Title VII and EEOC case law have created an almost blanket protection for defamatory statements made in the form of allegations of harassment or discrimination in the federal workplace. In this environment, federal supervisors would do well to exercise caution before resorting to the intuitive remedy of a defamation claim. Although there are some situations where an employee may engage in action so egregious that a claim of defamation is a good option, one cannot escape the fact that supervisory employment in the federal workplace comes with an increased risk of defamatory accusations for which there is no legal remedy.

By Daniel Watson

Rehabilitating a Federal Supervisor's Reputation Through a Claim of Defamation

John Doe is a supervisor for a federal agency. As he was leaving the office one night, a female subordinate, Jane Doe, stopped and asked why her work product had not received approval for publication. He attempted to explain that he had already documented his critique via e-mail and that the product was simply not suitable for publication. Not content to drop the issue, Jane continued to argue with John as they exited the building. The discussion escalated, and Jane began accusing John of sexism and of wanting to "keep her down," saying that she knew that he thought of her as little more than a beautiful woman. The conversation ended, but the next week, John's agency's equal opportunity (EO) office informed him that he had been accused of sexual harassment, based on the sexual epithets and demeaning insults he was alleged to have yelled at Jane Doe, and sex discrimination for his refusal to publish her work.

Outraged at the false accusation, John immediately called Jane into his office and asked her how she could have lied. Did she not know it was illegal to lie about that type of behavior? Jane responded by accusing John of retaliation. A week after the incident, while speaking to a coworker, John Doe discovered that the coworker had overheard the entire conversation between John and Jane and would swear to the fact that Jane was lying about what was said. In light of this proof, John decided to file a defamation action in state court against Jane. An agency-level EO investigation found that Jane's claims were unsubstantiated.

The facts recounted above may seem to prove that Jane maliciously defamed John. After examining the principles below, however, it will be clear that the outcome of a defamation suit would be anything but positive for John Doe and the agency.

When a supervisor is wrongfully accused of discrimination in the workplace, it can have a highly negative impact on his or her reputation and career prospects. It is natural for the supervisor to want to rehabilitate his or her reputation through the judicial system when facing a baseless accusation. Unfortunately, a supervisor faces a myriad of obstacles in successfully prosecuting a defamation claim, with the two largest being overcoming the protection of privilege and avoiding liability for retaliation. Unless the employee made

the discrimination claim with demonstrable, knowing falsity, those obstacles are likely to be insurmountable. Even when they are overcome, the slightest connection between the defamation suit and workplace conduct is likely to expose both the employer and supervisor to liability. The following paragraphs outline the obstacles faced by a federal supervisor in attempting to rehabilitate his or her reputation by pursuing a defamation claim and how those obstacles can be overcome.

Applying State and Federal Law in the Federal Workplace

Defamation is a state tort claim, but it is governed by the First and Fourteenth Amendments and limited by federal statutes.[1] The Restatement (Second) of Torts defines defamation as requiring (a) a false and defamatory statement, (b) unprivileged publication, (c) fault amounting to at least negligence on the part of the publisher, and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.[2] However, each state has its own variant on the particular elements and its own rules on the circumstances creating a privileged communication.[3] In addition, 15 states and 1 territory have criminal defamation statutes.[4]

Supervisory retaliation, as a statutory claim, has a basis in both federal and state statutes.[5] The federal prohibition against retaliation for complaining of discrimination is found in the "participation clause" of Title VII.[6] Federal courts examining the "exceptionally broad protection"[7] of the participation clause have held that malicious, defamatory, and incorrect assertions are protected.[8] In the Seventh Circuit, any Equal Opportunity Employment Commission (EEOC) complaint that is not "utterly baseless" is protected from retaliation by a supervisor.[9] Although the U.S. Supreme Court has found that some allegations of harassment are so unreasonable as not to receive Title VII protection,[10] the EEOC has never examined a complaint as such. If the quality of the complaints, punishment of which was considered reprisal, is an indication, then one can infer a complete rejection of any sort of restriction, such as that placed by the Seventh Circuit.[11] This permissive attitude is especially important from the perspective of an agency supervisor because EEOC decisions cannot be appealed at the agency level. In effect, for the supervisor and the agency, the EEOC is the court of final appeal for an employee's claim of retaliation and sex discrimination.

Overcoming Privilege to Bring a Defamation Claim

The first obstacle in bringing a claim of defamation is that of privilege. If the communication that is alleged to be defamatory was privileged, then the claim fails. Although federal statute for communications to the EEOC establishes absolute privilege, most claims originate in an agency's internal EO office.[12] In that case, two privileges may stand in the way of bringing a defamation suit for the wrongful accusation; the intracorporate privilege and the qualified privilege. State law governs both.

The intracorporate privilege holds that communication within a corporation does not constitute publication.[13] This is justified by an agency theory that finds that an employee communicating on behalf of the corporation to another employee cannot constitute communication to a third party since they both belong to the same entity.[14] It is also supported by the public policy of encouraging free and candid internal communication within the corporation in pursuit of investigations of wrongdoing.[15]

There are several different variants of the intracorporate privilege. Oklahoma has the most all-encompassing privilege, holding that "communication inside a corporation, between its officers, employees, and agents, is never publication for the purposes of actions for defamation."[16] Missouri's privilege is almost as absolute, only requiring that the communication be in the "due and regular course of corporate business."[17] Alaska is similar in only requiring that the communication be in the scope of employment and within the line and scope of the employee's duties.[18] Georgia, at the other end of the spectrum, has the more constrained view that protected communication is limited to an employee's communication to a person in authority during an investigation.[19]

In addition to this more general intracorporate privilege, there is a more specific qualified privilege for complaints alleging harassment or discrimination. A qualified or conditional privilege exists when there is good faith intent on the part of the speaker to protect his or her interest or in reference to which he has a right or duty.[20] The code of some jurisdictions contain this common law rule,[21] and some jurisdictions have rejected an intracorporate privilege in favor of a qualified privilege, finding that the burden of proving that the publication was not in good faith or in pursuit of an interest or duty is sufficient protection even in the employment context.[22]

