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OPINION AND RHETORICAL HYPERBOLE IN WORKPLACE DEFAMATION ACTIONS: THE CONTINUING QUEST FOR MEANINGFUL STANDARDS

*John Bruce Lewis**
*Gregory V. Mersot***

INTRODUCTION

The workplace is a microcosm of society, with employers, employees, and union representatives having their say on subjects ranging from purely individual concerns to economic, business, and political issues. The tenor of these statements may be straightforward and businesslike, or strident, profane, and charged with emotion. They may involve a white-collar worker's e-mail accusing a company official of engaging in fraudulent accounting practices, a striking union member's reflexive intonation of "scab" when a replacement worker crosses the picket line, or management's warning that a labor organization is using "blackmail tactics."

The individuals involved likely would describe many of these communications as "opinions"—opinions on pay rates, the level of an employee's performance, or the honesty of corporate management. Indeed, many participants in workplace discourse fail to recognize such statements of "opinion" are not fully protected by the United States Constitution or by the growing number of federal labor and employment laws.

While permitting robust debate during organizational campaigns and strikes, federal labor laws provide no absolute protection for workplace speech. The labor laws, to a great extent, leave the regulation of employment-related speech to the common law.¹ Statements

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1. See The Railway Labor Act (RLA), 45 U.S.C. §§ 151-188 (2002); The National Labor Relations Act (NLRA), 29 U.S.C. § 151 (2002). See also *infra* notes 161-175 (discussing the relationship between federal labor and state defamation law).

routinely made by employers in performance appraisals likewise receive no special protection under federal labor or employment laws and are consequently governed by common law principles.² Hence, the sometimes heavy hand of state defamation law chooses, on an *ad hoc* basis, which speech is legitimate and which is to be penalized—which should be expressed and which should be stifled by damage awards.

The impact of the common law of defamation on opinion and hyperbolic expression was, until 1990, mitigated in two ways. The first was through federal labor law and policy, which provided protection for rhetorical hyperbole in certain workplace situations.³ The federal Constitution was also thought to provide a second form of protection for hyperbole and opinions, independent of workplace connection or federal labor law.⁴

In 1990, the United States Supreme Court decided *Milkovich v. Lorain Journal Co.*,⁵ which held there was no “wholesale defamation exemption for anything that might be labeled ‘opinion.’”⁶ While other protections for free expression remained in place, *Milkovich* raised serious questions regarding the protection of opinions in workplace situations and protection in general for statements not involving media publications.

These workplace opinions, both written and oral, deserve special attention because of their unique background and importance to business, labor, and society. Case law protecting opinion developed in the 1960s and 1970s, in part, from work-related disputes. Many workplace communications, such as those regarding employee discipline or unionization, are hastily made by relatively unsophisticated individuals without the benefit of legal counsel or the prepublication review sometimes performed by the media. Yet, the nature of the workplace dictates that these communications be made and the authors be given simple, straightforward guidance as to their legality. The use of e-mail, the Internet, and other electronic vehicles for work-related speech only heightens this need.

This Article examines the impact of *Milkovich* on tests previously used by lower courts to safeguard the expression of opinion and hyperbolic speech. This Article also considers whether the search for

2. See John B. Lewis et al., *Defamation and the Workplace: A Survey of the Law and Proposals for Reform*, 54 MO. L. REV. 797, 830-35 (1989); see also *infra* notes 7-13.

3. See *infra* notes 161-175 and accompanying text.

4. See *infra* notes 63-109 and accompanying text.

5. 497 U.S. 1 (1990).

6. *Id.* at 18.

expressed and implied facts in communications suggested in *Milkovich* forecloses analysis of the content, setting, and immediate context of the “opinion,” thus leading to the finding of more implied factual statements. The utility of the decision is further questioned, since it recognizes protection for rhetorical hyperbole, vigorous epithets, and lusty expression, but fails to expressly provide for the more rational discourse found in employment-related debates.

Based upon this analysis, this Article concludes that while the *Milkovich* decision has done little harm, it has failed to provide clear, workable tests for identifying statements of opinion or rhetorical hyperbole in the workplace. Instead, the legality of routine workplace speech may turn upon a patchwork of tests and elements fashioned in other contexts. Left with no clear guidance, courts continue to struggle in their attempts to distinguish between protected workplace expression and actionable defamation. This Article concludes with a proposed set of common law and statutory reforms to protect the vital role of opinions in the workplace.

II. HISTORICAL OVERVIEW OF DEFAMATION AND THE OPINION DEFENSE

A. *Basic Elements of a Defamation Claim*

A claim of defamation arising out of the employment relationship must meet the same common law standards imposed on any other type of defamation claim. To establish a claim for defamation, the plaintiff must prove the following: (1) a publication to a third party; (2) of a false and defamatory⁷ statement about him; (3) “fault amounting at least to *negligence* on the part of the publisher;”⁸ and (4) either that the statement is actionable irrespective of special harm or the existence of special harm caused by the publication.⁹ Defenses

7. A statement is defamatory if “it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” RESTATEMENT (SECOND) OF TORTS § 559 (1977).

8. RESTATEMENT, *supra* note 7, at § 558 (emphasis added). This fault requirement is based on *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The Supreme Court’s decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (holding that a plaintiff must show actual malice to get punitive damages), however, raises questions about this position. Many commentators believe the *Gertz* fault requirement is diluted when the defamatory statement does not involve a matter of public concern. See FOWLER V. HARPER ET AL., THE LAW OF TORTS § 5.0 at 20-22 (3d ed. 1996).

9. The Restatement provides:

Actual harm to reputation is not necessary to make communication defamatory. To be defamatory, it is not necessary that the communication actually cause harm to another’s reputation or deter third persons from associating or dealing with him. Its character depends upon its general tendency to have such an effect. In a particular case it may

available to the defendant include: the truth of the statement;¹⁰ the plaintiff's consent to the statement;¹¹ fair comment;¹² the expression of pure opinion; and the existence of an absolute, conditional, or qualified privilege.¹³ This article will focus on the doctrine of opinion, which may or may not be a defense, and on protection for rhetorical hyperbole, which does not fall neatly within any category.

B. The Common Law Position on Abusive Words, Name-Calling and Hyperbole

1. Development of the English Common Law Position

The law of defamation developed from English ecclesiastical origins,¹⁴ with early decisions taking no definitive position on whether abusive words, name-calling, and hyperbole were actionable.¹⁵ Some

not do so either because the other's reputation is so hopelessly bad or so unassailable that no words can affect it harmfully, or because of the lack of credibility of the defamer. There is a difference in this respect between determining whether a communication is defamatory and determining whether damages can be recovered.

RESTATEMENT, *supra* note 7, at § 559 cmt. d. See also W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 111 (5th ed. 1984).

10. See RESTATEMENT, *supra* note 7, at § 581A (stating that "[o]ne who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true."). Following the decision in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-77 (1986), the plaintiff has the burden of proof on the issue of falsity on matters of public concern.

11. See RESTATEMENT, *supra* note 7, at § 583 (stating that a person's consent to the "publication of defamatory matter concerning him is a complete defense to his action for defamation.>").

12. See RESTATEMENT, *supra* note 7, at § 566 (stating that "[a] defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.>"). This section superseded the "fair comment" protection previously provided by Sections 606 through 610 of the RESTATEMENT (SECOND) OF TORTS (1965), since "[a] statement of opinion that does not imply a defamatory statement of fact is no longer actionable . . . no privilege is needed." See RESTATEMENT, *supra* note 7, at §§ 606-610.

13. See RESTATEMENT, *supra* note 7, at §§ 585-592A (stating that an absolute privilege exists based on the "necessity that certain persons, because of their special position or status, should be as free as possible from fear that their actions in that position might have an adverse effect upon their own personal interests.>"). The privilege extends to judicial officers, attorneys at law, parties to judicial proceedings, witnesses in judicial proceedings, jurors, legislators, witnesses in legislative proceedings, executive and administrative officers, husband and wife, and publications required by law. *Id.* See also *Sahara Gaming Corp. v. Culinary Workers Union Local 226*, 984 P.2d 164 (Nev. 1999) (holding that a union letter quoting portion of complaint in legal action is absolutely privileged).

14. For a description of the origins of the law of defamation in England, see 101 R. H. HEMHOLZ, SELECT CASES ON DEFAMATION TO 1600 xiv-cxi (Selden Society, 1985); J. H. BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY 495-508 (3d ed. 1990); R. H. Hemholz, *Canonical Defamation In Medieval England*, 15 AM. J. LEGAL HIST. 255 (1971); W. S. Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries*, 40 LAW Q. REV. 397, 397-412 (1924); R.C. Donnelly, *History of Defamation*, 1949 WIS. L. REV. 99, 99-126.

15. See HELMHOLZ, *supra* note 14, at xcv-xcvi.

clearly abusive words were found actionable, while others were not.¹⁶ By the mid-seventeenth century, however, two treatises found that abusive, passionate words were not actionable unless special damages were established.¹⁷

William Sheppard's *Action on the Case for Slander*, published in 1662, declared:

The words that follow are light and trivial or hasty and passionate words; and therefore . . . they give no Action as for any of these words, Villein, Rogue, Knave, Bastard, Varlet, Cheater, Cozener, Railer, Liar, Miscreant, Vermine, Hypocrite, and the like; except . . . where some special damage comes thereby to the party of whom the words are spoken. And it must be a real and considerable damage.¹⁸

This appears to have been the state of the English common law at the time it was received into the United States.¹⁹ The exact basis for the law's position is unclear, but it may have been adopted to stem the flow of slander cases into the royal courts, to avoid providing relief for trivial, commonplace injuries,²⁰ or because these cases did not fit within the established categories of actionable slander.²¹

2. *The American Experience*

The rational development of American law on abusive words was further complicated by the distinction between slander and libel,

16. See HELMHOLZ, *supra* note 14, at xciv-xcvi, 89 (contrasting *Hooper v. Webbe* (K.B. 1559) (describing that the statement "[t]hou art a knave and a villein" results in a verdict for the plaintiff) with *Burr v. Chappell* (K.B. 1595) (holding that an action based on "villein" found "not maintainable, because these are common and usual words of reproach by master to servant.")).

17. See JOHN MARCH, *ACTIONS FOR SLANDER* (1655); WILLIAM SHEPPARD, *ACTION ON THE CASE FOR SLANDER* (1662).

18. SHEPPARD, *supra* note 17, at 74. In his 1655 treatise, John March reached a similar conclusion:

There are many words which [are] words of passion, and choller only. [and] say of a man, that he is forsworn generally, or that he is a villain, or a rogue or a varlet, or the like, these words are not actionable of themselves; yet I do conceive that in these cases an action will lie, with an averment of particular damage, by reason of the speaking of them.

MARCH, *supra* note 17, at 98.

19. See CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT* 30-33 (1981); Andrew J. King, *The Law Of Slander in Early Antebellum America*, 35 AM. J. LEGAL HIST. 1, 6 n.18 (1991).

20. See HELMHOLZ, *supra* note 14, at xcvi. Today in England a "vulgar abuse" defense is available in actions for slander. "The usual form of the plea is that 'the words were words of heat or vulgar abuse and were so understood by those to whom they were published.'" PETER F. CARTER-RUCK ET AL., *CARTER-RUCK ON LIBEL AND SLANDER* 162 (4th ed. 1992).

21. See King, *supra* note 19, at 4; W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 335-47 (1925).

which also originated in England.²² The English courts recognized situations in which damages could be presumed from the character of the words spoken. In those situations, the statement was said to be slander *per se*.²³ Words were actionable *per se* if they: (1) imputed the commission of a crime; (2) imputed a loathsome disease; (3) imputed an unfitness for a profession, trade, or calling; or (4) imputed the lack of chastity of a woman.²⁴ If a statement did not fall into one of these categories, the plaintiff was required to plead and prove special harm resulting from the defamatory statement.²⁵

Libel, consisting of written or printed words, was treated differently. A libel plaintiff could recover without the necessity of pleading or proving special damages because such damages were presumed.²⁶ In the 1838 case of *Rice v. Simmons*,²⁷ the Delaware Court of Errors and Appeals considered this libel/slander distinction in the context of whether abusive words were actionable. In its analysis, the court acknowledged, “[w]ords of general abuse, however opprobrious, and however vexatious,” were not actionable as slander unless they fit

22. See BAKER, *supra* note 14, at 506-08. The categories essentially had been developed by the time of March's treatise in 1655. See MARCH, *supra* note 17, at 10-11. See also Donnelly, *supra* note 14, at 111-13; Holdsworth, *supra* note 14, at 397-400.

23. See BAKER, *supra* note 14, at 507; RODNEY SMOLLA, LAW OF DEFAMATION §§ 7:1-7:20 at 7-2.1-7-16 (2d ed. 2001).

24. See BAKER, *supra* note 14, at 507; Holdsworth, *supra* note 14, at 398; Donnelly, *supra* note 14, at 111-12. According to the Restatement, there are four categories of slander *per se* for which a person will be liable for general damages without proof of special harm: an imputation of a serious crime involving moral turpitude; an imputation of a loathsome disease; an imputation of inability to perform or lack of integrity in the discharge of the duties of a business, trade, profession or office; or an imputation of serious sexual misconduct. RESTATEMENT, *supra* note 7, at §§ 571-74.

25. See Holdsworth, *supra* note 14, at 401-02; SMOLLA, *supra* note 23, at § 7:1, § 7-2.1.

26. See Donnelly, *supra* note 14, at 120-21 (citing *King v. Sir Edward Lake* (1670) Hardres, 470). See also RESTATEMENT, *supra* note 7, at §§ 568-69 (1977). The Restatement defines slander and libel as follows:

- (1) Libel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words.
- (2) Slander consists of the publication of defamatory matter by spoken words, transitory gestures or by any form of communication other than those stated in Subsection (1).
- (3) The area of dissemination, the deliberate and premeditated character of its publication and the persistence of the defamation are factors to be considered in determining whether a publication is a libel rather than a slander.

Id.

27. 2 Del. 417 (1838). The court also commented that “to call a man ‘forsworn;’ or a ‘scoundrel;’ or a ‘cheat;’ or a ‘rogue;’ or a ‘rascal;’ or a ‘swindler;’ have been considered not actionable, because the words do not necessarily import punishable crimes.” *Id.* at 424.

within one of the *per se* categories or actually caused “special damage.”²⁸ Should libel be treated differently? The court thought not:

[M]ere general abuse and scurrility, however ill-natured and vexatious, is no more actionable *when written than spoken*, if it do [sic] not convey a degrading charge or imputation. Against all such attacks, a man needs no other protection than a good character; and the law will not suppose that damage can happen to such a character from the pointless arrows of mere vulgarity.²⁹

Likewise, in *Moseley v. Moss*,³⁰ the Virginia Court of Appeals examined whether abusive words were actionable in the slander context.³¹ After reviewing the categories that made words actionable without proof of damages, the court concluded at common law that abusive words were not “sufficiently substantial” to merit damages:³² “Words spoken that are merely vituperative, or insulting, or imputing only disorderly or immoral conduct, or ignoble habits, propensities or inclinations, or the want of delicacy, refinement or good breeding, are not . . . to be treated as injuries calling for redress in damages.”³³

Almost one hundred years later, the Ohio Supreme Court found the law on abusive words well-settled, declaring: “[I]t is axiomatic that opprobrious epithets, even if malicious, profane and in public, are ordinarily not actionable. There is no right to recover for bad manners.”³⁴

One modern commentator has suggested several bases for the American rule that abusive words, name-calling, and hyperbole were not actionable:

[I]f it is clear to the listener or reader that such language is no more than either an idle comment or the venting of the speaker’s or writer’s emotions and therefore does not reflect adversely on the plaintiff’s reputation; that epithets . . . may be merely a form of non-

28. *Id.*

29. *Id.* at 429 (emphasis added). In *Robbins v. Treadway & Co.*, 25 Ky. (2 J.J. Marsh.) 540, 541 (1829), the court declared: “[T]he publication, charged to be libellous, contains many opprobrious epithets; but these are not libellous.”

30. 47 Va. (6 Gratt) 534 (1850).

31. *Id.* at 538.

32. *Id.*

33. *Id.* The court of appeals listed types and categories of words for which an action would not lie:

[I]t is not actionable to call a man a villain, cheat, rascal, liar, coward or ruffian; to accuse him of swearing falsely, unless in a judicial proceeding; to charge him with a base or fraudulent act, or with having been guilty of adultery, seduction, or debauchery; or a woman with vulgarity, obscenity or incontinence; where such defamation bears only on the feelings or general standing or reputation of the party implicated, and the misconduct imputed has not been made punishable by statute.

Id.

