

No. 07-2159

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**United States Court of Appeals  
For The First Circuit**

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**ALAN S. NOONAN**

Plaintiff – Appellant

v.

**STAPLES, INC.**

Defendant – Appellee

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On Appeal from the United States District Court for the District of Massachusetts

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**PETITION FOR REHEARING EN BANC OR CERTIFICATION TO THE  
MASSACHUSETTS SUPREME JUDICIAL COURT**

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Ariel D. Cudkowicz (Appeals Bar No. 61745)

Krista Green Pratt (Appeals Bar No. 78868)

SEYFARTH SHAW LLP

World Trade Center East

Two Seaport Lane, Suite 300

Boston, MA 02210

Telephone: (617) 946-4800

Facsimile: (617) 946-4801

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Pursuant to Fed. R. App. Proc. 35, Defendant-Appellee Staples, Inc. (“Staples”) seeks en banc review of the panel’s February 13, 2009 decision, after panel rehearing, to remand a narrow portion of the defamation claim for trial, on the grounds that the proceeding raises two questions of exceptional importance: (1) Whether M.G.L. c. 231 § 92 (the “Statute”), which by its terms would permit liability for *true* statements made with “actual malice,” unconstitutionally infringes on the right to free speech; and (2) Whether, after having properly found that the single e-mail that gave rise to the defamation claim was *true* as a matter of law, the panel erred in remanding for a trial the question of whether the e-mail was sent with “actual malice,” when there was no evidence whatsoever of “actual malice” in the summary judgment record? In the alternative, Staples asks that this Court certify the question of the constitutionality of the Statute to the Massachusetts Supreme Judicial Court (“SJC”) pursuant to SJC Rule 1:03.

### **Procedural History**

The defamation claim arises solely from a single e-mail sent by Staples executive Jay Baitler (“Baitler”) following the termination of Alan Noonan (“Noonan”). As the panel held, the e-mail relayed “the simple fact” that “Staples fired Noonan after an investigation determined him to be out of compliance with the travel and expense policy.” February 13, 2009 Slip

Opinion (“Slip Op.”) at 11. The panel has twice now affirmed the District Court’s holding that the e-mail was *true* as a matter of law. Slip Op. at 14. Thus, the panel held, “Noonan’s only hope for keeping his libel claim alive is to prove that Staples . . . acted with actual malice,” because under the Statute, “even a true statement can form the basis of a libel action if plaintiff proves that the defendant acted with ‘actual malice.’” Slip Op. at 15.

The panel had first held that “actual malice” as used in the Statute meant “reckless disregard for the truth,” and that Noonan could not show actual malice because “there is simply nothing in the record to suggest that Baitler . . . believed Noonan not to have contravened the travel and expense policy, or that [he] sent the e-mail with reckless disregard for whether Noonan contravened the policy.” August 28, 2008 Slip Op. at 17-18. On rehearing, the panel reversed itself to hold that “actual malice” means actual malevolent intent or ill will, and remanded for trial on the narrow issue of whether Baitler sent the e-mail with actual malevolent intent. Slip Op. at 15.

I. This Court Should Review En Banc the Portion of the Panel’s Decision Remanding The Issue of “Actual Malice” under M.G.L. c. 231, §92 for Trial.

A. The Statute Is Unconstitutional.

The Statute, interpreted by the panel to permit liability for a *true* statement made with actual malevolent intent or ill will, is an

unconstitutional infringement on the right to free speech under the First Amendment and Article 16 of the Declaration of Rights of the Massachusetts Constitution. The panel recognized that the Statute's exception to the truth defense is not "constitutional when applied to matters of public concern," Slip Op. at 15, citing *Shaari v. Harvard Student Agencies, Inc.*, 427 Mass. 129, 691 N.E.2d 925, 927 (1998), but declined to consider the constitutionality of the Statute as applied in this case, on the grounds that this argument is "not developed now and was not raised in the initial briefing." Slip Op. at 15 n.7. However, Staples *did* raise the unconstitutionality of the Statute in its initial brief. Indeed, Staples' very first argument regarding the Statute in its brief was that the Statute had been held by the SJC to be abrogated by the First Amendment, and that "*even if* the Statute were constitutional as applied here," Noonan had no evidence of actual malice under any standard. Staples' Appellate Brief ("Staples' Brief") at 26 (emphasis added). Given that Staples did raise the argument, and given the vital importance of the question of the Statute's constitutionality, the likelihood that this issue will arise in other employment cases, and the purely legal nature of the question, the en banc Court should exercise its discretion to review the issue.

