

New York Supreme Court
New York County

BEVERLY WILKINS v. THE NEW YORK
POST and PORT AUTHORITY OF NEW
YORK AND NEW JERSEY

Index No. 401911/01

September 30, 2003

REGULATION OF MEDIA CONTENT

**[1] Defamation — Defamatory content —
Headlines (§ 11.0507)**

**Defamation — Defamatory content —
Insults (§ 11.0509)**

**Defamation — Privilege — Fair
comment/opinion (§ 11.4502)**

Headline of newspaper article about plaintiff toll collector, entitled "The toll collector from hell," as well as caption accompanying plaintiff's photograph stating "HAVE A ROTTEN DAY! Surly Beverly Wilkins refuses to answer motorists' questions at the Outerbridge Crossing. Even colleagues complain about her," and statements in article characterizing plaintiff as "the Outerbridge Ogre," "the toll collector from hell," "nasty," and stating that plaintiff "treats motorists like garbage," constitute protected opinion, since, when considered in context of article as whole, they would be understood as expressing opinion, based on specific facts set forth in article, since they reflect hyperbolic language, and since they constitute fair index or summary of factual matter asserted in article.

**[2] Defamation — Defamatory content —
Insults (§ 11.0509)**

**Defamation — Truth — In general
(§ 11.4001)**

Newspaper demonstrated substantial truth of factual statements in article about plaintiff

toll collector, that she has "foul mouth and belligerent and abusive manner," quoting toll official referring to her as "the nasty toll collector," and reporting that toll official stated that when customers make complaints against her, they are "flustered" and "don't want to repeat what she says," that port authority received "a number of oral complaints" about her from customers and that "staff members have observed instances of inappropriate behavior," that she has been reprimanded by her supervisor, that port authority will take appropriate action, including counseling and disciplinary action, that departmental disciplinary hearing has been scheduled based on driver's complaint, detailing five categories of complaints against plaintiff reported by drivers and port authority sources, quoting co-worker that plaintiff has "done this" to "thousands" of people, that she "treats motorists like garbage," that she is rude to co-workers and "can't even communicate with other workers," and that plaintiff is among several employees being kept under close scrutiny, since newspaper submitted evidence of numerous complaints made to port authority by customers and supervisors regarding plaintiff's conduct, and since plaintiff failed to come forward with any evidence to raise triable issue of fact as to falsity of factual statements.

**[3] Defamation — Defamatory content —
Insults (§ 11.0509)**

**Defamation — Truth — In general
(§ 11.4001)**

**Defamation — Privilege — Fair
comment/opinion (§ 11.4502)**

Plaintiff toll collector failed to raise triable issue of fact as to falsity of negative statements in newspaper article about her, since statement that motorists back out of plaintiff's lane when they see her on duty is clear hyperbole, since statement that stunned motorists have stormed port authority to complain about her, while factual, is sufficiently corroborated, and since claim that plaintiff's photograph is defamatory is unsupported by appearance of photograph or legal authority.

**[4] Defamation — Public official/figure —
Private figures (§ 11.2006)**

Plaintiff toll collector is private figure and not public official, for purposes of constitu-

tional analysis of her defamation action against newspaper, based on negative article about her entitled "The toll collector from hell," which included photograph of plaintiff with caption stating "HAVE A ROTTEN DAY! Surely Beverly Wilkins refuses to answer motorists questions at the Outerbridge Crossing. Even colleagues complain about her," since plaintiff interacts with public merely in performance of routine, ministerial functions.

**[5] Defamation — Defamatory content —
Insults (§ 11.0509)**

**Defamation — Standard of liability — In
general (§ 11.3001)**

Content of newspaper article about plaintiff toll collector, entitled "The toll collector from hell," which included plaintiff's picture with caption stating "HAVE A ROTTEN DAY! Surely Beverly Wilkins refuses to answer motorists questions at the Outerbridge Crossing. Even colleagues complain about her," is matter of legitimate public concern, since it concerns unprofessional conduct of government employee who is encountered by many members of public.