34. *Bartow v. Smith*, 78 N.E.2d 735 (Ohio 1948).

actionable opinion; and that courts cannot or should not intervene every time an unflattering words or expression is used.³⁵

The source of much recent authority on abusive words and hyperbole is the Fifth Circuit decision in *Curtis Publishing Co. v. Birdsong*,³⁶ in which the plaintiff referred to members of the Mississippi Highway Patrol as “those bastards.” The Court of Appeals held:

[T]hese words were used as mere epithets, as terms of abuse and opprobrium Not being intended or understood as statements of fact they are impossible of proof or disproof. Indeed such words of vituperation and abuse reflect more on the character of the user than they do on that of the individual to whom they are intended to refer. It has long been settled that such words are not of themselves actionable.³⁷

This well-established common law principle is not without exceptions. When abusive statements contain factual misstatements about an individual, they may become actionable. The context or circumstances in which the words are used is of prime importance.³⁸ Frequently courts must decide whether the words were used literally or figuratively. While “son-of-a-bitch” typically would be thought of as mere name-calling, it has been held to be actionable slander when addressed to an automobile dealer.³⁹ Indeed, the general rule has not

35. ROBERT D. SACK, *LIBEL, SLANDER AND RELATED PROBLEMS* § 2.4.7, at 2-39 (3d ed. 2002). Another view of this principle was expressed in Prosser & Keeton on Torts:

A certain amount of vulgar name-calling is tolerated, on the theory that it will necessarily be understood to amount to nothing more. It may be significant that most of the cases have involved slander, which would not have been actionable in any event without proof of special damage, but there are occasional decisions in which what would otherwise be clearly defamatory has been dismissed as only hasty, ill-tempered abuse.

KEETON ET AL., *supra* note 9, at 776.

36. 360 F.2d 344 (5th Cir. 1966).

37. *Id.* at 348 (citing *Robbins*, 25 Ky. (2 J.J. Marsh.) at 541, and *Rice*, 2 Del. (2 Harr.) 417 (1838)). See also RESTATEMENT, *supra* note 7, at § 566 cmt. e, which states:

There are some statements that are in form statements of opinion, or even of fact, which cannot reasonably be understood to be meant literally and seriously and are obviously mere vituperation and abuse. A certain amount of vulgar name-calling is frequently resorted to by angry people without any real intent to make a defamatory assertion, and it is properly understood by reasonable listeners to amount to nothing more. This is particularly true when it is obvious that the speaker has lost his temper and is merely giving vent to insult.

Id. See also BRUCE W. SANFORD, *LIBEL AND PRIVACY* § 5.4.2.2, at 172-73 (2d ed. 2002).

38. RESTATEMENT, *supra* note 7, at § 566 cmt. e, at 176 states in pertinent part:

The circumstances under which verbal abuse is uttered affects the determination of how it is reasonably to be understood. Words uttered face to face during an altercation may well be understood merely as abuse or insult, while words written after time for thought or published in a newspaper may be taken to express the defamatory charge and to be intended to be taken seriously.

Id. at 176. See also SMOLLA, *supra* note 23, at §§ 4-13-4-17.

39. *White v. Valenta*, 13 A.L.R.3d 1271 (Cal. App. 1965).

foreclosed some courts from finding actionable, both as slander and libel, what is essentially name-calling and abusive language.⁴⁰

Therefore, the long-standing common law protection for abusive words, name-calling, and hyperbole does not provide sufficient protection for rhetorical hyperbole or opinion as used in modern workplace discourse.⁴¹ The exceptions, differences in state law, and lack of any true “bright-line” tests are likely to have a chilling effect on the very speech that should be protected.⁴² The common law rule has proven to be inadequate when viewed in the employment context.

C. *Common Law Protection for “Fair Comment”*

Opinions were actionable at common law if they were sufficiently derogatory to injure another person’s reputation,⁴³ even though the truth or falsity of the opinion could not be determined. The truth of the communication was a complete defense.⁴⁴ This approach existed until courts began to recognize the tension created by the freedom of speech on one hand and freedom from injury to reputation on the other.⁴⁵ The qualified privilege of “fair comment” emerged as the common law’s attempt to reconcile these competing interests and provide some protection for statements of opinion.⁴⁶

“Fair comment” originally protected an expression of opinion only when the communication involved a matter of public concern or inter-

40. *Brooks v. Stone*, 317 S.E.2d 277, 278 (Ga. Ct. App. 1984) (holding the phrase “bitches” actionable); *Spence v. Flynt*, 816 P.2d 771, 772 (Wyo. 1991) (holding the phrase “vermin-infested turd dispensers” actionable), *cert. denied*, 112 S.Ct. 1668 (1992).

41. *See supra* notes 38-40 and accompanying text.

42. *See supra* notes 38-40 and accompanying text.

43. *See* RESTATEMENT, *supra* note 7, at § 566 cmt. a. *See also* *Triggs v. Sun Printing & Publ’g Ass’n*, 71 N.E. 739 (N.Y. 1904) (holding newspaper article which “ridicules the private life of an author and represents him as a presumptuous literary freak . . . is libelous *per se*, and cannot be justified on the ground that it is in jest.”).

44. *See* SMOLLA, *supra* note 23, at §§ 5.2, 5.11.

45. *See* Note, *Fair Comment*, 62 HARV. L. REV. 1207 (1949). The Note analyzes the defenses of “truth” and “fair comment,” stating:

[M]odern courts were gradually relaxing the strict civil liability imposed for defamation at common law, not so much by defining more narrowly the elements of the offense as by applying more widely certain already recognized defenses. This choice of technique reflected the fact that the principal influence toward relaxation of liability was not a diminished interest in reputation but a recognition that other interests deserved protection even at the cost of uncompensated defamation.

Id. *See also* *Burton v. Crowell Publ’g Co.*, 82 F.2d 154, 156 (2d Cir. 1936) (stating that “the utterance of truth is in all circumstances an interest paramount to reputation.”).

46. *See* Note, *Fair Comment*, *supra* note 45, at 1212-13. *See, e.g.*, *Sweeney v. Patterson*, 128 F.2d 457 (D.C. Cir. 1942); *Salinger v. Cowles*, 191 N.W. 167, 174 (Iowa 1922); *Cherry v. Des Moines Leader*, 86 N.W. 323 (Iowa 1901).

est.⁴⁷ The privilege also required that expression of an opinion be the actual opinion of the critic and not made for the sole purpose of causing harm to the person about whom it was made, regardless of whether the opinion was reasonable or not.⁴⁸ Under the majority common law position, the "fair comment" defense "applied only to an expression of opinion and not to a false statement of fact, whether it was expressly stated or implied from an expression of opinion."⁴⁹

Thus, most courts agreed that the defense protected only statements of opinion.⁵⁰ Courts disagreed, however, over whether certain communications were fact or opinion and whether these statements were within the protected scope of public interests.⁵¹ Accordingly, courts were forced to distinguish between fact and opinion.⁵²

47. See RESTATEMENT, *supra* note 7, at § 566 cmt. a.

If the expression of opinion was on a matter of public concern, it was a form of privileged criticism, customarily known by the name of fair comment. The privilege extended to an expression of opinion on a matter of public concern so long as it was the actual opinion of the critic and was not made solely for the purpose of causing harm to the person about whom the comment was made, regardless of whether the opinion was reasonable or not. According to the majority rule, the privilege of fair comment applied only to an expression of opinion and not to a false statement of fact, whether it was expressly stated or implied from an expression of opinion.

Id. See, e.g., *Moore v. Booth Publ'g Co.*, 185 N.W. 780 (Mich. 1921) (holding that communication pertaining to mayor was privileged); *Hall v. Ewing*, 74 So. 190 (La. 1917) (holding that communications pertaining to state senator, judge, and governor were privileged).

48. This is sometimes referred to as common law malice, as opposed to the malice standard set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). RESTATEMENT, *supra* note 7, at § 566 cmt. a.

49. RESTATEMENT, *supra* note 7, at § 566 cmt. a. See also *Eikhoff v. Gilbert*, 83 N.W. 110, 112 (Mich. 1900). This case held that a circular issued to voters encouraging them to vote against a particular candidate for representative was not privileged. *Id.* The circular stated that in the last legislature the candidate "championed measures opposed to the moral interests of the community" without stating the measure supported, which happened to be anti-temperance legislation. *Id.* The court found that since the factual basis for the opinion was not expressly stated, the listener was left to speculate as to the acts justifying the opinion. *Id.* Therefore, the fair comment privilege did not protect the opinion.

50. Note, *Developments in the Law Defamation*, 69 HARV. L. REV. 875, 925-26 (1956).

51. Note, *Fact and Opinion After Gertz v. Robert Welch, Inc.: The Evolution of a Privilege*, 34 RUTGERS L. REV. 81, 86 (1981). Some jurisdictions held that attributing corrupt political motives to a public figure were not protected under the fair comment privilege. Such comments were either not considered matters affecting the public, or were considered statements of fact not qualifying as fair comment. Other jurisdictions held that statements assigning dishonorable motives to a public official were protected under the fair comment privilege if reasonable grounds could be established for drawing the inference. *Id.* at 86-87. See also *Peck v. Coos Bay Times Publ'g Co.*, 259 P. 307 (Or. 1927); *Kinsley v. Herald & Globe Ass'n*, 34 A.2d 99 (Vt. 1943); *McClung v. Pulitzer Publ'g Co.*, 214 S.W. 193 (Mo. 1919).

52. One commentator concluded that:

The distinction between "facts" and "opinions" here . . . is somewhat nebulous, as a matter of pure logic The important point is whether ordinary persons hearing or reading the matter complained of would be likely to understand it as an expression of the writer's opinion, or a direct statement of existing fact.

D. *The Constitutionalization of the Fair Comment and Opinion Defenses—New York Times and Its Progeny*

Much of the common law's "fair comment" protection of opinion has been discussed within the context of the Constitution by the United States Supreme Court in a line of cases beginning in 1964 with *New York Times Co. v. Sullivan*.⁵³ In 1960, the *New York Times* printed a political advertisement containing several false statements of fact regarding the handling of civil rights demonstrators by the Montgomery, Alabama Police Department.⁵⁴ A city commissioner responsible for supervision of the police brought a libel action in state court against the newspaper.⁵⁵ The Alabama state court held in favor of the commissioner, ruling the allegations in the newspaper advertisement were libelous *per se* and the newspaper's only defense was to show the factual allegations were true, an impossible showing under the circumstances of the case.⁵⁶

The Supreme Court reversed, holding a public official⁵⁷ is prohibited "from recovering damages for a defamatory falsehood relating to his official conduct unless he proves the statement was made with 'actual malice'—that is, with knowledge it was false or with reckless disregard of whether it was false or not."⁵⁸ The Court noted that the First Amendment was designed to protect the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people,"⁵⁹ while the Alabama libel statute "dampens the vigor and limits the variety of public debate [and] is inconsistent with the First and Fourteenth Amendments."⁶⁰

Note, *Fact and Opinion After Gertz v. Robert Welch, Inc.: The Evolution of a Privilege*, *supra* note 51, at 90 (quoting 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 5.29, at 458 (1956)).

53. 376 U.S. 254 (1964). For an in-depth account of the case, see ANTHONY LEWIS, *MAKE NO LAW - THE SULLIVAN CASE AND THE FIRST AMENDMENT* (1991), and R. Pierce, Jr., *The Anatomy of an Historic Decision: New York Times Co. v. Sullivan*, 43 N.C. L. REV. 315 (1965). For a general discussion of the constitutional and tort law ramifications of *New York Times*, see Arthur Berney, *Libel and the First Amendment*, 51 VA. L. REV. 1 (1965); Sheldon Halpern, *Of Libel, Language, And Law: New York Times v. Sullivan At Twenty-Five*, 68 N.C. L. REV. 273 (1989); Bruce Ottley et al., *New York Times v. Sullivan: A Retrospective Examination*, 33 DEPAUL L. REV. 741 (1984).

54. *Sullivan*, 376 U.S. at 261; *New York Times Co. v. Sullivan*, 144 So. 2d 25 (Ala. 1962).

55. *Sullivan*, 376 U.S. at 261.

56. *Id.* at 267.

57. In 1967, the *New York Times*' "actual knowledge or reckless disregard for the truth" test was expanded to include public figures as well as public officials. See *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967).

58. *Sullivan*, 376 U.S. at 279-80.

59. *Id.* at 269 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

60. *Id.* at 279.

The Supreme Court's decision in *New York Times* created a constitutionally based form of "fair comment," which recognized a "conditional privilege for honest misstatements of fact," and "honest expression[s] of opinion based upon privileged, as well as true, statements of fact."⁶¹ It is a conditional privilege because it can be overcome by proof that the defamatory statement was made with actual malice.⁶²

In 1970, the Supreme Court examined the relationship between rhetorical hyperbole and defamation in *Greenbelt Cooperative Publishing Ass'n v. Bresler*.⁶³ Bresler, a real estate developer, sought several zoning variances from the Greenbelt City Council for high-density housing on his land. Simultaneously, the city council was trying to purchase a parcel of land from Bresler to construct a high school.⁶⁴ Bresler's negotiating demands, based on his bargaining leverage, were denounced as "blackmail" at a city council meeting.⁶⁵ A local newspaper, published by Greenbelt Cooperative Publishing Association, subsequently reported the accusations of "blackmail" in an account of the city council meeting.⁶⁶ Bresler sued the publishers for libel, contending that in reporting the use of the word "blackmail," they "were charging Bresler with the crime of blackmail, and that since the [publishers] knew that Bresler had committed no such crime, they could be held liable for the knowing use of a falsehood."⁶⁷ The case was submitted to the jury on this theory and a judgment against the publishers was affirmed by the Maryland Court of Appeals.⁶⁸

The Supreme Court reversed, holding Bresler, as a public figure, could only recover with proof of "actual malice" and the jury instruction, which allowed malice to be found from the language of the publication itself, constituted an "error of constitutional magnitude."⁶⁹ The Court determined that Bresler was unable to state a defamation claim.⁷⁰ "Blackmail," as used during the public debate and in the subsequent publication, was constitutionally protected; it was "no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable."⁷¹

61. *Id.* at 292 n.30.

62. *Id.* at 279-80.

63. 398 U.S. 6 (1970).

64. *Id.* at 7.

65. *Id.*

66. *Id.*

67. *Id.* at 13.

68. *Id.* See also *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 252 A.2d 755 (Md. 1969).

69. *Bresler*, 398 U.S. at 10.

70. *Id.* at 14.

71. *Id.*

The Court emphasized the context in which the words appeared, a public meeting on matters of local governmental interest, was such that an ordinary reader could not have thought Bresler was being charged with the crime of blackmail.⁷² Such speech was neither slanderous nor libelous, and proof of actual malice was irrelevant.⁷³ Left unstated was the rationale for barring rhetorical hyperbole from being the basis of a defamation action. Was it excluded because it was opinion that no reasonable person would interpret as a statement of fact, or was it excluded because the statement arose out of discussion of public affairs and was directed at a public person? Four years later, the Court appeared to narrow the possibilities.

In 1973, the Court heard *Gertz v. Robert Welch, Inc.*⁷⁴ Gertz was a civil attorney for the family of a boy killed by a Chicago police officer.⁷⁵ *American Opinion*, a magazine owned by Robert Welch, Inc., ran an article accusing Gertz as being the architect of a “frame-up” against the police officer and referred to Gertz as a “Leninist” and “Communist-frontier.”⁷⁶ Gertz sued for libel in federal court and was awarded \$50,000 by a jury.⁷⁷ The United States District Court for the Northern District of Illinois, however, entered a judgment notwithstanding the verdict for Robert Welch Inc., concluding the *New York Times*’ standard of “actual malice” should apply, even though Gertz was not a public figure or official, because the article discussed an issue of public concern.⁷⁸ The United States Court of Appeals for the Seventh Circuit affirmed.⁷⁹

The Supreme Court reversed, noting the issue in *Gertz* was whether the Constitution prohibited a private individual from bringing a defamation suit against a newspaper, which published statements that caused him injury.⁸⁰ In balancing the constitutional interest in free

72. *Id.*

73. See Note, *Fact and Opinion After Gertz v. Robert Welch, Inc.: The Evolution of a Privilege*, *supra* note 51, at 93.

74. 418 U.S. 323 (1974).

75. *Id.* at 325. The officer’s name was Richard Nuccio. *Id.*

76. *Id.* at 326. The title of the article was “FRAME-UP: Richard Nuccio And The War On Police.” *Id.* at 325. The article suggested that false testimony was given against Nuccio at trial and that his prosecution was part of a Communist campaign against the police. *Id.* at 326.

77. *Gertz*, 4108 U.S. at 329. Gertz brought suit in the Northern District of Illinois. The only issue presented to the jury was the proper measure of damages for the publication of the libelous *per se* article. *Gertz v. Robert Welch, Inc.*, 322 F. Supp. 997 (N.D. Ill. 1970).

78. *Gertz*, 418 U.S. at 329.

79. *Gertz v. Robert Welch, Inc.*, 471 F.2d 801 (7th Cir. 1972). Although the court of appeals doubted the correctness of the district court’s finding that Gertz was not a public figure, it did not overturn the finding. The court of appeals agreed with the trial court that because the article concerned a matter of public interest, the *New York Times* standard applied. *Id.*

80. *Gertz*, 418 U.S. at 332.

speech on matters of public concern with the private interest in protection against wrongful injury to reputation, the Court recognized private citizens have less opportunity to rebut defamatory allegations.⁸¹ Hence, private citizens require more protection than public figures.⁸² The Court concluded that in the case of private citizens, the *New York Times* rule does not apply, and the states are free to apply any standard of liability short of strict liability for publishers or broadcasters of defamatory materials.⁸³ *Gertz*, who was a private figure, was required only to prove the statements were negligently made.⁸⁴

Thus, *Gertz* established there was no blanket constitutional protection for defamatory statements involving a matter of public concern directed at a private individual. Private individuals could sue for defamation under any standard, short of strict liability, established by the state in which the claim was brought.

