In The

Supreme Court of Virginia

RECORD NO. 060400

RAYTHEON TECHNICAL SERVICES COMPANY and BRYAN J. EVEN,

Appellants,

v.

CYNTHIA HYLAND,

Appellee.

BRIEF OF *AMICI CURIAE*
THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA
AND THE VIRGINIA CHAMBER OF COMMERCE
IN SUPPORT OF APPELLANTS

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STATEMENT OF THE CASE

The *Amici* incorporate and adopt the Statement of the Case set forth in the Brief of the Appellants.

STATEMENT OF FACTS

The *Amici* incorporate and adopt the Statement of Facts set forth in the Brief of the Appellants.

ASSIGNMENTS OF ERROR

The Amici incorporate and adopt the Assignments of Error set forth in the Brief of the Appellants.

QUESTIONS PRESENTED

The *Amici* incorporate and adopt the Questions Presented set forth in the Brief of the Appellants.

INTERESTS OF THE AMICI

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations of every size, in every industry sector, and from every region of the country, including Virginia. The Chamber advocates the interests of the national business community in courts across the nation by filing *amicus curiae* briefs in cases involving issues of national concern to American business. Recent *amicus* filings include *Burlington Northern & Santa Fe Rwy Co. v. White*, 126 S. Ct. 2405 (U.S. 2006) (addressing retaliation provisions of Title VII); *Shikles v. Sprint/United Management Co.*, 426 F.3d 1304 (10th Cir. 2005) (discussing exhaustion of remedies requirements of the ADEA); and *Retail Industry Leaders Assn. v. Fielder*, 2006 U.S. Dist. Lexis 49037 (D. Md. 2006) (dealing with ERISA preemption of Maryland law).

The Virginia Chamber of Commerce is an association of more than 1,100 businesses throughout the Commonwealth of Virginia. It likewise advocates the interests of the business community with a principal focus on Virginia employers.

The present case highlights issues of great importance to the business community. In particular, the award of $1.85 million for defamation based solely on subjective opinions expressed by a supervisor in an internal employee evaluation threatens the ability of all employers to communicate essential information to and about their employees, within their corporate management structure. The candid expression of opinions within the employee evaluation process is indispensable to the operation of most

businesses today, and such internal management evaluations operate to the benefit of both supervisors and employees.

Absent reversal by this Court, the judgment below will have a dramatic chilling effect on the operation of all businesses in Virginia and elsewhere. Out of fear that inevitable criticisms of employee performance in the ordinary course of business will result in expensive litigation, supervisors will be deterred from providing meaningful input to management regarding employee performance. At the same time, employees will suffer from being unable to receive the kind of candid supervisory feedback regarding their performance that is necessary to achieve improved performance in the workplace.

For each of these reasons, this Court and the overwhelming majority of courts in other states have long disfavored the use of defamation suits based upon supervisory comments in internal evaluations of employees, absent showings of malice not at all present here. The decision of the trial court in allowing this case to be presented to a jury, and the jury verdict itself, threaten to undermine this well established public policy, both by treating as statements of fact the inherently subjective opinions expressed in the evaluation at issue, and by allowing such minimal evidence of malice as was present in this case to overcome the qualified privilege. The privilege previously recognized by this Court will become meaningless if the standards employed by the trial court and jury in this case are allowed to remain in effect and to be cited as precedent in future cases. The *amici* are submitting this brief, therefore, to support the Appellants' request for reversal of the unwarranted judgment below, in order to preserve the ability of employers to engage in one of their most vital business functions.

ARGUMENT

I. As A Matter of Public Policy, Courts Have Widely Recognized That Internal Employee Evaluations Of The Type At Issue Here Should Not Subject Employers To Liability For Defamation.

Employee evaluations are universally recognized management tools that serve the important business purposes of examining, appraising, judging and documenting employee performance.

