NiemanLab

Noonan v. Staples: "The most dangerous libel decision in decades"

By **MARTIN LANGEVELD** @MartinLangeveld Feb. 18, 2009, 10:23 a.m.

A long-established principle of libel law — truth is an absolute defense — has been called into question by a decision handed down last week by a federal appeals court in Boston. The court ruled in the case of *Noonan v. Staples* that truth published with "actual malice" gleaned from the context of the statement can give rise to a libel lawsuit. The case threatens to muzzle both news and entertainment media, and could be particularly dangerous to independent bloggers and small startup news organizations — neither of which is likely to have the legal resources a traditional established news organization has to battle libel suits.

The case rose not from anything published in news media, but from a mass e-mail sent by Staples to about 1500 employees informing them, within the context of a reminder about policy compliance, that Alan S. Noonan, a Staples manager, had been fired for violating the office-supplies firm's travel and expense policy. The memo read:

> It is with sincere regret that I must inform you of the termination of Alan Noonan's employment with Staples. A thorough investigation

> determined that Alan was not in compliance with our [travel and expenses] policies. As always, our policies are consistently applied to everyone and compliance is mandatory on everyone's part. It is incumbent on all managers to understand Staples['s] policies and to consistently communicate, educate and monitor compliance every single day. Compliance with company policies is not subject to personal discretion and is not optional. In addition to ensuring compliance, the approver's responsibility to monitor and question is a critical factor in effective management of this and all policies.

During the investigation, Noonan had admitted "pre-populating" his reports with generously estimated expenses, claiming that he had intended to adjust the figures to actual later on; but the investigation determined that he failed to do so.

In reversing the district court decision, as well as its own earlier affirmation of summary judgment for Staples, the court ruled in Noonan's favor, relying on a 1902 Massachusetts law that provided truth is a defense against libel unless the plaintiff can show "actual malice" on the part of the defendant in publishing the statement. The final outcome of the case could have chilling implications for journalism.

As Bob Ambrogi at his Media Law blog explains, the 1902 statute had previously been overturned by the Massachusetts Supreme Judicial Court:

> In a 1998 case, Shaari v. Harvard Student Agencies, the Supreme Judicial Court ruled that statute unconstitutional as applied to matters of public concern. Citing a line of U.S. Supreme Court opinions leading back to the seminal 1964 case, New York Times v. Sullivan, the SJC said, "To apply this statute to the defendants' truthful defamatory statement concerning a matter of public concern, even if the statement is malicious, violates the First Amendment."

But the first circuit infers the presence of malice in the Noonan case, based on the circumstances: Staples never previously disclosed the name of a fired employee in communications with employees; it sent no memos about other employees fired for expense policy violations; and most of the 1500 recipients did not travel for the company and did not need to be reminded of the travel expense policy.

The court dismissed the relevance of the *New York Times* case because it involved the question of libel against a public figure, not a private citizen like Noonan, and used the *Shaari* case to support its finding that "actual malice" in the statute should be understood in its common-law context of "ill will."

Ambrogi calls the current decision "the most dangerous libel decision in decades." The circuit court's decision reversed its earlier affirmation of summary judgment in the case, and sends the matter back to the district court for further action. Appeals could ultimately bring the case before the Supreme Court. If upheld there, its applicability then could extend outside of Massachusetts if other jurisdictions have statutes providing the "acual malice" exception to the truth defense.

The case has implications not only in the human resources arena in which it arose, but in journalism and any other kind of public statements. The mantra that "truth is an absolute defense" has long guided editors, reporters and columnists; the difficulty of proving actual malice has provided a reasonable shield; and *Shaari* eliminated that provision in Massachusetts. But the court in this case claims the discretion to infer malice, or ill will, simply from the context of the statement and in whether there are precedents for disclosure of particular truths. If upheld, and taken admittedly to an extreme, this could have courts parsing the language of news reports, editorials, opinion columns, blog posts, and even comments and public speeches to see whether they contain statements of facts, the truth of which is not in dispute, presented in a context that shows ill

will on the part of the writer or speaker. The door would be opened, potentially, even for a sarcastic tone of voice to be considered evidence of malicious intent.

In a followup post, Ambrogi quoted Boston media lawyer Rob Bertsche (via Dan Kennedy's blog):

> With this decision, the First Amendment has been replaced by the maxim, "If you don't have anything nice to say, don't say it."Consider the irony: The Supreme Court has said that there is constitutional protection for false statements on matters of public concern, but now the First Circuit says there is *no* constitutional protection for true statements on matters of private concern. What's worse, the court offers no guidance about how to distinguish what is of "public concern" from what is of "private concern."

Entertainment lawyer Gordon Firemark weighed in on his blog with implications for journalists, film makers and other entertainers:

> Although it seems fairly certain that Staples will ask for an en banc rehearing, and if necessary appeal to the U.S. Supreme Court, if allowed to stand, this case could make anybody a potential defendant. It will certainly have a chilling effect on important forms of speech, such as documentary films and many forms of investigative journalism....[and in a comment by Firemark on that post:] Media's efforts to "bring out the truth" are often the impetus for social change. I fear that this kind of rule will chill that important kind of speech. Think about documentaries by Michael Moore... always with an agenda... some could characterize the agenda as "ill will".

See also:

— Dan Kennedy: "A chilling decision about libel"

— Bertsche's full comments in Kennedy's MediaNation post

— Citizen Media Law Project post on the case

— Bill Ketter at CNHI News Service

UPDATE:

On March 18, 2009, the First Circuit court of appeals denied a petition from Staples for a rehearing of the case *en banc*. Details at Robert Ambrogi's blog.