The First Circuit has recognized that, in a series of cases that began

with *New York Times v. Sullivan*, 376 U.S. 254 (1964), the U.S. Supreme Court has “rigidly confine[d] state-law defamation claims within a First Amendment framework.” *Andresen v. Diorio*, 349 F.3d 8, \*\*20 (1<sup>st</sup> Cir. 2003). Since then, the SJC has steadily chipped away at the constitutionality of the 1902 Statute. In 1985, the SJC held the Statute unconstitutional at least as to plaintiffs who are public figures or public officials, but expressly left “open consideration of the constitutionality of the Statute as applied to private persons.” *Materia v. Huff*, 394 Mass. 328, 333 n.6, 475 N.E.2d 1212 (1985). The SJC went further in *Shaari*, 427 Mass. at 129, 134, holding the Statute unconstitutional at least as applied to statements involving issues of public concern, in cases brought by private or public figures. The *Shaari* Court reasoned broadly that it was “compelled . . . by the Supreme Court’s view of the First Amendment, to require that this plaintiff’s recovery be predicated, in part, on proof that the defamatory statements were untrue,” because the “Supreme Court has consistently held in defamation cases that, in order to avoid offending . . . First Amendment rights, a plaintiff must establish the existence of a defamatory falsehood.” *Id.* at 131.

While the *Shaari* Court did not need to reach the constitutionality of the Statute as applied to statements made about a private individual on a topic of private concern, its broad reasoning dictates that the Statute cannot

survive constitutional scrutiny in this context either, because it would impose liability without publication of a defamatory falsehood. *See Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 858 n.6, 330 N.E.2d 161 (1975) (no plaintiff, whether public or private person, can recover in a defamation action without proving at least negligent publication of defamatory falsehood), *citing Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (applying constitutional principles to decide that states could define standard of liability for defamatory falsehood about a private individual, as long they as did not impose liability without fault). At least one scholarly Massachusetts Superior Court opinion has applied such reasoning to hold the Statute entirely unconstitutional. *Gilbert v. Bernard*, No. 91-02125, 1995 Mass. Super. LEXIS 566, at \*6 n.3 (July 7, 1995) (holding *Gertz* rendered the Statute unconstitutional because the Statute “permits recovery in the absence of any falsehood. . .”).

Indeed, in its most recent opinions referencing the Statute, the SJC has stated broadly that the scope of the Statute “is limited by the provisions of the First Amendment to the United States Constitution.” *Ravnikar v. Bogojavlensky*, 438 Mass. 627, 630 n.3, 782 N.E.2d 508 (2003); *see also White v. Blue Cross & Blue Shield of Mass., Inc.*, 442 Mass. 64, 67 n.4, 809 N.E.2d 1034 (2004). *See also* Restatement (Second) of Torts §581A,

Comment a (1989) (statutes of minority of states that permit liability for true statement made with malice have been held unconstitutional and validity is “very dubious”). Thus, the en banc Court should hold that the Statute – which by its terms would undermine the bedrock principle that truth is an absolute defense to libel – is unconstitutional. “Just as under the first amendment there is ‘no such thing’ as a false idea, there should be ‘no such thing’ as liability for defamation for speaking the truth.” Rodney A. Smolla, LAW OF DEFAMATION (2d ed.) §5.10.