Many believed Justice Lewis F. Powell's dicta in *Gertz* defined speech that was constitutionally protected:

Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide open" debate on public issues.⁸⁵

Based on this passage, many courts and commentators concluded that opinions enjoyed some type of wholesale constitutional protection.⁸⁶

81. *Id.* at 344.

82. *Id.*

83. *Id.* at 347. The court noted that strict liability could require a publisher or broadcaster to prove the truth of a defamatory statement regarding a private individual. Failing such proof, the publisher or broadcaster could be held liable for defamation even though every conceivable precaution was taken to ensure the accuracy of the offending statement. *Id.* at n.10. Because the court held that the *New York Times* standard did not apply to suits by private figures, there was no constitutional requirement that *Gertz* prove the defendant knew his statement to be false or that he recklessly disregarded the truth. In suits brought by private figures, the states are free to decide whether a negligence, recklessness, or knowing falsity test is to be applied. The majority reasoned that private individuals are both more vulnerable, as well as more deserving of recovery for defamation, than public figures. *Id.* at 344. They are more vulnerable because public figures generally have "significantly greater access" to the media and can use that access to "counteract false statements." *Gertz*, 418 U.S. at 344. Private individuals are deserving of extensive protection against defamation, because, unlike private persons, public figures have generally "voluntarily exposed themselves to the increased risk of injury from defamatory falsehood." *Id.* at 345.

84. *Id.*

85. *Id.* at 339-40 (citing *New York Times*, 376 U.S. at 270).

86. See *infra* note 200. See also Note, *Fact and Opinion After Gertz v. Robert Welch, Inc., The Evolution of a Privilege*, *supra* note 51.

On the same day the Court decided *Gertz*, it also handed down its decision in *National Ass'n of Letter Carriers v. Austin*.⁸⁷ In *Letter Carriers*, unionized postal workers had been struggling to organize the remaining non-union letter carriers. To that end, the union published a newsletter as part of an organizational campaign. The newsletter listed the names of those employees who had not joined the union under a heading titled: "List of Scabs."⁸⁸ The newsletter also printed a colorful, derogatory definition, attributed to Jack London, of the term "scab."⁸⁹ Three of the employees whose names were listed in the newsletter brought suit against the union in a Virginia state court. A jury awarded each of the employees \$10,000 in compensatory and \$45,000 in punitive damages.⁹⁰

The Supreme Court reversed, finding the statements to be protected by federal labor law.⁹¹ Specifically, the Court noted the only statement of fact made by the union, that the employees were "scabs," was both literally and factually true and, therefore, could not support

87. 418 U.S. 264 (1974).

88. *Id.* at 267. For other cases involving epithets such as the word "scab," see *Barss v. Torches*, 785 F.2d 20, 21 (1st Cir. 1986) (holding that "scab" is literally correct); *Cline v. McLeod*, 349 S.E.2d 232, 234 (Ga. Ct. App. 1986) (noting that case law expressly protects the word "scab"); *Steinhilber v. Alphonse*, 495 N.Y.S.2d 908, 910 (N.Y. Sup. Ct. 1985) (holding that "scab" is not actionable), *aff'd*, 501 N.E.2d 550 (N.Y. Ct. App. 1986); *Local Lodge 1297 v. Allen*, 490 N.E.2d 865, 867 (Ohio 1986) (stating that "scab" is federally protected speech); and *Crawford v. United Steel Workers*, S.E.2d 828, 830-35 (Va. 1986) (holding that "scab," or "scabby" is federally protected in the context of a labor dispute).

89. *Letter Carriers*, 418 U.S. at 268. The definition, as attributed to Jack London:

The Scab

After God had finished the rattlesnake, the toad, and the vampire, He had some awful substance left with which He made a scab. A scab is a two-legged animal with a cork-screw soul, a water brain, and a combination backbone of jelly and glue. Where others have hearts, he carries a tumor of rotten principles. When a scab comes down the street, men turn their backs and Angels weep in Heaven, and the Devil shuts the gates of hell to keep him out. No man (or woman) has a right to scab so long as there is a pool of water to drown his carcass in, or a rope long enough to hang his body with. Judas was a gentleman compared with a scab. For betraying his Master, he had character enough to hang himself. A scab has not. Esau sold his birthright for a mess of Cottage. Judas sold his Savior for thirty pieces of silver. Benedict Arnold sold his country for a promise of a commission in the British Army. *The scab sells his birthright, country, his wife, his children and his fellowmen for an unfulfilled promise from his employer. Esau was a traitor to himself; Judas was a traitor to God; Benedict Arnold was a traitor to his country; A SCAB is a traitor to his God, his country, his family and his class.*

Id.

90. *Id.* at 268-69.

91. *Id.* at 283. The relevant federal law is Exec. Order No. 11,491, 34 Fed. Reg. 17605 (1969), rather than the NLRA. Executive Order Number 11,491 established a labor-management relations system for federal employment, which is similar to the NLRA.

a claim for defamation.⁹² The other claims of the employees, based on language within the definition such as “traitor,”⁹³ were held to be non-actionable opinions.⁹⁴ The Court stated, “Such words were obviously used here in a loose, figurative sense to demonstrate the union’s strong disagreement with the view of those workers who oppose unionization. Expression of such an opinion, even in the most pejorative terms, is protected under federal labor law.”⁹⁵ The Court, comparing the statements of the union to the accusation of “blackmail” made in *Bresler*, noted the “definition of a ‘scab’ is merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members towards those who refuse to join.”⁹⁶

Once again, the Court did not clearly explain whether the definition of “scab” was non-actionable because it was nothing more than rhetoric and hyperbole and thus non-actionable opinion, or whether it was protected speech because of the policy considerations of federal labor law. If its decision was based upon the dictates of federal labor policy, *Letter Carriers* would have little impact outside of the labor context. If the basis was opinion, however, then the Court recognized some sort of constitutional privilege for opinion.⁹⁷

The Court had the opportunity to reexamine the relationship between hyperbole and defamation in 1988 with *Hustler Magazine v. Falwell*.⁹⁸ In 1983, *Hustler Magazine* published an advertisement parody depicting television evangelist Jerry Falwell having sex with his

92. *Letter Carriers*, 418 U.S. at 283 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (unabridged ed. 1961)) (stating that “[o]ne of the generally accepted definitions of ‘scab’ is ‘one who refuses to join a union,’ and it is undisputed that the appellees had in fact refused to join the Branch.”).

93. *Letter Carriers*, 418 U.S. at 281. In particular, the appellees contended that they had been charged as traitors, having “rotten principles,” and lacking “character.” *Id.*

94. *Id.* at 284.

95. *Id.*

96. *Id.* at 286. The Court explained that there may be situations where a “writing or other similar rhetoric in a labor dispute could be actionable, particularly if some of its words were taken out of context and used in such a way as to convey a false representation of fact.” *Id.* But in this case, the Court held “no such factual representation [could] reasonably be inferred and, the publication [was] protected under the federal labor laws.” *Letter Carriers*, 418 U.S. at 286-87.

97. *See infra* note 200.

98. 485 U.S. 46 (1988). For further discussion of the case, see Robert Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 603 (1990); Paul A. LeBel, *Emotional Distress, The First Amendment and “This Kind of Speech:” A Historical Perspective on Hustler Magazine v. Falwell*, 60 U. COLO. L. REV. 315 (1989); Rodney Smolla, *Emotional Distress and the First Amendment: An Analysis of Hustler v. Falwell*, 20 ARIZ. ST. L.J. 423 (1988); RODNEY A. SMOLLA, *JERRY FALWELL v. LARRY FLYNT: THE FIRST AMENDMENT ON TRIAL* (1988).

mother in an outhouse.⁹⁹ Falwell brought suit in federal court alleging libel, invasion of privacy, and intentional infliction of emotional distress.¹⁰⁰ The jury found for *Hustler* on the defamation claim, but for *Falwell* on his intentional infliction of emotional distress claim.¹⁰¹ The United States Court of Appeals for the Fourth Circuit affirmed the emotional distress judgment, holding the “actual malice” standard of *New York Times* did not apply to that claim.¹⁰²

The Supreme Court disagreed. Chief Justice William H. Rehnquist, writing for the majority, left no doubt as to the status of First Amendment protection of speech concerning public figures.¹⁰³ The Court emphasized public figures substantially shape events and American citizens have a right to criticize these public figures.¹⁰⁴ Chief Justice Rehnquist warned, “[T]he candidate who vaunts his spotless record and sterling integrity cannot convincingly cry ‘Foul!’ when an opponent or an industrious reporter attempts to demonstrate the contrary.”¹⁰⁵ The Court concluded that public figures and officials, to prevail on an intentional infliction of emotional distress claim, must prove the complained of publication contained a false statement of fact that was made with actual malice.¹⁰⁶

The Court determined that Falwell was a public figure and that he had failed to prove the advertisement parody contained a false statement of fact.¹⁰⁷ In coming to this conclusion, the Court relied upon the jury’s determination that the parody could not “reasonably be understood as describing actual facts about [respondent] or actual events

99. An advertising campaign for Campari Liqueur featured celebrities talking about their “first time.” The phrase, “Campari. You’ll never forget your first time.” accompanied each advertisement. The parody contained a picture of Falwell, a picture of a bottle and a glass of Campari Liqueur, and a fictional interview with Falwell. The “interview” depicted Falwell stating that his “first time” was during a drunken, incestuous rendezvous with his mother in an outhouse. See Smolla, *supra* note 98, at 428.

100. *Falwell*, 485 U.S. at 47-48.

101. *Id.* at 48. The Court directed a verdict against Falwell on his invasion of privacy claim. *Id.*

102. *Id.* at 49-50.

103. *Id.* at 50-51.

104. *Id.* at 51.

105. *Falwell*, 485 U.S. at 51-52 (quoting *Monitor Patriot v. Roy*, 401 U.S. 265, 274 (1971)). *Monitor* involved a libel suit brought by an unsuccessful political candidate against a local newspaper that had characterized him as a “former small-time bootlegger.” The Court in that case held that the *New York Times* standard applied to political candidates as well as officeholders. *Monitor Patriot*, 401 U.S. at 265.

106. *Falwell*, 485 U.S. at 51-52.

107. *Id.* at 50. Although the Supreme Court did not directly consider the opinion defense, it extended First Amendment protection to speech that is patently offensive and intended to inflict emotional distress, but only where the “speech could not reasonably have been interpreted as stating actual facts about the public figure.” *Id.*

in which [he] participated.”¹⁰⁸ Thus, the Supreme Court’s decision in *Falwell* seemed to reaffirm First Amendment protection for rhetorical hyperbole.

In summary, the Supreme Court’s decisions in *New York Times*, *Bresler*, *Gertz*, *Letter Carriers*, and *Falwell* appeared to expand protection for opinion and rhetorical hyperbole. However, the underlying rationale and the boundaries of protection were unclear. One commentator suggested the Court had “set the outer ‘ground rules’—opinion [is] absolutely protected, but misstatements of facts [are] not—and left it to case-by-case development . . . to work out more sensitive and refined definitions.”¹⁰⁹

E. *The Evolution of the Restatement of Torts*

While lower courts used the Supreme Court’s holdings as guidance, they also turned to the Restatement of Torts. The Restatement (First) of Torts took the position that a defamation action could be premised on the expression of an opinion based on “facts known or assumed by both parties to the communication.”¹¹⁰ The Restatement (Second) of Torts retained substantially all of Section 566 of the Restatement (First) of Torts.¹¹¹ Shortly after the Restatement was adopted, however, the Supreme Court decided *Gertz* and *Letter Carriers*.¹¹² In response, the American Law Institute (ALI) proposed a revised Section 566, which contained significant changes:

A defamatory communication may consist of a statement in the form of an opinion. A statement of this nature, at least if it is on a matter of public concern, is actionable, however, only if it also expresses, or implies the assertion of, a false and defamatory fact which is not known or assumed by both parties to the communication.¹¹³

This proposed revision of Section 566 suggested that “mere expressions of opinion on matters *not* of ‘public concern’ could be actionable

108. *Id.* at 57.

109. SMOLLA, *supra* note 23, at § 6.13, 6-20.

110. RESTATEMENT OF TORTS § 566, at 156 (1938). The original text of Section 566 reads: “A defamatory communication may consist of a statement of opinion based upon facts known or assumed by both parties to the communication.” *Id.* The original text of Section 567 reads: “A defamatory communication may consist of a statement of opinion based upon undisclosed facts.” RESTATEMENT OF TORTS § 567 (1938). See also *Manley v. Harer*, 235 P. 757 (Mont. 1925) (holding that, in a petition to county commissioners, statement that road supervisor “does not put in full time, but draws warrants for full time,” was libelous *per se*).

111. See RESTATEMENT (SECOND) OF TORTS (Tentative Draft No. 11, 1965); RESTATEMENT (SECOND) OF TORTS (Tentative Draft No. 12, 1966).

112. RESTATEMENT (SECOND) OF TORTS § 566, at 6 (Tentative Draft No. 21, 1975).

113. *Id.*

even if they did not express or imply the assertion of a 'false and defamatory fact, which is not known or assumed by both parties to the communication.'"¹¹⁴

Subsequently, the ALI struck the language "at least if it is on a matter of public concern" from Section 566, a step necessitated by the dicta in *Gertz*.¹¹⁵ Section 566 of the Restatement (Second) of Torts now reads: "A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion."¹¹⁶

Accordingly, the Restatement (Second) recognizes two types of opinion: "pure" and "mixed."¹¹⁷ A comment is a "pure" opinion

114. George Christie, *Defamatory Opinions and the Restatement (Second) of Torts*, 75 MICH. L. REV. 1621, 1630 (1977). Comment c, however, stated "it is possible that private communications on private matters will be treated differently, the logic of the constitutional principle would appear to apply to all expressions of opinion of the first, or pure, type." RESTATEMENT, *supra* note 7, at § 566 cmt. c.

115. 52 A.L.I. PROC. 155 (1975). The Restatement position was:

The common law rule that an expression of opinion of the first, or pure, type may be the basis of an action for defamation now appears to have been rendered unconstitutional by U.S. Supreme Court decisions. As the Court says in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974): "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact." This categorical statement was not necessary to the decision, and the Supreme Court's indications that an expression of opinion cannot be the basis of a defamation action have involved public communications on matters of public concern. Although it is thus possible that private communications on private matters will be treated differently, the logic of the constitutional principle would appear to apply to all expressions of opinion of the first, or pure, type.

RESTATEMENT, *supra* note 7, at § 566 cmt. c.

116. 52 A.L.I. PROC. at 170.

117. RESTATEMENT, *supra* note 7, at § 566 cmt. c.

There are two kinds of expression of opinion. The simple expression of opinion, or the pure type, occurs when the maker of the comment states the facts on which he bases his opinion of the plaintiff and then expresses a comment as to the plaintiff's conduct, qualifications or character. The statement of facts and the expression of opinion based on them are separate matters in this case, and at common law either or both could be defamatory and the basis for an action for libel or slander. The opinion may be ostensibly in the form of a factual statement if it is clear from the context that the maker is not intending to assert another objective fact but only his personal comment on the facts, which he has stated The second kind of expression of opinion, or the mixed type, is one, which, while an opinion in form or context, is apparently based on facts regarding the plaintiff or his conduct that have not been stated by the defendant or assumed to exist by the parties to the communication. Here the expression of the opinion gives rise to the inference that there are undisclosed facts that justify the forming of the opinion expressed by the defendant. To say of a person that he is a thief without explaining why, may, depending upon the circumstances, be found to imply the assertion that he has committed acts that come within the common connotation of thievery. To declare, without an indication of the basis for the conclusion, that a person is utterly

where either the speaker states the facts on which the opinion is based or the recipient of the statement is already aware of the facts upon which the opinion is based.¹¹⁸ The opinion, even if unreasonable or outrageous, is protected so long as the factual basis for the opinion is true.¹¹⁹

A “mixed” opinion, on the other hand, does not include disclosure of facts upon which it is based or awareness by the recipient of the factual basis for the opinion.¹²⁰ Instead, a mixed opinion consists of a statement of opinion by the speaker that implies the existence of undisclosed defamatory facts.¹²¹ Pure opinions under the Restatement (Second) are protected, while mixed opinions may be actionable.¹²²

The ALI also eliminated the “fair comment” sections of the Restatement (Second), reasoning that because only false statements of fact were actionable, whether the comment was fair or not was no longer relevant.¹²³ Thus, the Restatement (Second) took the position that, under *Gertz*, opinions that did not imply the existence of undisclosed defamatory facts enjoy an absolute, constitutionally-based privilege, and this protection of opinions extended to both private and public concerns, as well as private citizens and public officials.¹²⁴ The

devoid of moral principals may be found to imply the assertion that he has been guilty of conduct that would justify the reaching of that conclusion. It was the first, or pure, type of expression of opinion to which the privilege of fair comment was held to apply.

Id.

118. *Id.*

119. *Id.* at § 566 cmt. c.

