LEGAL DEFENSE TRUST
TRAINING BULLETIN

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FORMER EMPLOYEE'S INTERNET RANT IS CONSTITUTIONALLY PROTECTED SPEECH

***Summit Bank v. Robert Rogers*, filed May 29, 2012**

by
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Summit Bank sued its former employee Robert Rogers for posting allegedly defamatory messages on a section of Craigslist entitled "Rants and Raves". The Bank alleged that Rogers made false and libelous statements about the Bank's operations, the integrity of its chief executive officer (CEO), the safety of depositors' funds and made false statements about audits and regulatory actions. Rogers moved to strike the Bank's complaint pursuant to California's "anti-SLAPP" statute, on the ground that the suit was brought for the illegitimate purpose of chilling Rogers' right to speak freely about the Bank.[1]

Rogers was formerly employed by the Bank as its vice-president from September 2007 until September 2008, when he resigned. The Bank's single cause of action for defamation was based on Internet posts in the "Rants and Raves" section of Craigslist starting about May 2009 and ending about July 2009. The alleged defamatory posts read as follows:

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[1] "SLAPP" is an acronym for strategic lawsuit against public participation. To ensure that participation in matters of public significance not be chilled through abuse of the judicial process, the Legislature established a presumption against the maintenance of litigation arising from any act "in furtherance of the [defendant]'s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue".

The June 7, 2009 post: "Being a stockholder of this screwed up Bank, this year there was no dividend paid. The bitch CEO that runs this Bank thinks that the Bank is her personel [sic] bank to do with as she pleases. Time to replace her and her worthless son."

The June 21, 2009 post: "Whats [sic] up at this problem Bank. The CEO provides a [sic] executive position to her worthless, lazy fat ass son Steve Nelson. This should not be allowed. Move your account now."

The July 14, 2009 post: "the FDIC and the California Department of Financial Institutions are looking at Summit Bank. This is the third time in less than one year. This is not a good thing, move your accounts ASAP."

The July 25, 2009 post: "I had banked at Summit Banks [sic] Hayward Office. Service was poor and Summit Bank closed this office. Whats [sic] up with that. All the customer [sic] were left high and dry. This is a piss poor Bank. I would suggest that anyone that banks at Summit Bank leave before they close."

The second July 25, 2009 post: "Move your accounts now before its [sic] too late."

Defamation consists of, among other things, a false and unprivileged publication, which has a tendency to injure a party in its occupation. The Bank claimed several statements might imply or state assertions of fact that were simply not true. The Bank contended Rogers' statement that the CEO "thinks that the Bank is her personel [sic] Bank to do with it as she pleases," is defamatory because it can reasonably be construed as implying one or more falsehoods about the CEO - for example, that the CEO was misappropriating money. The Bank also pointed to Rogers' post characterizing it as a "problem Bank." A banking expert stated that a 'Problem Bank' is a term of art in the banking industry and carries with it the implication that it will likely fail in the near future. The Bank also claimed that Rogers' post falsely represented that he was a customer at the Hayward branch and that when it closed "[a]ll the customer [sic] were left high and dry." Rogers was never a customer of this branch and the Bank claims that his "high and dry" statement implied that the customers lost their money - something that was not true.

The court pointed out that because Rogers' alleged defamatory statements appeared in a section of Craigslist entitled "Rants and Raves", the reader of the statements should be predisposed to view them with a certain amount of skepticism, and with an understanding that they will likely present one-sided viewpoints rather than assertions of provable facts. Any reader of electronic bulletin boards would know that board culture encourages discussion participants to play fast and loose with facts. Indeed, the very fact that most of the posters remain anonymous, or pseudonymous, is a cue to discount their statements accordingly. Looking at the actual language used in Rogers' posts, it is obvious his messages are intended to be free-flowing diatribes (or "rants"), which strongly suggest that these epithets are his own unsophisticated opinions about the Bank.

Comments that are no more than "rhetorical hyperbole, vigorous epithet[s], lusty and imaginative expression[s] of contempt, and language used in a loose, figurative sense have all been accorded constitutional protection". Courts have frequently found the type of name calling,

exaggeration, and ridicule found in Rogers' posts to be nonactionable speech. Since the statements on which the Bank's defamation claim is based were nonactionable statements of opinion, the Court granted Rogers' motion to strike the Bank's complaint and awarded Rogers his attorney fees and costs.

Comment: Rogers was a **former** employee. This case does not consider what action, if any, may be taken against **current** employees who post anonymous statements about their employers on online blogs and message boards or even their own Facebook page. An area which raises a great many questions among law enforcement supervisors and administrators is how far may a department go when restricting, through policies, an officer's use of social media, and under what circumstances can a department discipline an officer without violating the officer's First Amendment Right of free speech. A public employer can discipline an employee for speaking on a matter of public concern "if it can show that it reasonably believed that the speech would potentially interfere with or disrupt the government's activities and can persuade the court that the potential disruptiveness was sufficient to outweigh the First Amendment value of that speech." The courts have noted the need for even greater latitude to control speech by law enforcement agencies - "the police department is a quasi-military organization. In quasi-military organizations such as law enforcement agencies, comments concerning coworkers' performance of their duties and superior officers' integrity can directly interfere with the confidentiality, esprit de corps and efficient operation of the police department." If a **currently** employed law enforcement officer wrote something similar to what Rogers wrote about his employer, discipline would surely follow.

Stay Safe!

Muna Busailah and Robert Rabe