian found that the alleged defamatory statement about which Rosen complained was not provably false but merely a characterization by an employer which did not rest on an objectively verifiable facts. The decision was in accord with this Court's decision in *Guilford Transportation Industries, Inc.*, and should be affirmed. Rosen has argued to the contrary, taking the position that this Court should not affirm the decision granting summary judgment, based upon the rationale employed by Judge Christian and should return the case to the trial court. In making his argument, Rosen ignores the positions taken by AIPAC and Dorton below, as set forth in their motion for summary judgment, which demonstrate that there was no issue of material fact in dispute, and that AIPAC and Dorton were entitled to judgment in their favor as a

matter of law. The positions set forth, which Judge Christian did not employ in reaching his decision in granting summary judgment, include the following:

> The March 3, 2008 statement was at most a repetition and as such, it should be barred by the statute of limitations.
>
> The March 2008 alleged statement is not defamatory as a matter of law, because it was true and accurate, and further, set forth an opinion which cannot be shown to have been objectively false.
>
> Rosen, as a public figure, must prove actual malice to recover for defamation, and the facts established below demonstrate that the March 2008 statement was not made with actual malice.
>
> Plaintiff cannot recover for defamation because he had no damages.

All of these alternative grounds would have provided a basis upon which Judge Christian could have ruled in favor of AIPAC and Dorton. The matters were briefed by both sides below and are in the record. This Court could choose to affirm the decision granting summary judgment on any of these grounds, in the alternative, to the ground chosen by Judge Christian.

A. The March 3, 2008 statement was a repetition which should be barred by the statute of limitations

It is clear that a claim for defamation in the District of Columbia must be filed within one year of the accrual of the cause of action. *Maupin v. Haylock*, 931 A.2d 1039, 1042 (D.C. 2007). *See.* D.C. Code § 12-301(4). In defamation cases, a cause of action accrues, and the one year limitations period will begin to run, at the time the alleged defamatory statement was published. *Mullin v. Washington Free Weekly, Inc.*, 785 A.2d 296, 298 n. 2, 299 (D.C. 2001). Further, an action cannot be based upon a republication of a statement that was made more than one year prior to the republication, as any action based upon that statement should be time barred at the time of republication. There is a rule which is a

narrow exception to the above, which arguably opens a window of opportunity to file a lawsuit based on a republication of an allegedly defamatory statement when a republication occurs within one year of the initial publication. *Judd v. Resolution Trust Corp.*, 1999 W.L. 1014964, p. 6 (D.D.C. 1999) (*citing, Moore v. Allied Chemical Corp.*, 480 F. Supp. 364, 376 (E.D.Va. 1979). In *Judd*, the United States District Court for the District of Columbia explained the logic of the rule as follows:

> A plaintiff who was initially defamed on January 1, 1999, would have until January 1, 2000 to bring her lawsuit. If the defamation was republished on February 2, 1999, the statute would be extended until February 2, 2000, because the republication occurred within the one year statute of limitations which commenced to run when the defamation was first uttered on January 1, 1999. That principle, however, would not permit a lawsuit to be run on January 1, 2004, based on the republication of the defamatory statement uttered on January 1, 2003, because that republication did not occur within one year of the original utterance on January 1, 1999.

*Judd*, 1999 W.L. 1014964 at p. 6. *See, Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 882 (D.C. 1998). That rule would not have application under the facts here.

It is clear that the March 3, 2008 *New York Times* article contains a statement which was originally made by Defendant Dorton in 2005. The statement concerned Rosen's dismissal because his behavior did not comport with standards that AIPAC expected of its employees. That statement was originally made at the time of Plaintiff's discharge from AIPAC in 2005. Rosen testified in his deposition as well that the statement in the March 2008 *New York Times* article was merely a repetition of prior statements, as well as an allusion to the prior statements and their "continuing validity." The March 3, 2008 article could not "revive" the statements made in 2005, because the article was not published within one year of the original statement.

Because the March 3, 2008 article did not "revive" the statements made earlier, and because the phrase found to be actionable by the court below, standing alone "...Aipac still held that view of their behavior" did not contain any statement of fact about Rosen that was defamatory, the repetition made in the March 3, 2008 statement should be barred by the statute of limitations.