The distinction between the two types of expression of opinion [is] constitutionally significant. The requirement that a plaintiff prove that the defendant published a defamatory statement of fact about him that was false (see § 558) can be complied with by proving the publication of an expression of opinion of the mixed type, if the comment is reasonably understood as implying the assertion of the existence of undisclosed facts about the plaintiff that must be defamatory in character in order to justify the opinion. A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is. But an expression of opinion that is not based on disclosed or assumed facts and therefore implies that there are undisclosed facts on which the opinion is based, is treated differently.

Id. at § 566 cmt. c.

120. *Id.* at § 566 cmt. b.

121. RESTATEMENT, *supra* note 7, at § 566 cmt. a. To state that a person is a thief without explaining why, might imply an assertion that he has committed acts of thievery. *Id.* Comment c further explains that the difference between “pure” and “mixed” opinions is in the effect on the recipient of the communication. A “mixed” opinion is similar to a communication subject to more than one meaning. *Id.*

122. *Id.*

123. 52 A.L.I. PROC. 155 (1975).

124. See Note, *Fact and Opinion After Gertz v. Robert Welch, Inc.: The Evolution of a Privilege*, *supra* note 51, at 98.

ALI, however, was not alone in its adjustment to the Supreme Court's presumed creation of a constitutional privilege for opinions. Lower courts were left with the unenviable task of designing ways to distinguish actionable statements of fact from non-actionable statements of opinion or rhetorical hyperbole, rarely providing better guidance than Justice Potter Stewart's pronouncement on pornography that "I know it when I see it."¹²⁵

F. Tests Used to Distinguish Fact from Opinion Before Milkovich

In addition to the "pure" opinion approach of the Restatement (Second) of Torts, other tests used by lower courts included the "totality of the circumstances" and the "provable as false"¹²⁶ tests.

1. Application of the Restatement Approach to Workplace Defamation

Since the revision of Section 566, several courts have clarified the distinctions between "pure" and "mixed" opinions under the Restatement. In applying the Restatement rationale, the court in *Hoover v. Peerless Publications, Inc.*,¹²⁷ found a letter from the plaintiff's former employer to a prospective employer indicating he had some mental problems actionable.¹²⁸ Although the court held the communication was an expression of opinion, not fact, the former employer's statements fell into the category of "mixed" opinion, since the communication failed to disclose any stated or assumed facts on which the former employer's conclusion could have been based.¹²⁹

The court in *Adler v. American Standard Corp.*¹³⁰ reached a similar conclusion regarding comments in a former employee's discharge letter stating he had been terminated "for unsatisfactory perform-

125. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

126. The "provable as false" test was first used by the Supreme Court, although not in the opinion context, in *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986). After *Hepps*, a plaintiff suing a media defendant for speech of public concern must prove both fault and falsity in order to recover. The applicability of the "provable as false" test to labor or employment disputes is unclear, because the Court explicitly declined to decide whether the rule applied to cases involving non-media defendants, such as an employer or a labor union. *Id.* at 796.

127. 461 F. Supp. 1206 (E.D. Pa. 1978).

128. *Id.* at 1210.

129. *Id.* at 1209. The court went on to explain that "[t]he basic rule regarding a 'mixed' expression of opinion is that it is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 566 (1977)). The former employer's statements were capable of being defamatory simply because the jury might find that his conclusions were based on facts which were not disclosed in the letter. *Id.* at 1210.

130. *Adler v. Am. Standard Corp.*, 538 F. Supp. 572 (D. Md. 1982).

ance.”¹³¹ The comments were found to be “mixed” opinion and, as such, could reasonably be based on undisclosed defamatory facts subject to liability.¹³² The District Court of Maryland found that the statements implied plaintiff was guilty of some form of “misconduct, negligence, or incompetence in the performance of his duties.”¹³³

Courts also relied upon the Restatement’s “pure opinion” doctrine. In *Burns v. Supermarkets General Corp.*,¹³⁴ the employer justified terminating an employee for improperly reducing the price of goods, by likening the conduct to “stealing.”¹³⁵ The District Court for the Eastern District of Pennsylvania held the statement was not actionable, reasoning the recipient of the communication had been given the underlying facts of improperly reducing merchandise, and was, therefore, able to draw his own conclusion about the opinion expressed by the employer.¹³⁶

The same court, in *McFadden v. Burton*,¹³⁷ relied upon the Restatement’s “pure opinion” standard to reject an employee’s claims against his employer and two of his employer’s customers.¹³⁸ McFadden was a limousine driver who suffered from a congenital condition, which caused him to walk with a limp.¹³⁹ Two customers of the limousine service complained that they “felt embarrassed about having a person who limped carrying packages in front of or behind him,” and one said he did “not feel comfortable riding with a handicapped driver.”¹⁴⁰ The limousine service prohibited him from driving for the complaining customers and subsequently terminated his employment.¹⁴¹ McFadden brought a defamation action against the service, its two

131. *Id.* at 576. As to expressions of opinion, which indicate a basis of undisclosed facts, the court explained that “if the recipient draws the reasonable conclusion that the derogatory opinion expressed in the comment must have been based on undisclosed defamatory facts, the defendant is subject to liability.” *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 566 cmt. c, at 173 (1977)).

132. *Hoover*, 461 F. Supp. at 576.

133. *Id.*

134. *Burns v. Supermarkets Gen. Corp.*, 615 F. Supp. 154 (E.D. Pa. 1985).

135. *Id.* at 158. The produce supervisor reviewed the plaintiff’s discharge with the lead produce clerk and commented that reducing merchandise improperly was “like stealing.” *Id.*

136. *Id.* at 157-58.

137. 645 F. Supp. 457 (E.D. Pa. 1986).

138. *Id.* at 462.

139. *Id.*

140. *Id.* at 461. The plaintiff testified he had heard from one of the owners of the limousine service that celebrities Richard Burton and Brook Williams asked that he be replaced as the Burton party chauffeur. The owner allegedly told the plaintiff that Williams asked to have him removed because he felt embarrassed having his packages carried by a person who limped. Additionally, Burton, his wife, and his secretary felt uncomfortable riding with a handicapped driver. *Id.*

141. *Id.* at 459.

owners, and two of the service's customers, actors Brooks Williams and Richard Burton.

The court held the customers' comments to be expressions of opinion and not actionable, since the underlying facts of the opinion had been disclosed and any assumed facts were non-defamatory.¹⁴² It reasoned an opinion "based on disclosed or assumed non-defamatory facts is not, itself, sufficient for an action or defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory."¹⁴³

The court went on to dissect the bases for the customer's opinions.¹⁴⁴ As to the comments concerning McFadden's limp, the court found they could not form the basis of a defamation claim because they were true; McFadden did walk with a limp.¹⁴⁵ As to the comments concerning the embarrassment of Williams and Burton, about having a person with a limp carrying packages for them, the court concluded such comments, based on the non-defamatory fact of McFadden's limp, were "pure opinion" and could not be considered defamatory, no matter how unreasonable the comment.¹⁴⁶

The Restatement approach was also used in *Steinhilber v. Alphonse*.¹⁴⁷ Steinhilber, a union member, continued to work during a strike in violation of a union strike order and union rules.¹⁴⁸ Subsequently, she resigned and the union assessed a fine against her for crossing the picket line.¹⁴⁹ Several months later, a union official made a tape-recorded telephone message, referring to Steinhilber as "Louise the scab Steinhilber," and commenting on what he claimed to be her lack of "talent, ambition, and initiative."¹⁵⁰ The message played

142. *Burton*. 645 F. Supp. at 462. It was "undisputed that plaintiff suffered from a shortening of the leg that force[d] him to walk with a limp." *Id.* Furthermore, the statements by defendants about their embarrassment was simply their emotional reaction to a non-defamatory fact concerning the plaintiff. *Id.*

143. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 566 cmt. c (1977)).

144. *Id.*

145. *Id.*

146. *Burton*. 645 F. Supp. at 462. See also *Avins v. Moll*, 610 F. Supp. 308 (E.D. Pa. 1984) (holding that law school dean's statements in response to a telephone interview that the former dean was a "nothing" at the law school were clearly his personal opinion and, therefore, did not give rise to a defamation claim); *McConnell v. Howard Univ.*, 621 F. Supp. 327, 331 (D.D.C. 1985) (holding that statements made by university personnel to the effect that the plaintiff, in refusing to teach his class, neglected his professional duties were in essence "evaluation opinions" that would not support an action for defamation). Under the Restatement, virtually all "evaluative only" opinions would be non-actionable, since they are by definition based on disclosed facts. See SMOLLA, *supra* note 23, at § 6:34, 6-67.

147. 501 N.E.2d 550, 552 (N.Y. 1986).

148. *Id.* at 551.

149. *Id.*

150. *Id.*

automatically for anyone dialing the private telephone number provided to union members. In addition, during picketing, a banner was displayed on a union official's truck, which stated "#1 SCAB LOUISE STEINHILBER SUCKS."¹⁵¹ Steinhilber sued for defamation.

The court held that both the telephone message and the banner were non-actionable expressions of "pure opinion;" "a tasteless effort to lampoon plaintiff for her activities as a 'scab,'" and intended as an expression of the union's disapproval that she had crossed the picket line.¹⁵²

Thus, opinions that include facts, which themselves are not defamatory, or language that is rhetoric, hyperbole, or epithet have been held to be "pure" opinion and not actionable. However, if the opinion does not include supporting facts, or the listener does not know those facts, such opinion is "mixed" with implications of unknown facts, and is actionable.

2. *The Totality of the Circumstances Approach to Workplace Defamation*

In 1984, the Court of Appeals for the District of Columbia attempted to develop a different test to distinguish fact from opinion. In *Ollman v. Evans*,¹⁵³ a political science professor brought a defamation action against two newspaper columnists who had written an article critical of his nomination to head the Department of Government and Politics at the University of Maryland.¹⁵⁴ In an attempt to determine whether statements in the article were non-actionable opinion or actionable fact, the Court of Appeals set forth four factors to determine how, under the "totality of the circumstances," the average reader or listener would view the statement:

- (1) whether the allegedly defamatory statement has a precise meaning and thus is likely to give rise to clear factual implications;
- (2) the degree to which the statements are verifiable—is the statement objectively capable of proof or disproof?;
- (3) the context in which the statement occurs; and
- (4) the broader social context into which the statement fits.¹⁵⁵

151. *Id.*

152. *Id.* at 556.

153. 750 F.2d 970 (D.C. Cir. 1984) (en banc).

154. *Id.* at 971-73.

155. *Id.* at 979-83.

After applying its four-part test, the court concluded that the columnists' statements were constitutionally protected expressions of opinion.¹⁵⁶

The Eighth Circuit adopted the *Ollman* test in *Janklow v. Newsweek*,¹⁵⁷ but modified and shortened it to include an analysis of: (1) the statement's precision and specificity; (2) the statement's verifiability; (3) the social and literary context in which the statement was made; and (4) the statement's public context.¹⁵⁸

In workplace defamation cases, the "totality of the circumstances" analysis has been widely used to distinguish fact from opinion.¹⁵⁹ Among other factors, courts consider the context in which the statement was made; each word used, not just a mere phrase taken out of context; cautionary terms, which accompanied the statement; the medium used; and the audience.¹⁶⁰

G. *Application of Federal Labor Law to Workplace Defamation Before Milkovich*

Labor disputes are hotbeds for potentially defamatory statements. Federal labor law provides protection to statements made in this context, often tolerating "intemperate, abusive and inaccurate state-

156. *Id.* at 986-92.

157. 788 F.2d 1300 (8th Cir. 1986).

158. *Id.* at 1302-03.

159. See *Davis v. Ross*, 754 F.2d 80, 83 (2d Cir. 1985). In *Davis*, entertainer Diana Ross circulated a letter containing the names of seven former employees and the statement, "[I]f I let an employee go, it's because either their work or their personal habits are not acceptable to me." *Id.* at 81. A former employee named in the letter sued based on its defamatory content. The court considered the circumstances and concluded that the communication was actionable because of the implied factual assertion of the former employee's professional incompetence. *Id.* at 84-85. See also *Gregory v. McDonnell Douglas Corp.*, 552 P.2d 425 (Cal. 1976). In *Gregory*, union officers brought an action against the employer for two allegedly defamatory statements arising out of retroactive application of a pay increase in the union's labor agreement with the employer. *Id.* at 426. The alleged statement was that "there were some internal politics within Local 148 and other areas of the UAW which certain individuals were using to seek personal gain and political prestige rather than to serve the best interests of the members they were supposed to represent." *Id.* at 427. The California Supreme Court held the statements were not actionable as expressions of opinion and not false assertions of fact. *Id.* at 429-30. Under a "totality of the circumstances" analysis, the court determined that the comments: (1) were made in the context of a spirited labor dispute and were of the type where "the judgment, loyalties and subjective motive of rivals are reciprocally attacked and defended, frequently with considerable heat;" (2) were not of a type "calculated to induce the audience . . . to conclude or understand that they are factual;" and (3) were "cautiously phrased in terms of apparency" given the expected give and take of a spirited labor dispute. *Id.* at 429-30.

160. See *supra* note 159.

ments.”¹⁶¹ This protection is based upon federal labor law’s policy of encouraging debate on issues dividing labor and management.

In the 1966 case of *Linn v. United Plant Guard Workers*,¹⁶² the United States Supreme Court examined the potential conflict between federal labor and state defamation laws.¹⁶³ In *Linn*, a company official brought a defamation claim for statements made by the union in a leaflet distributed during an organizational campaign.¹⁶⁴ The Court held that the National Labor Relations Act did not necessarily preempt state defamation actions, which were merely a “peripheral concern of the Act.”¹⁶⁵ In balancing the legitimate state interest in protecting citizens’ reputations and the national labor policy of free debate on issues dividing labor and management, the Court held federal law did not protect all statements made during labor disputes.¹⁶⁶ Applying the *New York Times* actual malice standard to statements issued during labor disputes, the Court held such statements were only actionable when “circulated with malice” and where there were actual damages.¹⁶⁷ Therefore, even the most repulsive speech in a union dispute is immune from a defamation action so long as it is not a deliberate or reckless untruth and a court is precluded, by federal labor law, from applying state remedies for defamation unless the complainant pleads and proves “actual malice” and shows actual damages.¹⁶⁸

161. See, e.g., *Linn v. United Plant & Guard Workers*, 383 U.S. 53 (1966). See also *NLRB v. Container Corp. of Am.*, 649 F.2d 1213 (6th Cir. 1981). See generally Derek Bok, *The Regulation of Campaign Tactics and Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38 (1964).

162. 383 U.S. 53 (1966).

163. *Id.*

164. *Id.* at 56.

165. *Id.* at 61.

166. *Id.* The definition of “labor dispute” under the National Labor Relations Act includes: any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee. 29 U.S.C. § 152(9) (1978). For cases interpreting the meaning of “labor dispute,” see *Austin*, 418 U.S. at 272; *Linn*, 383 U.S. at 61; *Hasbrouck v. Sheet Metal Workers Local 232*, 586 F.2d 691, 694 n.3 (9th Cir. 1978); *Mountain Navigation Co. v. Seafarers*, 348 F. Supp. 1298, 1302-03 (D. Wis. 1971); *Tosti v. Ayik*, 437 N.E.2d 1062, 1064 (Mass. 1982); and *Raffensberger v. Moran*, 495 A.2d 447, 452 (Pa. Super. Ct. 1984).

167. *Linn*, 383 U.S. at 65.

168. *Id.* at 64-65; see *Cline v. McLeod*, 349 S.E.2d 232 (Ga. Ct. App. 1986) (describing the situation where a union engaged in a strike disseminated a letter to union members naming eighteen “scabs” who crossed the picket line, including a drawing depicting an “Anatomy of a Scab;” the court found the letter and drawing to be protected by the NLRA as “metaphorical and clearly represent[ing] opinion rather than fact.”). For an example of the application of state defamation law in the absence of federal labor law, see *Carter v. Bradshaw*, 138 S.W.2d 187 (Tex. Ct. App. 1940) (affirming injunction against union picketers on the grounds that the language

In 1974, eight years after *Linn*, the Supreme Court reaffirmed its position that defamatory statements arising out of a labor dispute governed by federal law are not actionable under state law unless they were made with “actual malice” in *National Ass’n of Letter Carriers v. Austin*.¹⁶⁹ As previously discussed, *Letter Carriers* appeared to recognize protection based upon federal labor law, allowing parties to a labor dispute to use abusive or insulting language without fear of penalty.¹⁷⁰ Such statements could not form the basis of a defamation claim, as no reasonable person would believe the statements expressed actual or implied facts regarding the subject of the statements.¹⁷¹

Many courts, following the reasoning of *Letter Carriers*, protected statements made in the context of labor disputes under the “hyperbole, rhetoric, epithet” rationale.¹⁷² For example, the Ohio Supreme Court, in *Yeager v. Local Union 20*,¹⁷³ held picket signs and handbills

used by the picketers, “Bradshaw Motor Company is Unfair to Organized Labor Carpenters Union No. 1201,” was false, because Bradshaw had no control over which its contractor hired. The court found this language to be libelous and thus not a lawful means of protest protected by article 5153 R.C.S. of 1925).

