

Sheriff Joe Turned Away By D.C. Federal Court

By Mara Gassmann

A judge on the U.S. District Court for the District of Columbia dismissed all claims brought against *The New York Times* and columnist Michelle Cottle by former Arizona sheriff Joe Arpaio arising out of an opinion column. [Arpaio v. Cottle, et al.](#), 1:18-cv-02387-APM, 2019 WL 3767104 (D.D.C. Aug. 9, 2019) (Mehta, J.).

Arpaio had alleged he was defamed by Cottle's column, but the Court held that Arpaio failed to plead facts alleging actual malice, which was fatal to his defamation and false light privacy claims, and that he could not maintain a tortious interference with prospective business relations claim as an end-run around libel protections.

The Column

The day after Arpaio's defeat in the Arizona Republican primary for U.S. Senate, *The Times* published the column by Cottle, a member of the newspaper's editorial board, titled "Well, at Least Sheriff Joe Isn't Going to Congress." A subtitle offered this observation: "Arpaio's loss in Arizona's Senate Republican primary is a fitting end to the public life of a truly sadistic man." As the title would suggest, the column is highly critical of Arpaio, describing him as the former county sheriff who "so robustly devoted himself to terrorizing immigrants that he was eventually convicted of contempt of court" and then received a controversial Presidential pardon. The column then summarizes, with a particular rhetorical style, certain facts regarding Arpaio's tenure as Sheriff:

The Court held that Arpaio failed to plead facts alleging actual malice, which was fatal to his defamation and false light privacy claims

His 24-year reign of terror was medieval in its brutality. In addition to conducting racial profiling on a mass scale and terrorizing immigrant neighborhoods with gratuitous raids and traffic stops and detentions, he oversaw a jail where mistreatment of inmates was the stuff of legend. Abuses ranged from the humiliating to the lethal. He brought back chain gangs. He forced prisoners to wear pink underwear. He set up an outdoor "tent city," which he once referred to as a "concentration camp," to hold the overflow of prisoners. Inmates were beaten, fed rancid food, denied medical care (this included pregnant women) and, in at least one case, left battered on the floor to die.

Indeed, many prisoners died in Mr. Arpaio's jail—at an alarming clip. The number of inmates who hanged themselves in his facilities was far higher than in jails elsewhere in the country. More disturbing still, nearly half of all inmate deaths on his watch were never explained. Over the years, the county paid out tens of millions in wrongful death and injury settlements.

At the same time, Mr. Arpaio’s department could not be bothered to uphold the laws in which it had little interest. From 2005 through 2007, the sheriff and his deputies failed to properly investigate, or in some cases to investigate at all, more than 400 sex-crime cases, including those involving the rape of young children.

The column then identifies the occasions on which Arpaio “blatantly thumb[ed] his nose at the law” in service to his anti-immigrant objectives. It also discusses President Trump’s swift pardon of Arpaio following his conviction and the controversy that it caused even among Republicans. Cottle concludes her column with the sentiment that, “[f]or nearly a quarter-century, Sheriff Joe Arpaio was a disgrace to law enforcement, a sadist masquerading as a public servant. In a just system, we would not see his like again. In the current political climate, it may be enough that Arizona Republicans solidly rejected him.”

The Lawsuit

On October 16, 2018, Larry Klayman, representing Arpaio, filed a three-count complaint against The Times and Cottle alleging defamation *per se*, false light invasion of privacy, and “tortious interference with prospective business relations.” Arpaio alleged that the above-quoted statements harmed his reputation “both in the law enforcement community . . . as well as with Republican establishment and donors,” thereby undercutting his chances of being elected to Congress in future. Compl. ¶ 14. The Complaint alleges that the column accuses him of crimes of “moral turpitude” by stating Arpaio “was directly responsible for numerous inmate deaths during his time as sheriff of Maricopa County” and “was directly responsible for numerous abused, assaulted, and battered inmates during his time as sheriff of Maricopa County.” *Id.* at ¶¶ 23-24. In support of his business expectancy claim, Arpaio alleges that The Times, because of its purported “malice and leftist enmity,” knew of and “sought to destroy” his relationship with the Republican National Committee “with the publication of the [column],” thereby tortiously interfering with his prospective business relations with the Committee. *Id.* at ¶¶ 32-35. Arpaio sought damages in excess of \$147 million.