> One of the most important factors affecting employees' engagement--and, thus, employees' productivity and effectiveness--is knowing what is expected from them at work, according to The Gallup Organization's employee engagement surveys. Performance reviews are a big part of communicating these expectations. ***
>
> Effective performance management is critical because companies rely heavily on this annual rite. Two-thirds of companies use performance reviews to determine pay increases, and almost half use them to calculate bonuses….

Kathryn Tyler, *Performance Art*, HRMagazine August 1, 2005. *See also* The Washington Post, Page F1 (Nov. 5, 2006) (indicating that 98% of surveyed employers rely on annual performance reviews).

For these and related reasons, courts around the country have expressed "strong judicial disfavor" for libel suits based on communications in employment performance reviews. The seminal case in this regard, often quoted elsewhere, is *Jensen v. Hewlett-Packard Co.*, 14 Cal. App. 4th 958, 18 Cal. Rptr. 2d 83 (Cal. Ct. App. 1993), where the court held as follows:

> In light of the multitude of laws designed to protect the employee from oppressive employment practices, evaluations serve the important business purpose of documenting the employer's hiring, promotion, discipline and firing practices. Moreover, the laudable practice of evaluating employees is to be encouraged for other important reasons. The performance review is a vehicle for informing the employee of what management expects, how

> the employee measures up, and what he or she needs to do to obtain wage increases, promotions or other recognition. Thus, the primary recipient and beneficiary of the communication is the employee. Tangential beneficiaries are ordinarily … all part of a management group with a common interest, i.e., the efficient running of the business.
>
> Clearly, there is a legitimate raison d'etre for such records, and management has an unquestioned obligation to keep them. We would therefore be loathe to subject an employer to the threat of a libel suit in which a jury might decide, for instance, that the employee should have been given a rating of "average," rather than "needs improvement," or that the employee had an ability, unrecognized and unappreciated by a foolish supervisor, to get along with and lead others.

Id. at 963. *Accord, Gould v. Maryland Sound Industries, Inc*., 31 Cal. App. 4th 1137, 1153-54 (Cal. Ct. App. 1995) (rejecting defamation claim against supervisor who evaluated subordinate's "poor performance"); *Zayed v. Apple Computers*, 2006 U.S. Dist. LEXIS 20132, 39-41 (D. Cal. 2006) (granting summary judgment against defamation claim for evaluation describing employee as "having an adversarial attitude that annoyed and disrupted team members' work" and describing her as "dishonest."). *See also Caslin v. General Electric Co*., 608 S.W.2d 69 (Ky. App. 1980) (recognizing qualified privilege to protect employee evaluations from defamation claims); *Parrish v. Ford Motor Co*., 1990 U.S. App. LEXIS 13318 (6th Cir. 1990) (rejecting defamation claim due to qualified privilege protecting employee evaluations); *Bratt v. IBM*, 392 Mass. 508, 509, 467 N.E.2d 126 (1984) (finding internally circulated evaluation privileged as "reasonably necessary to serve the employer's legitimate interest in the fitness of an employee to perform his or her job."); *Scott v. Sulzer Carbomedics, Inc*., 141 F. Supp. 2d 154, 178 (D. Mass. 2001) (applying privilege to grant summary judgment against defamation claim arising out of evaluation that was an "internal business communication, drafted by an executive in the service of his employer's legitimate business interests" and reflecting the

supervisors perceptions of the employee's performance.). *See also* Peter Bennett, *Defamation Claims Arising Out of the Employment Relationship*, 33 Tort & Ins. L.J. 857 (1998).