169. *Letter Carriers*, 418 U.S. at 264. The Court emphasized that a union’s vigorous efforts “to persuade other employees to join” should not be “stifled by the threat of liability for its over enthusiastic use of rhetoric.” *Id.* at 277. The Court held that “any publication made during the course of union organizing efforts, which is arguably relevant to that organizational activity, is entitled to the protection of *Linn*.” *Id.* at 279. *Letter Carriers* differed from *Linn* in that the preemptive power in *Linn* came from the National Labor Relations Act, while *Letter Carriers* was based on section 10 of Executive Order Number 11,491, governing labor management relations in the Executive Branch of the Federal Government. *Linn*, 383 U.S. at 53; *Letter Carriers*, 418 U.S. at 266.

170. *Letter Carriers*, 418 U.S. at 283-87.

171. *Id.* For an interesting variation on the typical set of facts, see *Dunn v. AirLine Pilots Ass’n*, 836 F. Supp. 1574 (S.D. Fla. 1993), *aff’d*, 193 F.3d 1185 (11th Cir. 1999). In *Dunn*, a group of workers crossed a picket line during an allegedly invalid strike. After being named on a scab list, they brought suit, contending that since the strike was not properly authorized, the name “scab” was inaccurate. In a two to one decision, the Eleventh Circuit affirmed the grant of summary judgment against them. *Id.*

172. See *Great Lakes Steel v. NLRB*, 625 F.2d 131 (6th Cir. 1980) (holding that reference to company’s policy of providing ambulance service as murderous policy was mere hyperbole and protected under section seven of the National Labor Relations Act and 29 U.S.C. § 157, as read in accord with *Linn* and *Letter Carriers*); *NLRB v. Container Corp. of Am.*, 649 F.2d 1213 (6th Cir. 1981) (*per curiam*) (holding that bulletin posted by Union vice-president referred to General Manager as a “slave driver” and manager’s employees as his “chain gang” was protected as rhetoric under section seven of the NLRA as read in accord with *Linn* and *Letter Carriers*); *Nat’l Ass’n of Gov’t Employees v. Cent. Broad. Corp.*, 396 N.E.2d 996, 1000-02 (Mass. 1979), *cert. denied*, 446 U.S. 935 (1980) (holding charge that Union faced an “inroad of communism” was not actionable based on disclosed facts and because it was “mere pejorative rhetoric”); *Hob Nob Hill Rest. v. Hotel Employees and Rest. Employees Intern’l Union*, 660 F. Supp. 126 (S.D. Cal. 1987) (finding that accusations of communism, theft, and double sets of books to be either protected statements of opinion or so nonsensical as not to be considered representations of fact).

173. 453 N.E.2d 666 (Ohio 1983).

describing a managerial employee as being a “Little Hitler” and accusing him of operating a “Nazi concentration camp” were mere hyperbole or rhetoric and were not actionable.¹⁷⁴

While courts routinely relied on federal labor law as the basis for protecting hyperbole and opinion in labor disputes, they usually cited *Linn* and *Letter Carriers* as supporting authority. This raised the issue of whether the principles underlying *Linn* and *Letter Carriers* were applicable outside of the labor context as part of some type of constitutional protection for opinion, or whether the protection only existed where federal labor law and opinion intersected.¹⁷⁵ In 1990, the United States Supreme Court addressed the viability of constitutional protection for opinion regardless of the setting in which it was made.

III. *MILKOVICH V. LORAIN JOURNAL CO.*

A. *Facts and Procedural Background*

The controversy that later became *Milkovich v. Lorain Journal*¹⁷⁶ began in 1975, when the *Willoughby News-Herald*¹⁷⁷ published a column critical of Michael Milkovich, the wrestling coach of Maple Heights High School. The column concerned Milkovich’s role in his team’s altercation with another high school team at a wrestling meet and the subsequent investigatory hearing before the Ohio High School Athletic Association (OHSAA).¹⁷⁸ Both Milkovich and School Superintendent H. Don Scott testified before the OHSAA, which suspended the school’s wrestling team from state competition. Milkovich and Scott later testified during a suit brought by several

174. *Id.* at 667. See also *Crawford v. United Steelworkers*, 335 S.E.2d 828 (Va. 1985). Larry Crawford crossed the picket line at the Virginia Lime plant and applied for and accepted a job in the place of striking employees. Whenever Crawford crossed the picket line and entered the plant he was called “cocksucker,” “motherfucker,” “bastard,” and “son-of-a-bitch” by various union members. *Id.* at 832. Crawford sued both the union and individual employees, alleging defamation. Relying on *Linn* and *Letter Carriers*, the Virginia Supreme Court held that under the circumstances of a labor dispute, the use of the terms “cocksucker,” “motherfucker,” “bastard,” and “son-of-a-bitch” regarding workers crossing a union picket line could not reasonably be interpreted to convey a false representation of fact and were simply rhetorical hyperbole. *Id.*

175. *Letter Carriers*, 418 U.S. at 283-87.

176. 497 U.S. 1 (1990). For a discussion of *Milkovich*, see Daniel Anker, *Milkovich v. Lorain Journal Co.: The Balance Tips*, 41 CASE W. RES. L. REV. 613 (1991); T.R. Hager, *Milkovich v. Lorain Journal Co.: Lost Breathing Space - Supreme Court Stifles Freedom of Expression By Eliminating First Amendment Opinion Privilege*, 65 TUL. L. REV. 944 (1991); Lisa Herkowitz, Note, *One Bad Bit of Dictum Deserves Another: Gertz and Milkovich*, 24 CONN. L. REV. 1159 (1992).

177. The *Willoughby News-Herald* is a daily newspaper owned by the Lorain Journal Company. It circulates in Lake County, Ohio, the home of Mentor High School. *Milkovich*, 497 U.S. at 4.

178. *Id.* at 3-4. The visiting wrestling team was from Mentor High School, Mentor, Ohio. *Id.*

parents against OHSAA that led to a Common Pleas Court overturning the OHSAA ruling and reinstating the Maple Heights team to state competition.¹⁷⁹

The newspaper's sports column, published the day after the court's decision, stated in part, "Anyone who attended [the meet] . . . knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth."¹⁸⁰ The column's head-

179. *Id.* at 4. The Court of Common Pleas of Franklin County, Ohio, tried the suit approximately 150 miles from where the fracas had occurred and from each of the teams' hometowns.

180. *Id.* at 5. The column read in its entirety:

Yesterday in the Franklin County Common Pleas Court, Judge Paul Martin overturned an Ohio High School Athletic Assn. decision to suspend the Maple Heights wrestling team from this year's state tournament.

It's not final yet - the judge granted Maple only a temporary injunction against the ruling - but unless the judge acts much more quickly than he did in this decision (he has been deliberating since a Nov. 8 hearing) the temporary injunction will allow Maple to compete in the tournament and make any further discussion meaningless.

But there is something much more important involved here than whether Maple was denied due process by the OHSAA, the basis of the temporary injunction.

When a person takes on a job in a school, whether it be as a teacher, coach, administrator or even maintenance worker, it is well to remember that his primary job is that of educator.

There is scarcely a person concerned with school who doesn't leave his mark in some way on the young people who pass his way - many are the lessons taken away from school by students, which weren't learned, from a lesson plan or out of a book. They come from personal experiences with and observations of their superiors and peers, from watching action and reactions.

Such a lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.

A lesson which, sadly, in view of the events of the past year, is well they learned early. It is simply this: If you get in a jam, lie your way out.

If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.

The teachers responsible were mainly head Maple wrestling coach, Mike Milkovich, and former superintendent of schools, H. Donald Scott.

Last winter they were faced with a difficult decision. Milkovich's ranting from the side of the mat and egging the crowd on against the meet official and the opposing team backfired during a meet with Greater Cleveland Conference rival Mentor [sic], and resulted in first the Maple Heights team, then many of the partisan crowd attacking the Mentor squad in a brawl which sent four Mentor wrestlers to the hospital.

Naturally, when Mentor protested to the governing body of high school sports, the OHSAA, the two men were called on the carpet to account for the incident.

But they declined to walk into the hearing and face up to their responsibilities, as one would hope a coach of Milkovich's accomplishments and reputation would do, and one would certainly expect from a man with the responsible position of superintendent of schools.

Instead they chose to come to the hearing and misrepresent the things that happened to the OHSAA Board of Control, attempting not only to convince the board of their own innocence, but, incredibly, shift the blame of the affair to Mentor.

line read: "Maple beat the law with the 'big lie,'" followed with a photograph of the columnist and the words "TD Says."¹⁸¹

Milkovich sued the paper for defamation, alleging the article accused him of committing the crime of perjury and damaged him in his teaching and coaching professions.¹⁸² Thus began fifteen years of litigation. The trial court originally granted the newspaper's motion for a directed verdict on the grounds that the evidence failed to establish the article was published with actual malice as required by *New York Times Co. v. Sullivan*.¹⁸³ The Ohio Court of Appeals, holding there was sufficient evidence of actual malice to present the case to the jury, reversed and remanded the case for a new trial.¹⁸⁴ The Ohio Supreme Court refused to certify the issue for appeal, and the United States Supreme Court denied the newspaper's petition for certiorari.¹⁸⁵

I was among the 2,000-plus witnesses of the meet at which the trouble broke out, and I also attended the hearing before the OHSAA, so I was in a unique position of being the only non-involved party to observe both the meet itself and the Milkovich-Scott version presented to the board.

Any resemblance between the two occurrences [sic] is purely coincidental.

To anyone who was at the meet, it need only be said that the Maple coach's wild gestures during the events leading up to the brawl were passed off by the two as "shrugs," and that Milkovich claimed he was "Powerless to control the crowd" before the melee. Fortunately, it seemed at the time, the Milkovich-Scott version of the incident presented to the board of control had enough contradictions and obvious untruths so that the six board members were able to see through it.

Probably as much in distasteful reaction to the chicanery of the two officials as in displeasure over the actual incident, the board then voted to suspend Maple from this year's tournament and to put Maple Heights, and both Milkovich and his son, Mike Jr. (the Maple Jaycee coach), on two-year probation.

But unfortunately, by the time the hearing before Judge Martin rolled around, Milkovich and Scott apparently had their version of the incident polished and reconstructed, and the judge apparently believed them.

"I can say that some of the stories told to the judge sounded pretty darned unfamiliar," said Dr. Harold Meyer, commissioner of the OHSAA, who attended the hearing. "It certainly sounded different from what they told us."

Nevertheless, the judge bought their story, and ruled in their favor.

Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

But they got away with it.

Is that the kind of lesson we want our young people learning from their high school administrators and coaches?

I think not.

Id. at 5 n.2.

181. *Milkovich*, 497 U.S. at 4. "TD" are the initials for columnist Ted Diadiun. *Id.*

182. Superintendent Scott filed his own suit against the newspaper alleging a claim of defamation. *Id.* at 8.

183. *Id.* at 7.

184. *Id.* See *Milkovich v. Lorain Journal*, 416 N.E.2d 662 (Ohio Ct. App. 1979).

185. *Milkovich*, 497 U.S. at 8 (1990). See *Lorain Journal Co. v. Milkovich*, 449 U.S. 966 (1980), for the first denial of certiorari by the United States Supreme Court.

On remand, the newspaper was granted summary judgment on the ground that the article was a constitutionally protected opinion under *Gertz v. Robert Welch, Inc.*¹⁸⁶ In addition, the court noted that Milkovich, a public figure, had failed to establish a *prima facie* case of actual malice.¹⁸⁷ The Ohio Court of Appeals affirmed.¹⁸⁸ The Ohio Supreme Court, however, reversed and remanded. The court first determined Milkovich was neither a public figure nor a public official. It then found the statements in the column were factual assertions and not constitutionally protected as opinions of the author.¹⁸⁹ The United States Supreme Court denied the newspaper's second petition for a writ of certiorari in 1985.¹⁹⁰

Before the case was retried, the Ohio Supreme Court, in a separate defamation action brought by H. Don Scott, Superintendent of Schools for the City of Maple Heights, against the Lorain Journal arising out of the same article, reversed its earlier holding in *Milkovich* and found the column to be "constitutionally protected opinion."¹⁹¹ Considering itself bound by the Ohio Supreme Court's decision in *Scott*, the Ohio Court of Appeals again affirmed the trial court's grant of summary judgment in favor of the newspaper.¹⁹² After the Ohio Supreme Court refused to accept jurisdiction of Milkovich's appeal, the United States Supreme Court granted his petition for certiorari.¹⁹³ The United States Supreme Court reversed, holding the First Amendment does not require a separate "opinion" privilege limiting the application of state defamation laws.¹⁹⁴

B. *The Supreme Court's Analysis*

The Supreme Court's opinion began with a discussion of the origin and evolution of defamation law.¹⁹⁵ It noted that under the common law, an expression of opinion could be defamatory if it was sufficiently derogatory to another's reputation.¹⁹⁶ The privilege of "fair comment," however, had been incorporated into the common law as an

186. 418 U.S. 323 (1974).

187. *Milkovich*, 497 U.S. at 8.

188. *Id.*

189. *Milkovich v. News-Herald*, 473 N.E.2d 1191, 1193-96 (Ohio 1984).

190. *Lorain Journal Co. v. Milkovich*, 474 U.S. 953 (1985).

191. *Scott v. News-Herald*, 496 N.E.2d 699, 709 (Ohio 1986). The court held the four-factor test set out in *Ollman* was the proper test for distinguishing fact from opinion. *Id.*

192. *Milkovich v. News-Herald*, 545 N.E.2d 1320, 1324 (Ohio Ct. App. 1989).

193. *Milkovich v. Lorain Journal Co.*, 493 U.S. 1055 (1990).

194. *Milkovich*, 497 U.S. at 10 (1990).

195. *Id.* at 11.

196. *Id.* at 11-13 (citing L. ELDRIDGE, LAW OF DEFAMATION 5 (1978); RESTATEMENT OF TORTS § 558 (1938); *Gertz*, 418 U.S. at 370).

affirmative defense to a defamation action and afforded legal immunity to the expression of opinion on matters of "legitimate public interest."¹⁹⁷ The Court reasoned this "fair comment" privilege struck a "balance between the need for vigorous public discourse and the need to redress injury to citizens wrought by invidious or irresponsible speech."¹⁹⁸ The Court then considered whether a constitutional "fair comment" privilege existed for alleged defamatory statements and began weighing the arguments of the parties.¹⁹⁹

The newspaper, relying upon the dictum of *Gertz*, argued that the statements in the newspaper were protected opinion.²⁰⁰ The Court disagreed, stating the *Gertz* dictum was never "intended to create a wholesale defamation exemption for anything that might be labeled

197. *Milkovich*, 497 U.S. at 13.

198. *Id.* at 14.

199. *Id.* at 14-17. The Court reviewed *New York Times, Curtis Publ'g Co., Bresler, Gertz, Letter Carriers, Hepps* (citing the constitutional requirement that the plaintiff prove the falsity of the statement against a media defendant), and *Falwell*.

200. Brief for Respondents, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). The existence of a constitutional opinion privilege was also asserted by the *American Civil Liberties Union of Ohio et al.* in its Brief of *Amici Curiam* in support of respondents, which stated at page 36:

Moreover, one of the libel cases often cited as providing some support for a constitutional opinion privilege, *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*, [citation omitted], protected the speech of non-media defendants on the grounds at least undergirded by the *Gertz* dictum that 'there is no such thing as a false idea,' *Id.* at 284. The epithets in *Letter Carriers*, which the Court found could not constitutionally support a libel judgment, were clearly statements of opinion. And no question was raised as to the applicability of constitutional libel standards under the *New York Times v. Sullivan* line of cases.

American Civil Liberties Union Brief of *Amici Curiam* in Support of Respondents at 36, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). The *Amici* Brief went on to comment that:

While decided in the context of a labor dispute, it is clear that *Letter Carriers*, decided on the same day as *Gertz*, was premised on constitutional considerations. The *Letter Carriers* Court did not rely on the non-constitutional, federal 'pre-emption' approach to libel in the labor context formulated in *Linn v. Plant Guard Workers* [citation omitted].

Id. at 36-37.

Another *Amici* brief, submitted by Dow Jones & Company, Inc. et al., written by Robert D. Sack in support of Respondents, noted that:

On the day the Court rendered its opinion in *Gertz*, it also decided *Letter Carriers v. Austin*, [citation omitted]. The Court held that the use of vigorous epithets in the context of a labor dispute could not support a defamation judgment, basing its holding, at least in part, on the *Gertz* principle that 'there is no such things as a false idea.' The epithets were opinion, as such unprovable, and therefore non-actionable. Although the *Gertz* language when stated was dictum, the Court thus treated it as authoritative on the same day it was first uttered.

Dow Jones & Co., Inc. Brief of *Amici Curiam* in Support of Respondents at 284, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). The *Dow Jones* brief went on to note that in 1990, every federal circuit as well as the courts of at least thirty-six states and the District of Columbia recognized a constitutional opinion privilege based on *Gertz*. *Id.* at 13-14 n.14-15. See also SACK, *supra* note 35, at 4-10 - 4-11.

