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D.C. Court Affirms Anti-SLAPP Dismissal, and Attorneys' Fees, in Case About Newsroom Manager's Workplace Conduct

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On February 13, 2024, the D.C. Court of Appeals affirmed the dismissal of a pair of lawsuits, under the D.C. Anti-SLAPP Act, alleging claims of defamation, employment discrimination, false light, and tortious interference arising from expressions critical of a newsroom manager's conduct at public radio station WAMU. This is the first case counsel is aware of extending the D.C. statute to an employment discrimination claim.

In *Berry v. Current et al.*, the Court of Appeals held that comments by the plaintiff's former colleagues and published in the magazine *Current* were within the public interest, and therefore subject to the Anti-SLAPP Act, because they concerned "workplace equity at a prominent donor funded news organization." It then held that because the plaintiff had not meaningfully disputed on appeal that the comments were non-actionable opinions or that the Anti-SLAPP Act applied to the discrimination claim, he had not established a likelihood of success on the merits, as the statute requires. Finally, it held that the lower court did not abuse its discretion in awarding Defendants more than $350,000 in attorneys' fees.

The Plaintiff's Tenure at WAMU

Zuri Berry was, from January 2019 until January 22, 2021, the Senior Managing Editor of WAMU, the DC-area NPR affiliate, which is owned and operated by American University. He supervised a staff of four to six women and had an especially poor relationship with at least two of them. Those two, both Black women, filed human resources complaints against Berry and ultimately left the station. They alleged that Berry, a Black man, was overbearing, a micromanager, and a bully.

After their departures, as well as the departures of several other women of color from the newsroom, the station held a meeting to discuss the atmosphere in the workplace. This discussion came in the summer of 2020, in the midst not only of internal turmoil at WAMU (which received news coverage), but also of turmoil at workplaces everywhere, spurred by the murder of George Floyd and the #MeToo movement. At this meeting, the News Director read a memo written by a different Black woman very critical of Berry's management style in the newsroom. The memo relayed that Berry questioned the judgment and stifled the growth of Black and Asian journalists, that he "berated" them in front of others, "shot down" their ideas, "micromanaged" them and was otherwise "problematic."

Following the meeting, Berry sent an apology email to all WAMU staff, in which he acknowledged that he "failed the women of color in our newsroom" and "contributed to [their] exodus." Shortly thereafter, WAMU began an investigation of his conduct and issued to him a Notice of Complaint which cited examples of various ways in which Berry allegedly created a difficult work environment, including by "dismissing the ideas of women," "yelling" at and "raising his voice with women," "making condescending comments," "micromanaging," "hovering over a female employee," and "bully[ing]," among other things. Several months later, in January of 2021, WAMU terminated his employment.

The *Current* Article

Current magazine is a non-profit news organization covering public media, published and operated by American University. On July 20, 2020, after the meeting in which Berry was criticized, but before he was ultimately terminated, *Current* published the article, "WAMU Licensee Investigates Editor Blamed for Departures of Women of Color." The article reported, among other things, that Berry "has been the subject of multiple complaints from staffers," that his conduct was being investigated by the station, that "three female journalists of color" said that their decisions to leave the newsroom "were prompted by Berry's behavior toward them," and that those staffers felt "undermined, micromanaged, and mistreated" by him.

Berry's First Lawsuit

Berry brought a lawsuit ("*Berry I*") against *Current*/AU and six individual women, his two subordinates who filed HR complaints against him, the colleague who wrote the memo read at the meeting, the journalist who wrote the article, and the managing and executive editors of *Current*. He alleged claims for defamation, false light, and tortious interference with current and prospective business or contractual relationships. The statements he challenged as false and defamatory boiled down to those in *Current* and elsewhere that he was, *e.g.*, "dismissive," "micromanaging," a "bully," and that he "yelled" at a subordinate and "hovered" over another's desk.

In December of 2020, AU and the women filed a special motion to dismiss pursuant to the D.C. Anti-SLAPP Act on the grounds that the case arose from statements communicated to the public about a matter of public concern and that Berry was unlikely to succeed on the merits. Specifically, they alleged that issues surrounding "toxic" work environments and the treatment of women in the workplace – particularly in a high-profile field like listener-funded public radio in a major metro area – are related to matters of public interest. And they alleged that Berry could not succeed on the merits because the statements were non-actionable opinions, or, in the alternative, were substantially true. In support of their substantial truth argument, Defendants submitted ten affidavits – as is permitted under the Anti-SLAPP Act – most from Berry's former colleagues, attesting to his difficult workplace behavior.

Given the Anti-SLAPP Act's automatic discovery stay provision, Berry moved to take discovery, asserting that he needed to depose each of the affiants as well as engage in document discovery. The superior court denied Berry's motion, determining that he had not shown, as is required to overcome the automatic stay, that "targeted discovery" would likely enable him to defeat the motion. He then went on to oppose the Anti-SLAPP motion, arguing that the matter was a private personnel matter, and not in the "public interest."

In December of 2021, the D.C. Superior Court issued a written ruling granting Defendants' Anti-SLAPP motion. *Berry v. Current et al.*,2021 WL 11737375 (D.C. Super. Dec. 28, 2021). The court first held that the claims were in the public interest and thus subject to the Anti-SLAPP Act because:

> Information concerning [WAMU's] investigation regarding ... Berry's conduct throughout his employment related to WAMU's negative reputation that was highly publicized in the past. Further, the statements were related to public discourse concerning WAMU's alleged long history of racism and sexism.