B. The March 3, 2008 statement was not defamatory as a matter of law.

The March 2008 statement was not defamatory. It was a statement of opinion, and as this Court has held, an assertion of opinion on a matter of public concern receives full Constitutional protection if it does not contain a provably false factual connotation. *Guilford Transp. Industries, Inc., supra* at 597. As noted above, by the time the March 2008 article was published, the facts available to AIPAC clearly demonstrated that Rosen's actions did not comport with the standards it expected of its employees. The additional information included, but was not limited to, AIPAC's concern that Rosen may have lied to the FBI, the existence of the federal indictment, Rosen's disregard of an order from AIPAC's general counsel with regard to his conduct after he was contacted by the FBI, Rosen's lack of candor to his superiors at AIPAC regarding his relationship with Lawrence Franklin, and his initial contact with the FBI, and the "experience" of AIPAC's counsel, Nathan Lewin, as well as the discovery of pornographic material on Rosen's work computer.

A notation in the March 2008 article "that AIPAC still held the view of that behavior" does not contain a quote or statement from Defendant Dorton. Even assuming that this statement could be attributed to Dorton and/or AIPAC, the statement was an accurate and true opinion of AIPAC's "view"—and an affirmation. Dorton did nothing more than confirm AIPAC's opinion that Rosen's conduct as of March 2008, was still not what AIPAC

expected of its employees particularly in light of the federal indictment against Rosen, the facts developed during the course of the Department of Justice's investigation, as well as other information AIPAC had learned about Rosen's conduct in the intervening years.

As stated in *Parsi v. Daioleslam*, 595 F. Supp.2d 99, 108 (D.D.C. 2009):

> [Truth] is a complete defense to defamation. *Moldea v. New York Times Co.*, 15 F.3d 1137, 1142 (D.C.Cir. 1994); *see also. Ford Motor Credit Co. v. Holland*, 367 A.2d 1311, 1313 (D.C. 1977). A statement that is not completely error-free can still be "true" for purposes of defamation law. *See Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1296 (D.C. Cir. 1988) (holding that a "substantially true" statement does not give rise to a defamation action); *see also* Restatement (Second) of Torts § 581 A, Comment f (1977) ("it is not necessary to establish the literal truth of the precise statement made. Slight inaccuracies in expression are immaterial provided that the defamatory charge is true in substance.") The D.C. Circuit has employed a rough test to determine whether a defendant's defense of truth will dispatch a plaintiff's defamation suit: is the "sting of the charge" "substantially true"? *See Dow Jones & Co.*, 838 F.2d at 1296; *Moldea*, 15 F.3d at 1150. If so, then the defamation suit must fail.

Here, it is clear that there was no statement of fact contained in Dorton's statement "that AIPAC still held the view of that behavior." That refers back to a matter of opinion—an expression made in 2005 that at that time, Rosen's conduct was not what AIPAC expected of its employees. In fact, the statement should be protected as pure opinion, because it does not contain a provably false factual connotation and therefore is not defamatory. *See, Gibson v. Boy Scouts of America, supra*, at 781.

Assuming that the March 3, 2008 statement was arguably defamatory, all of the facts known to AIPAC by March 3, 2008 must be taken into account to determine whether the opinion was not true, and instead was objectively false. By March 3, 2008, AIPAC had learned a number of facts which supported his view that Rosen's conduct did not comport

with his standards. For example, as set forth in the Statement of Facts above, AIPAC had learned that Rosen may have lied to the FBI. AIPAC learned that in fact Rosen had been indicted. AIPAC learned that Rosen had disregarded a direction from AIPAC's general counsel, to come immediately to the AIPAC offices once he had been interviewed by the FBI, and instead he chose to go elsewhere, and was followed at the time by the FBI. AIPAC had also learned of Rosen's lack of candor with AIPAC regarding his relationship with Franklin, and his contacts with the FBI. Additionally, there was the "experience" of AIPAC's counsel, Nathan Lewin, and his initial recommendation that AIPAC terminate Rosen. Finally, there was the pornography discovered on Rosen's work computer, which was in direct violation of written requirements at AIPAC. All of these facts must be considered in determining whether the statement made in 2008 was non-defamatory.

Rosen has set forth here in his Brief, and argued below, that AIPAC had no standards with regard to classified information and that because of this lack of standards, that its statement was false and defamatory. It is clear that the statement made in 2008 in the *New York Times* article did not refer to standards regarding classified information, and none were referred to in the article.

In his Brief, Rosen argues that the statement made was defamatory because AIPAC had no relevant written standards of employee behavior, because AIPAC had supported and praised him in a prior incident involving an investigation in the past (in February 1984), that other AIPAC employees previously had been involved with receiving classified material, who were not fired under any of AIPAC's purported standards, and that the statement asserted untrue allegations against him of criminal conduct.