'opinion.'"²⁰¹ The Court warned such an interpretation of *Gertz* ignored the fact that expressions of opinion often imply an assertion of fact. It explained:

If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar."²⁰²

The Court ruled no constitutional privilege for opinions was necessary, because the "breathing space" required for freedom of expression was already secured by existing constitutional doctrine.²⁰³ In situations involving a media defendant, "*Hepps* ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection."²⁰⁴ The Court further explained:

[T]he *Bresler-Letter Carriers-Falwell* line of cases provides protection for statements that cannot "reasonably [be] interpreted as stating actual facts about an individual." This provides assurance that public debate will not suffer for lack of "imaginative expression" or the "rhetorical hyperbole," which has traditionally added much to the discourse of our Nation.²⁰⁵

The Court continued by stating that "[t]he *New York Times-Butts-Gertz* culpability requirements further ensure that debate on public issues remains 'uninhibited, robust, and wide-open.'"²⁰⁶ Thus, according to the Court, no additional constitutional protection for opinion was required to ensure freedom of expression.

Having decided there was no constitutional opinion privilege, the Court examined the statements in the *Willoughby News-Herald* to determine if they might be non-actionable because they were rhetorical hyperbole, that is, because no reasonable person would have thought them to be a *literal fact*.²⁰⁷ The Court reasoned the statements in the column were not the sort of "loose, figurative, or hyperbolic lan-

201. *Milkovich*, 497 U.S. at 18.

202. *Id.* at 18-19. The Court explained that "unlike the statement, 'In my opinion Mayor Jones is a liar,' the statement, 'In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin,' would not be actionable." *Id.*

203. *Id.* at 19.

204. *Id.* at 20.

205. *Id.* (citations omitted).

206. *Milkovich*, 497 U.S. at 20 (citing *New York Times*, 376 U.S. at 270).

207. *Id.* at 21.

guage” that would alert the listener to the fact that the writer was not seriously accusing Milkovich of perjury.²⁰⁸ Finally, the Court noted the accusation of perjury was sufficiently factual to be susceptible of being proved true or false.²⁰⁹ Thus, the statements in the *Willoughby News-Herald* were sufficient, as a matter of law, to support a defamation action and were not protected by any First Amendment privilege. The Court concluded that its decision balanced its numerous decisions establishing that First Amendment protection for defendants in defamation cases with the rights of individuals to prevent and redress attacks on their reputations.²¹⁰

On remand, the Ohio Court of Appeals held the Ohio Constitution provided no more protection for opinion than the Federal Constitution,²¹¹ and that Milkovich must only prove that false connotations were made with the level of fault (*i.e.*, negligence) required by

208. *Id.*

209. *Id.*

210. *Id.* at 22. *Milkovich* was not a unanimous decision. In fact, Justice Brennan's dissenting opinion noted that "Diadun not only reveals the facts upon which he is relying but he makes it clear at which point he runs out of facts and is simply guessing." *Id.* at 28 (Brennan, J., dissenting). Justice Brennan, looking at the context in which the statements were made, noted that they could not be interpreted as an assertion of fact. *Milkovich*, 497 U.S. at 28 (Brennan, J., dissenting). In particular, Justice Brennan pointed to qualifying language used within the article; the fact that the article clearly indicated it was one man's commentary, not an impartial analysis; and the location of the article, in an editorial column in a newspaper located in the hometown of the team that was allegedly mauled at the wrestling meet. *Id.* at 31-34. Justice Brennan appeared to be advocating a "totality of the circumstances test" to determine if a statement could reasonably be interpreted as a factual assertion.

211. Five years after *Milkovich*, in *Vail v. Plain Dealer Publ'g Co.*, 649 N.E.2d 182 (Ohio 1995), the Ohio Supreme Court limited the effect of *Milkovich* by recognizing that Ohio's state constitution provides broader protection than the First Amendment for media commentary. Similarly, New York courts have also recognized broader protection under the New York Constitution than the minimum required by the federal constitution and have adopted the four-part test developed in *Ollman* to differentiate between fact and opinion. See *Steinhilber v. Alphonse*, 501 N.E.2d 550 (N.Y. 1986); *Abbot v. Sucich*, No. 95 CIV. 5678 (RPP), 1996 WL 453077 (S.D.N.Y. Aug. 9, 1996); *Kovacs v. Briarcliffe Sch.*, 617 N.Y.S.2d 804 (N.Y. 1994); *Coliniatis v. Dimas*, 848 F. Supp. 462 (S.D.N.Y. 1994). See also *Gehl Group v. Koby*, 838 F. Supp. 1409, 1416-17 (D. Colo. 1993) (applying Colorado law, the court held the defendant's charge that Fraternal Order of Police plaintiffs were "the prostitutes of the law enforcement profession" was pure opinion, meaning that plaintiff FOP Organizations demeaned the law enforcement profession by allowing a charitable fund raising organization to profit off of FOP name).

Conversely, other states have failed to recognize broader protection under their state constitutions, even though their constitutions arguably provide broader protection for opinion than the United States Constitution. See OR. CONST. art. I, § 8; *Hickey v. Settlemeir*, 917 P.2d 44 (Or. Ct. App. 1996), *cert. denied*, 920 P.2d 549 (Or. Ct. App. 1996); MICH. CONST. art. I, § 5; *Garvelinck v. Detroit News*, 522 N.W.2d 883 (Mich. Ct. App. 1994).

Gertz.²¹² The case was remanded to the trial court for proceedings consistent with the opinion.²¹³

C. *The Impact of Milkovich on the Opinion Defense*

In *Milkovich*, the Supreme Court held a separate constitutional privilege for opinion was not required because the “breathing space” required for freedom of expression was “adequately served by existing constitutional doctrine.”²¹⁴ The Court then set forth two tests for determining whether certain types of speech were protected in a defamation case: the “provable as false” test and the “incapable of interpretation as actual facts” test.²¹⁵ It concluded that the Constitution provides protection for statements of opinion in two situations: if they address matters of public concern and do not contain a provably false factual connotation; or if they cannot be “reasonably interpreted as stating actual facts” about an individual.²¹⁶

Although the Supreme Court did not completely abolish constitutional protection for opinion, the initial reaction of lower courts as well as commentators was that *Milkovich* narrowed the privilege.²¹⁷ However, as courts have continued to interpret and apply *Milkovich*, it has become apparent that the case added little to the search for protected expressions of opinion.²¹⁸ In part, this was due to the fact

212. *Milkovich v. News-Herald*, 591 N.E.2d 394, 396 (Ohio Ct. App. 1990). The court of appeals, citing *Lansdowne v. Beacon Journal Publ'g Co.*, 512 N.E.2d 979, 984 (Ohio 1987), held that to recover in a private-figure defamation action the plaintiff must prove by clear and convincing evidence that the defendant failed to act reasonably in attempting to discover the truth or falsity or defamatory character of the publication. *Id.*

213. *Milkovich* and the newspaper settled the case for an undisclosed amount “of more than \$100,000.” Mahoney, *News-Herald, Coach Settle 16-year-old Libel Suit*, PLAIN DEALER, Mar. 30, 1991, § 2, at 2. Interestingly, the Maple Heights City School District named a Middle School after Coach *Milkovich* not long after his retirement. Ruth Marcus, *High Court to Rule on Opinion As Protected Speech; Former Wrestling Coach Pursues 15-year-old Libel Suit Against Ohio Sports Columnist*, THE WASH. POST, Apr. 29, 1990, § A, at a9.

214. *Milkovich*, 497 U.S. at 19.

215. *Id.* at 19-20.

216. *Id.* at 20.

217. For a discussion of the wide divergence among lower courts interpreting *Milkovich*, see Robert C. Vanderet et al., *Media Law and Defamation Torts: Recent Developments*, 27 TORT & INS. L.J. 333, 340-42 (1992) (listing cases). The authors opined that as a consequence of *Milkovich's* narrowing of First Amendment protection, “a larger number of cases . . . will go to trial and be unreviewable by the U.S. Supreme Court in the event of an adverse verdict.” *Id.* at 339. See also Kathryn Dix Sowle, *A Matter Of Opinion: Milkovich Four Years Later*, 3 WM. & MARY BILL RTS. J. 467 (1994).

The initial media reaction to *Milkovich* was negative. See Hentoff, Editorial, *Wrestling with the First Amendment*, THE WASH. POST, June 30, 1990, at a19; Cynthia Fox, *How Scary Is Milkovich? A Matter of Opinion*, COLUM. JOURNALISM REV., May/June 1992, at 19.

218. Some commentators noted the questionable impact of *Milkovich* immediately after the opinion. See Nat Stern, *Defamation, Epistemology, and the Erosion (But Not Destruction) of the*

that many lower courts, in attempting to apply *Milkovich*, continued to use the same tests to distinguish fact from opinion²¹⁹ that were used prior to *Milkovich*.²²⁰

The “incapable of interpretation as actual facts” test in *Milkovich* protects statements that cannot be reasonably interpreted as stating actual facts about a person.²²¹ The Supreme Court explained that protecting such statements ensures “public debate will not suffer for lack of ‘imaginative expression’ or the ‘rhetorical hyperbole’ that has traditionally added much to the discourse of our Nation.”²²² In support of its position, the Court relied on *Bresler*, *Letter Carriers*, and *Falwell*.

Bresler protected the accusation of “blackmail” as “no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler’s negotiating position extremely unreasonable.”²²³ *Letter Carriers* protected the accusation of “scab” and its definition as “rhetorical hyperbole, a lusty and imaginative expression of contempt” for those not joining the union.²²⁴ *Falwell* protected an advertisement

Opinion Privilege, 57 TENN. L. REV. 595, 613 (1990) (noting that the Court’s shift in terminology “has neither eliminated the problem nor significantly improved the analysis”); Jerry J. Phillips, *Opinion and Defamation: The Camel in the Tent*, 57 TENN. L. REV. 647, 675 (1990) (asserting that *Milkovich* “does nothing to clarify the morass of the fact opinion distinction.”).

One commentator put a positive interpretation on the decision: “There was, in short, much less to *Milkovich* than met the eye; the Court had really made only a cosmetic change in terminology, substituting the age-old dichotomy between ‘fact’ and ‘opinion’ with a dichotomy between ‘fact’ and ‘nonfact.’” RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 53 (1992).

219. Although the *Milkovich* Court reiterated that statements of public concern must be proven as false before liability under state defamation law occurs, as it previously held in *Hepps*, the Court declined to expand the rule to non-media defendants, and thus it is not applicable to cases involving non-media defendants, such as employers and labor unions. *Milkovich*, 497 U.S. at 16.

220. See Sowle, *supra* note 217 (concluding that there are eight different applications of *Milkovich* by the lower courts); M. Eric Eversole, *Eight Years After Milkovich: Applying A Constitutional Privilege For Opinions Under the Wrong Constitution*, 31 IND. L. REV. 1107, 1118 (1998) (advocating a more expansive protection under state constitutions).

Further, the Restatement’s protection of pure opinion continued to be used by courts after *Milkovich*, even though this protection was based on the dicta in *Gertz* that the Court appeared to repudiate in *Milkovich*. See *Pope v. Chronicle Publ’g Co.*, 95 F.3d 607, 614 (7th Cir. 1996) (holding that an editorial which disparaged and maligned the plaintiff as an “Ugly American,” was an expression of opinion); *Colodny v. Iverson, Yoakum, Papiano & Hatch*, 936 F. Supp. 917, 919, 923 (M.D. Fla. 1996) (attorney’s editorial that a book on the Watergate break-in would be exposed as a fraud was a non-actionable declaration of opinion); *Hickey v. Settlemier*, 917 P.2d 44, 48 (Or. Ct. App. 1996) (holding that statement by neighbor of business that sold animals for use in medical research, that plaintiff’s treatment of the animals was inhuman was a non-actionable expression of opinion).

221. *Milkovich*, 497 U.S. at 20.

222. *Id.* (quoting *Hustler Magazine v. Falwell*, 485 U.S. 46, 53-55 (1988)).

223. *Bresler*, 398 U.S. at 14.

224. *Letter Carriers*, 418 U.S. at 283-84.

parody, which depicted Jerry Falwell having drunken sex with his mother in an outhouse.²²⁵

In determining that the statements at issue in *Milkovich* were not rhetorical hyperbole, the Court focused on more than just the words used. The Court examined the article to determine if there was anything in the “general tenor of the article” to negate the impression that Milkovich had committed the crime of perjury.²²⁶ The Court noted the statements in the column, were “not the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining [that petitioner] committed the crime of perjury.”²²⁷ This analysis resembled the “totality of the circumstances” test originally adopted by the *Ollman* court and subsequently used in labor and employment cases.²²⁸

However, by analyzing words in context to determine if they are rhetorical hyperbole or actionable facts, it is clear that words, which may be non-actionable rhetorical hyperbole in some situations, may be actionable in others.²²⁹ Thus, rhetorical hyperbole is not a delineated class of words, but a class that varies based on the context in which such statements are made and, as such, requires a case-by-case analysis to determine if particular statements are non-actionable hyperbole or actionable fact. This distinction between non-actionable rhetorical hyperbole and actionable statements of fact is crucial in the often heated and emotionally charged areas of labor and employment. Yet, the variety of approaches taken by courts in attempting to apply *Milkovich* to workplace defamation cases underscores the confusion and uncertainty that continues to exist when courts attempt to distinguish between actionable statements of fact and non-actionable rhetorical hyperbole.

225. *Falwell*, 485 U.S. at 48.

226. *Id.*

227. *Milkovich*, 497 U.S. at 21.

228. *See supra* notes 153-160 and accompanying text.

229. *Letter Carriers*, 418 U.S. at 286.

IV. APPLICATION OF *MILKOVICH* TO THE OPINION DEFENSE OF WORKPLACE DEFAMATION ACTIONS

A. *Employment Cases*

1. "Pure"-Milkovich Analysis

a. *Post-Milkovich "Provable as False" Test*

Although the Supreme Court specifically limited *Milkovich's* "provable as false test" to cases involving media defendants,²³⁰ lower courts have applied *Milkovich* to workplace defamation cases without confronting that limitation.²³¹ Many of these cases are result oriented, merely citing the test and concluding the statements were not provable as false, with little or no analysis. Nevertheless, *Milkovich* continues to be cited as the controlling authority for workplace defamation cases.

In *Conkle v. Jeong*,²³² the plaintiff asked a friend to telephone her former employer to verify her employment. In response to the call, the employer stated that the plaintiff was "difficult as an employee" and "more trouble than [she] was worth."²³³ The plaintiff brought suit, alleging the employer's statements were defamatory.²³⁴ Relying upon *Milkovich*, the Court of Appeals for the Ninth Circuit held the statements were non-actionable opinion because they did not imply a provably false factual assertion.²³⁵

The court in *Sullivan v. Conway*²³⁶ reached a similar conclusion. In that case, a former lawyer and business manager for a local union sued the union and a union official claiming they defamed him by publicly describing him as "a very poor lawyer."²³⁷ The court concluded the statement was "constitutionally protected opinion" that could not

230. *Milkovich*, 497 U.S. at 19 n.6.

231. See *infra* notes 232-248 and accompanying text.

232. 73 F.3d 909 (9th Cir. 1995).

233. *Id.* at 917.

234. *Id.* In addition to liability based upon oral or written statements, employers may also be held liable for defamation based upon statements made in company e-mail messages. See, e.g., *Meloff v. N.Y. Life Ins. Co.*, 51 F.3d 372 (2d Cir. 1995) (vacating summary judgment on employee's defamation claim where employer informed other employees via e-mail that plaintiff was fired because she attempted to defraud the company).

235. *Conkle*, 73 F.3d at 917. See also *Hinz v. REM-Minn.*, No. C7-97-1798, 1998 WL 157337 (Ct. App. Minn. Apr. 7, 1998) (plaintiff claimed that a former employer had defamed her when it informed Minnesota's Board of Social Workers that: 1) she pursued personal relationships with client to the point of dangerousness; 2) residents got upset when she was around; and 3) she was a troublemaker. The court held that holding that the statements would not support a defamation action because they were as "a matter of law subjective, unverifiable opinions and thus, not actionable.").

236. 959 F. Supp. 877 (N.D. Ill. 1997).

237. *Id.* at 880.

form the basis of a defamation claim²³⁸ because the statement was incapable of being proven true or false due to its inherent subjectivity.²³⁹ Although not a true employment case, the *Sullivan* case exemplifies a straightforward *Milkovich* analysis in a non-media case.

Another case focusing on the subjective nature of employee evaluation is *Sliter v. Electronic Data Systems, Inc.*²⁴⁰ In *Sliter*, the plaintiff sued his former employer for defamation based upon statements made in a meeting between the employer and one of its customers in which he was accused of being a “smart ass, rude and offensive.”²⁴¹ The court observed the term “smart ass” connotes one who is “annoyingly or obnoxiously cocky, knowing, [or] flippant.”²⁴² Similarly, the term “rude” connotes one who is “barbarous or ignorant . . . lacking refinement, culture or elegance.”²⁴³ Reasoning that each person’s own experience would dictate their personal subjective assessment of such traits, the court held the statements were subjective opinions and not capable of truth or falsity.

