1-2021

N.Y. Appellate Division 2nd Department Overrules Precedent, Holding False Imputation of Homosexuality is not Defamatory Per Se

Arthur S. Leonard

Court in *Fulton v. City of Philadelphia*, which was argued on November 4 and will be decided sometime in 2021. It is likely that many state agencies and courts dealing with religious exemption claims by civil rights defendants may delay ruling on such claims until the Supreme Court rules in *Fulton*.

Judge Murray ended his opinion by stating, "This is not a final order as it does not resolve all of the pending issues in this case." This cryptic remark implies that Uprooted Electrolysis may not immediately appeal the court's determination that the ELCRA applies to the transgender discrimination claim, since its religious exemption claim has not yet been ruled upon. However, the declaration that the MDCR does not have jurisdiction over the sexual orientation claim against Rouch World seems final as to that complaint, so Attorney General Nessel may be able to appeal that ruling. ■

N.Y. Appellate Division 2nd Department Overrules Precedent, Holding False Imputation of Homosexuality is not Defamatory *Per Se*

By Arthur S. Leonard

In *Laguerre v. Maurice*, 2020 WL 7636435, 2020 N.Y. App. LEXIS 8011, 2020 NY Slip Op 07887 (2nd Dept., Dec. 23, 2020), a panel of the N.Y. Appellate Division, 2nd Department, abandoned a departmental precedent dating from 1984, *Matherson v. Marchello*, 100 App. Div. 2d 233, finding that today a false statement that the plaintiff was a homosexual who watched gay porn on his employer's computer is not defamatory *per se* and thus a complaint to that effect must be dismissed for failure to allege special damages. The court noted with approval the 3rd Department's 2012 decision in *Yonaty v. Mincolla*, 97 App. Div. 3d 144, which was the first intermediate appellate ruling in New York to abandon prior case law on this point. Justice Sheri Roman wrote the opinion for the panel.

Pierre Delor Laguerre was an elder in the Gethsemane Seventh Day Adventist Church in Brooklyn. He claims that he had a falling out with Pastor Jean Renald Maurice, the defendant, which, according to Justice Roman's summary, "initially centered around church-related issues, and that Pastor Maurice stated that, if the plaintiff 'did not submit to him,' Pastor Maurice would 'crumble' the plaintiff." According to the complaint, Maurice stated that he would "make false statements against the plaintiff and have the church membership vote to relieve the plaintiff of his responsibilities at the church." Laguerre claims that before a congregational meeting with about 300 members in attendance, Maurice made the false statement concerning Laguerre, thus prompting the congregation to vote as Maurice requested. Laguerre sued for *per se* defamation.

Pastor Maurice moved to dismiss the complaint on three grounds.

First, he argued, the court lacked jurisdiction because this was essentially an ecclesiastical matter. Laguerre countered that the question of defamation could be decided as a matter of civil law without reference to any religious doctrine, and the trial judge, Justice Devin P. Cohen of Kings County Supreme Court, agreed with Laguerre's argument on this point and denied the motion to dismiss on jurisdictional grounds, and the Appellate Division panel found this ruling to be correct.

Second, Maurice argued that his statement was privileged under the "common interest" rule, contending that a communication from a pastor to a congregation on a church-related matter could not be made the basis of a defamation claim. While acknowledging the existence of the privilege, Justice Cohen found that Laguerre's allegations support the argument that the privilege was lost in this case because the statement was made with "malice," noting Laguerre's allegation that Pastor Maurice had threatened to make a false statement about Laguerre to persuade the congregation to terminate his status. Knowingly making a false statement of fact with malice is not privileged. The appellate panel also found this ruling to be correct.