**[6] Defamation — Standard of liability —
Gross irresponsibility (§ 11.3004)**

Newspaper reporter did not act in grossly irresponsible manner by publishing article about plaintiff toll collector, entitled "The toll collector from hell," which included photograph of plaintiff with caption stating "HAVE A ROTTEN DAY! Surly Beverly Wilkins refuses to answer motorist's questions at the Outerbridge Crossing. Even colleagues complain about her," and which included numerous negative statements about plaintiff, since reporter's affidavit detailed steps he took to corroborate account as to plaintiff's conduct that he had learned from his co-worker, including interviews with toll collector, toll supervisor, port authority officials, and plaintiff fact that he had found port authority spokes person to be reliable source on many occasions in past, that he believed that all of information reported in article was true, and that during his research he never encountered any information contradicting or calling into question any of his sources or information received from them, and since plaintiff offered

no evidence of any irresponsibility on part of reporter or newspaper.

Defamation action against newspaper and port authority. On defendants' motions for summary judgment.

Granted.

Leonard H. Adoff, of Adoff & Glinn, Iselin, N.J., for plaintiff.

Slade R. Metcalf and Trina R. Hunn, of Hogan & Hartson, New York, N.Y., for defendant New York Post.

Megan Lee and Angel Kelley, Port Authority of New York and New Jersey, New York, for defendant Port Authority of New York and New Jersey.

Friedman, J.:

In this defamation action, defendant NYP Holdings, Inc., sued as The New York Post ("the Post"), and defendant The Port Authority of New York and New Jersey ("Port Authority") move for summary judgment dismissing the complaint.

This action arises out of the Post's publication on October 24, 1999 of an article, written by reporter Carl Campanile, concerning plaintiff's conduct as a toll collector for the Port Authority. The article is entitled "The toll collector from hell" and contains a picture of plaintiff, with a caption beneath it stating: "HAVE A ROTTEN DAY! Surly Beverly Wilkins refuses to answer motorists' questions at the Outerbridge Crossing. Even colleagues complain about her." The article opens with the following two paragraphs: "To motorists traveling between Staten Island and New Jersey, she's the Outerbridge Ogre. [¶] Her name is Beverly Wilkins, and she's the toll collector from hell—known for her foul mood and belligerent and abusive manner." The article quotes a "toll official" as referring to plaintiff as "the nasty toll collector," and further reports that a toll official stated that when customers make complaints against plaintiff, "[u]sually they are so flustered when they get here. A lot of time they don't want to repeat what she says." The following statement of a Port Authority spokesperson regarding complaints against plaintiff is also quoted: "[¶] The Port Authority has received a number of oral complaints about this individual from customers—and staff members have observed instances of inappropriate behavior. [¶] She

has been reprimanded by her supervisor. The PA will continue to take appropriate action—including counseling and, if appropriate, disciplinary action." The article further reports that a department disciplinary hearing had been scheduled based on a complaint from a driver. In addition, the article details five categories of complaints against plaintiff "reported by drivers and PA sources": "Ignoring a truck driver's request for directions, preferring to read a magazine"; "[b]erating a California motorist who stopped alongside her booth because the motorist was confused about the E-Z Pass signals"; "[t]elling a friendly motorist who had bid her hello: 'Cut the small talk and get moving!'" ; "[s]lamming her toll-booth window shut in a motorist's face when asked for information"; "[f]orcing motorists to stretch far out of their car windows to pay their tolls because she barely reaches outside her booth to collect it." The article also quotes a "toll collector who works with" plaintiff as stating: "How many thousands of people has she done this to? She treats motorists like garbage. [¶] She's rude to us. She can't even communicate with other workers." A Port Authority source is further quoted as stating that based on written complaints received by the Port Authority, "there are several employees who are being kept under close scrutiny—and Wilkins is one of them."

The Post's Motion

The complaint alleges that each of the above statements, as well as the "staged" photograph of plaintiff taken by the reporter, is false and defamatory. In moving to dismiss the complaint, the Post argues that the statements are true or constitute protected opinion. In the alternative, the Post contends that this libel action is subject to constitutional standards that plaintiff has not met. In particular, the Post contends that plaintiff is a public official and may not recover for libel because she has failed to show that the statements were made with actual malice. The Post further argues that even if plaintiff is a private figure, she may not recover because she has failed to show that the statements were published with gross irresponsibility.

It has long been held that "a written statement may be defamatory 'if it tends to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of him in the minds of a substantial number of the com-

munity.'” (*Golub v. Enquirer/Star Group, Inc.*, 89 NY2d 1074, 1076 [25 Med.L.Rptr. 1863] [1997] [internal citations omitted].) “Whether particular words are defamatory presents a legal question to be resolved by the court in the first instance.” (*Aronson v. Wiersma*, 65 NY2d 592, 593 [12 Med.L.Rptr. 1150] [1985]; *Golub*, 89 NY2d at 1076.)