Finally, in *Hunt v. University of Minnesota*,²⁴⁴ the plaintiff sued for defamation after her former employer told potential employers she “had trouble dealing with legislators, . . . lacked warmth, was insincere, and had no sense of integrity.”²⁴⁵ Analogizing *Milkovich* and the analysis used by the Minnesota Court of Appeals in distinguishing between fact and opinion, which used the four-factor test of *Janklow*,²⁴⁶ the court affirmed the granting of summary judgment in the employer’s favor. The court held the employer’s statements were not actionable because the words could not be proven false.²⁴⁷ It reasoned that the first two elements of the *Janklow* test, “specificity” and “verifiability,” were closely related to whether a statement is capable of being proven false.²⁴⁸

238. *Id.* The court based this conclusion on *Milkovich* and a recent Illinois Supreme Court decision. The court stated that a “statement is constitutionally protected if it cannot be reasonably interpreted as stating actual facts.” *Sullivan*, 959 F. Supp. at 880 (citing *Bryson v. News Am. Publ’n*, 672 N.E.2d 1207, 1220 (Ill. 1996)).

239. *Sullivan*, 959 F. Supp. at 881.

240. No. C-96-Z0044 PVT, 1996 WL 449189 (N.D. Cal. Aug. 5, 1995).

241. *Id.* at *1.

242. *Id.* at *2.

243. *Id.*

244. 465 N.W.2d 88 (Minn. Ct. App. 1991).

245. *Id.* at 91.

246. *Janklow v. Newsweek* 788 F.2d 1300 (9th Cir. 1986). For a discussion of the *Janklow* test, see *supra* notes 157-160 and accompanying text.

247. *Hunt*, 465 N.W.2d at 94.

248. *Id.*

b. *Post-Milkovich* “Capable of Interpretation as Actual Facts” Test

The *Milkovich* “capable of interpretation as actual facts” test is derived from the Supreme Court’s earlier holdings in *Bresler*, *Letter Carriers*, and *Falwell*. As its name implies, this test grants protection to statements that cannot be reasonably interpreted as stating actual facts about a person.

In *Bross v. Smith*,²⁴⁹ the Ohio Court of Appeals employed a straightforward *Milkovich* analysis to determine whether a set of letters was actionable. In *Bross*, a police officer was accused of putting “rat letters” on department bulletin boards and in police officers’ mailboxes regarding the controversial suspension of the Chief of Police based on allegations of misconduct.²⁵⁰ One letter stated “[a]ny mother fucker that rats on a cop is no cop.”²⁵¹ Other “rat letters” included such statements as a rat was a “doper” or “pill head;” a rat used “illegal drugs;” rats stole ammunition; and rats were “fucking each other’s wives and girlfriends.”²⁵² The letters went on for almost a year and a half, calling various individuals and the “rats” collectively vulgar and profane names, making allegations of wrongdoing, and threatening to fire and press criminal charges against various individuals.²⁵³

On review of a directed verdict granted in favor of the defendants (the city, the current police chief, and the assistant chief of police), the Ohio Court of Appeals stated the “rat letters” were the “sort of loose, figurative or hyperbolic language which would negate the impression that these individuals [rats] committed these acts.”²⁵⁴ Concluding the general tenor of the “rat letters” negated any impression the statements are factual assertions, the court held the letters to be within the realm of protected speech.²⁵⁵

c. *Post-Milkovich* Totality of the Circumstances Analysis

The vast majority of post-*Milkovich* workplace defamation cases viewed the *Milkovich* test as substantially similar to the totality of the circumstances, or the four-factor test, set forth in *Janklow* and *Ollman* and used by the federal courts to distinguish fact from opinion before-

249. *Bross v. Smith*, 608 N.E.2d 1175 (Ohio Ct. App. 1992).

250. *Id.* at 1176. Two factions had formed in the police ranks as a result of the Chief’s suspension: the “A team,” which supported the suspended Chief; and the “B team,” which included individuals who made the accusations of the Chief’s misconduct. *Id.* at 1176-77.

251. *Id.* at 1177.

252. *Id.* at 1181.

253. *Id.* at 1177.

254. *Bross*, 608 N.E.2d at 1181.

255. *Id.* at 1182.

hand.²⁵⁶ Some cases view the four-factor test as merely helpful in applying *Milkovich*.²⁵⁷ Others hold *Milkovich* merely narrows the totality of the circumstances,²⁵⁸ and still others view *Milkovich* as not changing the test at all.²⁵⁹ All of these cases generally cite *Milkovich* and apply the totality of the circumstances test in one form or another.

In *Lund v. Chicago & Northwestern Transportation Co.*,²⁶⁰ the Minnesota Court of Appeals applied the *Janklow* four-factor test to determine whether statements implied actual facts that could be proven false under *Milkovich*. The court held a memorandum posted by the employer with the words “favoritism,” “move-ups,” “brown nose” and “shit heads” after the plaintiff’s name were constitutionally protected expressions of opinion and, therefore, were not actionable.²⁶¹

Simply because a statement is framed in rhetorical terms does not, however, make the speaker immune from liability.²⁶² In *Godfrey v. Perkin-Elmer Corp.*,²⁶³ a supervisor told his female employee: “Your job isn’t important and doesn’t require brains You have a bad attitude. You have a lot of growing up to do. You should learn what you’re doing here. Who do you think you’re working for?”²⁶⁴ The court noted that New Hampshire constitutional law protects statements of opinion “even when pernicious, pejorative, or harsh,” unless “it may reasonably be understood to imply the existence of a defamatory fact as the basis for opinion,”²⁶⁵ and *Milkovich* only strengthened that protection.²⁶⁶ Nevertheless, the court held the statement about plaintiff’s job requiring no brains could be defamatory because it was easily susceptible to verification.²⁶⁷

256. See *infra* notes 260-281 and accompanying text.

257. See *infra* note 261 and accompanying text.

258. See *infra* note 267 and accompanying text.

259. See *infra* note 266 and accompanying text.

260. 467 N.W.2d 366 (Minn. Ct. App. 1991).

261. *Id.* at 369. See also *Geraci v. Eckankar*, 526 N.W.2d 391 (Minn. Ct. App. 1995) (determining, using the *Janklow* four-factor test, that the statements by a former employer that plaintiff “had poisoned the board,” was “out of control,” “a bad influence,” “emotional,” and “not a team player” were not actionable under *Milkovich* because the statements could not reasonably be interpreted as stating facts); *French v. Eagle Nursing Home*, 973 F. Supp. 870 (D. Minn. 1997) (applying a totality of the circumstances analysis, using the four-factor test from *Janklow*, holding that a supervisor’s statements that plaintiff was a “terrible nurse” and “shouldn’t be working” were opinions which could not reasonably be interpreted as stating actual facts and were constitutionally protected under *Milkovich*).

262. See, e.g., *infra* notes 263-267 and accompanying text.

263. *Godfrey v. Perkin-Elmer Corp.*, 794 F. Supp. 1179 (D.N.H. 1992).

264. *Id.* at 1190.

265. *Id.* (quoting *Nash v. Keene*, 498 A.2d 348, 351 (1985)).

266. *Id.*

267. *Id.*

California courts have also embraced the “totality of the circumstances” test in determining whether statements could be reasonably interpreted as stating actual facts. In *Campanelli v. Regents of University of California*,²⁶⁸ a former basketball coach at the University of California sued the university, its athletic director, and the vice chancellor regarding statements made to *The New York Times* by the university’s athletic director after a loss by the basketball team to a rival school.²⁶⁹ The athletic director was quoted as stating:

There were things that were unwarranted and inexcusable It was so incredibly bad. I said, “Sheesh, something must be done.” The players were beaten down and in trouble psychologically. Every other word was a four-letter one. Let me tell you, if I hadn’t made that wrong turn [into the team’s locker room], I wouldn’t have known the fix the team was in.²⁷⁰

Concluding California courts use the “totality of the circumstances test” to distinguish between fact and opinion, the California Court of Appeals explained a court must “put itself in the place of an average reader and decide the natural and probable effect of the statement.”²⁷¹ The court stressed, “[T]he words themselves must be examined to see if they have a defamatory meaning, or if the sense and meaning . . . fairly presumed to have been conveyed to those who read it have a defamatory meaning. Statements cautiously phrased in terms of apparenacy are more likely to be opinions.”²⁷² Applying this rationale to the statements made by the athletic director, the court concluded they could not reasonably be understood to be factual assertions.

In many post-*Milkovich* cases applying the totality of the circumstances test, the public and social context of the statement are critical factors in the analysis.²⁷³ Very few of the cases that purport to follow *Milkovich*, however, confront the fact that it did not overtly consider context as part of its analysis. This distinction may be academic, as the decisions relied upon in *Milkovich* (e.g., *Bresler*, *Letter Carriers*, and

268. 51 Cal. Rptr. 2d 891 (Cal. Ct. App. 1996). See also *Kimura v. Vandenberg*, 281 Cal. Rptr. 691, 699 (1991) (applying a “totality of the circumstances” analysis and holding that a budget director’s letter accusing plaintiff of being a “bigot” and a “racist” was protected by the First Amendment because the general tone of the letter revealed it was not based on implied or undisclosed factual assertions).

269. *Campanelli*, 51 Cal. Rptr. 2d at 897.

270. *Id.*

271. *Id.* at 898.

272. *Id.* at 897. The court’s opinion relied heavily on the charged atmosphere surrounding the firing of the plaintiff, a former university basketball coach, the highly publicized facts set forth in the article, and the use of epithets, fiery rhetoric or hyperbole in heated disputes to persuade others to their positions. *Id.* at 899-900.

273. See *infra* notes 274-281 and accompanying text.

Falwell) considered the immediate and broader social context as part of the analysis. At least one court has decided the best way to resolve this apparent conflict is to simply ignore *Milkovich* and rely on the *Ollman* test to determine if statements are constitutionally protected. In *Quinn v. Jewel Food Stores, Inc.*,²⁷⁴ a former grocery store employee sued the company based on the disclosure of a written evaluation to a potential employer. The evaluation stated that plaintiff was “very aggressive to the point of being cocky” and “could be a problem.”²⁷⁵ The evaluation further provided, “Watch out for the bullshit [The plaintiff] could be dynamite.”²⁷⁶

The Illinois Court of Appeals began its analysis by stating the constitutional protection of opinion is rooted in *Gertz v. Robert Welch, Inc.*, citing to the dicta in *Gertz*, while ignoring the limitations placed on that dicta by *Milkovich*.²⁷⁷ The court used the *Ollman* test to conclude the terms “cocky,” “con artist,” and “bullshit” were not express statements of fact. In reaching this conclusion, the court noted the nature, content, and context of the statement must be considered along with the “knowledge and understanding of the audience to whom the publication was directed.”²⁷⁸ In particular, the court pointed out that employment interviews or evaluations “may include comments which communicate subjective opinions.”²⁷⁹ Applying *Ollman*, the court held that because the allegedly defamatory statements [could] not be read to imply facts because they “could be interpreted loosely” and were capable of neither proof nor disproof,²⁸⁰ they were constitutionally protected opinions.²⁸¹ This analysis is reminiscent of the fact/opinion dichotomy the Supreme Court attempted to eliminate in *Milkovich*.

2. *Milkovich Is Only Applicable to Media Defendants*

A small number of courts have found that *Milkovich* only applies to media defendants.²⁸² There is strong support for the view that the *Milkovich* “provable as false test” only applies to statements on mat-

274. 658 N.E.2d 1225 (Ill. App. Ct. 1995).

275. *Id.* at 1228-29. See also *Banfield v. Laidlaw Waste Sys.*, No. 05-96-01425-CV, 1998 Aug 24 1998 519485 (Tex. Ct. App. Aug. 24, 1998) (noting without comment that management’s reference to plaintiffs as “son of a bitching troublemakers” was a constitutionally protected opinion and not defamatory).

276. *Quinn*, 658 N.E.2d at 1278-79.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* at 1231.

281. *Id.*

282. See, e.g., *infra* notes 286-288 and accompanying text.

ters of public concern made by media defendants.²⁸³ The Supreme Court specifically stated in the *Milkovich* opinion it reserved judgment on whether that test was applicable to non-media defendants.²⁸⁴ Thus, after *Milkovich*, one logical conclusion was that, while the “provable as false test” is not applicable to non-media defendants, the “incapable of interpretation as actual facts/rhetorical hyperbole” test is.²⁸⁵ Amazingly, few courts have made this distinction. Moreover, cases rejecting *Milkovich’s* application to non-media defendants appear to reject both *Milkovich* tests.

For example, in *Gant v. Mahoney, Dougherty, Mahoney*,²⁸⁶ the Minnesota Court of Appeals found *Milkovich* inapplicable to statements such as the plaintiff “could not cut it” and he possessed “inadequate research and writing skills” because *Milkovich* applied only to cases involving media defendants or matters involving public interest.²⁸⁷ Applying the analysis from the Restatement (Second) of Torts Section 566, comment b, the court held the statements were not actionable because they were either true or non-actionable opinions.²⁸⁸

3. *Milkovich Completely Eliminated All Constitutional Protection of Opinions*

At least one court has taken the position that *Milkovich* completely eliminated all constitutional protection for opinions. In *Weissman v. Sri Lanka Curry House, Inc.*,²⁸⁹ the plaintiff sued her former employer for defamation after it informed a prospective employer, in response to a reference request, she was dishonest. The employer argued its characterization of the plaintiff was opinion and therefore protected under the First Amendment.²⁹⁰ The Minnesota Supreme Court held that because *Milkovich* rejected a separate constitutional privilege for opinion, and the Supreme Court has not extended constitutional protection to private speech, private concern and private plaintiff defamation cases must be analyzed under state law principles.²⁹¹ Under those principles, the employer’s accusation of dishonesty was held to be actionable.²⁹² The *Weisman* view is clearly in the minority. Indeed,

283. *Milkovich*, 497 U.S. at 19-20.

284. *Id.* at 19-20 n.6.

285. *Id.*

286. No. C6-90-571, 1990 WL 105956 (Minn. Ct. App. July 31, 1990).

287. *Id.* at * 3 n.1.

288. *Id.* at * 2.

289. 469 N.W.2d 471 (Minn. 1991).

290. *Id.* at 472.

291. *Id.* at 473.

292. *Id.*

other Minnesota private plaintiff workplace defamation cases decided after *Weisman* have refused to take such a limited view.²⁹³

B. *Labor Cases After Milkovich*

The federal labor law rationale for the protection of opinion or rhetorical hyperbole in the workplace was apparently unaffected by *Milkovich*. That protection had its genesis in the watershed case of *Old Dominion Branch No. 496, National Ass'n of Letter Carriers v. Austin*,²⁹⁴ and is based upon federal labor law's policy of encouraging debate between labor and management, even when the debate includes intemperate, abusive, and inaccurate statements.²⁹⁵ Federal labor law's protection of statements made in labor disputes is consistent with the "rhetorical hyperbole" protection recognized in *Milkovich*. Both protect statements that cannot be construed as representations of fact and promote public debate. However, courts apply the rhetorical hyperbole test far more liberally in the labor context, and generally with far less analysis.

1. *Federal Labor Law Protection for Rhetorical Hyperbole After Milkovich*

In *Beverly Hills Foodland, Inc. v. United Food and Commercial Workers Union, Local 655*,²⁹⁶ a grocery store sued a union based upon picket signs and copies of a handbill distributed by the union during attempts to organize the store's work force. The handbill, entitled "ARE THE SCALES OF JUSTICE BALANCED?," stated Foodland was treating its employees "unfairly" and invited customers to ask themselves whether the store was "discriminatory" in its hiring practices.²⁹⁷ Similarly, the picket signs proclaimed that Foodland was "unfair" to its black employees.

293. See *Hunt v. Univ. of Minn.*, 465 N.W.2d 88 (Minn. 1991); *Lund v. Chi. & Northwestern Transp. Co.*, 467 N.W.2d 366 (Minn. 1991).

294. 418 U.S. 264 (1974).

295. See *supra* notes 161-174 and accompanying text.

296. *Beverly Hills Foodland, Inc. v. United Food and Commercial Workers Union, Local 655*, 39 F.3d 191 (8th Cir. 1994).

297. *Id.* at 195 n.4. The handbill stated in its entirety:

It is the opinion of an alliance of Beverly Hills citizens that the employees of Beverly Hills Foodland are being treated unfairly at their jobs.

BEFORE YOU DO YOUR SHOPPING ASK YOURSELF AND BEVERLY HILLS FOODLAND THESE QUESTIONS

1. Is Beverly Hills Foodland being discriminatory in their hiring practices in the community? For answers to these questions call [Foodland's telephone number.] PLEASE DO NOT SHOP BEVERLY HILLS FOODLAND.

Id.

