

D.C. Court Grants First Anti-SLAPP Motion

Applies Law Retroactively

By Charles D. Tobin and Drew E. Shenkman

A District of Columbia judge has ordered the first dismissal under the jurisdiction's new anti-SLAPP law, finding that a firefighter failed to show he was "likelihood of success" in his defamation claim concerning reporting that he earned extreme amounts of overtime. [*Lehan v. Fox Television Stations, Inc. and Roby Chavez*](#), Case No. 2011 CA 004592 B (D.C. Super. Ct. November 30, 2011).

Judge Rufus G. King III, of the D.C. Superior Court applied the new statute retroactively and granted the dismissal motion brought by WTTG, which is owned by Fox Television Stations, and its former reporter Roby Chavez. King held that fire department Lt. Richard Lehan failed to meet his burden to show the station was at fault or that he suffered any damages. The judge dismissed the lawsuit with prejudice and ordered the defendants to brief attorney's fees, which are discretionary under D.C.'s statute.

Background

The lawsuit arose out of WTTG's January 2011 report on a local government review of \$5 million annual budget overruns in the D.C. Fire and Emergency Medical Service. A committee of the D.C. Council, examining the District's overtime budget, received a report that listed Lt. Lehan as the service's largest overtime earner in fiscal 2008 and in the top 10 largest in fiscal 2009 and 2010.

On top of his \$90,000 annual salary, Lehan had earned between \$66,000 and \$119,000 in overtime each of those years, the Council committee's records showed. WTTG's report on the committee's probe highlighted Lehan's earnings, and reported his comments that he worked the overtime to

support a large family and took simply took the assignments given to him. The station also reported that, according to unnamed sources, Lehan and his brother, also a firefighter, were in charge of the computer system that assigned overtime.

Lehan in June 2011 sued for defamation and defamation per se. He alleged that the station's figures were inaccurate and that the report's use of phrases like "racked up" and "month-after-month" were defamatory. He also alleged that the report that he and his brother controlled the assignment of overtime was false. He charged the station with accusing him of a criminal act.

Anti-SLAPP Motion

The station filed a special motion to dismiss under the District's anti-SLAPP statute, D.C. Code §16-5501, *et seq.*, enacted in March 2011. D.C. is the 29th jurisdiction with a law permitting early challenges SLAPP lawsuits -- which stands for "Strategic Lawsuits Against Public Participation." Under the D.C. statute, if a defendant establishes the lawsuit arose out of "acts in furtherance of the right of advocacy on issues

of public interest," the burden shifts to the plaintiff to demonstrate a "likelihood of success" on the merits. If the plaintiff fails, the statute requires the court to dismiss the lawsuit, and provides the judge with discretion to award reasonable attorney's fees.

The station argued that the statute applied because the journalism met the statutory definitions for "issues of public interest," as it: touched on "an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law"; involved the communication of "views to members of the public in

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connection with an issue of public interest"; and also involved "an issue related to health or safety; environmental, economic, or community well-being." On the merits, the station argued:

- ◆ The figures the station reported were substantially accurate;
- ◆ The station's report was based on government records and therefore protected by fair report privilege;
- ◆ The descriptions "racked up" and "month-after-month" were nonactionable expressions because they were truthful or were protected opinions;
- ◆ The station's report did not accuse Lehan of a crime, let alone one involving moral turpitude, and therefore was not libel per se;
- ◆ Lehan could not show damages;
- ◆ Finally, that Lehan is a public official and could not establish actual malice by clear and convincing evidence.

To bolster the actual malice argument, WTTG filed an affidavit from the reporter. He attested that his confidential sources were high ranking fire-department officials who had provided information on several previous stories, including internal investigations, and that their information had always been reliable.

Lehan vigorously challenged the statute's application on retroactivity grounds. He argued the law provided new "substantive" rights because, in his view, it increased a defamation plaintiff's burden. Therefore, he argued, since the story was broadcast in January and the statute enacted in March, it could not be applied retroactively.

He also filed an affidavit containing his calendar year income figures, which were at variance with the fiscal year figures contained in the public records and WTTG's report. Lehan also argued he was not elevated enough in D.C. government to warrant treatment as a public official under defamation law, and that simple negligence therefore applied. Finally, his affidavit and an affidavit from his firefighter-brother both attested that the Lehans did not control the computer assignment of overtime.

WTTG responded to the retroactivity issue by arguing that the procedural/substantive dichotomy used to analyze

Erie questions in federal court was unhelpful, and that under controlling D.C. law, retroactivity simply turns on whether the statute made it harder for Lehan to win the lawsuit. WTTG argued that as Lehan had the same defamation burdens before the statute and after -- falsity, defamatory content, lack of privilege, actual malice and damages -- the statute did not alter his chances of prevailing. Instead, the statute merely accelerated the timeframe for the court's consideration of the merits.

Judge King ruled in the defendants' favor at the November 21 hearing, and his November 30 order dismissing the lawsuit incorporated the hearing transcript. He firmly agreed with WTTG that the statute applied retroactively. He noted that while a part of the legislative history had used the word "substantive":

[M]y finding is that the burden of proof on the Plaintiff does not change. It simply is accelerated a little bit, in part. So, that instead of having to actually provide preponderance of the evidence proof, he has to show early on that he is likely to be able to do so. That is not a substantive change in his burden of proof. It does not add anything that he will have to do. It simply changes the timing of when he has to do it. He has to do a little bit of it now. He has to show likelihood, that he is likely to get there and then he actually has to get there. In the Court's view, it does not change the substance of the law. The statute then applies.

"Certainly, a publication that describes how the District Government is spending its money would be a matter of public interest and subject to comment."

As to applicability, the judge said the anti-SLAPP statute clearly covered WTTG's reporting: "Certainly, a publication that describes how the District Government is spending its money would be a matter of public interest and subject to comment."

The judge then held that the distinction between a public and a private figure would not "make[] the critical difference in this case" because the reporter's affidavit demonstrated that Lehan could not even show "ordinary negligence." In

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addition to relying on public records, the judge found, the reporter established that he:

did an investigation that frankly sounded very like the showing that police officers have to make when they want to show probable cause based on a confidential informant. They have to show that they had experience; that it was substantial and that there has never been an incident when the informant has been proven false. I think [the reporter] did that here. So, I don't think that there was negligence then in using that information.

Judge King alternatively held, however, that Lehan is a public figure whose claim is governed by actual malice, and that fault "cannot be shown by a clear and convincing standard or even a negligence standard."

Finally, the judge agreed that Lehan had failed to demonstrate a likelihood that he could establish damages, not even emotional harm:

[T]he allegation is not that he was falsely reporting his hours. It was that he simply worked a lot of hours when in the view of some, he should not have been working those hours. That is almost not even embarrassing in the normal daily run of news on the operations of the city government. The idea that some people are working a lot of hours almost is not even embarrassing. I say almost. I don't need to get into whether it is or whether it is not. But, there is no showing of damage.

Lt. Richard Lehan was represented by Michael E. Thorsen, John D. McGavin and Dawn E. Boyce, of Bancroft, McGavin, Horvath & Judkins, P.C., Fairfax, VA.

Fox Television Stations and its former reporter Roby Chavez were represented by Charles D. Tobin and Drew E. Shenkman, Holland & Knight LLP, Washington D.C., in close collaboration with Susan Seager, Senior Counsel, Fox Entertainment Group, and Lisa Rafferty, Vice President, Legal Affairs, Fox Television Stations, Los Angeles.



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