Jurisdictions vary on what it takes to overcome the intracorporate privilege. In Oklahoma, motive, intent, or truthfulness are irrelevant to whether or not the statement is privileged because intracorporate communication is not considered publication as a matter of law.[23] In a jurisdiction such as this, the only way to overcome this barrier is to show that the publication was not solely intracorporate.[24] However, Nevada's more nuanced intracorporate privilege contrasts this by stating it can be overcome if the communication was not "in the regular course of business" or if it was made with "actual malice."[25] As if the privileges were not confusing enough, some jurisdictions mislabel their qualified privilege an intracorporate privilege and combine the requirements of the two.[26] In those jurisdictions, the privilege can be overcome if it would exceed the scope of the qualified privilege or was made with actual malice.[27]

State treatment of the qualified privilege is much more consistent than state treatment of the intracorporate privilege. The qualified privilege can be overcome by a showing that the publication was made with actual malice, reckless disregard for the truth, or excessive publication.[28] Malice can be inferred from knowledge of falsity or the defendant's doubt of the statement's truth.[29] In general, excessive publication is publication to a party not necessary to protect the interest asserted.[30]

Some jurisdictions find that a showing of common law malice (a malicious motive for offering statements, even if believed to be true) is sufficient to overcome the privilege.[31] Although a demonstration of common law malice is not sufficient to overcome the constitutional requirement of actual malice for defamation of a public figure, it will still suffice to compromise the qualified privilege if it was the primary motive for making the statement.[32] The logic behind allowing a malicious motive to defeat a qualified privilege is that the privilege extends to good faith attempts to protect an interest.[33] If the motive for publishing the defamatory statements is malicious rather than the protection of an interest,

it makes sense to terminate the protection of the privilege meant only to protect an interest.

As a practical matter, to overcome the privileges discussed and mount a successful defamation claim requires that the plaintiff have admissible proof that the falsity of the statements was known or suspected, or that the defendant made the statements out of a primarily malicious motive, or that the publication exceeded what was necessary to protect interest. In *Dragonas v. School Comm.,* the Massachusetts Appeals Court found that even when a principal was speaking to parents about their interest in protecting their children, if the false statements were made from a primarily malicious motive, then the principal could still be liable for defamation.[34] In another instance, the Virginia Supreme Court remanded a case for trial because the jury had been limited to evaluating whether there was a personal spite or ill will in determining malice.[35] The court affirmed that the privilege could also be violated by statements in bad faith or those made in strong and abusive language disproportionate to the occasion.[36] Ultimately, the easiest route is to be able to prove knowing falsity. If it comes down to proving common law malice, the outcome of the defamation suit may be considerably less certain and subject to a jury's determination of the defendant's primary motivation when making the statements. Proving malice, actual or otherwise, is a difficult endeavor and thus rarely successful.[37]

Privilege can also cause another upsetting outcome in cases arising in the federal workplace. If the statements made were privileged, then they are likely to be within the scope of employment and the supervisor runs the risk of having the United States substituted as a defendant and the case permanently removed to federal court.[38] Of course, the question of whether or not the statements made were within the scope of employment is one that federal law mandates be determined by state law.[39] Although a comprehensive evaluation of state law on scope of employment is beyond the reach of this article, generally, privileged statements are considered in the scope of employment.[40] Finally, if the United States substitutes itself as the defendant, the burden of proof to show the substitution illegitimate rests on the supervisor.[41]

Having the United States substituted as a defendant has two related effects: (a) more than likely, the case will be dismissed on the grounds of sovereign immunity; and (b) even if it is not dismissed on those grounds, there will be an additional round of litigation on the scope of employment issue.[42] The story of Robert McKee and Denise Quick illustrates the effect that such a substation can have. Ms. Quick accused Mr. McKee of sexual harassment and racial discrimination. These allegations were found to be of no merit, and Mr. McKee filed a state defamation action against Ms. Quick in 1997.[43] Mr. McKee's defamation action against Ms. Quick was derailed by the substitution of the United States as defendant based on the theory that Ms. Quick was acting within the scope of employment in making allegedly defamatory statements.[44] Finally, after a determination that only the statements made outside the purpose and scope of the grievance process could be "outside the scope of employment," the case was sent back to state court where it was eventually dismissed by the plaintiff without prejudice four days before the trial on Feb. 24, 2006.[45] Finally, exactly 1 year later (and 10 years after the alleged defamation) the case was filed again and then finally dismissed, as the defendant could not be located.[46] Clearly, much rests on whether or not the defamatory communication was privileged.

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The Burden of Proof

Which party bears the initial burden to prove that the publication was privileged depends on the specific articulation of the tort. The formulation found in the Restatement (Second) of Torts is that it includes "unprivileged communication" as one of the *prima facie* elements.[47] This shifts the evidentiary burden to the plaintiff to prove that the communication lacked privilege. Twenty-five states and the District of Columbia have tacitly failed to include this element in the plaintiff's case, thus making privilege an affirmative defense,[48] while the remaining states have adopted the requirement of "non-privileged" communication as an additional element.[49]

Escaping the Charge of Retaliation

Even if a supervisor can overcome the hurdles of actually bringing a case for defamation in state court, there is still a chance that a successful suit could create liability for the supervisor and the agency under Title VII's retaliation prohibition.[50]

The EEOC has determined that a supervisor's state suit for defamation could be retaliation and the employer may be held responsible. In *Burlington N. & Santa Fe Ry. Co. v. White*, the Supreme Court affirmed the first half of the EEOC determination, holding that retaliation did not have to affect a term or condition of employment to be actionable.[51] The Court adopted the EEOC's argument that retaliation is adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity.[52] Even before the *White* decision settled the issue in 2006, most courts recognized that a state defamation suit could constitute retaliation if it was filed without a reasonable basis and for an improper purpose.[53]

Some supervisory rights to combat defamation should have been reserved by the "based on retaliatory motive" requirement

of the *White* standard.[54] Unfortunately, when a defamation complaint is based on a privileged communication, retaliatory motive is presumed, even when the sexual harassment complaint that spawned the defamation complaint is determined to be without merit.[55] If there is a plausible argument that the communication forming the basis for the defamation complaint is not privileged, it is unclear if retaliatory motive would still be considered admitted, assuming that the information was ultimately found privileged.

