STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

LISA BROWN, in her individual capacity, Plaintiff, vs. ERICAH CAUGHEY, Defendant.	Case No. 13-523-NO Hon. William E. Collette

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DEFENDANT'S REPLY IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(8)

Defendant Ericah Caughey ("Defendant"), by and through her undersigned counsel, hereby submits this reply in further support of her Motion for Summary Disposition pursuant to MCR 2.116(C)(8).

Plaintiff's response to Defendant's motion for summary disposition not only demonstrates that Plaintiff's complaint should be dismissed for failure to state a claim pursuant to MCR 2.116(C)(8), but that Plaintiff's defamation claim is frivolous such that this court should award Defendant her reasonable costs and attorney's fees for having to defend against this action. *See* MCR 2.114(F); MCL 600.2591.

As an initial matter, Defendant is not "attempt[ing] to hide behind the First Amendment" as Plaintiff imprudently claims. (Pl.'s Resp. at 5). Indeed, the First Amendment stands as a

bulwark against frivolous actions such as this that are no doubt designed to intimidate and silence political opponents.[1] *See, e.g., Tomkiewicz v. The Detroit News*, 246 Mich. App. 662, 666 (Mich. Ct. App. 2001) (stating that "[t]he involvement of First Amendment freedoms mandates a closer degree of scrutiny by this Court in reviewing defamation claims" and noting the concomitant need to "safeguard[] the free flow of ideas and opinions on matters of public interest that lie at the heart of the First Amendment's protection") (internal quotations omitted); *Locricchio v. Evening News Ass'n*, 438 Mich. 84, 88, 118 (1991) (noting that "the First Amendment . . . accord[s] maximum protection to public speech about public figures"). Consequently, this case is ripe for dismissal at the pleading stage.

Here, Plaintiff expressly disavows the recovery of damages in this case (*see* Pl.'s Resp. at 2 ["Plaintiff seeks no damages from the Defendant."]), and indeed, has not set forth any *facts* demonstrating the existence of such damages.[2] Moreover, even accepting Plaintiff's claim in her response as if it were true (which it is not based on the specific allegations in the complaint)—"that Defendant claimed that she was treated hostilely[3] and terminated because she was

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[1] For the record, while Plaintiff gained substantial national notoriety through numerous media outlets—outlets which champion the same liberal causes as Plaintiff—on account of her censure by the Michigan Legislature, the reason for the censure was not simply that Plaintiff used the term "vagina" in her speech, as Plaintiff suggests. (Pl.'s Resp. at 2). Rather, while Plaintiff did refer to her female anatomy when making an inappropriate comment regarding the *intentions* of the legislators ("I'm flattered that ***you are so interested*** in my vagina."), she further disparaged the legislators' noble efforts to protect women's health by equating the passage of the bill to rape ("No means no."). *See* http://www.freep.com/article/20120621/NEWS06/120621084/Lisa-Brown-discusses-vagina-controversy-in-State-House-.

[2] As Plaintiff admits in her complaint, she won the very election for which these allegedly defamatory videos were produced. (Compl. at ¶ 3). Consequently, there are no *facts* alleged in the complaint setting forth any actionable damages in this case. Thus, as noted in the text above, Plaintiff's defamation claim fails as a matter of law.

[3] Defendant never said she was treated "hostilely" according to the allegations in the complaint. (*See* Compl. at ¶ 19 [alleging that Defendant "falsely states that Brown became 'negative' toward her"]). And even if she did, this is a subjective assertion and thus not defamation as a matter of law. *Milkovich v. Loraine Journal, Co.*, 497 U.S. 1, 20 (1990); *Ireland v. Edwards*,

pregnant" (Pl.'s Resp. at 4)—such a claim is not defamation *per se*. *See* MCL 600.2911(1) (limiting defamation *per se* to "[w]ords imputing a lack of chastity" and "words imputing the commission of a *criminal offense*") (emphasis added). While employment discrimination on the basis of sex (which may include under some factual circumstances discrimination based on the fact that the employee is pregnant) might be unlawful and thus subject the employer to civil damages under various civil statutes, *see, e.g., Boyd v. Harding Acad. of Memphis, Inc.*, 88 F.3d 410, 413 (6th Cir. 1996) ("In 1978, Congress enacted the Pregnancy Discrimination Act ('PDA'), which amended Title VII to specify that sex discrimination under Title VII includes discrimination on the basis of pregnancy."); MCL 37.2202(1)(d), such discrimination is not unlawful as a matter of *criminal* law.

