BARB

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.,

Defendant-Appellee.

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

REPLY BRIEF OF APPELLANT

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Having no need whatsoever to do so, Appellee AIPAC's spokesman told *The New York Times* in 2008 that AIPAC *still believed* AIPAC had correctly fired Appellant Rosen in 2005 because Mr. Rosen's conduct back then "did not comport with standards that AIPAC expects of its employees." AIPAC's statement to the *Times* was gratuitous, heedless and defamatory, given these facts presented in Appellant's opening brief:

(i) AIPAC initially publicly stated in 2004 it did not believe Mr. Rosen had done anything wrong;

(ii) AIPAC's counsel had conceded internally to AIPAC executives he could not necessarily conclude Mr. Rosen had violated any law;

(iii) AIPAC admitted at deposition and now openly contends it never had any written "standards" that Mr. Rosen could have violated;

(iv) Publicity surrounding the indictment of Mr. Rosen in 2005, for obtaining information that AIPAC sought, highlighted alleged criminal wrongdoing;

(v) The indictment against Mr. Rosen was ultimately dismissed entirely a short while after AIPAC's 2008 statement to the *Times*; and

(vi) By stating to the Times that AIPAC "still" believed Mr. Rosen had violated its standards, implying confirmation of earlier publicity about "standards" violations and the criminal indictment, AIPAC issued an unprivileged statement about a *former* employer that was untrue and defamatory.

ARGUMENT

I. Appellee AIPAC's Brief Advances a "Truth" Defense to the Defamation Cause of Action, Thereby Conceding That AIPAC's March 3 Statement Was Defamatory

A. Clarifying The Distinction Between The Terms "Defamation" and "Defamatory" Is Crucial To Deciding This Appeal.

A problem arises when using the terms "defamatory" and "defamation," but precise usage can resolve the problem. The briefs in this case and some published judicial opinions have sometimes blurred the two terms.

The *Standardized Civil Jury Instructions for the District of Columbia* separates neatly the overlapping meanings. Previously referred to as "libel" or "slander," the tort cause of action is modernly called "defamation." *See Standardized Civil Jury Instructions for the District of Columbia* No. 17-1 (2009 rev. ed.). The term "defamation" is thus the noun form attached to the legal theory.

The term "defamatory" has a separate meaning, however. "Defamatory" appears in the defined second element of the "defamation" cause of action. *Id.* The term "defamatory" is an adjective used expressly to describe the actual words of the defendant's statement. *Id.* "A statement is *defamatory* if it tends to injure a person in his or her trade, profession or community standing, or lowers him or her in the estimation of the community." *Id.* (emphasis added); *Williams v. District of Columbia*, 9 A.3d 484, 491 (D.C. 2010) (same); *Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 594 (D.C. 2000) (same); *Howard University v. Best*, 484 A.2d 958, 989 (D.C. 1984) (same).

Crucial to deciding this appeal is determining whether Appellee AIPAC's statement, published in the March 3, 2008 article in the New York Times (the "March 3 Statement"), was or could be found by a jury to be *defamatory* – using the precise meaning of the term.

B. AIPAC's Insisting That The March 3 Statement Was "True" Means AIPAC Is Raising The "Truth" Defense Needed to Avoid The Liability Otherwise To Apply.

AIPAC's brief on page 24 states: "The March 2008 statement[1] was not defamatory." As a matter of law, AIPAC's assertion there is incorrect. The above-cited authorities declare a "statement is defamatory if it tends to injure a person in his or her trade, profession or community standing, or lowers him or her in the estimation of the community." By expressing or implying that Mr. Rosen was fired because he fell short of AIPAC's standards, the March 3 Statement tended to weaken Mr. Rosen's standing in his professional or social community. Therefore, the March 3 Statement was defamatory as a matter of law – or certainly could be deemed defamatory by a jury.

On pages 24-30 or its brief, AIPAC argues to this Court that AIPAC was *justified* in making the March 3 Statement. For example, AIPAC's brief, on page 24, asserts: "by the time the March 2008 statement was published, the facts available to AIPAC clearly demonstrated that Rosen's actions did not comport with [AIPAC's] standards ..." On page 25, AIPAC's brief states: "all of the facts known to AIPAC by March 3, 2008 must be

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[1] Appellant's opening brief refers to the offending statement as the "March 3 Statement"; Appellee's brief refers to the same statement as the "March 2008 Statement."

taken into account to determine whether the opinion was ... objectively false."