Cassidy v. Virginia Carolina Veneer Corporation stands as a cautionary tale for falsely accused, hot-headed supervisors or company owners. In that case, an employee quit her job with the company after she was allegedly denied permission to take off for a medical appointment.[56] After leaving the company, she filed a complaint with the EEOC, accusing her supervisor of sex discrimination.[57] Her supervisor immediately filed a defamation suit in state court and the employee responded by modifying her EEOC complaint to allege retaliation.[58] Even though the EEOC found there was no cause to believe that the actions of the company constituted discrimination, the court found that the filing of the defamation suit was retaliation.[59] Because the only publication mentioned in the defamation complaint was the filing of an EEOC complaint, the court found this to be retaliation as a matter of law because alleging defamation by a communication to which absolute privilege extended constituted an admission of malice.[60] Thus, if a defamation suit is to be filed by a supervisor, it is of utmost importance that the alleged defamatory remarks not be privileged. Although the Fourth Circuit's position in *Cassidy* sits at the far end of spectrum, even the Fifth Circuit, which sits on the opposite end of the spectrum, seems to suggest that defamation claims without an "arguable basis" suggest a retaliatory motive.[61]

The EEOC uses this distinction of merit to limit the principle that companies and supervisors have a constitutional litigation privilege to bring defamation suits.[62] In effect, it is a double or nothing gamble: if a supervisor wins the defamation suit, then it was protected by the litigation privilege, but if he or she loses, then it may stand as evidence of retaliatory motive.[63] The EEOC approach to retaliatory defamation claims thus seems to mirror the approach of the malicious prosecution tort, allowing for liability if the defendant in the criminal action was found not guilty and there was no "probable cause" for the accusation that resulted in the prosecution.[64] The EEOC effectively makes a determination of whether there was probable cause or an arguable basis for the defamation complaint, and that becomes the determinative factor in whether or not the suit is protected by a litigation privilege. Thus, if the defamation complaint relies on a privileged communication, the EEOC will determine there was no probable cause and will conclude that the suit is evidence of retaliatory animus and not protected by a litigation privilege.

The second half of the current EEOC position is that a federal agency can be held accountable for the supervisor's actions. To do this, the EEOC must find some link between the supervisor's actions and the agency to establish that the agency did something "that might dissuade a reasonable worker from making or supporting a charge of discrimination."[65] Some treatises argue that a claim or counterclaim filed by a supervisor in his own private capacity cannot support a retaliation claim since they cannot be attributed to an employer.[66] This did seem to be the holding in the Fifth Circuit cases of *Hernandez* and *Scrivner*.[67] It is a holding parroted by the EEOC when dealing with the subject.[68] However, the reality of the situation is that there are a myriad of ways the EEOC can make the agency responsible for a supervisor's private suit.

In a recent case, the EEOC determined that the action of a supervisor could be viewed as an additional incident in a continuing hostile workplace claim on the basis of reprisal, making the rest of the complaint timely.[69] In previous cases the EEOC held that as little a nexus as failing to advise a supervisor against submitting a defamation claim or not providing an employee with assistance in defending such a claim can create agency liability.[70] A supervisor's threat at work to an employee that he would sue if defamation was not halted is also a sufficient nexus to hold the agency liable.[71]

Paradoxically, the EEOC has also found that certain defamation suits did not create agency liability, determining that if there is ***no*** adverse action on the part of the agency, then it could not have retaliated and is not responsible for the action of a supervisor as a private citizen.[72] In one case, the EEOC held that a cease-and-desist letter was appropriate to an employee making defamatory comments and not evidence of retaliation.[73] The EEOC also held that an agency could make itself immune from the accusation of retaliation when it immediately counseled the angry recipient of a sexual harassment complaint after he sent a vitriolic e-mail in response to the allegation.[74] These contrasting rulings predate the Supreme Court's ruling in *White* and thus cannot be explained as an increased sensitivity to retaliation in the wake of that decision. The only way to harmonize these seemingly discordant results is to conclude that while agency action may be needed to incur liability, agency inaction where there is responsibility or a duty to act or even the slightest action in the workplace on the part of the supervisor can trigger retaliation liability on the part of the agency.

Getting Around Retaliation by Filing in the EEOC

Some managers, frustrated at the potential liability and expense of a state defamation suit, have attempted to cast their defamation complaint as a discrimination complaint. The EEOC has been anything but sympathetic to the plight of these managers, affirming the dismissal of the supervisor's complaint because (a) the manager's position should have allowed him or her to discipline the employee and thus no condition of employment was changed[75] and (b) the EEOC has found these suits to be an attempt to collaterally attack another proceeding (the subordinate's sexual harassment complaint).[76] If anything, these cases teach the agency that it is better to avoid disciplining the subordinate, even if it comes at the cost of exposing managers to false claims.

What About John Doe?

The manager in our prefatory fact pattern, John Doe, is in an unfortunate position. Even a completely false allegation can cause job loss or discipline.[77] Frustrated subordinates can, at a minimum, create an immense emotional and financial cost.[78] However, in his response, John made a couple of mistakes that will cost him more than Jane Doe's original accusation.

John's first mistake was to speak to Jane on the subject of

her complaint. Any contact with a complainant questioning the veracity of a complaint could be construed as chilling or burdening the use of the complaint process, making John's agency liable for retaliation. The extent to which John is held personally accountable is up to the agency, but it is not a risk John should take.

Filing a defamation claim was John's second mistake. If John is in a jurisdiction that follows the intracorporate privilege doctrine, his complaint is dead for lack of publication. Assuming the jurisdiction does not apply the intracorporate privilege, he still has to overcome the qualified privilege. To do so, he must prove that Jane's statements were excessively published, made with actual malice, or made with reckless disregard for the truth. It is possible that his coworker's testimony might convince a judge that Jane was lying about the sexual harassment. That there was an arguable basis for Jane's sex discrimination claim will not make it easier for John to convince the EEOC that Jane knew she was lying. In addition, knowing falsity does not necessarily move the publication outside the scope of employment, and the claim may be dismissed if the United States substitutes itself as the defendant. Even if John manages to bring a successful defamation claim, the agency will be guilty of retaliation for failing to advise the supervisor against filing a claim of defamation and tolerating a supervisor speaking to a subordinate in a way that could chill the exercise of Title VII participation.