Other courts take into account the fact that an evaluation has not been communicated beyond those within the business who have a need to know about it, if only to show lack of malice sufficient to defeat the evaluation privilege. *See, e.g., Garcia v. Burris*, 961 S.W.2d 603, 604 (Tex. Ct. App. 1996), where the court noted that the only two members of the company to review the evaluation at issue were the company president and the employee's direct supervisor, both of whom had an "interest and duty in evaluating the employee plaintiff." The court therefore held: "A qualified privilege exists when an employer publishes allegedly defamatory remarks regarding an employee to a person having a corresponding interest or duty in the matter to which the communication relates."[1]

Also contributing to the protection of internal employee evaluations is their inherent nature as workplace opinions, which have been generally recognized as being outside the definition of defamation. *See Jensen v. Hewlett-Packard Co., supra,* 14 Cal. App. 4th at 970 ("[T]he word 'evaluation' denotes opinion, not fact," citing Webster's Dictionary definition.) *See also Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), and numerous cases applying the standard set forth in that case by the Supreme Court to

[1] Some courts have further insulated the evaluation process from litigation by finding that purely intracorporate communications do not constitute actionable "publication" for purposes of satisfying that required element of defamation law. *See, e.g., DeLeon v. St. Joseph Hospital*, 871 F.2d 1229 (4th Cir.), *cert. den.* 439 U.S. 825 (1989) (applying Maryland law). While this Court has so far declined to grant absolute immunity in such circumstances, the Court has reaffirmed that the qualified privilege requiring clear and convincing proof of malice applies, as further discussed below. *See Larimore v. Blaylock*, 259 Va. 568, 528 S.E.2d 119 (2000).

reject defamation claims arising out of evaluations of employees. Numerous courts have thus held that, as in the present case, employee evaluations are inherently opinions by nature and are not provably false statements of fact. *See, e.g.*, *Conkle v. Jeong*, 73 F.3d 909 (9th Cir. 1995) (employer statement that employee was "more trouble than she was worth" held not actionable as subjective opinion); *Hunt v. University of Minnesota*, 465 N.W. 2d 88 (MN Ct. App. 1991)(employer statement that employee "had trouble dealing with legislators, … lacked warmth, was insincere, and had no sense of integrity" was protected opinion); *Dietz v. Bytex*, 1994 Mass Super. LEXIS 612 (Mass. Super. Ct. 1994) (Challenged statements were "merely the opinions of supervisors about Dietz's job performance and qualifications for her job. Subjective assessments of an employee's job performance made by managers do not give rise to any actionable defamation claim.").

For each of these reasons, the court decisions described above have widely recognized that public policy mandates special protection of internal employee evaluations from claims of defamation. There has been general recognition that employers require supervisors to be able to render their opinions of their subordinates without fear of being sued for engaging in the necessary business activity of criticizing performance. Employees likewise benefit from such feedback, without which they are often unable to improve their performance. For each of these reasons, most courts have developed and preserved the presumption of privilege, to be overcome only by clear and convincing proof of malice, in order to allow all but an extremely narrow category of evaluation comments to be secure against defamation claims. As further explained below, this Court's precedents are consistent with these expressions of public policy nationwide and compel reversal of the jury verdict in the present case.

II. This Court's Precedents Are Consistent With The Above Referenced Public Policy Protecting Internal Employee Evaluations From Defamation Claims And Compels Reversal Of The Trial Court Judgment In The Present Case.

This Court's recognition of the qualified privilege protecting employee evaluations is entirely consistent with the public policy recognized by the numerous authorities from around the country that have been discussed above. Indeed, as further discussed below, this Court has repeatedly applied the workplace defamation privilege in Virginia in such a way as to protect employer statements considerably more injurious to employees than those in the present case. The Court should therefore apply its precedent now to protect the right of employers to candidly evaluate employees in the ordinary course of business, consistent with the even greater protections afforded generally to internal employee evaluations than to the publicly disseminated statements about employees that the Court has protected in the past.

In *Southeastern Tidewater Opportunity Project, Inc. v. Bade*, 246 Va. 273, 435 S.E.2d 131 (1993), this Court overturned a defamation verdict in favor of a discharged employee who had been accused by his former employer of engaging in bribery. The accusations were contained in a letter from the company president that also discharged the employee. These facts were clearly more egregious than the internal employee evaluation in the present case. Yet the Court in *Southeastern* found that the defendant employer was protected by common law privilege from the former employee's defamation claims, a holding that clearly compels a similar reversal here.