Taking the last first, at the time the statement was made in March 2008, Rosen had been indicted and was still under indictment. The indictment was not dismissed until 2009. Further, the statement made by Dorton on AIPAC's behalf did not specifically make reference to any criminal conduct by Rosen. It merely reiterated the position taken in 2005 that Rosen's conduct did not comport with the standards at AIPAC. In fact, the statements made with regard to Rosen in the article—not statements attributable to AIPAC or to Dorton directly—were factually accurate. The article stated that Rosen had been indicted for two felonies. In fact, he had been. At the time of the article that indictment was still in effect, and there was nothing untrue about those statements. In any event, neither Dorton nor AIPAC was involved in writing the article, Dorton was merely quoted in the article.

The fact that AIPAC had no written standards with regard to how to handle classified information is of no moment. It certainly did have a written standard with regard to employees keeping pornographic material on their computers, and Rosen violated that standard. The statement made by Dorton does not make reference to any written standards. It makes reference only to AIPAC's standards. As Judge Christian noted below, while Rosen takes the view that "standards" encompasses only written material, Judge Christian stated that "standards" "could just as easily refer to AIPAC's expectation that its employees not be charged with crimes, or the more subjective and amorphous expectation that its employees not cause it undue embarrassment." Whether AIPAC did or did not have written policies concerning these other standards of conduct is immaterial. (App. 99-100).

Rosen also raises as a basis to support his defamation claim that AIPAC had supported and praised him in an earlier incident involving investigation of classified information that allegedly occurred in 1984. The leadership of AIPAC in 2008 is different

than that of AIPAC in 1984. More importantly, Rosen cites to no deposition testimony from any AIPAC Board member or witness who recalled the matter or was involved with it. In any event, there is no indication of any indictment which was handed down at that time, nor is there any indication that the facts and circumstances which occurred then, are akin to those which occurred resulting in the statement made in 2008. Even if Mr. Rosen's assertions were true (and they are not), the matters are so attenuated in time that they have no probative value to facts arising decades later.

He also refers to other AIPAC employees previously being involved with receiving classified material who were not fired because of AIPAC standards. Documents which he refers to in his Brief apparently also refer to circumstances which occurred in 1984. What he does not go on to indicate is that following an FBI investigation, that AIPAC was cleared of any wrongdoing and the document that formed the basis of the investigation contained no classified national defense information. (App. 606-629).

Rosen could not point below and does not point here in his Brief to a single witness that acknowledged having ever engaged in conduct of the type for which he was indicted. Rosen testified at deposition that an email which he wrote decades ago concerning alleged Libyan campaign funds utilized in a presidential campaign was the only incident concerning classified information that he could remember in 23 years at AIPAC. (App. 568-569). Simply stated, Rosen points to no evidence that the 1984 matter involved any impropriety by AIPAC or any AIPAC employee.

In fact, in multiple depositions taken by Rosen, the testimony established that AIPAC had never condoned dealing in classified information. For example, Raphael Danzinger, AIPAC's Director of Research and Information, testified that he had never heard of a case

where anyone at AIPAC received U.S. classified information other than the matter involving Rosen and Weissman. (App. 570-572).

Richard Fishman, AIPAC's Managing Director, testified at deposition that those at AIPAC would assume that government officials knew what they could share and what they couldn't share, so that while that that doesn't mean that anyone could be absolved of their responsibility for understanding whether or not they were being given information they should or should not have, the expectation was that no classified information would be obtained. He testified that he understood that Rosen understood the same, and that he had heard Rosen open conversations by stating that he was there to learn as much as he could but was not there to learn information he was not supposed to have and was not seeking classified information. Fishman testified that that indicated to him that Rosen well understood the standards that were expected in terms of interaction with government officials. (App. 573-577).

AIPAC's Executive Director, Howard Kohr, also testified at deposition that he never sought to get classified information. To his knowledge, he never received classified information from his hire in 1987 until the date of the deposition. He testified that he recalled that Rosen had conversations with people indicating that we were not seeking classified information in meetings that he and Rosen would attend. No classified information was obtained. (App. 562-567).

Renee Rothstein, AIPAC's Communications Director, testified she believed there was never any other member of AIPAC staff that received classified information other than Rosen and Weissman. She began working at AIPAC in 1989, and it was never reported to her that anyone at AIPAC had received classified information. (App. 578-583).

There was no evidence of any kind presented in the record that the alleged 1984 involvement by AIPAC that was investigated by the FBI, involved any impropriety by AIPAC or any AIPAC employee. The matter clearly involved no classified documents. References by Rosen to this evidence does not support his defamation claim.

Clearly, the March 3, 2008 statement was not defamatory as a matter of law, and had the law Court not rule as it did, it could have ruled in favor of AIPAC on that basis.