The most likely end result of our hypothetical case is that John will be left subject to agency discipline (additional EEO training at least) and out a considerable amount of money in attorney fees, in addition to costing his agency additional money and time. Although Jane may lose her sexual harassment and sex discrimination claims, she will win on retaliation. Even though it is hard to see what actual pecuniary damages Jane could claim, the EEOC has a habit of awarding non-pecuniary damages that are completely disproportionate to any actual monetary harm.[79] Jane's assertions of mental anguish, sleep deprivation, stress, nausea, and social withdrawal in response to being "yelled at" by her supervisor will be more than enough justification for the EEOC to pry open the agency's pocketbook.

Conclusion

The irony is that under the guise of preventing retaliation, the EEOC has effectively created a powerful retaliatory tool for employees. Title VII was not designed to "arm employees with a tactical coercive weapon" under which they can make baseless claims simply to "advance their own retaliatory motives and strategies," but that is exactly what has happened.[80]

After examining the case law above, the following suggestions can help prevent federal supervisors from making the same mistakes as our hypothetical supervisor.

Supervisors should refrain from pursuing a defamation suit until there is ample evidence of publication outside of the EO complaint process or of knowing falsity.

If possible, supervisors should wait to act until the defamation is particularly egregious.

- Supervisors should attempt to strictly compartmentalize their private suit and their workplace activities, not so much as mentioning the suit in the workplace.
- Before filing suit, supervisors should familiarize themselves with their state's particular rules on privilege.
- Supervisors should document any interaction with or toward the accuser so that as much as possible they are not placed in a situation where the EEOC is evaluating the relative believ-

ability of the employee and supervisor.
- If an employee is disciplined for defamation, agency supervisors should document clear and outrageous conduct that occurred outside the EO complaint process.

Even if all the right steps are taken, defamation suits against an employee for a malicious discrimination complaint involve a considerable amount of risk and should be approached cautiously. In the end, one cannot escape the fact that supervisory employment in the federal workplace comes with an increased risk of defamatory accusations for which there is no legal remedy. ⊙

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Endnotes

[1]*New York Times Co. v. Sullivan*, 376 U.S. 254, 281 (1964) (defining the limitations placed on defamation law by the First and Fourteenth Amendments); 47 U.S.C. § 230 (section 230 of the Communications Decency Act protects online service providers from liability for defamation).

[2]Restatement (Second) of Torts § 558 (1977).

[3]The Digital Media Law Project provides a useful overview of a variety of the differences between 18 different state's defamation laws: www.dmlp.org/legal-guide/state-law-defamation. Kelly Warner Law has also assembled a comprehensive database of defamation law in all 50 states and around the world: kellywarnerlaw.com/us-defamation-laws/.

[4]**Alabama** (Ala. Code § 13A-11-163 (determined to be unconstitutional)); **Colorado** (Colorado Revised Statutes § 18-13-105 (repealed in Sept. 2012), § 11-40-107 (misdemeanor for defamation of associations remains), § 10-1-116); **Florida** (Florida Statutes, § 836.01–836.11); **Georgia**, (O.C.G.A. § 16-11-40) (held unconstitutional in 1983); **Idaho** (Idaho Code, § 18-4801-18-4809); **Kansas** (Kansas Statute Annotated, §21-6103); **Louisiana** (Louisiana R.S., 14:47); **Michigan** (Michigan Compiled Laws, § 750.370); **Minnesota** (Minnesota Statutes. § 609.765); **Nevada** (Nevada Revised Statutes §§ 200.510–200.560); **New Hampshire** (New Hampshire Revised Statute Annotated, § 644:11); **New Mexico** (New Mexico Statute Annotated, §30-11-1) (held unconstitutionally lacking actual malice standard in *Mata v. Anderson*, 685 F. Supp. 2d 1223 (D.N.M. 2010), *aff'd*, 635 F.3d 1250 (10th Cir. 2011)); **North Carolina** (North Carolina General Statutes, § 14–47); **North Dakota** (North Dakota Century Code, § 12.1-15-01); **Oklahoma** (Oklahoma Statutes Annotated, tit. 21 § 773); **Utah** (Utah Code Annotated, § 76-9-404); **Virginia** (Virginia Code Annotated, § 18.2-417); **Wisconsin** (Wisconsin Statutes, § 942.01); and **Virgin Islands** (Virgin Islands Code, Title 14, § 1172).

[5]The federal anti-retaliation statute that specifically addresses retaliation for a sex discrimination complaint is 42 U.S.C. § 2000e-(3)(a). Some state legislatures have passed legislation meant to comply with the Civil Rights Act, creating state law causes of action for retaliation. For example, in Texas the anti-retaliation statute, modeled after the federal statute, is found at Tex. Labor Code Ann. § 21.055 (West).

[6]42 U.S.C. § 2000e-(3)(a) "Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

[7]*Pettway v. American Cast Iron Pipe Co.,* 411 F.2d 998, 1006 n. 18 (5th Cir.1969).

[8]*Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 582 (6th Cir. 2000); *Prouylx v. Citibank, N.A.*, 659 F. Supp. 972, 977-78 (S.D.N.Y. 1987); *Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1312 (6th Cir.1989) (stating that under the participation clause, protection "is not lost if the employee is wrong on the merits of the charge, nor is protection lost if the contents of the charge are malicious and defamatory as well as wrong." (internal citations omitted)); *but see Mattson v. Caterpillar, Inc.,* 359 F.3d 885, 890 (7th Cir. 2004) ("Rather, this Court has consistently stated that utterly baseless claims do not receive protection under Title VII.").

[9]*Mattson*, 359 F.3d at 891; *see also Payne v. McLemore's Wholesale & Retail Stores,* 654 F.2d 1130, 1137 (5th Cir. Unit A Sept. 1981), *cert. denied,* 455 U.S. 1000 (1982) (affirming that "reasonably believed" was a limiting factor on Title VII Section 704 protection).

[10]*See Clark County Sch. Dist. v. Breeden,* 532 U.S. 268, 270 (2001) (although a supervisor read comments from plaintiff's personnel file aloud and was subsequently accused of harassment, the court found that no one could believe that Title VII had been violated, as it was one offhand comment and its inclusion in the personnel file was not objected to).