In the instant case, the court finds that the statements as to which plaintiff complains are unquestionably defamatory. The court further holds that these statements are either protected expressions of opinion, or, if factual, that plaintiff fails to raise a triable issue as to their falsity.

It is well settled that “[a]n expression of pure opinion is not actionable.” (*Steinhilber v. Alphonse*, 68 NY2d 283, 289 [13 Med.L.Rptr. 1562] [1986].) It is further settled that whether a statement expresses fact or opinion is a question of law for the court. (*Id.* at 290.) “A ‘pure opinion’ is a statement of opinion which is accompanied by a recitation of the facts upon which it is based. * * * When, however, the statement of opinion implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, it is a ‘mixed opinion’ and is actionable.” (*Id.* at 289.) The determination as to whether a statement is fact or opinion must be based on “what the average person hearing or reading the communication would take it to mean. * * * The essential task is to decide whether the words complained of, considered in the context of the entire communication and of the circumstances in which they were spoken or written, may be reasonably understood as implying the assertion of undisclosed facts justifying the opinion.” (*Id.* at 290.) The court must examine “the content of the whole communication as well as its tone and its apparent purpose.” (*Id.* at 293. *Accord Immuno AG. v. Moor-Jankowski*, 77 NY2d 235, 254 [18 Med.L.Rptr. 1625] [1991], *cert denied* 500 US 954.)

[1] Applying these standards, the court holds that the Post article contains several statements of opinion—namely, the headline of the article and the caption beneath the picture; the characterizations of plaintiff as an “ogre,” “the toll collector from hell” and “nasty”; and the statement that she treats motorists like garbage. These statements, considered in the context of the article as a whole, would be understood as expressing opinion,

based on the specific facts which are also set forth in the article. The statements reflect the hyperbolic language which is consistent with opinion rather than fact. (*See Immuno AG.*, 77 NY2d at 245.) Moreover, although hyperbolic, the statements are a “fair index” or summary of the factual matter asserted in the article, and therefore are not actionable. (*See Gunduz v. New York Post Co.*, 188 AD2d 294 [20 Med.L.Rptr. 2071] [1st Dept 1992]. *See also Von Gerichten v. Long Is Advance*, 202 AD2d 495 [2d Dept 1994 [headline must be evaluated in connection with the text it precedes].)

The remaining statements in the article—i.e., the statements of fact—if truthful, will also not be actionable, as “[i]t is axiomatic that truth is an absolute, unqualified defense to a civil defamation action.” (*Schwartzberg v. Mongiardo*, 113 AD2d 172, 174 [3d Dept 1985], *lv denied* 68 NY2d 602 [1986].)

As will be discussed further below, because this case involves a private plaintiff and a matter of public concern, plaintiff has the burden of pleading and proving that the statements are “substantially false.” (*Von Gerichten*, 202 AD2d at 496. *See Philadelphia Newspapers v. Hepps*, 475 US 767 [12 Med.L.Rptr. 1977] [1986]; *Immuno AG.*, 77 NY2d 235, *supra.*)

[2] On the instant motion, the Post meets its burden of coming forward with evidence showing that the factual statements in the article were substantially truthful. In particular, the Post submits evidence of numerous complaints made to the Port Authority regarding plaintiff’s conduct in the period from 1992 through 1999. These complaints (annexed as Exhibit D to the moving papers) include complaints from customers as well as supervisors. The customer complaints concern rudeness—i.e., use of profanity to a toll user (Aug. 18, 1992), and “giving the finger” to a customer (Mar. 1, 1993); complaints about the manner in which plaintiff gave receipts or change or in which she accepted the money for the tolls (Aug. 18, 1992; Mar. 15, 1994; Aug. 15, 1994; Apr. 8, 1995; May 17, 1995; Sept. 3, 1995; Mar. 9, 1996; Dec 6, 1996; July 14, 1997; June 9, 1998; June 28, 1998)¹; and a com-

¹ Many of these customer complaints are evidenced by plaintiff’s written responses to her supervisors concerning the complaints, rather than by a writing from the customer. Plaintiff’s responses frequently refer to the customer as “irate.” While plaintiff does not acknowledge that she refused to extend her arm, and ac-

plaint regarding plaintiff's refusal to open her window to give directions, and her reading of newspaper clips in her booth (Aug. 30, 1999). The supervisor complaints concern plaintiff's insubordination (Aug. 8, 1995); driving through a toll without paying (Feb. 23, 1997); abandoning her post (Nov. 7, 1997; Aug. 30, 1999); and reading while on duty (May 13, 1999).