B. Noonan Cannot Show “Actual Malice” Under the Statute As a Matter of Law.

The panel’s holding that there was a jury question as to whether Baitler sent the e-mail with actual malevolent intent is plainly wrong, and contrary to the undisputed evidence in the summary judgment record. The panel’s decision overlooked the long-established rule that summary judgment is especially favored in defamation case because “allowing a trial to take place in a meritless case would put an unjustified and serious damper on freedom of expression. Even if a defendant in a libel case is ultimately successful at trial, the costs of litigation may induce an unnecessary and undesirable self-censorship.” *Dulgarian v. Stone*, 420 Mass. 843, 846, 652 N.E.2d 603 (1995). This principle has even greater force where the statement at issue is *true* as a matter of law.

The District Court properly held that there was “no evidence of actual malice.” Indeed, the panel recognized: “To be sure, Staples has offered a non-malicious explanation. Baitler stated in his deposition that he considered the e-mail naming Noonan to be important in effectively making the point to his employees that they must comply with Staples’ travel and expense policies.” Slip Op. at 20. Indeed, Baitler testified that he sent the e-mail using Noonan’s name, because he believed it was a key opportunity for his group to “take serious notice” of the importance of complying with Staples’ policies and that a generic “e-mail about how seriously we take the T&E policy” would not have had the same effect. Joint Appendix (“A.”) 507-9.

The panel’s decision also recognized that Baitler confined his e-mail to statements that were indisputably true, and that the e-mail merely recounted “the simple fact” that “Staples fired Noonan after an investigation determined him to be out of compliance with the travel and expense policy.” Slip Op. at 10-11. Yet, the panel failed to recognize that the language of the e-mail itself belies any claim that the e-mail was motivated by personal ill will. Baitler’s undisputed testimony was that when he sent the e-mail, he knew the audit team had found Noonan had engaged in a pattern of having, as the panel put it, “deliberately doctored these entries” to over-claim travel expenses, such as the \$1,129 Big Mac. A. 501, 747-8, Add. to Staples’ Brief

at 6; Slip Op. at 30. Yet rather than saying so in the e-mail, Baitler confined his e-mail to a professional, carefully worded, objectively true, statement of the “simple fact” that Noonan had violated the policy. Slip Op. at 11. This undisputed evidence fatally undermines any claim of ill will.

Further, the panel’s decision ignored the fact that there is no evidence of any acrimony, or even any real relationship at all, between Baitler, an Executive Vice President responsible for the 1,500 people in the Staples’ Contract Division for North American Delivery, and Noonan, a Regional Sales Director with only 30-55 direct reports. A. 338 (¶¶60-1), 363-4, 369, 506-7. Baitler testified that to the extent he thought of him at all, he had a positive opinion of Noonan before learning of his policy violations. A. 503.

In finding a dispute of fact regarding ill will, the panel focused primarily on the fact that Baitler had not previously “referred to a fired employee by name in an e-mail or other mass communication.” Slip Op. at 19. The panel characterized this as a “deviation from policy,” from which a “jury could permissibly infer that Baitler singled out Noonan in order to humiliate him.” Slip Op. at 19-20. However, the undisputed evidence is that the e-mail did *not* deviate from Staples policy. Staples’ Vice President of Business Ethics testified she *encouraged* senior leaders to provide staff with truthful information about misconduct to demonstrate that Staples takes

its Code of Ethics “very, very seriously and doesn’t condone violations.” A. 954. Staples’ Executive Vice President for Human Resources and Audit Manager echoed this sentiment. A. 779, 938-9. Further, while Baitler personally did not recall having had occasion to send such an e-mail before, Staples’ executives testified that they had seen similar communications following terminations, belying any inference that the e-mail was somehow an outlier at Staples. A. 776, 847.<sup>1</sup>

Next, the panel improperly relied on Noonan’s wild speculation that somehow the e-mail had something to do with the termination of a third-party former employee named James Dorman (“Dorman”), who had been indicted for embezzling money from Staples through fraudulent expense claims before the audit that revealed Noonan’s transgressions. Slip Op. at 3. The panel held that Noonan’s theories that “Baitler had supervised Dorman and failed to notice his misfeasance,” and that he “did not send around a similar e-mail regarding Dorman’s actions,” “*while speculative* on their own, could provide additional background to support Noonan’s pretext argument.” Slip Op. at 21 (emphasis added). However, the panel failed to