[11]*Boyd v. Dep't of Transportation*, EEOC Appeal No. 01955276 (Oct. 10, 1997) (the EEOC found a letter from a supervisor's private attorney alleging that her EO complaints constituted defamation to be credible evidence of sex discrimination and a lack of discipline for the manager whose attorney sent the complaint to be retaliation).

[12]*See, e.g., Paros v. Hoemako Hosp.,* 681 P.2d 918 (Ariz. Ct. App. 1984); *Saini v. Cleveland Pneumatic Co*., 1987 WL 11098 (Ohio Ct. App. May 14, 1987); *Hurst v. Farmer*, 697 P.2d 280 (Wash. App. 1985). Absolute immunity is also granted for statements made to a state administrative agency. *See, e.g., Gantt v. Sentry Ins*., 265 Cal. Rptr. 814, 822 (Cal. Ct. App. 1990).

[13]47 A.L.R.4th 674 (Originally published in 1986) (Alaska, Florida, Georgia, Missouri, Nevada, Oklahoma, Pennsylvania, Washington, New Mexico, Tennessee and Wisconsin all apply the intracorporate privilege); *Woods v. Helmi*, 758 S.W.2d 219, 222

(Tenn. Ct. App. 1988).

[14]*Starr v. Pearle Vision, Inc.*, 54 F.3d 1548, 1553 (10th Cir. 1995) (quoting *Magnolia Petroleum Co. v. Davidson,* 148 P.2d 468, 471 (Okla. 1944)).

[15]*Hagebak v. Stone*, 61 P.3d 201, 205 (N.M Ct. App. 2003) (examining the reasoning for adopting the intracorporate privilege rule); *see also* Ruth A. Kennedy, *Insulating Sexual Harassment Grievance Procedures from the Chilling Effect of Defamation Litigation,* 69 Wash. L. Rev. 235, 236 (1994).

[16]*Edwards v. Creoks Mental Health Servs., Inc.*, 505 F. Supp. 2d 1080, 1096 (N.D. Okla. 2007).

[17]*Lovelace v. Long John Silver's, Inc.,* 841 S.W.2d 682, 684 (Mo. Ct. App. 1992).

[18]*Hayes v. Wal-Mart Stores, Inc.,* 953 F. Supp. 1334, 1340 (M.D. Ala. 1996).

[19]*Agee v. Huggins,* 888 F. Supp. 1573, 1581 (N.D. Ga. 1995).

[20]24 A.L.R.4th 144 § 2[a] (originally published in 1983); *See, e.g., Roscoe v. Schoolitz*, 464 P.2d 333, 336 (Ariz. 1970); *Sigal Const. Corp. v. Stanbury,* 586 A.2d 1204, 1214 (D.C. 1991); *Cain v. Hearst Corp.,* 878 S.W.2d 577, 582 (Tex.1994); *Great Coastal Exp., Inc. v. Ellington*, 334 S.E.2d 846 (Va. 1985). .

[21]*Green Acres Trust v. London*, 688 P.2d 617, 624 (Ariz. 1984) (stating that because of the public and private interest in preventing sexual harassment a qualified privilege exists for complaints of harassment); *Miller v. Servicemaster by Rees,* 851 P.2d 143, 145 (Ariz. Ct. App. 1992) (public policy dictates protecting sexual harassment complaints); *see also Garziano v. E.I. Du Pont De Nemours & Co.,* 818 F.2d 380, 387-88 (5th Cir.1987) (recognizing that state and federal laws "condemn sexual harassment as a matter of public policy"); Ga. Code Ann. § 51-5-7 (West) (Georgia code's statutory establishment of a qualified privilege for communications effecting a public duty, a legal or moral private duty, statements meant to protect the speaker's interest in a matter in which he or she is concerned).

[22]*Popko v. Cont'l Cas. Co.,* 823 N.E.2d 184, 191 (Ill. App. Ct. 2005) (finding that corporate interests were sufficiently protected when privilege was a defense rather than an absolute bar from liability); *Luttrell v. United Tel. Sys., Inc.*, 683 P.2d 1292, 1294 (1984), *aff'd,* 695 P.2d 1279 (Kan. 1985) (finding that the qualified privilege was a sufficient protection and that a statements made in the employment context should be examined for knowing or reckless falsity).

[23]*Starr,* 54 F.3d at 1553; *Cohlmia v. Ardent Health Servs., LLC,* 448 F. Supp. 2d 1253, 1269 (N.D. Okla. 2006).

[24]*Id*.

[25]*Gordon v. Dalrymple*, 3:07-CV-00085-LRH-RA, 2008 WL 2782914, at *6 (D. Nev. July 8, 2008) (finding that a letter that went through proper channels in an internal complaint process was in "the regular course of business"); *see also Moonin v. Nevada ex rel. Dep't of Pub. Safety Highway Patrol*, 3:12-CV-00353-LRH, 2013 WL 1628389 (D. Nev. Apr. 15, 2013).

[26]*Muhammad v. Westinghouse Elec. Co. LLC*, 3:12-CV-03298-JFA, 2013 WL 5469982, at *7 (D.S.C. Sept. 30, 2013) (quoting the South Carolina Appeals court's articulation of the qualified privilege and referring to it as an intracorporate privilege requiring good faith and excluding statements that exceeding the scope of the occasion or were made with actual malice); *Andrews v. Virginia Union Univ.,* CIV. A. 3:07CV447, 2007 WL 4143080, at *9 (E.D. Va. Nov. 19, 2007) (referring to the qualified privilege as a qualified intracorporate privilege and finding it did not extend to statements made with common-law malice based on the inference of corrupt motive).

[27]*Id.*

[28]*E.g., Christensen v. Weichert Ins. Agency, Inc.,* A-4953-11T2, 2013 WL 6122593, at * 4 - 6 (N.J. Super. Ct. App. Div. 2013) (known falsity, reckless disregard, or excessive publication void a qualified privilege); *Larimore v. Blaylock*, 528 S.E.2d 119, 121 (Va. 2000) (citing a long history of Virginia Supreme Court opinions holding that qualified privilege in a workplace setting may be defeated if statements were made maliciously); *see also DeNardo v. Bax*, 147 P.3d 672, 680 (Alaska 2006); *Green Acres Trust*, 688 P.2d at 624; *Scarpelli v. Jones,* 626 P.2d 785, 791 (Kan. 1981); *Dragonas v. Sch. Comm.,* 833 N.E.2d 679, 687 (Mass. App. Ct. 2005); *Armistead v. Minor*, 815 So. 2d 1189, 1193 (Miss. 2002).