In opposition, plaintiff fails to come forward with any evidence to raise a triable issue of fact as to the falsity of the factual statements. Significantly, plaintiff does not submit an affidavit disputing the truthfulness of either the complaints and other factual statements that were made in the Post article, or the complaints (Exhibit D to the moving papers) that were documented by the Port Authority over the course of her employment. Plaintiff instead argues primarily that the statements were not corroborated. For example, plaintiff argues that four of the five customer complaints that the article specifies were not corroborated by documentary evidence. However, the court finds that these complaints are sufficiently similar to the documented complaints as to vitiate any claim that they were substantially false. (*See Fulani v. New York Times Co.*, 260 AD2d 215 [27 Med.L.Rptr. 1959] [1st Dept 1999].) More particularly, although there is no evidence in the record of a complaint by a berated California motorist, there are numerous other complaints by motorists about plaintiff's rudeness when they asked for information. Similarly, the last three of the specific complaints were purportedly based on conversations by the reporter with a colleague at the Post who had complained to him about her personal experiences with plaintiff. Although she did not document her complaints and apparently did not file a formal complaint with the Port Authority, the conduct she identified—plaintiff's rudeness, shutting her window when asked for information, and not reaching out of her booth to collect the money—were repeatedly expressed by other motorists.

cuses the customers who complained of not unfolding the money or being too far from the booth, her responses confirm repeated disputes with customers about the manner in which money for tolls was handed back and forth between plaintiff and customers. In a March 1, 1993 response, she complains of having to "over extend my reach to collect the toll."

[3] Plaintiff's objections to the lack of corroboration of the other statements in the article are without merit. Many of the statements to which plaintiff objects (e.g., the headline and characterizations of plaintiff) were, as held above, statements of opinion rather than fact. Plaintiff now objects to certain statements that were not identified as defamatory in the complaint. One such statement—that motorists back out of plaintiff's lane when they see she is on duty—is clear hyperbole. The second statement—that stunned motorists have stormed into the Port Authority office at the bridge to complain about plaintiff—while factual, is sufficiently corroborated by the complaints produced by the Post on this motion. Plaintiff's further claim that her photograph is defamatory is unsupported by the appearance of the photograph itself or by any legal authority.

As plaintiff thus fails to raise a triable issue of fact as to falsity of the statements, the Post is entitled to summary judgment dismissing the complaint. Even if plaintiff had made a showing of falsity, however, plaintiff fails to show that the article was published with the fault necessary to satisfy the constitutional standard for imposition of damages for libel against a media defendant.

[4] The court agrees with plaintiff that she is a private figure, not a public official, for purpose of the constitutional analysis. Although New York cases have accorded public official status to certain government employees without high-level managerial responsibilities (*see Sweeney v. Prisoners' Legal Servs.*, 84 NY2d 786 [23 Med.L.Rptr. 1540] [1995] [corrected officer]; *Orr v. Lynch*, 60AD2d 949 [3d Dept 1978], *aff'd* 45 NY2d 903 *on the memorandum below*), the court sees no basis, and defendant submits no authority, for extending such status to employees such as toll collectors who interact with the public in the performance of routine, ministerial functions.

[5] The court, however, rejects plaintiff's contention that the content of the Post article is not a matter of legitimate public concern. In determining whether a publication is within the sphere of legitimate public concern, courts must examine its "content, form, and context." (*Huggins v. Moore*, 94 NY2d 296, 302 [28 Med.L.Rptr. 1601] [1999] [internal citations and quotation marks omitted].) While a publication's subject will not be found a mat-

ter of public concern "when it falls into the realm of mere gossip and prurient interest" (*id.* [internal citations and quotation marks omitted]), a publication may qualify as a matter of public concern even though it involves a "human interest" portrayal. (*id.* at 303.) The standard is "deferential to professional journalistic judgments. Absent clear abuse, the courts will not second-guess editorial decisions as to what constitutes matters of genuine public concern." (*Id.*; *Gaeta v. New York News*, 62 NY2d 340, 349 [10 Med.L.Rptr. 1966] [1984].)