These above statements and the subsequent pages of factual considerations in Appellee's brief are all relevant to the "truth" defense to a defamation cause of action. *See Standardized Civil Jury Instructions, supra*, No. 17-6. AIPAC thus urges that its March 3 Statement – which indisputably tended to harm Mr. Rosen's reputation and thus was *defamatory* – is not actionable because (AIPAC says) it was true.

But the issue of the truth of an otherwise defamatory statement is a jury question. *Guilford Transp.*, 760 A.2d at 594-595 (holding when a statement is indeed capable of bearing a defamatory meaning, then whether that statement is in fact defamatory and false is a question of fact to be resolved by the jury); *Moldea v. New York Times Co.*, 15 F.3d 1137, 1150 (D.C. Cir. 1994) (same rule); *see Samuels v. Tschechtelin*, 135 Md. App. 483, 553, 763 A.2d 209 (2000) (holding, on summary judgment motion, "the truth or falsity of the statement and the degree of [defendant's] fault, if any, are questions for a jury to resolve").

C. Summary Judgment Should Not Have Been Granted When AIPAC's Truth Defense Evidence Raised Triable Issues of Fact.

Perhaps inadvertently, AIPAC's brief offers evidence about the "truth" defense and thereby raises the questions of fact that require jury evaluation. Such jury questions

mean the Superior Court should have denied summary judgment.[2]

II. Appellee AIPAC's Brief Erroneously Contends A Jury Cannot Determine What An Employer's Standards of Conduct Are and Whether An Employee's Conduct Violated Them

AIPAC's Brief, at pages 18 to 19, argues that a jury would be incapable of deciding this defamation action:

> [A]llowing 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.

Note the features of AIPAC's claim: (1) juries cannot hear evidence about and decide what were AIPAC's standards of conduct, whether expressed or implied; (2) juries cannot hear evidence and decide whether Mr. Rosen violated AIPAC's standards. Yet juries are frequently asked to hear evidence about standards, decide what they are, and then decide whether a party complied with those standards. Indeed, this very proposition is briefed with ample citations to authorities in Appellant's opening brief at Argument Section III, starting at page 26.

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[2]At common law in cases of private figure plaintiffs like Mr. Rosen, truth is an affirmative defense requiring the defendant to make the proof. *Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995) (recognizing and applying the rule).

III. Appellee AIPAC's Brief Effectively Concedes AIPAC's Negligence and Malice In Making Its Defamatory March 3 Statement

AIPAC's brief contends the March 3 Statement "was a characterization by an employer, which did not rest on any objectively verifiable facts." Appellee's Brief, at 17. If true, that is a surprising and damning admission.

A. AIPAC's Negligence in the March 3 Statement Is Conceded.

The March 3 Statement tells readers:

(1) AIPAC's spokesman said Mr. Rosen was "dismissed because [his] behavior did not comport with standards that AIPAC expects of its employees," and

(2) AIPAC's spokesmen "said recently that AIPAC still held that view of [Rosen's] behavior."

App. at 245-248.

Now AIPAC's brief asserts that the March 3 Statement "did not rest on any objectively verifiable facts." AIPAC is thus contending that its spokesman uttered a defamatory statement[3] about Mr. Rosen *without* "any objectively verifiable facts."

When a jury considers a defamation of a private figure plaintiff, the third element for consideration is whether the defendant's statement was "negligent." *Standardized Civil Jury Instructions, supra*, No. 17-1 (citing authorities). "To be negligent in publishing [a defamatory statement] means to unreasonably fail, under the circumstances,

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[3] A statement is "defamatory" if it injures the business or social reputation of the plaintiff. See discussion and authorities cited at Argument Section I (A), *supra*.

to take care that the statement was true." *Id.*

Here, AIPAC positively contends that the March 3 Statement did not have to be true, and in fact had no objectively verifiable basis in truth. AIPAC's position practically defines "negligence" in the defamation context.

B. AIPAC's "Malice" – Not An Element In Rosen's Private Figure Defamation Case – Nevertheless Is Established By AIPAC's Concession.

AIPAC contends that Mr. Rosen must establish the March 3 Statement was uttered not with "negligence" but with "malice." Appellee's Brief, at 30. Appellant Rosen disagrees. Even if *arguendo* "malice" had to be established, AIPAC's position makes "malice" indisputable.

To establish "malice" in a defamation case, the plaintiff needs to show "the defendant published the statement either knowing that the statement was false, or with reckless disregard of whether it was false or not." *Standardized Civil Jury Instructions, supra*, No. 17-3 (citing authorities). Here, AIPAC's brief contends it uttered a defamatory statement about Mr. Rosen without knowing whether it was true or false, and without having any factual basis for the statement. AIPAC's position supports a finding of "reckless disregard" that establishes malice.