[29]*Id.*

[30]*Green Acres Trust*, 688 P.2d at 624; *Wal-Mart Stores, Inc. v. Lane*, 31 S.W.3d 282, 289 (Tex. App. 2000) ("privilege remains intact as long as the communications pass only to persons having an interest or duty in the matter to which the communications relate."); David Edler, Defamation: A Lawyer's Guide § 2:34, Westlaw Database (updated August 2013).

[31]*Dragonas,* 833 N.E.2d at 687; *Se. Tidewater Opportunity Project, Inc. v. Bade*, 435 S.E.2d 131, 132 (Va. 1993); *Sigal Const. Corp*, 586 A.2d at 1214.

[32]*Greenbelt Co-op. Pub. Ass'n v. Bresler*, 398 U.S. 6, 8 (1970) (suit against public figure requires showing of actual malice); *Cashion v. Smith*, 749 S.E.2d 526, 533 (Va. 2013) (long established rule that showing of common law malice will defeat the qualified privilege); Edler, § 2:32 (providing a summary of the various jurisdiction's treatment of common law malice as sufficient to overcome a qualified privilege).

[33]Edler, § 2:32.

[34]*Dragonas,* 833 N.E.2d at 687.

[35]*Cashion*, 749 S.E.2d at 533.

[36]*Id.*

[37]*Garziano,* 818 F.2d at 391 (overturning a jury award for defamation and finding that the communication was privileged as there was legitimate interest. The court held that actual malice could not be met as knowing falsity could not be inferred from the circumstantial evidence that they jury relied on even if it was close to 50/50 call the there was not a sufficient "quantum of evidence to overcome a presumption of good faith"); *Stockley v. AT & T Info. Sys., Inc.,* 687 F. Supp. 764, 770 (E.D.N.Y. 1988) (finding that evidence of malice must exceed inference and that the plaintiff failed to establish more than "some metaphysical doubt," failed to present evidence beyond "mere allegations and speculation," and that such evidence did not constitute evidence on which a reasonable jury could find a breach of privilege).

[38]28 U.S.C.A. § 2679(d) (West); *Osborn v. Haley*, 549 U.S. 225, 244, (2007) (holding that once the attorney general removed a case to federal court, even if the statements made were found to not be in scope of employment and the employee had to be resubstituted, the case should be decided in district court and not remanded to the state court).

[39]28 U.S.C.A. § 1346(b)(1) (West).

[40]*Coleman v. United States*, 91 F.3d 820, 824 (6th Cir. 1996) (the following criteria determine scope of employment under Kentucky law: "(1) whether the conduct was similar to that which the employee was hired to perform; (2) whether the action occurred substantially within the authorized spacial and temporal limits of the employment; (3) whether the action was in furtherance of the employer's business; and (4) whether the conduct, though unauthorized, was expectable in view of the employee's duties."); *Pizzuto v. County of Nassau,* 239 F. Supp. 2d 301, 313 (E.D.N.Y. 2003) (New York law seems to apply an even broader principle: determining that anything which "was done while the servant was doing his master's work, no matter how irregularly, or with what disregard of instructions" falls within the scope of employment).

[41]*Maron v. United States*, 126 F.3d 317, 323 (4th Cir. 1997)

[42]*Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 418 (1995) (finding the attorney general's decision to substitute the United States reviewable).

[43]*Quick v. Dep't of the Air Force*, EEOC Appeal No. 01A00116 (Aug. 13, 2002).

[44]*Allstate Ins. Co. v. Quick*, 254 F. Supp. 2d 706, 713 (S.D. Ohio 2002).

[45]*Id*. The Ohio Civil Case Docket Number, 1997 CV 0328, timeline is all that remains to piece together the final outcome of this case.

[46]Ohio Civil Case Docket Number 2007 CV 0183 (at least this much can be pieced together from the docket notes).

[47] Restatement (Second) of Torts § 558 (1977).

[48]States that do not include privilege as part of the elements of defamation: **Alabama:** *Delta Health Grp., Inc. v. Stafford*, 887 So. 2d 887, 895 (Ala. 2004); **Arizona**: *Saban v. Maricopa Cty.*, 1 CA-CV 08-0607, 2010 WL 2977553 (Ariz. Ct. App. July 29, 2010); **Arkansas**: *Boellner v. Clinical Study Centers, LLC*, 378 S.W.3d 745, 757 (2011); **Colorado**: *Han Ye Lee v. Colorado Times, Inc.,* 222 P.3d 957, 961 (Colo. Ct. App. 2009); **Connecticut**: *Johns v. Brown*, CV085024593, 2009 WL 1218623 (Conn. Super. Ct. Apr. 8, 2009); **Delaware**: *Williams v. Howe*, CIV.A. 03C-10-054PLA, 2004 WL 2828058 (Del. Super. May 3, 2004); **Florida**: *Bass v. Rivera*, 826 So. 2d 534, 535 (Fla. Dist. Ct. App. 2002); **Idaho**: *Clark v. The Spokesman-Review*, 163 P.3d 216, 219 (Idaho 2007) **Indiana**: *Hamilton v. Prewett*, 860 N.E.2d 1234, 1243 (Ind. Ct. App. 2007); **Iowa**: *Kiesau v. Bantz*, 686 N.W.2d 164, 175 (Iowa 2004); **Kansas**: *Droge v. Rempel*, 180 P.3d 1094, 1097-98 (Kan. Ct. App. 2008); **Kentucky**: *Smith v. Martin*, 331 S.W.3d 637, 640 (Ky. Ct. App. 2011); **Louisiana**: *Cooksey v. Stewart*, 938 So. 2d 1206, 1209 (La. App.), *writ denied*, 943 So. 2d 1087 (La. 2006); **Maryland**: *Piscatelli v. Van Smith*, 35 A.3d 1140, 1147 (Md. 2012); **Massachusetts**: *Boyle v. Cape Cod Times*, BACV200600760A, 2009 WL 6593979 (Mass. Super. Nov. 9, 2009) , *aff'd*, 959 N.E.2d 457 (Mass. App. Ct. 2012); **Minnesota**: *Longbehn v. Schoenrock*, 727 N.W.2d 153, 159 (Minn. Ct. App. 2007); **Missouri**: *Diehl v. Fred Weber, Inc.*, 309 S.W.3d 309, 319 (Mo. Ct. App. 2010); **New Hampshire**: *Sanguedolce v. Wolfe*, 62 A.3d 810, 812 (N.H. 2013); **New Mexico**: *Fikes v. Furst*, 81 P.3d 545, 549 (N.M. 2003); **North Carolina**: *Craven v. Cope*, 656 S.E.2d 729, 732 (N.C. Ct. App. 2008); **Ohio**: *Sullins v. Raycom Media, Inc.,* 996 N.E.2d 553, 560 (Ohio Ct. App.), *reconsideration denied,* 2013 WL 5773499 (Ohio Ct. App. Oct. 24, 2013); **Oregon**: *Mannex Corp. v. Bruns*, 279 P.3d 278, 284 (Or. Ct. App. 2012); **Tennessee**: *Sullivan v. Baptist Mem'l Hosp.,* 995 S.W.2d 569, 571 (Tenn. 1999); **Texas**: *Avila v. Larrea*, 394 S.W.3d 646, 657 (Tex. App. 2012), *reh'g overruled* (Mar. 5, 2013), *review denied* (Aug. 23, 2013); **Virginia**: *Lewis v. Kei*, 708 S.E.2d 884, 891 (Va. 2011); **Wyoming**: *Abromats v. Wood*, 213 P.3d 966, 969 (Wyo. 2009).