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<sup>1</sup> The panel stated that Staples “has made no showing that Noonan was not similarly situated to other previously fired Staples’ employees.” Slip Op. at 20 n. 11, but Staples did point to undisputed evidence that Noonan’s conduct was particularly outrageous, such as the fact that no other audited expense reports had the same volume of discrepancies as Noonan’s initial audited expense report, on which he collected \$1,129 from Staples for a meal at an airport McDonald’s. A. 384-5, 387, 491.

acknowledge that these “speculative” theories were unsupported by *any* record evidence *whatsoever*. Noonan’s theory that Baitler somehow sent the e-mail for political reasons because he felt vulnerable in the company after failing to notice Dorman’s misfeasance was unsupported by the portions of the record to which Noonan cited, *see* Noonan’s Brief at 33-34, by Noonan’s or Baitler’s testimony, or by anything else in the record. Noonan’s argument that Baitler decided “to make Noonan the public face of the company malefactor instead of his own direct report, James Dorman,” Noonan’s Brief at 33, is also wholly unsupported. There is no evidence that Baitler chose Noonan *instead of* Dorman; rather, the undisputed evidence was that Dorman was the subject of a highly-publicized criminal action, and Noonan was only the subject of an internal departmental e-mail, actions that were in proportion to their relative misconduct. A. 966-80.<sup>2</sup> The panel’s holding is directly contrary to the rule that a claim cannot survive summary judgment based on “conclusory allegations, improbable inferences or unsupported speculation.” *Torres-Negron v. Merck & Co.*, 488 F.3d 34, 39 (1<sup>st</sup> Cir. 2007), *citing* *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990). Further, evidence that Baitler sent the entirely true e-mail to

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<sup>2</sup> Indeed, Staples could not issue its own statement about Dorman at the time of his termination because he was under federal investigation and Staples was actively cooperating with the government in that regard. A. 966-80.

advantage himself politically – even if it existed in the record, which it does not – is plainly not evidence that he sent it with “actual malevolent intent” *toward Noonan*.

Finally, the panel noted that Baitler sent the e-mail to a list of approximately 1,500 employees,<sup>3</sup> and reasoned that a jury could find that it was excessively published, which in turn could show a “malevolent desire to harm Noonan’s reputation.” Slip Op. at 21. This theory fails at two levels. First, there is no evidence of excessive publication, because it is undisputed that Baitler restricted the e-mail to the employees within his division, the same group that was the subject of the audit that revealed Noonan’s violations. A. 470-1, 504-5. Noonan has cited *no* record evidence of anyone receiving the email who did not have a legitimate need to know; Baitler’s un-rebutted testimony is that even the support staff on the list had a need to know because they were directly involved in preparing expense reports. Addendum to Staples’ Brief 7-8.

Second, there is no support in Massachusetts law for the notion that excessive publication is sufficient to show, or even evidence of, “actual malice” under the Statute. The panel cites only a conditional privilege case

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<sup>3</sup> The panel wrongly stated the e-mail was sent to all employees in the “North American division,” Slip Op. at 4, when it is undisputed that it was sent to Baitler’s Contract Division of Staples’ North American Delivery group. Staples’ Brief at 7.

for the proposition that excessive publication can show malice,<sup>4</sup> defined in that separate context as a “base ulterior motive,” to defeat a conditional privilege to publish *false* and *defamatory* statements. Slip Op. at 21, *citing* “*Cf.*” *Dragonas v. Sch. Comm. of Melrose*, 64 Mass. App. Ct. 429, 438, 833 N.E.2d 679, 687 (2005). There is simply no precedent in Massachusetts law for the panel’s holding that Staples could be liable under the Statute for a *true* statement simply on the grounds that it was excessively published. Further, even in the conditional privilege context, courts have not hesitated to grant summary judgment to employers who publish even allegedly *false* information about an employee’s termination to large numbers of co-workers for a business reason. *See* Staples’ Appellate Brief at 31-3.<sup>5</sup> Staples’ legitimate business reasons for publishing the e-mail were well-documented in the record and recognized by the panel. Slip Op. at 20.