Consequently, in order to plead a defamation claim in the first instance, Plaintiff must allege ***facts*** (not conclusions) demonstrating, *inter alia*, "actionability of the statement irrespective of special harm (defamation *per se*) ***or*** the existence of special harm caused by publication." *Mitan v. Campbell*, 474 Mich. 21, 24 (2005) (emphasis added). Plaintiff has failed to do so.

Moreover, as Defendant pointed out in her motion, Plaintiff must plead her defamation claim with ***specificity*** by identifying the ***exact*** language which the plaintiff alleges to be defamatory. *Royal Palace Homes, Inc. v. Channel 7 of Detroit Inc.*, 197 Mich. App. 48, 52, 57 (Mich. Ct. App. 1992). And because this is a libel claim, Plaintiff is required to plead "***the very words of the libel***." *Id*. at 53 (quoting *De Guvera v. Sure Fit Products*, 14 Mich. App. 190, 206 (1968); *see also Royal Palace Homes, Inc.*, 197 Mich. App. at 57 ("Plaintiffs must plead precisely the statements about which they complain.").

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230 Mich. App. 607, 616 (Mich. Ct. App. 1998) (noting the distinction in defamation law between an "objectively verifiable event" and a "subjective assertion").

Plaintiff seeks to avoid this inconvenient legal requirement by arguing that what Defendant actually intended to say—but never in fact said—was that Plaintiff *unlawfully* fired her because she was pregnant. However, as alleged in the complaint, the only ***factual*** statement actually expressed by Defendant regarding her firing was that she was fired "without explanation." (Compl. at ¶ 18). Plaintiff does not set forth ***any*** facts demonstrating that this is a false statement, which undermines any claim of defamation and demonstrates without dispute that Plaintiff cannot establish actual malice. Further, alleging that Defendant did not make any prior complaints or "file an administrative charge or judicial complaint" (*see* Pl.'s Resp. at 9) does not establish actual malice as a matter of law. *Ireland v. Edwards*, 230 Mich. App. 607, 622 (Mich. Ct. App. 1998) ("Reckless disregard for the truth is not established merely by showing that the statements were made with preconceived objectives or insufficient investigation.").

Here, there is no dispute that Defendant was pregnant at the time of the firing, and there is no dispute that Defendant was abruptly fired "without explanation." Consequently, even if Defendant actually stated that she believed she was fired because she was pregnant (a statement that Defendant did not make and certainly not one in which Plaintiff has pled with specificity as required by the law), this is not a defamatory statement of fact, but Defendant's opinion. Moreover, even if it were a defamatory statement of fact, the fact that Defendant was abruptly fired ***while pregnant and without any explanation as to why she was being fired*** demonstrates a lack of actual malice on her part as a matter of law.

Plaintiff complains that Defendant is "examining each thread instead of the whole cloth." (Pl.'s Resp. at 7). However, no matter how Plaintiff weaves "each thread" of the alleged defamatory statements, the "cloth" at the end of the day is simply not defamation. Consequently,

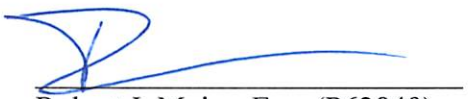
Plaintiff is left with attempting to create a defamation claim out of "whole cloth," which she cannot do. Indeed, Plaintiff, by her counsel's own words, must resort to "suggestive juxtapositions and turns of phrases" (Pl.'s Resp. at 8) in a vain effort to salvage what is, at its core, a meritless, and indeed frivolous, defamation claim.

CONCLUSION

For the foregoing reasons and for those set forth more fully in Defendant's brief in support of her motion, the court should dismiss Plaintiff's complaint for failure to state a claim on which relief can be granted.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER



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Date: August 2, 2013.

PROOF OF SERVICE

I hereby certify that on August 2, 2013, a true and correct copy of the foregoing reply was served upon the following by enclosing the same in a sealed envelope with first class postage fully prepaid, and depositing the envelope in the United States mail addressed to:

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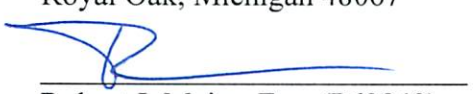

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