IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BRITNEE KENYON, Plaintiff, v. BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT 113, DANIEL STRUCK, THOMAS KRIEGER, MICHELLE HAMMER BERNSTEIN, Defendants.	Case No. 1:24-cv-09878 Judge Sharon Johnson Coleman Magistrate Judge Beth W. Jantz

DEFENDANT MICHELLE BERNSTEIN'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

Defendant Michelle Bernstein, by and through undersigned counsel, hereby replies to Plaintiff's Response In Opposition to Defendant Bernstein's Motion to Dismiss Second Amended Complaint, Doc. 96 (hereinafter "Response"). In the wake of a newly decided case directly on point and deficient factual allegations, Plaintiff Kenyon's complaint fails to sufficiently allege any claims against Bernstein and her constitutionally protected speech. Both the First Amendment and Illinois law require that Kenyon's complaint be dismissed.

ARGUMENT

In an attempt to dissuade against dismissal of her ill-pleaded claims against Defendant Bernstein, Plaintiff conflates the facts actually alleged in her Second Amended Complaint ("SAC") and encourages this Court to ignore the case law directly on point demonstrating that dismissal is warranted. For instance, Plaintiff asserts in her Response that Defendant Bernstein's alleged defamatory posts prompted the District to conduct an investigation and "issue[] a ruling that concluded the December 9 Instagram Story violated school policies." Response at 4 (citing SAC ¶49; ¶56). But the facts alleged in the SAC fail to demonstrate any connection between the December 9 Instagram Story and the District's investigation and written reprimand. *See* SAC ¶¶ 49-56 (alleging

only that the investigation and reprimand centered around Kenyon's posting of pictures of herself in a swimsuit, in bed, and smoking – not around her posts about Israel).

Plaintiff also fails to satisfy specific pleading requirements as to the harm she allegedly suffered, making only conclusory, unsupported statements. For instance, Kenyon alleges that she was subjected to additional threats and harassment in the community, SAC ¶ 75, but fails to give a single example of any threat or harassment she actually received. Kenyon also contradicts her own assertion of damage to her reputation by alleging that "[a]t all times relevant, Ms. Kenyon was, and continues to be, generally well-liked by DHS students, parents, colleagues, and the community at large." SAC ¶ 14.

Simply put, Plaintiff's "story" blaming Bernstein's posts about Plaintiff's December 9 Instagram post for any action allegedly taken by the District and/or any damage to her reputation does not "hold together." *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010) (". . . the plaintiff must give enough details about the subject-matter of the case to present a story that holds together. In other words, the court will ask itself *could* these things have happened, not *did* they happen."). What is clear, even from Kenyon's version of the facts contained within her complaint, is that Kenyon's personal conduct and her posts with students are what led to any alleged breach of contract and harm.

I. Unanimous Case Precedent Affirms Defendant Bernstein's Statements Are Protected Opinion Under the First Amendment.

It must not go unnoticed that in the face of case law supporting dismissal here, Plaintiff fails to provide this Court with a single case to support her assertion that Bernstein's statements are *not* protected opinion. As both federal and state courts have explained, statements describing someone as "anti-semitic" are not actionable because such statements are "hopelessly imprecise" and "thus not provably false." *Florio v. Gallaudet Univ.*, 119 F.4th 67, 77-78 (D.C. Cir. 2024) (citing *Ollman v. Evans*, 750 F.2d 970 (DC Cir. 1984); *see e.g., Filippo v. Lee Publ'ns, Inc.*, 485 F. Supp. 2d 969, 980 (N.D. Ind. 2007) ("Courts have repeatedly held that statements about another person's attitudes, beliefs, and personality traits constitute protected opinions."); *Rambo v. Cohen,* 587 N.E.2d 140, 149 (Ind. Ct. App.

1992) (statement that plaintiff was "anti-Semitic" was protected opinion)); *see e.g.,* Def. Bernstein MTD SAC (Doc. 83-1), at 7 (collecting cases). Defendant Bernstein's arguments are further supported by a recent decision of this very Court dealing with almost identical facts and emphasizing "that courts universally recognize that allegations of racism or bigotry are not actionable in a defamation claim because they express subjective opinions that cannot be proven true or false." *Braun v. Box*, 2025 U.S. Dist. LEXIS 36690, *13 (N.D. Ill. Feb. 28, 2025). Rather than address or respond to this directly on-point decision, Plaintiff Kenyon chooses to completely ignore it.

Plaintiff's sole reliance on the example in *Milkovich v. Lorain Journal. Co.*, 497 U.S. 1, 18-19 (1990), only serves to affirm that dismissal is proper here. The example in *Milkovich* involves a speaker who couches a statement of fact – not opinion – in terms of "I think" or "in my opinion." For example, "In my opinion John Jones is a liar." *Id.* at 19. Bernstein did not do the same. Nor did Bernstein imply a knowledge of other facts that were not shared with readers. *Id.* Quite the opposite. Bernstein shared Kenyon's post upon which she relied to support her opinion that it slandered Israel and/or was antisemitic. SAC Exhibits C-E, G. In other words, Bernstein provided the "context that 'readers can easily judge for themselves,'" thereby removing it from an exception to the rule that opinion is nonactionable. *Florio*, 119 F.4th at 77-78 (quoting *McCafferty v. Newsweek Media Grp., Ltd.,* 955 F. 3d 352 (3d Cir. 2020)).