The court went on to hold that Berry could not "meet his burden to show that he is likely to succeed on the merits" on any of his claims including because the challenged statements were "non-actionable opinion" or, in the alternative, were "substantially true":

> The statements Plaintiff highlights as defamatory in his complaint are subjective comments based on personal perceptions and feelings that cannot be proven true or false and are therefore nonactionable. Moreover, the context of the article makes it clear that these former employees were describing their personal experience while working at WAMU. Furthermore, the statements in the article are substantially true based on the sworn statements from eight employees and former employees at WAMU regarding their experience, and Plaintiff's behavior toward them, and Plaintiff's apology email acknowledging these reoccurring issues and complaints.

Several months after the dismissal, the superior court awarded Defendants the entire amount of the attorneys' fees they requested under the Anti-SLAPP Act, $136,700.50. Plaintiff then noticed an appeal of the dismissal and the fee award.

Berry's Second Lawsuit

While *Berry I* was being briefed, Berry filed a second lawsuit ("*Berry II*"), this time against just American University, again alleging defamation and false light, and adding a claim for discrimination under the D.C. Human Rights Act ("DCHRA"). Like the defamation and false light claims, the gravamen of Berry's DCHRA claim arose from expression, specifically that AU "disclosed" or "announced" at a staff meeting that he was "under investigation," "while refusing to identify Caucasian managers who were under investigation" and then "terminat[ing his] employment."

Given that all three claims again arose from (the same) speech on a matter of public interest, AU again brought an Anti-SLAPP motion to dismiss. It asserted that Berry was unlikely to succeed on the defamation and false light claims for the same reasons as before, and that he was unlikely to succeed on the DCHRA claim because he had not alleged sufficient facts to support such a claim. Defendants also asserted that the claims were barred by *res judicata* because they arose from the same set of facts alleged in *Berry I* and therefore should have been asserted in that case. While *Berry II* was being briefed, the court decided *Berry I*.

The Superior Court granted AU's motion, *see Berry v. Current*, 2022 WL 20747500 (D.C. Super. March 14, 2022). It held that the claims in *Berry II* were barred by *res judicata*. It held that the Anti-SLAPP Act applied to the defamation and false light claims because (as the court had held in *Berry I*), those claims "clearly arise out of 'public discourse concerning WAMU's alleged long history of racism and sexism.'" And it held that Berry was unlikely to succeed on the merits because (a) all claims were barred by *res judicata*, (b) the defamation and false light claims were not viable because the challenged statements were opinions and/or substantially true, and (c) he failed to plead facts sufficient to support the DCHRA claim.

The court in *Berry II* likewise awarded Defendants recovery of 100% of their attorneys' fees of $217,368. Plaintiff again appealed the dismissal and the fee award in April of 2022.

The Appeal

Berry I and *Berry II* were consolidated for purposes of appeal. Oral argument was ultimately heard on January 18, 2024, nearly two years after the appeal was noticed.

The Court of Appeals issued its ruling affirming the lower court decisions less than a month after oral argument. In its *per curiam* order, the Court agreed that the allegations against Berry were of public concern, and thus fell under the Anti-SLAPP Act. Specifically, though it "agree[d] that statements alleging mistreatment by Mr. Berry of workplace subordinates relate in part to his private interests, they were intermingled with and were 'sufficiently connected' to issues of public interest" to warrant the protection of the Anti-SLAPP Act. It continued:

> Mr. Berry "himself ma[d]e[] the case that the statements at issue in this lawsuit were made 'in connection with an issue of public interest.'" It was Mr. Berry who, in his opposition to the Anti-SLAPP special motion dismiss, placed his employment dispute in the context of the "years of bad publicity" that WAMU, a "popular National Public Radio affiliate" at "the fifth largest nongovernmental employer Washington D.C.," had "suffered." The Current article . . . appeared to document a continuation of what Mr. Berry characterized as the "long history of racism and sexism at WAMU," which he acknowledged had been the subject of news and social media.

The Court rejected Berry's analogy to *Close It! Title Servs., Inc. v. Nadel*, 248 A.3d 132 (D.C. 2021), where the Court "held that an attorney's statement to the press" about a title company he was suing "was not a matter of public interest." In *Close It!,* the Court held, "the statements at issue 'related primarily to a private dispute about responsibility for the loss of'" money, whereas "here, as discussed above, the statements in the Current article did connect to issues of public interest regarding workplace equity at a prominent donor-funded news organization."

The Court then affirmed the lower courts' determinations that Berry had not shown likelihood of success on the merits. It found that Berry's appeal did not sufficiently challenge the underlying "opinion" ruling, and it therefore "assume[d] that [the ruling below on this point] was correct." And it affirmed the dismissal of the DCHRA claim because Berry did not argue on appeal that it fell outside the Anti-SLAPP Act. (The Court did not address the alternative "substantial truth" argument.)

The Court also affirmed the fee awards, finding Berry's argument that the trial court abused its discretion in awarding more than $350,000 was not "persuasive."

The Defendants in Berry I *were represented by Chuck Tobin and Alia Smith of Ballard Spahr LLP in Washington, DC. The Defendant in* Berry II *was represented by Chuck Tobin and Alia Smith of Ballard, as well as Laurel Malson and Eli Berns-Zieve of Crowell & Moring LLP. Plaintiff was represented by David Branch.*