[49]States that include in defamation the element of unprivileged communication: **Alaska** *MacDonald v. Riggs*, 166 P.3d 12, 15 (Alaska 2007); **California**: *Sanders v. Walsh*, 162 Cal. Rptr. 3d 188, 194 (Cal. App. 2013); **District of Columbia**: *Solers, Inc. v. Doe*, 977 A.2d 941, 948 (D.C. 2009); **Georgia**: *Lewis v. Meredith Corp.,* 667 S.E.2d 716, 718 (Ga. Ct. App. 2008); **Hawaii**: *Wilson v. Freitas*, 214 P.3d 1110, 1118 (Haw. Ct. App. 2009); **Illinois**: *Popko v. Cont'l Cas. Co*., 823 N.E.2d 184, 188 (Ill. App. Ct. 2005); **Maine**: *Nest v. Casco Aeirie*, CIV.A. CV-02-673, 2003 WL 23112401 (Me. Super. Dec. 4, 2003); **Michigan**: *Mitan v. Campbell*, 706 N.W.2d 420, 421 (Mich. 2005); **Mississippi**: *Richard v. Supervalu, Inc.,* 974 So. 2d 944, 949 (Miss. Ct. App. 2008); **Montana**: *Shors v. Branch,* 720 P.2d 239, 245 (Mont. 1986); **Nebraska***: Nolan v. Campbell,* 690 N.W.2d 638, 646 (Neb. Ct. App. 2004); **Nevada**: *Clark Cty. Sch. Dist. v. Virtual Educ. Software, Inc.*, 213 P.3d 496, 503 (Nev. 2009); **New Jersey**: *G.D. v. Kenny*, 984 A.2d 921, 927 (N.J. Super. Ct. App. Div. 2009), *aff'd*, 15 A.3d 300 (2011); **New York**: *Konig v. CSC Holdings, LLC*, 112 A.D.3d 934 (N.Y. App. Div. 2013); **North Dakota**: N.D. Cent. Code Ann. § 14-02-03 (West); **Oklahoma**: *Springer v. Richardson Law Firm*, 239 P.3d 473, 475(Okla. Civ. App. 2010); **Pennsylvania**: *Krajewski v. Gusoff*, 53 A.3d 793, 802 (Pa. Super. Ct. 2012), *reargument denied* (Oct. 22, 2012), *appeal granted,* 74 A.3d 119 (Pa. 2013); **Rhode Island**: *Cullen v. Auclair*, 809 A.2d 1107, 1110 (R.I. 2002); **South Carolina**: *McBride v. Sch. Dist. of Greenville Cty.*, 698 S.E.2d 845, 852 (S.C. Ct. App. 2010); **South Dakota**: S.D. Codified Laws § 20-11-3; **Utah**: *Jensen v. Sawyers*, 130 P.3d 325, 333 (Utah 2005); **Vermont**: *Russin v. Wesson*, 183 Vt. 301, 303 (2008); **Washington**: *Mohr v. Grant*, 108 P.3d 768, 773 (Wash. 2005); **West Virginia**: *Belcher v. Wal-Mart Stores, Inc.,* 568 S.E.2d 19, 26(W. Va. 2002); **Wisconsin**: *Schaul v. Kordell*, 773 N.W.2d 454, 458 (Wis. Ct. App.2009).

[50]42 U.S.C. s 2000e-3(a).

[51]*Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64 (2006).

[52]*Id*. at 65-66.

[53]*See, e. g., Power Systems, Inc. v. NLRB,* 601 F.2d 936 (7th Cir. 1979); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996); *Beckham v. Grand Affair, Inc*., 671 F. Supp. 415 (W.D.N.C.1987); *Cassidy v. Virginia Carolina Veneer Corp.,* 652 F.2d 380, 381 (4th Cir. 1981). *But see Hernandez v. Crawford Bldg. Material Co.,* 321 F.3d 528, 532 (5th Cir. 2003) (holding that counter claims and law suits should not be viewed as retaliatory as long as there was a reasonable basis because (a) there was a right to file a claim and (b) it was not an ultimate employment decision).

[54]*White*, 548 U.S. at 64.

[55]*Equal Employment Opportunity Comm'n v. Virginia Carolina Veneer Corp.,* 495 F. Supp. 775, 777 (W.D. Va. 1980), *appeal dismissed,* 652 F.2d 380 (4th Cir.1981).