However, Pastor Maurice was more successful with his third argument on appeal, that the alleged statement was not defamatory *per se*. Laguerre's complaint relies on *Matherson v. Marchello*, cited above, to contend that in the 2nd Department a false imputation of homosexuality is automatically actionable as *per se* defamation. That is, in ruling on a motion to dismiss, a trial court in the 2nd Department should presume that such a statement would harm the reputation and livelihood of the plaintiff, so the plaintiff would not

have to allege special damages such as economic injury in order to maintain his action. At the time *Matherson* was decided, there were rulings by all four Appellate Departments to similar effect. However, the 3rd Department broke ranks in 2012 with *Yonaty*. The Court of Appeals has not ruled on the question, so the matter is left to be decided by each Appellate Division department. Given the state of precedent in the 2nd Department, Justice Cohen had denied the motion to dismiss on this ground as well. Laguerre appealed Cohen's decision on all three grounds.

Finding the reasoning of *Yonaty* to be persuasive, the 2nd Department now holds that *Matherson* and the earlier cases that it had cited "are inconsistent with current public policy," wrote Justice Roman. "This profound and notable transformation of cultural attitudes and governmental protective laws impacts our own consideration of stare decisis," she wrote. The court recited a litany of legal developments since 1984, particularly noting the Supreme Court's 2003 decision in *Lawrence v. Texas* striking down as unconstitutional a Texas statute outlawing homosexual sex and that court's 2015 decision in *Obergefell v. Hodges* finding a constitutional right for same-sex couples to marry. The court also noted that New York has banned sexual orientation discrimination in employment, housing and public accommodations since 2002 and enacted its own marriage equality law in 2011.

Thus, there is today no necessary presumption that falsely calling somebody homosexual will harm their reputation, and such a statement no longer falls within the sphere of cases in which reputational harm can be assumed on ground of criminality, professional disqualification or the imputation of a "loathsome illness." A false statement that does demonstrably cause economic harm to the plaintiff could still be the basis of a defamation claim, but such harm would have to be alleged and factually supported in the complaint. Although the court does not discuss the point, it seems likely that being an elder in the church did not make Laguerre an employee and so the loss of his position did not inflict an economic injury on him; otherwise, he might have alleged that as special damages.

"Based on the foregoing," wrote Justice Roman, "we conclude that the false imputation of homosexuality does not constitute defamation *per se*. *Matherson*'s holding to the contrary should no longer be followed. Therefore, the plaintiff was required to allege special damages. He failed to do so, and, consequently, his cause of action alleging defamation *per se* must be dismissed."

The unanimous panel of the 2nd Department in this case included, in addition to Justice Roman, Justices Cheryl E. Chambers, Sylvia O. Hinds-Radix, and Colleen D. Duffy. Laguerre is represented by Maurice Dean Williams of The Bronx, and Pastor Maurice by the firm of Lester Schwab Katz & Dwyer of Manhattan. ■

Re-Thinking Correctional Liability for Threatened Violence Against LGBT Prisoners

By William J. Rold

A Missouri prison gang, calling itself "Family Values," extorts payment from gay prisoners who want to use the yard. Gang members told *pro se* plaintiff Daniel Van Allen that "all gay prisoners had to pay the gang 'sooner or later.'" Van Allen paid the gang with monthly canteen purchases. He was never actually beaten, although he was repeatedly threatened. In *Van Allen v. Lawson*, 2020 U.S. Dist. LEXIS 235349 (E.D. Mo., Dec. 15, 2020), U.S. District Judge Sarah E. Pitlyk dismissed Van Allen's equal protection and protection from harm claims as "frivolous." She allowed Van Allen to proceed against the warden and a unit manager on a First Amendment retaliation claim – more about that later – but first, a discussion about the dismissed claims and a suggestion of possible new arrows for the victimized LGBT inmate's quiver.

Judge Pitlyk dismissed the equal protection claim because of lack of "state action," since the extortion was from other inmates, in the form of forced commissary "buys." It was not carried out by prison employees, although Van Allen alleged that the warden and her deputy knew about and tolerated the extortion. In fact, Van Allen alleged that the Family Values extortion was so widely known that even the commissioner of DOC was a proper defendant. Nevertheless, Judge Pitlyk ruled: "The gang members who discriminatorily target inmates based on their sexual preference . . . are not acting under state law and are not state actors. They are private parties. There are no facts alleged suggesting joint activity between Defendants and