The *Southeastern* Court declared that the letter from the company president there was a qualifiedly privileged communication because it was written in the context of the

employment relationship, citing *Chesapeake Ferry Co. v. Hudgins*, 155 Va. 874, 906, 156 S.E.2d 429, 441 (1931). The Court further held that the privilege could only be lost if the plaintiff proved by "clear and convincing evidence that the defamatory words were spoken with common-law malice," citing *Smalls v. Wright*, 241 Va. 55, 399 S.E.2d 805, 808 (1991) and *Great Coastal Express, Inc. v. Ellington*, 230 Va. 142, 154, 334 S.E.2d 846, 854 (1985). The Court found that common law malice is "behavior actuated by motives of personal spite, or ill-will, independent of the occasion on which the communication was made."

Pursuant to this standard, the *Southeastern* Court found insufficient evidence to support a jury verdict of defamation, notwithstanding the plaintiff's contention there that the discharge letter "falsely accused the employee of violating the law," was "unnecessarily insulting," "utilized stronger language than necessary," and was intended to "hurt" the employee. *Id.*, 246 Va. at 275-6, 435 S.E.2d at 132.

This Court likewise overturned a defamation jury verdict against an employer based upon the qualified privilege in *Chesapeake Ferry Co. v. J. L. Hudgins*, 155 Va. 874, 156 S.E. 429 (1931). There, the company superintendent fired an employee who sought reinstatement in a meeting at which he was accompanied by a committee of union representatives. The jury found that the superintendent explained his refusal to reinstate the employee by falsely and publicly accusing the employee, in the presence of the union committee, of drunkenness and offensiveness, among other transgressions. The Court nevertheless found that the superintendent's statements were privileged and that the plaintiff employee had failed to prove malice by clear and convincing evidence. The Court held:

> Public policy and the interest of society demand that in cases such as this an employer, or his proper representatives, be permitted to discuss freely with an employee, or his chosen representatives, charges affecting his employment which have been made against the employee to the employer. There is a privilege on such occasions and a communication made under such circumstances, within the scope of the privilege, without malice in fact, is not actionable, even though the imputation be false, or founded upon erroneous information.
>
> In cases such as this, not only must malice be proven to exist at the time the words were spoken, but there is a presumption of law that the words were spoken in good faith from proper motives, and without malice. This presumption has been raised as a matter of law upon the soundest grounds of public policy, and it requires more than a scintilla of evidence to overcome it. "Evidence merely equivocal, that is, equally consistent with malice or bona fides, will do nothing towards rebutting the presumption." Evidence which does no more than raise a suspicion that the defendant might have been actuated by malice or only a doubt as to the good faith of the defendant is, as a matter of law, not sufficient to rebut the presumption of lack of malice or establish the existence of malice.

Id., 155 Va. at 906-7, 156 S.E.2d at 441.

Finally, in *Merlo v. United Way of Am.*, 43 F.3d 96 (4th Cir. 1994), the Court of Appeals again overturned a defamation jury verdict under Virginia law, based upon the qualified privilege protecting employer statements about an employee. Significantly, the Court found it undisputed that the employer was entitled to disseminate a report internally that accused a plaintiff employee of financial impropriety without fear of committing an act of defamation. The Court went on to find that the employer was also entitled to the qualified privilege sufficient to defeat defamation claims even where the allegedly false report was distributed to the public, so long as the communication was in the interest of the organization, as follows:

> A communication, made in good faith, on a subject matter in which the person communicating has an interest, or owes a duty, legal, moral or social, is qualifiedly privileged if made to a person having a corresponding interest or duty." Citing *Great Coastal Express v. Ellington*, 334 S.E.2d at

> 853 (quoting *Taylor v. Grace*, 166 Va. 138, 184 S.E. 211, 213 (Va. 1936)). A qualified privilege thus exists if the challenged communication is made to those with a legitimate interest in the subject matter of the communication.