For these reasons, on the undisputed record, and as a matter of law, Noonan cannot show that Baitler acted out of actual malevolent intent in publishing the true e-mail. There is no *evidence* that Baitler had any motive

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<sup>4</sup> The panel’s original decision held that excessive publication did *not* evidence actual malice even in the conditional privilege context. August 28, 2008 Slip Op. at 18-19.

<sup>5</sup> *See, e.g., Garrity v. John Hancock Mut. Life Ins. Co.*, No. 00-12143, 2002 U.S. Dist. LEXIS 8343 (D. Mass. May 7, 2002) (summary judgment on conditional privilege grounds for employer who published that plaintiffs terminated for sending sexually explicit emails in violation of company e-mail policy, on grounds employer “had an obvious legitimate business purpose, as to *all employees*, if it so chose -- to warn them and thereby prevent any recurrence of the events that led to this law suit”).

except enforcing Staples' travel policy; if Noonan's reputation was damaged, it was not by Baitler's e-mail but by Noonan's own flagrant violations of Staples' policies and, in the panel's words, "unblushing" insistence that he had not done so. Slip Op. at 30. The panel's decision to force Staples to endure a jury trial solely on the question of whether Baitler sent the single, true e-mail with actual malevolent intent, when the summary judgment record is devoid of any evidence of such intent, is a grave error that should be reversed by the en banc Court. The panel's decision will open the floodgates for terminated employees to claim that their employers "defamed" them with *true* statements about their performance or termination, and to require their employers to prove at trial that they did so with an acceptable or pure motive. As a result, the panel's decision will have a dramatic chilling effect on free speech, and the important flow of legitimate business information between and among employees, in the Massachusetts workplace.

II. Alternatively, This Court Should Certify the Constitutional Question to the Massachusetts Supreme Judicial Court.

Supreme Judicial Court Rule 1:03(1) allows for certification of "questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of this court." Thus,

as an alternative to en banc review, Staples requests that this Court certify the following question to the Massachusetts Supreme Judicial Court:

Is M.G.L. c. 231, § 92 an unconstitutional infringement on the right to free speech to the extent that it would impose liability for a truthful statement by an employer about an employee's termination to co-workers?

This important question would be determinative of the outcome here, since the narrow claim under the Statute is all that remains of this case, and there is no directly controlling precedent in the decisions of the SJC.

Respectfully submitted,  
STAPLES, INC.  
By its attorneys,



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Ariel D. Cudkowicz  
(Appeals Bar No. 61745)  
[acudkowicz@seyfarth.com](mailto:acudkowicz@seyfarth.com)  
Krista Green Pratt  
(Appeals Bar No. 78868)  
[kpratt@seyfarth.com](mailto:kpratt@seyfarth.com)  
SEYFARTH SHAW LLP  
World Trade Center East  
Two Seaport Lane, Suite 300  
Boston, MA 02210-2028  
Telephone: (617) 946-4800  
Facsimile: (617) 946-4801

Date: February 27, 2009

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**CERTIFICATE OF SERVICE**

I, Ariel D. Cudkowicz, do hereby certify that I served by priority FedEx, on February 27, 2009, one (1) true and accurate copy of Defendant-Appellee Staples, Inc.’s Petition for Rehearing En Banc or Certification to the Massachusetts Supreme Judicial Court (the “Petition”) upon counsel for the Plaintiff-Appellant, Wendy Sibbison, Esq., 26 Beech Street, Greenfield, MA 01301-2308. I also certify that I served by hand, on February 27, 2009, one (1) true and accurate copy of the Petition upon counsel for the Plaintiff-Appellant, Richard Gelb, Esq., Gelb & Gelb LLP, 20 Custom House Street, Boston, MA 02210. I further certify that I filed with the Clerk of the First Circuit Court of Appeals ten (10) paper copies of the Petition, and one (1)

CD containing the entire contents of the Petition in PDF format by hand  
delivery on February 27, 2009.



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Ariel D. Cudkowiz