If AIPAC is contending Mr. Rosen has to prove common law "actual malice," then AIPAC needs to first claim an employer's qualified privilege defense. *See Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 879 (D.C. 1998). Yet AIPAC's

brief does not claim the privilege at all. Even if, *arguendo,* the employer's privilege were raised, then "actual malice" would need to be established *unless the privilege were lost.* The employer's "qualified privilege ...can be lost if the publication occurs outside normal channels," i.e., outside of the confines of the employer-employee environment, or "is otherwise excessive." *Id.*(citation omitted).

Here, AIPAC may previously have been an employer with a qualified privilege to comment upon Mr. Rosen's performance within the employment relationship perimeter. But AIPAC's spokesman uttered the defamatory remarks to America's traditional newspaper of record, the *New York Times*. That publication was certainly "outside normal channels" and "excessive," and, therefore, it extinguished any qualified privilege that might otherwise have applied. *Id.* When no qualified privilege applies, then "actual malice" is no longer an element of plaintiff's proof. Accordingly, AIPAC's extensive discussion of the "malice" is issue is therefore irrelevant to this appeal.

IV. Appellee AIPAC Advances A Novel Loophole Doctrine To Become D.C. Law: "An Employer May Escape Defamation Liability By Asserting An Employee Was Fired for 'Violating Standards,' So Long As The Employer Testifies There Were No 'Standards'"

A. AIPAC's Proposed Doctrine Creates An Employer Defamation Immunity.

AIPAC's brief agrees that AIPAC had no written standards of conduct that related to Mr. Rosen's job performance concerning the receipt or handling of classified materials.

AIPAC contends the lack of written standards *immunizes* AIPAC from defamation liability. AIPAC's brief at page 27 thus avers:

> The fact that AIPAC had no written standards with regard to how to handle classified information is of no moment.

Indeed, AIPAC's brief cites no evidence that there were any actual "standards of conduct" on this subject at all. And AIPAC argues that fact is a blessing. When AIPAC tells the world an employee was fired for violating AIPAC's "standards of conduct," AIPAC contends, *it escapes all defamation liability by simply denying any such standards ever existed.*

If no standards of conduct exist, AIPAC argues, then the employer's accusations against an employee are mere opinion. *See, e.g.*, Appellee's Brief, at 12 (asserting "the [March 3 Statement] could be found to be pure opinion, as it does not contain a provably false factual connotation and therefore is not defamatory"). So anytime an employer desires, it may publish in the *New York Times* that "Employee Ted Jones was fired today for violating our standards of conduct." The employer could publish that statement every day for years and escape defamation liability, according to AIPAC ... *so long as the employer testifies it has no standards of conduct.*

AIPAC's proposed new doctrine contradicts the definition and purpose of defamation law. As shown above, the term "defamatory" expressly refers to statements made that injure a persons' business or professional reputation. An employer's published

negative comments about an employee stand among the most powerful sorts of defamatory words. If AIPAC's view prevails, then employers need only abolish all "standards of conduct" to obtain the AIPAC doctrine's protection.

B. The Supreme Court's *Milkovich* Precedent Rejects Every Aspect of AIPAC's New Doctrine.

The Supreme Court has expressly *rejected* the idea that covering defamatory words in a self-serving cloak of "pure opinion" is enough to avoid liability for defamation. The Court, in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S. Ct. 2695 (1990), discussed a hypothetical case remarkably similar to that which occurred in Mr. Rosen's case:

> If a speaker says, "In my opinion John Jones is a liar," *he implies a knowledge of facts which lead to the conclusion* that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, *"In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar."* As Judge Friendly aptly stated: "[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.' "

Id., 497 U.S. at 18-19 (emphasis added; citations omitted).

In Mr. Rosen's case, AIPAC claims it can say "he was fired for violating standards" and escape liability because (1) there were no standards, so (2) its statement is not factually based, and therefore (3) its defamatory statement was pure opinion. Quoted above, the *Milkovich* Court expressly rejected that line of reasoning, and this Court should reject it as well.

CONCLUSION

Appellant Rosen respectfully requests this Court to vacate the summary judgment and remand this case for further proceedings and trial on the merits.

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CERTIFICATE OF SERVICE

I certify that a copy of Plaintiff-Appellant's Reply Brief was served upon Defendant-Appellee's attorney of record on August 16, 2011 via courier at the address below.

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