The Times published the column by Cottle, a member of the newspaper’s editorial board, titled “Well, at Least Sheriff Joe Isn’t Going to Congress.”

In their motion to dismiss the complaint, defendants observed that publications like the column at issue lie at the core of protected political speech under the First Amendment. Defendants set forth in detail the numerous public controversies, many involving allegations of grave mistreatment, surrounding Arpaio and the law enforcement institution he oversaw. Defendants argued that the defamation and “tag-along” claims all failed because Arpaio had not and could not plead facts to show “actual malice.” Given the public record of Arpaio’s conduct, Defendants argued, leave to amend the complaint would be futile. Defendants also argued that several of the statements put at issue in the complaint were non-actionable pure opinion or opinion based on fully disclosed facts.

In his opposition, Arpaio insisted he was not required to plead actual malice and that, even if he was, The Times’ statements were “so inherently improbable” they could not have believed them

at the time of publication.

The Court's Decision

On August 9, 2019, the Court issued its written decision dismissing the complaint for failure to plead facts supporting actual malice. The Court observed that, because Arpaio is indisputably a public figure, he “must plausibly allege that Defendants ‘published the defamatory falsehood with ‘actual malice,’ that is, with ‘knowledge that it was false or with reckless disregard of whether it was false or not.’” *Id.* at 6 (citation omitted). Yet, instead of “pleading sufficient facts that plausibly establish ‘actual malice,’” Arpaio’s complaint “does no more than recite the applicable legal standard.” *Id.* at 6-7.

In so holding, the Court rejected Arpaio’s arguments that he was not required to plead facts supporting actual malice in the complaint and that its adequacy cannot be resolved on a motion to dismiss. *Id.* at 7. The Court pointed to the ever-growing body of case law in this District and among the Courts of Appeals dismissing defamation claims for failure to adequately plead actual malice. *Id.* The Court also rejected the proposition that actual malice could be inferred from the defendants’ supposed “political partisanship” and bias. *Id.* Invoking well-known Circuit precedent, the Court explained that even if The Times were “unfavorably disposed towards” Arpaio, “the mere taking of an adversarial stance” is “not antithetical to the truthful presentation of facts.” *Id.* at 8 (citation omitted). Finally, the Court also rejected Arpaio’s argument that defendants were on notice as to falsity due the “very nature” of the statements themselves. *Id.* To the contrary, the Court held, not only were they not “self-evidently false,” the public record of Arpaio’s statements in the news and in judicial proceedings gave defendants “ample reason” to believe their own publication. *Id.*

The Court pointed to the ever-growing body of case law in this District and among the Courts of Appeals dismissing defamation claims for failure to adequately plead actual malice.

The Court also observed that several of the “incendiary” words in the column that Arpaio challenged (*i.e.*, “sadist,” “medieval,” “bare-knuckled,” “disgrace,” and “true American villain”) are too imprecise or subjective to be verifiably false facts. Instead, they are protected expressions of opinion.

On August 21, Arpaio filed a motion for leave to amend his complaint. Among the “new facts” alleged in support of his contention that he has adequately pleaded actual malice are Cottle’s failure to seek comment from Arpaio before publishing the column, and that The Times and Cottle “were part of a leftist/Democrat and Republican establishment political partisanship scheme or parallel concerted action to injure and destroy Plaintiff Arpaio’s reputation and profession.” That motion was pending as of publication of this article.

Mara Gassmann is an associated at Ballard Spahr LLP. The Times and Cottle are represented by Jay Ward Brown and Chad Bowman of Ballard Spahr LLP and by David McCraw and Dana Green of The Times (the latter at Ballard Spahr when the motion to dismiss was briefed). Arpaio is represented by Larry Klayman.