C. Rosen, a public figure, cannot prove malice.

As a public figure, to prevail on a claim of defamation, Rosen must not only allege and prove the basic four elements—that a defendant made a false and defamatory statement concerning him, that a defendant published a statement without privilege to a third party, that the defendant's fault in publishing a statement amounted to at least negligence, and that either the statement was actionable as a matter of law irrespective of special harm or that its publication caused him harm—but must also prove by clear and convincing evidence that a defendant acted with actual malice, *i.e.*, intentional or reckless disregard of [the] falsity of the statement. *Clampitt v. American University*, 957 A.2d 23, 42 (D.D.C. 2008) (*citing Moss v. Stockard*, 580 A.2d 1011, 1029 (1990). Unless a statement is so extreme, unreasonable, or abusive that a reasonable trier of fact would find malice inherent in the statement itself, it must be proven by extrinsic evidence. *Moss v. Stockard, supra*, 580 A.2d at 1024. In *Columbia First Bank v. Ferguson*, 665 A.2d 650 (D.C. 1995), this Court indicated as follows:

> The standard of actual malice is a daunting one. *Parsi v. Daioleslam*, 595 F. Supp. 2d 99, 106 (D.D.C. 2009) (*quoting McFarlane v. Esquire Magazine*, 74 F.3d 1296, 1308 (D.C. Cir. 1996). The actual malice standard is subjective; the plaintiff must prove that the defendants actually entertained a serious doubt. *McFarlane v. Sheraton Square Press, Inc.*, 91 F.3d 1501, 1508 (D.C. Cir. 1996); *see also Tavoulareas*, 817 F.2d at 776 (defendant

> must have "come close to willfully blinding itself to the falsity of its utterance:).

*Id.*, at 656. *See, Klayman v. Judicial Watch, Inc.*, 628 F. Supp. 2d 112, 154 (D.D.C. 2009). In his Brief at page 19, Rosen argues that the evidence supports a finding of malice. He states that evidence shows that AIPAC made a defamatory statement to the *New York Times*, without just cause or excuse, and without regard for the harm to Rosen's feelings and reputation. Rosen does not identify exactly what "evidence" supports his position that AIPAC acted with malice. All of the direct evidence is to the contrary. AIPAC's counsel met with the Department of Justice. At that meeting, evidence was shared of recorded conversations. Following that meeting, AIPAC's counsel recommended that Rosen be terminated from his at-will employment. Even though he was terminated, AIPAC advanced Rosen's legal fees which were in excess of $4.9 million, even though it had no legal obligation to do so. (App.188-189; 303-304). Subsequent to the termination, AIPAC learned of numerous other facts, outlined above, which reinforced its view that Rosen's actions did not comport with conduct which it expected of its employees. Lewin testified in deposition that he believed that conduct an organization could not condone would be the same as conduct which did not meet its standards. (App. 291-292). By 2008, AIPAC had read and reviewed the federal indictment, obtained additional information through articles and other pleadings filed in the Plaintiff's criminal case, had concern over discrepancies in Rosen's story as told to AIPAC at the outset of the investigation, and had knowledge of Rosen's use of AIPAC computers improperly, in violation of written company regulations. All of this direct evidence supported AIPAC's continued belief that Rosen's conduct did not exemplify what AIPAC or any other employer expected from an employee.

Where there is no direct evidence of actual malice was offered, one court has indicated that three scenarios could be examined, to determine the existence of malice. That court said:

> To prevent the inquiry into the defendant's objective state of mind from slipping into an open-ended review of the reasonableness of the defendant's investigation [], the courts have identified only three scenarios which the circumstantial evidence of subjective intent could be so powerful that it could provide clear and convincing proof of actual malice. These scenarios are where there is evidence that the story: (i) was "fabricated" or the product of defendants' imagination; (ii) is "so inherently improbable that only a reckless man would have put [it] in circulation"; or (iii) is "based wholly on a source that the defendant had obvious reasons to doubt, such as an unverified anonymous telephone call." *McFarlane*, 91 F.3d at 1512-13 (quotation omitted).

*OAO Alfa Bank v. Center for Public Integrity*, 387 F. Supp. 2d 20, 50 (D.D.C. 2005). Rosen has put forth no direct evidence of actual malice. Further, none of the three scenarios described above are present. Therefore, as a matter of law, Rosen has not established malice and as a public figure cannot prevail on a defamation claim, even if the statement in the 2008 article was defamatory. Whether the trial Judge did not rule in AIPAC's favor on this basis, he could have done so. And this Court could as well.