Here, there can be little doubt that the unprofessional conduct of a government employee who is encountered by many members of the public is a matter of legitimate public concern. Accordingly, as the claimed defamation involves a matter of public concern, plaintiff, although a private figure, is subject to the constitutional requirement of proving fault that was established by the Court of Appeals in *Chapadeau v. Utica Observer-Dispatch, Inc.* (38 NY2d 196 [1 Med.L.Rptr. 1693] [1975].) Under this standard, "where the content of the article is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition, the party defamed may recover; however, to warrant such recovery he must establish, by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." (*Id.* at 199; *Huggins*, 94 NY2d at 302.)

In order for a plaintiff to prevail on a gross irresponsibility claim, the plaintiff must show that the publisher failed to "utilize methods of verification that are reasonably calculated to produce accurate copy." (*See Karaduman v. Newsday*, 51 NY2d 531, 549 [6 Med.L.Rptr. 2345] [1980].) Gross irresponsibility will not be found where a reporter relies on facts from an authoritative official source, and had no reason to doubt the accuracy of the information supplied. (*See Freeze Right Refrigeration & Air Conditioning Servs. v. City of New York*, 101 AD2d 175 [10 Med.L.Rptr. 2032] [1st Dept. 1984]; *Robare v. Plattsburgh Publ. Co.*, 257 AD2d 892 [27 Med.L.Rptr. 1509] [3d Dept 1999].)

[6] In support of its motion, the Post submits the affidavit of reporter Carl Campanile,

detailing the steps he took to corroborate the account as to plaintiff's conduct that he had learned from his co-worker. These included interviews with a toll collector and a toll supervisor at the location where plaintiff worked; interviews with Port Authority officials, including a Port Authority spokesperson and a confidential source at the Port Authority; and an interview with plaintiff. Mr. Campanile also attests that he had found the Port Authority spokesperson, Peter Yerkes, a reliable source on many occasions in the past (*Campanile Aff.*, ¶ 12); that he believed all of the information reported in the article was true, based on the "multiple layers of corroboration from various levels of persons at the PA" (*id.*, ¶ 17); and that during his research for the article, he "never encountered any information that contradicted or called into question any of [his] sources or any information [he] received from them." (*Id.*, ¶ 20.)

This affidavit makes a prima facie showing that the reporter did not act in a grossly irresponsible manner. In opposition, plaintiff merely offers the following statement: "While in order to make a true inquiry into whether these elements [of gross irresponsibility] were met requires some investigation, it appears that they were not." (P's Memo. of Law In Opp. At 5.) Although discovery in this action has been completed, plaintiff offers no evidence of any irresponsibility on the reporter's or the Post's part.

While the issue of gross irresponsibility is ordinarily for the jury where, as here, plaintiff fails to raise a triable issue of fact, summary judgment should be awarded to the defendant. (*See Chapadeau v. Utica Observer-Dispatch, Inc.* 38 NY2d 196 [1 Med.L.Rptr. 1693], *supra*; *Freeze Right Refrigeration & Air Conditioning Servs. v. City of New York*, 101 AD2d 175 [10 Med.L.Rptr. 2032], *supra*.) The Post is accordingly entitled to summary judgment dismissing the complaint.

The Port Authority's Motion

Plaintiff's fourth, sixth, eighth, tenth, twelfth, and fourteenth causes of action against the Port Authority all appear to allege damages for defamation based on statements in the article that were attributed to the Port Authority or its employees. As held above, these statements are not actionable either because they are protected opinion or because, in the case of the statements of fact, a triable issue of fact as to their falsity has not been

raised. Contrary to plaintiff's contention, internal Port Authority memoranda concerning its policies on divulging information to the press, do not raise a triable issue of fact as to the falsity of any of the statements in the articles. The Port Authority is accordingly also entitled to summary judgment dismissing the complaint.

It is accordingly hereby ORDERED that the motions of defendants NYP Holdings, Inc. and The Port Authority of New York and New Jersey for summary judgment dismissing the complaint are granted. The Clerk shall enter judgment accordingly.

This constitutes the decision and order of the court.