Id. at 104. Again, the facts of *Merlo* were substantially more egregious than what occurred in the present case, where the allegedly defamatory statements were merely opinions rendered in the course of a regularly scheduled employee evaluation that was never disseminated publicly. As was true of *Southeastern Tidewater Opportunity Project v. Bade*, *supra*, and *Chesapeake Ferry Co. v. Hudgins*, *supra*, if the jury finding of malice had to be overturned in the *Merlo* case, then surely the judgment in the present case cannot stand.

As explained more fully in the brief of the Appellants, Appellant Bryan Even in the present case had a duty as a corporate official to evaluate his subordinate as part of the business's human resource review process. In the course of that evaluation, he necessarily rendered subjective opinions regarding the plaintiff employee's performance that were amply justified by undisputed facts but were in any event opinions which he was entitled to express as the management evaluator of his subordinate.[2] Indeed, Appellant Even was *required* by his company to express such opinions in order to fulfill his own job duties. Moreover, the evaluation of the Plaintiff as a whole was not an entirely negative assessment of the employee's overall performance, and there was no clear nexus

[2] The challenged evaluation contains such plainly subjective opinions as "significantly off plan," "significant gaps in our strategic plans," "frequently verbose and vocal," "appear[ing] to be unwilling to accept and work with feedback," "inappropriately critical," and "destructive behavior." Each of these opinions was "relative in nature and depend[ed] largely upon the speaker's viewpoint, which this Court has declared to be non-actionable opinion. *Fuste v. Riverside Healthcare Ass'n, Inc*., 265 Va. 127, 132, 575 S.E.2d 858 (2003).

between the evaluation and Respondent's termination. The opinions expressed by Mr. Even about the Respondent in her evaluation were not as negative or as forceful as the statements found to be privileged by the Court in the above referenced cases. *See Southeastern Tidewater Opportunity Project, Inc. v. Bade, supra* (accusations of bribery); *Chesapeake Ferry Co. v. J. L. Hudgins, supra,* (accusations of drunkenness and sexual offensiveness).

Finally, the evidence of malice in this case consisted of little more than Appellant Even's allegedly being upset that his subordinate had criticized him and allegedly making false or inconsistent statements (actually opinions) about her. The verdict was thus directly contrary to this Court's holding in *Southeastern Tidewater Opportunity Project, Inc. v. Bade, supra,* that "evidence which does no more than raise a suspicion that the defendant might have been actuated by malice or only a doubt as to the good faith of the defendant is, as a matter of law, not sufficient to rebut the presumption of lack of malice or establish the existence of malice."

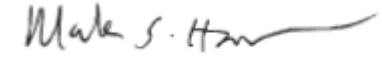
Under all of these circumstances, the trial judge plainly erred in allowing the case to reach the jury, and the jury verdict finding "clear and convincing" proof of both defamation and malice sufficient to overcome the qualified privilege was clearly erroneous. Absent reversal by the Court of a verdict such as this, little or nothing will be left of the qualified privilege for workplace evaluations of employees in Virginia. Certainly, Virginia will find itself outside the mainstream of judicial authority nationally on the scope of the qualified workplace privilege, if opinions expressed in internal employee evaluations become subject to

defamation claims based upon so little evidence of malice. Employers will be significantly chilled in their ability to expect supervisors to render candid evaluations of the perceived faults of their employees, and the employees will be unable to get meaningful feedback from their supervisors due to the latter's legitimate fear of being sued for their workplace opinions. As representatives of both Virginia's and the nation's business community, the *amici* believe that the adverse impact of the judgment in this case, if allowed to stand, will be severe. The Court should avoid such a draconian result by setting aside the jury verdict, as the trial court should have done, for insufficiency of proof of malice under settled Virginia law.

CONCLUSION

For the reasons set forth above and in the brief of the Appellants, the judgment of the trial court should be reversed and the jury verdict against the Appellants should be set aside.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that Rule 5:26(d) of the Supreme Court of Virginia has been complied with, and that copies of the foregoing Brief of Amici Curiae were served on the following by first class mail, postage prepaid, this 6th day of November, 2006:

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