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Altered flier not basis for defamation claim

By Patricia Manson
Law Bulletin staff writer

A woman whose picture was transposed onto a flier for a seminar titled Problem Employees and the Games They Play doesn't have a case against a former subordinate, a federal judge ruled Monday.

In a written opinion, U.S. District Judge Sharon Johnson Coleman dismissed the claim of defamation per se that Joan Nebel brought against Gerald Modory.

Nebel was a sergeant in the Oakton Community College public safety department in Des Plaines when she was fired in 2015 after 13 years on the job.

Modory is the department's training officer.

After Nebel lost her job, Modory altered the flier to place her photo next to the title of the training seminar.

He also placed the photo of another former employee who had been fired on the flier.

The flier says those attending the seminar will "learn what games are actually being played and why problem employees are motivated to play those games."

And the flier says the seminar will emphasize how to address "gossip and rumors" started by such employees.

Nebel alleges the flier was posted in public safety department areas — including patrol and interview rooms — that are accessible to the public.

In her opinion, Coleman did not address Modory's denial that the flier was posted where it could be viewed by members of the public.

She also did not rule on the merits of Modory's contention that he never treated Nebel inappropriately and never engaged in any other wrongdoing.

Instead, Coleman held Nebel does not have a case against Modory because she failed to state a claim for defamation per se.

The Illinois Supreme Court has ruled that a statement that "may reasonably be innocently interpreted" when considered in context "cannot be actionable per se," Coleman wrote, quoting *Chapski v. Copley Press,* 92

Ill. 2d 344 (Ill. 1982).

She noted that Nebel is not identified by name on the flier and that the photo shows her in uniform.

"Nothing about this photograph suggests that she is one of the problem employees being referred to in the content of the flier," Coleman wrote.

To conclude Nebel is being identified as a "problem employee," she continued, someone viewing the flier would have to know that she had been fired from her job and had sued the college.

But those facts are not contained in the flier and, therefore, "are not part of per se analysis," Coleman wrote, quoting *Mittelman v. Witous,* 135 Ill. 2d 220 (Ill. 1989).

Under those circumstances, she wrote, the altered flier is capable of an innocent construction.

Coleman did not address Modory's argument that he also was shielded from Nebel's defamation per se claim by the First Amendment.

Nebel's claims against the college remain pending.

She alleges the college is guilty of defamation per se and that it retaliated against her in violation of Title VII of the Civil Rights Act of 1964 by giving her the duties of a patrol officer and then firing her.

Nebel contends she was subjected to retaliation for complaining that she was passed over for a promotion in favor of a less qualified man and that her female subordinates were routinely subjected to sexual harassment and gender discrimination.

Nebel's attorney, Jessica J. Fayerman of Fayerman Law LLC in Evanston, could not be reached for comment.

The lead attorney for Modory is Peter S. Lubin of DiTommaso, Lubin P.C. in Oakbrook Terrace.

Lubin said Coleman's ruling "vindicates" his client's argument that the flier could be innocently construed.

And although Coleman did not rule on the First Amendment issue, Lubin said, the dismissal of the defamation claim also is a victory for free speech.

"Every gripe about a co-worker in the workplace shouldn't result in a suit," he said, "because workers have a First Amendment right to their opinion."

The lead attorneys for the college are Frank B. Garrett III and Rachel E. Lutner, both of Robbins Schwartz Nicholas Lifton & Taylor Ltd.

Neither Garrett nor Lutner could be reached for comment.

The case is *Joan Nebel v. Oakton Community College, et al.,* No. 16 C 4613.