Plaintiff Kenyon cannot demonstrate that Bernstein's statement about Kenyon's state of mind or her beliefs is anything other than a subjective opinion. She has not identified any manner in which Bernstein's statements could be proved or disproved by a trier of fact. She has not cited any decision that contradicts the many Bernstein has cited holding that the exact word at issue, "antisemitic," is protected opinion and not an actionable statement of fact.

II. Plaintiff Fails To Sufficiently Plead Any of Her Claims Against Bernstein

A. Defamation Per Se and False Light Invasion of Privacy Claims

In an attempt to save her defamation per se claim, Plaintiff makes several unsupported assertions of fact in her Response that are nowhere to be found in the SAC. For example, at no time did Bernstein accuse Kenyon of being a "dishonest bigot." Response at 8, *but see* SAC (completely devoid of any such language); Exhibits C-E, G (same). Likewise, at no time did Bernstein accuse Kenyon of "bre[a]k[ing] the law." Response at 6, *but see* SAC and attached exhibits (completely devoid of any such statement).[1]

Other facts alleged by Plaintiff in the SAC are rebutted by exhibits attached thereto. For example, Kenyon alleges that Bernstein called for her to be terminated, Response at 6, and that Bernstein made the posts "with the aim of getting Plaintiff fired." *Id.* at 7. Ms. Bernstein never said anything of the sort. Ms. Bernstein's challenged posts only stated as follows:

> this is not the message that should be represented by our staff/school. We have seen this kind of propaganda at Universities and it is not going over well. Feel free to call Kathy and send to the Board if you agree.

Exhibits C-E to SAC.

Finally, Plaintiff fails to address the primary issue with her false light claim, i.e., her allegation that Bernstein acted "*with knowledge that the statements were false or with reckless disregard.*" At no time in this lawsuit has Kenyon alleged that Bernstein knew she was Jewish, or that she was *not* antisemitic. Even if Ms. Bernstein had known that Kenyon was Jewish, this would not somehow prove that Bernstein's statements were false or made with reckless disregard. *See* Pl. MTD SAC at 11. There are no allegations in the SAC that would substantiate Bernstein's knowledge of falsity.

B. Tortious Interference With Contract

Plaintiff's argument in support of her tortious interference with contractual relations claim is also without factual and legal support and fails to address this Court's ruling. This Court emphasized

[1] Further, only accusations of committing a *criminal* offense constitute defamation per se. *Bryson v. News Am. Publ'ns*, 174 Ill. 2d 77, 87, 220 Ill. Dec. 195, 202, 672 N.E.2d 1207, 1214 (1996).

that "[k]nowledge of employment does not equate of knowledge of contract." MTD Order, Doc. 74 at 19. Plaintiff ignores this Court's ruling and identifies nothing to change this analysis. Plaintiff does not dispute that her allegation that Bernstein attended Board meetings is insufficient to demonstrate that Bernstein knew of the specific contractual obligations sufficient to show an intentional or malicious inducement of a breach. And the leap attempted by Plaintiff here is not plausible, i.e., that "Bernstein's call to action by the District" equates to actual knowledge "that Plaintiff had a contractual relationship with the District" *and* that she knew that "the District had certain procedures to follow in disciplining and terminating employees." Response at 11. The *Twombly* pleading standard requires more than this. As this Court has already held, Plaintiff must point to knowledge of the specific contract; she still has not done so. Plaintiff's response does not even address this Court's reasoning, and in fact continues to rely on alleged knowledge of an "employment relationship" despite this Court's express reasoning to the contrary.

Several other problems exist with Plaintiff's ill-pleaded claim. For example, while Plaintiff argues that Bernstein intentionally induced the District to breach Plaintiff's contract, Plaintiff's allegations readily acknowledge that, at most, Bernstein's comments resulted in a letter and a "pre-disciplinary meeting" – not a breach of the CBA. SAC at ¶¶ 32-44. In fact, as Kenyon expressly acknowledges, only after a second pre-disciplinary meeting involving an *unrelated* matter (Kenyon's use of Snapchat to communicate with students), did the District decide to open an investigation that allegedly failed to comply with the CBA. *Id.* at ¶¶ 45-48. This investigation and the written reprimand that followed had nothing to do with Kenyon's posts on Israel and, instead, involved Kenyon's posting of pictures of herself in a bathing suit, in a bed, and smoking cigarettes. *Id.* at ¶¶ 50-58 (detailing the purpose of the investigation and the written reprimand that followed).

CONCLUSION

For these reasons and those articulated in her motion, Defendant Michelle Bernstein respectfully requests that this Court dismiss Plaintiff's three amended counts against her and the claim for punitive damages.

Dated: July 7, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on July 7, 2025, he caused a copy of the foregoing Defendant Bernstein's Reply in Support of her Motion to Dismiss Second Amended Complaint to be e-filed using the CM/ECF e-filing system which will serve all parties of record.

/s/ Abigail Southerland