D. Rosen has no damages.

Finally, Rosen cannot recover for his defamation claim, because he has no damages. He has admitted at deposition that he is not making a claim for lost wages or any alleged mental or emotional harm. His claim for damages is limited to an allegation that the statement made in 2008 placed him in a "zone of danger" of a wrongful conviction. At the time he was under indictment by federal authorities, and he has not demonstrated how a statement by his employer with regard to his failure to follow their standards, could possibly impact the federal indictment.

District of Columbia cases discussing a "zone of danger" refer to a cause of action that allows a plaintiff to recover for the negligent infliction of emotional distress caused by a defendant's negligence. This Court has indicated that to establish a case of negligent infliction of emotional distress that a plaintiff must prove he was in the zone of danger created by the defendant's negligence and that the distress was serious and verifiable. *Sowell v. Hyatt Corp.*, 623 A.2d 1221, 1224 (D.C. 1993). Generally, the rule has been applied in tort actions, and this Court has indicated that recovery for mental distress can be allowed as long as plaintiff is in a zone of physical danger and as a result feared for his own safety because of the defendant's negligence. *Williams v. Baker*, 572 A.2d 1062, 1073 (D.C. 1990).[9]

Even if the "zone of danger" analysis could be applied to Rosen's claim, he still cannot prevail, because the very nature of his claims—facing a potential 20 years in jail if convicted—no longer exists. Rosen offered no evidence below that the March 3, 2008 statement contributed in any way to the criminal prosecution, or to his alleged "zone of danger." Rosen was asked at deposition whether the March 3, 2008 article was going to be used against him, and he indicated that government authorities did not specifically enumerate that particular article. (App. 227-228). The criminal case against Rosen was dropped in May 2009, or only weeks after Rosen filed his defamation claim. Indeed, Rosen testified at deposition that by the time his defamation suit was actually filed, he was confident that the

[9] This Court has recently examined the "zone of danger" theory of recovery and adopted a rule to supplement the zone of physical danger test holding that a duty to avoid negligent infliction of emotional distress will be recognized where a defendant has an obligation to care for a plaintiff's emotional well being, *e.g.*, a doctor –patient relationship, or where a plaintiff's emotional well being is implicated by the nature of a defendant's understanding to or relationship to a plaintiff. That rule would not apply here. *Hedgepeth v. Whitman Walker Clinic*, ___ A.3d ___, 2011 WL 2586720 (D.C. June 30, 2011)

criminal case would be dropped.[10] If Rosen has no compensatory damages, there can likewise be no award of punitive damages. *Vassiliades v. Garfinkel's, Brooks Brothers, Miller & Rhoades. Inc.*, 492 A.2d 580, 593 (D.C. 1985). If he has no damages, Rosen cannot recover in his defamation action, and therefore has no claim.

## CONCLUSION

For the reasons set forth above, AIPAC and Dorton respectfully request that this Court affirm the decision of the trial court, granting summary judgment in their favor. The court below properly granted judgment in favor of AIPAC and Dorton as the statements made were not provably false, but merely a characterization by an employer. As well, the March 3, 2008 statement which was allegedly defamatory was at most a repetition, which should be barred by the statute of limitations. Alternatively, the statement was not defamatory as a matter of law because it was true and accurate as set forth an opinion which could not be shown to have been objectively false. Further, as Rosen was a public figure, he was required to establish actual malice to recover for defamation, and the facts established below demonstrated that the March 2008 statement was not made with actual malice. Finally, Rosen through his own testimony established that there were no damages which could be awarded for the alleged defamation. Upon any or all of these bases, this Court should affirm the decision of the trial court.

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[10] When asked why the element of risk of a criminal prosecution had decreased to the point that it was acceptable for him to file the lawsuit, Rosen stated:"There were many legal events in the criminal case. There was a Court of Appeals ruling, there were many rulings by Judge Ellis in my case.... And these things all had an effect on the attorneys' judgment about, you know, the viability of the Government's case."
(App. 227-228).

William J. Carter, DC Bar No. 329637
Thomas L. McCally, DC Bar No. 391937
Allie M. Wright, DC Bar No. 499323
CARR MALONEY P.C.
2000 L Street, NW
Suite 450
Washington, DC 20036
Tel. 202-310-5500
Fax 202-310-5555
Email: wjc@carrmaloney.com
tlm@carrmaloney.com
amw@carrmaloney.com
Attorneys for Appellees

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of Appellees' Brief was mailed to counsel for the Appellant by U.S. Mail, first class postage prepaid at the address below on July 25, 2011.

David H. Shapiro, Esquire
Swick & Shapiro PC
1101 15th Street NW
Suite 550
Washington, D.C. 20005

Allie M. Wright