[56]*Cassidy v. Virginia Carolina Veneer Corp.,* 652 F.2d 380, 381 (4th Cir. 1981).

[57]*Id.*

[58]*Id.*

[59] *Id.* at 381-82.

[60]*Virginia Carolina Veneer Corp.,* 495 F. Supp. at 777.

[61]*Hernandez v. Crawford Bldg. Material Co.,* 321 F.3d 528, 532 (5th Cir. 2003); *Scrivner v. Socorro Indep. Sch. Dist.,* 169 F.3d 969, 972 (5th Cir.1999). In an analogous suit for fraudulent misrepresentation, a district court in the Eleventh Circuit found that if the claim was "groundless" then it could be a violation of Title VII. *Hill v. Lazarou Enterprises, Inc.*, 10-61479-CIV, 2011 WL 860526 (S.D. Fla. Feb. 18, 2011), *Report and Recommendation adopted*, 10-61479-CIV, 2011 WL 860475 (S.D. Fla. March 9, 2011).

[62]*Scrivner v. Socorro Indep. Sch. Dist.,* 169 F.3d 969, 972 (5th Cir.1999) ("After all, companies and citizens have a constitutional right to file lawsuits, tempered by the requirement that the suits have an arguable basis.").

[63]*See Quick v. Dep't of the Air Force*, EEOC Appeal No. 01A00116 (Aug. 13, 2002) (referring to the supervisor's defamation suit (wrongfully filed in the eyes of the EEOC) the court stated that "[t]he record reflects the agency's failure to enforce anti-retaliation policies. The agency failed to adequately advise RMO against retaliating against complainant for her Feb. 11, 1997, informal complaint and resultant settlement agreement.").

[64]*Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996) (a complaint of forgery was condemned as retaliatory prosecution when the accused was found not guilty). *See also Quick v. Dep't of the Air Force*, EEOC Appeal No. 01975552 (April 30, 1998) (citing the malicious prosecution in *Berry* as a justification for finding the defamation in *Quick* retaliatory).

[65]*White*, 548 U.S. at 64 (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).

[66]§ 8:50.Employers' lawsuits, 1 Emp. Discrim. Coord. Analysis of Federal Law § 8:50 (referencing *Scrivner v. Socorro Indep. Sch. Dist.*, 169 F.3d 969, 972 (5th Cir. 1999), which held a claim filed in a supervisors capacity as a private individual did not equate to retaliation).

[67]*Hernandez v. Crawford Bldg. Material Co.,* 321 F.3d 528, 532 (5th Cir. 2003); *Scrivner v. Socorro Indep. Sch. Dist.,* 169 F.3d 969, 972 (5th Cir.1999).

[68]*Lewis v. United States Postal Service*, EEOC Appeal No. 01883241 (June 29, 1989).

[69]*Robinson v. Dep't of the Army*, EEOC Appeal No. 0120111526 (July 28, 2011).

[70]*Quick v. Dep't of the Air Force*, EEOC Appeal No. 01A00116 (Aug. 13, 2002) (finding an agency liable for not adequately advising a supervisor against pursuing a retaliatory private defamation suit in response to a baseless sexual harassment complaint; and finding an agency liable for not limiting the supervisor conduct at work from mentioning or discussing the suit, thereby creating a hostile work environment; although undetermined, the court found that if the agency's lack of assistance to the employee being sued for defamation was based on a retaliatory motive then the agency could be liable for damages in regard to that as well).

[71]*Boyd v. Dep't of Transportation*, EEOC Appeal No. 01955276 (Oct. 10, 1997) (concluding that the threats of state defamation action by complainant's manager if she continued with what he considered defamatory complaints amounted to retaliation).

[72]*Kumpe v. Social Security Administration*, EEOC Appeal No. 01983207 (March 3, 1999) (administrative law judge defamation suit was not retaliation as there was no adverse action on the part of the agency); *Lewis v. U.S. Postal Service*, EEOC Appeal No. 05890303 (June 29, 1989) (supervisor who was demoted due to witnesses testimony during a sexual harassment proceeding in EEOC filed defamation claim in state court and witness claimed retaliation by the agency in releasing information to assist in defamation proceeding; but reaffirming that agency was not responsible for action of supervisor as a private citizen in actually filing complaint in state court); *Martinelli v. U.S. Postal Service*, EEOC Appeal No. 01880984 (June 14, 1988) (rejecting sex discrimination claim against agency for supervisor's private suit, reaffirming that agency was not responsible for action of supervisor as a private citizen in actually filing complaint in state court).

[73]*Lyons v. Dep't of Veterans Affairs,* EEOC Appeal No. 0120062672 (Aug. 9, 2007) (agency was within right to send cease and desist letter in response to employee publishing defamatory statements about another employee at work).

[74]*Sikka v. Dep't of Defense*, EEOC Appeal No. 01990620 (Feb. 28, 2002) (agency was not responsible for an e-mail expressing racial animus when the agency counseled the person sending the e-mail against its appropriateness).

[75]*Adelman v. Dep't of Transportation*, EEOC Appeal No. 01953393 (July 11, 1996); *Smith v. Dep't of Veterans Affairs*, EEOC Appeal No. 01944012 (Dec. 30, 1994).

[76]*Smith v. Dep't of Veterans Affairs*, EEOC Appeal No. 01944012 (Dec. 30, 1994).

[77]Catherine Burr, "False Allegations of Sexual Harassment: Misunderstandings and Realities" Academic Matters: The Journal of Higher Education, Oct–Nov 2011, accessed online at www.academicmatters.ca/2011/10/false-allegations-of-sexual-harassment-misunderstandings-and-realities/.

[78]*Id*.

[79]*E.g.*, ***v. Dep't of the Interior*, EEOC Appeal No. 0720120037 (Oct. 31, 2013) (awarding $25,000 non-pecuniary damages and $0 in pecuniary damages); *Guess v. EPA*, EEOC Appeal No. 0720110029 (May 17, 2013) (awarding $100,000 in non pecuniary damages where no other monetary harm was shown).

[80]*Mattson v. Caterpillar, Inc.,* 359 F.3d 885, 890 (7th Cir. 2004); *see also Spadola v. New York City Transit Auth.,* 242 F. Supp. 2d 284, 292 (S.D.N.Y. 2003).

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