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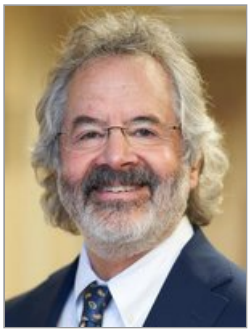
Are False Accusations Of Racism A Form Of Defamation?

By **Phillip Zisook** (July 1, 2020, 4:27 PM EDT)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The other day as I was taking my work-from-home morning walk, I explored a thought: Should racism be made a per se defamation category?

Clearly, that's not a solution to the enormous problem of societal and institutional racism spurring the current protests in furtherance of the Black Lives Matter movement, in the wake of George Floyd's death. But as a lawyer who concentrates in defamation litigation, it was an idea that intrigued me.

Defamation is a cause of action that seeks recourse for false statements causing reputational injuries. Significantly, of the universe of false, disparaging statements that can be made about someone, only a handful are considered defamation per se.

These are statements which, by their subject matter, are deemed so repugnant and harmful to one's reputation that proof of out-of-pocket loss is unnecessary to sustain a cause of action; damages are presumed. Defamation per se status is limited to false statements deemed particularly egregious: charging the commission of a crime; impugning one's ability in his occupation or profession; impugning one's ethics or integrity in his occupation or employment; having a sexually transmitted disease; and committing adultery or fornication.

As I continued my walk, I thought: Don't we need to underscore that being a racist is absolutely repugnant and unacceptable under the law? Shouldn't holding racist views be at least as damning to one's reputation as committing a crime or adultery? Shouldn't racism be included as a defamation per se category, to signal how vile and repugnant it is?

Part of the problem is that getting labeled as a racist is often based upon subjective criteria rather than objectively verifiable facts. Racism may be shown through objective conduct, but it is also a way of thinking, and may be hidden from view. Courts have grappled with this issue in the past.

For example, in Stevens v. Tillman,[1] a Chicago elementary school principal brought a defamation action against PTA president and Chicago alderman Dorothy Tillman for, among other things, calling her a racist and asserting that she made "racist statements." The court held that these assertions were not defamatory per se.

The statements or conduct that purportedly predicated the defamation claim were not submitted to the court. In finding that the statements were not actionable, the court noted:

> Illinois has competing doctrines: first, that statements impugning one's professional competence are actionable without further proof of injury; second, that "mere" name-calling is not actionable. … Accusations of "racism" no longer are "obviously and naturally harmful." The word has been watered down by overuse, becoming common coin in political discourse. Tillman called Stevens a racist; Stevens issued a press release calling Tillman a "racist" and her supporters "bigots." … When Stevens called Tillman a "racist," Stevens was accusing Tillman of playing racial politics … rather than of believing in segregation or racial superiority. That may be an unfortunate brand of politics, but it also drains the term of its former, decidedly opprobrious, meaning. … The term has acquired intermediate meanings too. The speaker may use "she is a racist" to mean "she is condescending to me, which must be because of my race because there is no other reason to condescend." … Meanings of this sort fit comfortably within the immunity for name-calling. … In daily life "racist" is hurled about so indiscriminately that it is no more than a verbal slap in the face; the target can slap back (as Stevens did). It is not actionable unless it implies the existence of undisclosed, defamatory facts, and Stevens has not relied on any such implication.[2]

Similarly, in Grutzmacher v. Chicago Sun-Times Inc.,[3] Judge Kathy Flanagan, citing Stevens, found that statements referring to the plaintiff as a "neo-Nazi" were non-actionable opinions.

Stevens and Gruzmacher are based upon a fundamental concept in defamation law: To prove actionable, a statement must consist of objectively verifiable fact. Amorphous opinions, even when obviously negative, which lack clearly ascertainable meaning are not actionable.

Other Illinois reported cases have found that the following terms and phrases, in the absence of objectively verifiable facts, were nonactionable opinions: "fired because of incompetence," "cocky con-artist," "useless piece of shit," "very poor lawyer," "unethical," "lazy," "burnt out," and "unstable."

As Stevens teaches, assertions that someone is a racist or guilty of racism are often unaccompanied by factual context. In such circumstances, even if racism was to become a new defamation per se category, the statement, "Smith is a racist," without more, would remain nonactionable.

In contrast, a case from California, Overhill Farms Inc. v. Lopez,[4] demonstrates that with sufficient facts, a false accusation of racism can support a defamation action. The plaintiff, Overhill Farms, sued for defamation based upon statements that its recent firings of Latino immigrant workers were racist, and that it was a "racist employer."

The court recognized and cited the rationale of Stevens, and agreed that a general statement that one is racist, without more, constitutes mere name-calling, and does "not contain a [required] provably false assertion of fact."[5]

However, the court held that because the statements referred to racist firings in the context of the company's employment practices having a disparate impact on immigrant women, "the assertion of racism, when viewed in that specific factual context, is not merely a hyperbolic characterization of Overhill's black corporate heart — it represents an accusation of concrete, wrongful conduct."[6]

The court further explained:

> [A] claim of racially motivated employment termination is a provably false fact. Indeed, that very fact is subject to proof in wrongful termination claims on a regular basis. If we were to conclude than an employer's racist motivation for terminating an employee's job were not "provable," it would come as a great shock to the Fair Employment and Housing Commission.[7]

Placing Stevens and Overhill in context, I was reminded that we do not need to create a new category of defamation per se to further signal that racism and being a racist are repugnant and unacceptable under the law. As citizens, we have an affirmative duty to

call out and seek to eradicate racism — whether it is the basis for abhorrent conduct in the workplace, in housing decisions, in education, in employment practices or in social situations.

When that repugnant conduct causes a deprivation of legal rights based upon objectively verifiable facts — even in defamation cases — it will indeed prove actionable.

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[1] Stevens v. Tillman, 855 F.2d 394 (7th Cir. 1988).

[2] Id. at 402.

[3] Grutzmacher v. Chicago Sun-Times Inc., 1994 WL 742257.

[4] Overhill Farms Inc. v. Lopez, 190 Cal. App 4th 1248 (4th Dist. 2011).

[5] Id. at 1262.

[6] Id.

[7] Id. at 140-41.