Although acknowledging that under *Milkovich* statements in the form of opinions “do not enjoy absolute protection as such,” the Eighth Circuit emphasized the “presence of a false statement of fact [was] a *sine qua non* for the maintenance of a state defamation action in the labor field.”²⁹⁸ Due to the fact the handbill did not contain a false statement of fact, the court held it was not defamatory in the context of the existing labor dispute.²⁹⁹ With respect to the picket signs, the court relied upon *Letter Carriers* and reasoned the statement was the sort of “loose language or undefined slogans that are part of the conventional give and take in our economic and political controversies.”³⁰⁰ The court held the term “unfair” was a term requiring subjective determination and was thus incapable of factual proof.³⁰¹

Although not an issue on appeal, the district court also considered whether copies of a second handbill distributed by the union were defamatory.³⁰² That handbill, entitled: “DON’T HELP FEED THE RAT,” stated Foodland was a “RAT EMPLOYER” and it “DESERVED TO BE CALLED A RAT.”³⁰³ The court reasoned the word “rat” could not be construed as a representation of fact, as no one reading the handbill would believe the owner of Foodland was actually a rodent.³⁰⁴ It further stated the term was used in a “loose, figurative sense” to describe the union’s strong opinion of Foodland’s employment practices and, as such, was protected under federal labor law.³⁰⁵

Similarly, in *Pease v. International Union of Operating Engineers, Local 150*,³⁰⁶ the union president was quoted in a local newspaper as stating that the company owner was “dealing with half a deck I think he’s crazy,” following the failure of the owner to sign a collective bargaining agreement.³⁰⁷ The owner sued the union and its president for slander.³⁰⁸ The Illinois Court of Appeals held the statements,

298. *Id.* at 195. In *Shepard v. Courtoise*, 115 F. Supp. 2d 1142, 1147 (E.D. Mo. 2000), the court cited *Milkovich* and *Letter Carriers* in concluding that “useless individual,” “sarcastic,” “cocky,” and “arrogant” were not actionable, but that “continues to abuse employees” could be a false assertion of fact and therefore was potentially actionable. *Id.*

299. *Beverly Hills Foodland*, 39 F.3d at 196.

300. *Id.*

301. *Id.*

302. *Beverly Hills Foodland Inc. v. United Food Workers*, 840 F. Supp. 697, 705 (E.D. Mo. 1993).

303. *Id.*

304. *Id.*

305. *Id.* (citing *Letter Carriers*, 418 U.S. at 284).

306. 567 N.E.2d 614 (Ill. App. Ct. 1991).

307. *Id.* at 616. The court held that because the union was attempting to organize the plaintiff’s construction company, the statements were made during a labor dispute. *Id.* at 620.

308. *Id.*

mere name-calling, were rhetorical hyperbole “employed only in a loose, figurative sense,” and, therefore, were not actionable.³⁰⁹

Even more sinister, severe statements made at a political rally and a so-called “town hall meeting” were found not to be actionable defamation in *Beverly Enterprises, Inc. v. Trump*.³¹⁰ The Third Circuit affirmed dismissal of an action brought by Beverly Enterprises, a national nursing home chain, and Donald L. Dotson, a company official and former Chairman of the National Labor Relations Board, against Rosemary Trump, President of Local 585 of the Service Employee International Union.³¹¹ A hostile relationship existed between the company and the union, whose locals represented many Beverly Enterprise employees.³¹²

Trump encountered Dotson at a 1996 political rally for the Dole/Kemp presidential campaign.³¹³ Trump accused Dotson of being a “criminal” and declared “you people at Beverly are all criminals.”³¹⁴ Trump refused to listen to Dotson’s response, instead charging him with “devoting [his] entire career to busting unions.”³¹⁵ Finally Trump shouted at Dotson: “I know your kind. You’re just part of that World War II generation that danced on the graves of Jews.”³¹⁶

The court found the “union busting” and “criminal” statements “undoubtedly offensive and distasteful,” but “mere insult.”³¹⁷ In reaching this conclusion, the Third Circuit cited *Bresler*³¹⁸ and the Restatement (Second) of Torts, Section 566, but curiously did not cite *Letter Carriers*³¹⁹ or *Milkovich*.³²⁰

The court also found the declaration, “you people at Beverly are all criminals” to be “reasonably understood as a vigorous and hyperbolic rebuke, but not a specific allegation of criminal wrongdoing.”³²¹ The court doubted “union-busting” was a criminal offense, but instead was “merely a vituperative outburst.”³²² Finally, the comment that Dot-

309. *Id.* at 619.

310. 182 F.3d 183 (3d Cir. 1999).

311. *Id.* at 186.

312. *Id.*

313. *Id.*

314. *Id.* at 187.

315. *Id.*

316. *Trump*, 182 F.3d at 187.

317. *Id.*

318. 398 U.S. 6 (1970).

319. 418 U.S. 264 (1974). The district court cited *Letter Carriers* to support the proposition that insults, especially in a heated labor dispute, are not capable of a defamatory construction. *Beverly Enterprises, Inc. v. Trump*, 1 F. Supp. 2d 489, 491 (W.D. Pa. 1998).

320. 497 U.S. 1 (1990).

321. *Trump*, 182 F.3d at 188.

322. *Id.*

son was “part of the . . . generation that danced on the graves of Jews” was not actionable because it did not amount to slander *per se* and the required special damages were not alleged.³²³

The appellate court also analyzed a statement made by Trump at a “town hall meeting” regarding Dotson’s departure from government service and employment by Beverly Enterprise.³²⁴ The court found the statement “incapable of a defamatory construction” and even if capable not slander *per se*, requiring allegations of special damages, which were absent.³²⁵

The rationale developed in labor dispute cases has also been extended to protect statements made in intra-union conflicts.³²⁶ For ex-

323. *Id.*

324. The following exchange took place between Congressman Ronald Klink and Trump:

CONGRESSMAN KLINK: Thank you. To Ms. Trump and Ms. Ford, just to clear up in my mind, why have we seen this problem exacerbated so much in Pennsylvania and we haven’t seen it at the other Beverly locations across the country? What transpired in Pennsylvania to make the situation here much worse?

MS. TRUMP: Well, this is one of the most unionized, heavily unionized Beverly states, if not the most unionized Beverly state. They operate approximately 42 facilities in Pennsylvania, 20 of which are organized and we have had a history of bargaining that went very well. *But quite frankly when President Clinton was elected and a new Chairman of the National Labor Relations [Board] was appointed, the former Chairman, Don Dotson, walked out of his federal government job and knocked on evidently the Beverly door and said, who knows more about all of your unfair labor practice cases in Beverly 1 and 2 than me since I have been supervising them on behalf of the government and besides which, I could really – really this is conjecture on my part, but I can only assume that because they went out and recruited the former general counsel for the National Right to Work Committee. They decided that you’re the largest chain of Beverly facilities, if we’re able to break unionism in Beverly chain, then, of course, it will have a ripple effect in the entire industry and the whole industry will operate nonunion.*

Id. at 189 (emphasis in original).

325. *Id.*

326. For other examples of how the protection for statements made during labor disputes has been expanded significantly, see *Wallulis v. Dymowski and Communications Workers of Am. Local 7901*, 895 P.2d 315 (Or. Ct. App. 1995) (union steward, at the request of several employees, informed Wallulis’s supervisor that he was always late to work, took long lunch breaks, was difficult to reach, and that these issues were affecting the work conditions of other employees; the court held that the statements occurred during a “labor dispute” and were thus non-actionable absent a showing of actual malice); *Bertsch v. Communications Workers of America*, 655 N.E.2d 243 (Ohio Ct. App. 1995) (holding that comments in a union newsletter about Bertsch’s inability to tell time or add and her sensitivity “regarding the size of her hind end,” were protected because they were directed to the employee in charge of payroll and arose in the context of a long running dispute between the company and the union concerning payroll calculation); and *Beverly Hills Foodland*, 39 F.3d at 191 (holding that a “labor dispute” existed for the purposes of invoking federal labor law’s protection of rhetorical hyperbole, where the local union was picketing and boycotting a business it had unsuccessfully tried to organize, even though it had terminated its organizational efforts). *But see Briggs & Stratton Corp. v. Nat’l Catholic Reporter Publ’g Co.*, 978 F. Supp. 1195 (E.D. Wis. 1997) (holding that statements published by a local newspaper concerning layoffs were not protected by federal labor law because *Letter Carriers* and *Linn* did not extend protection to third parties “unrelated to a purported labor dis-

ample, in *Wellman v. Fox*³²⁷ an unsuccessful candidate for a union position and three of his family members sued the incumbent business manager along with members of the union's executive board for libel, based upon statements made in an election flier.³²⁸ The flier alleged the candidate's father "was thrown off of the Union's executive board for obtaining funds fraudulently," characterized the candidate's family as a "gang," and connected the family to a known strikebreaker.³²⁹ The plaintiffs alleged those statements implied they were dishonest, crooked, and untrustworthy.³³⁰

The Nevada Supreme Court, affirming summary judgment for the defendants, reasoned that although the statements constituted factual assertions under *Milkovich*, they were not actionable because they were proven to be true.³³¹ With respect to certain secondary statements in the flier (the plaintiffs' actions were a "blemish in our proud history," and that "the story [plaintiffs] want you to believe and the truth of the matter are two very different things"), the court appeared to adopt a *Letter Carriers* analysis and held such exaggerated statements and overbroad generalizations made in the context of a union election would be interpreted by a reasonable person as mere rhetorical hyperbole and, thus, were not actionable.³³²

The protection of federal labor laws, however, is not without limits. In *San Antonio Community Hospital v. Southern California District Council of Carpenters*,³³³ the Ninth Circuit held a union banner proclaiming that a hospital "full of rats" was not protected labor dispute rhetoric.³³⁴ The hospital sought an injunction against the union, which was engaged in a dispute with a subcontractor employed by the hospital, but *not* with the hospital itself, seeking to enjoin the union from displaying a banner outside the hospital that stated "THIS MEDICAL FACILITY IS FULL OF RATS." Beneath that statement, in smaller letters, the banner stated "CARPENTERS L. U. 1506 HAS A DISPUTE WITH [BEST INT.] FOR FAILING TO PAY PREVAILING WAGES TO ITS WORKERS."³³⁵

pute."). In *Briggs* the paper had attempted to argue that its article was non-actionable opinion and "rhetorical hyperbole in the context of a labor dispute between Briggs & Stratton and its Milwaukee employees.

327. 825 P.2d 208 (Nev. 1992).

328. *Id.* at 209.

329. *Id.*

330. *Id.*

331. *Id.* at 211.

332. *Id.*

333. 125 F.3d 1230 (9th Cir. 1997).

334. *Id.* at 1235-37.

335. *Id.* at 1233.

The union argued the term “rat” was protected speech in the context of a labor dispute and the banner merely expressed its opinion that Best Interiors was a “rat contractor” for failing to pay its workers the prevailing wage.³³⁶ Recognizing federal labor law provides protection for the use of “intemperate, abusive, or insulting language” when such “rhetoric” is used to make a point in a labor dispute, the court cautioned that such protection was not unbridled.³³⁷ In affirming the preliminary injunction for the hospital, the court held the banner was not rhetorical hyperbole entitled to the protections of *Letter Carriers*, but “unprotected fraudulent misrepresentations of fact.”³³⁸

Interestingly, the court distinguished the Eighth Circuit’s decision in *Beverly Hills Foodland*,³³⁹ where a union handbill referring to Foodland as a “rat employer” was held to be protected by federal labor law. The court reasoned that in *Beverly Hills Foodland*, no one would believe the owner of the Foodland was actually a rodent. However, in *San Antonio Community Hospital*, many readers would be misled into believing the hospital was infested with rodents.

The contrasting results of these two cases illustrate the crucial role that context can play in an analysis. Words that may be held to be merely loose, figurative language in one context may be actionable in another if they can reasonably be interpreted as fact.

2. *Federal Labor Law Considered as Part of a Totality of the Circumstances Analysis*

Some courts confronted with defamation actions based upon statements made in the course of labor disputes recognize a federal labor law protection for rhetorical hyperbole, but do so as part of a totality of the circumstances analysis. These cases generally follow some variation of the *Ollman* four-factor test³⁴⁰ and consider federal labor law protection as part of the specific context and broader social context parts of the analysis.

In *Henry v. National Ass’n of Air Traffic Specialists, Inc.*,³⁴¹ former union officials brought a defamation action against the union. The alleged libel included three letters published by the union’s board of directors and disseminated to all 1700 union members during a bitter

336. *Id.* at 1235.

337. *Id.*

338. *Id.* at 1237.

339. 39 F.3d 191 (8th Cir. 1994).

340. *See supra* notes 153-156 and accompanying text.

341. *Henry v. Nat’l Ass’n of Air Traffic Specialists*, 836 F. Supp. 1204 (D. Md. 1993).

dispute for union control.³⁴² One of the letters contained an oft-quoted statement by Lord Acton of the British Parliament: “Power corrupts, and absolute power corrupts absolutely.”³⁴³ The plaintiffs claimed the defendants stated, implicitly and explicitly, that they were corrupt and incompetent, and they intentionally mismanaged union affairs and embezzled union funds.³⁴⁴

Although the federal district court in Maryland recognized *Milkovich* had abolished any “wholesale defamation exemption for anything that might be labeled ‘opinion,’” it applied pre-*Milkovich* law and analyzed the case in terms of the distinction between fact and opinion³⁴⁵ using a modified version of the *Ollman* four-factor test set out in *Potomac Valve & Fitting Co. v. Crawford Fitting Co.*³⁴⁶ Under this analysis, the threshold inquiry is whether the challenged statement can objectively be characterized as true or false.³⁴⁷ If the statement cannot be so characterized, it is not actionable. If the statement can be characterized as either true or false, the three remaining *Ollman* factors must be considered: the author’s choice of words, the context of the challenged statement within the writing as a whole, and the broader social context that informs the statement.³⁴⁸ Under the Fourth Circuit’s analysis, if a verifiable statement satisfies any one of the remaining three *Ollman* factors such that a reasonable person would recognize its “weakly substantiated,” or “subjective” character, then the statement qualifies as protected opinion.³⁴⁹

342. *Id.* at 1206. The letters, written by the union’s board of directors, allegedly defamed the union’s Executive Director and the Executive Vice President who were the plaintiffs. *Id.* The board wrote and published the letters shortly after the board removed the plaintiffs from their appointed positions. *Id.*

343. *Id.* at 1214.

344. *Id.* at 1211.

345. *Henry*, 836 F. Supp. at 1214-15 (quoting *Milkovich*, 497 U.S. at 18). The court also noted that under *Milkovich*, if a statement is not provable as false or is not reasonably interpretable as stating facts, it cannot form the basis of defamation. *Id.* at 1214 (citing *Milkovich*, 497 U.S. at 19-20). Thus, under *Milkovich*, only an “objectively verifiable event is actionable.” *Id.* at 1214 (citing *Milkovich*, 497 U.S. at 22). The court concluded that “although opinions are not absolutely privileged, the basic distinction between fact and opinion appears to have survived *Milkovich*.” *Id.* at 1214-15.

346. 829 F.2d 1280 (4th Cir. 1987).

347. *Id.* at 1288.

348. *Blue Ridge Bank v. Veribanc, Inc.*, 866 F.2d 681, 685 (4th Cir. 1989).

349. *Potomac Valve*, 829 F.2d at 1288. See *Gilbrook v. City of Westminster*, 177 F.3d 839, 862-63 (9th Cir. 1999), cert. denied, 120 S. Ct. 614 (1999) (analyzing the comparison of a union president to “Jimmy Hoffa,” via a three-part totality of the circumstances test, and citing the *Letter Carriers* decision without discussing the impact of labor law).

The district court in *Henry* concluded the statements about the corrupting influence of power³⁵⁰ were merely “loose, figurative, or hyperbolic language” that were not subject to objective characterization as either true or false and thus, not actionable.³⁵¹ It found the remaining statements referring to incompetence, mismanagement, and embezzlement could be objectively characterized as either true or false, thus satisfying the *Potomac Valve* threshold question of verifiability.³⁵² Upon further examination of the language, specific context, and broader social context of the statements, the court concluded that the statements were protected opinions made within the broader social context of a labor-management dispute.³⁵³

In *Smith v. Papp*,³⁵⁴ the plaintiff, a candidate in an election for union office, sued a union member for distributing an allegedly defamatory campaign flier referring to the plaintiff as “Danny the Company Man” and “Danny No-Balls,”³⁵⁵ and including statements that the plaintiff had accepted an all-expense paid trip to Portugal from management and had secret meetings with management during prior contract negotiations.³⁵⁶ In addition, it attributed the following statements to one of the plaintiff’s former constituents: “Danny Smith wouldn’t make a pimple on a Union man’s ass, but he makes the best company man any management could hope to have in the Union.”³⁵⁷

350. The statements appeared in two letters, containing almost identical sentences about corruption. The statements read: “Lord Acton, of the British Parliament two hundred years ago said, ‘Power corrupts, and absolute power corrupts absolutely!’ Perhaps that is what happened to [plaintiff]” and “There is a saying from the British Parliament that is over two hundred years old which states: ‘Power corrupts, and absolute power corrupts absolutely.’ perhaps that is what happened to both [plaintiffs].” *Henry*, 836 F. Supp. at 1215.

351. *Id.* at 1216 (citing *Milkovich*, 497 U.S. at 21).

352. *Id.* at 1217.

353. *Id.* at 1218-19.

354. 683 N.E.2d 384 (Ohio Ct. App. 1996).

355. *Id.* at app. at 391.

356. *Id.*

357. The Flier read, in its entirety:

WHO THE HELL IS DANNY SMITH?

I’ve been hearing this question more and more lately, and it deserves an answer. Since a good number of us worked at the Euclid plant where Smith comes from, we are fairly familiar with his record:

1) He is the ex-shop chairman who earned 2 (two!) well deserved nicknames during his less than illustrious career: “Danny the company man” and “Danny no-balls.”

2) He is the ex-Union official I heard making a speech to the members one day while standing next to the plant manager, that went something like this: “You guys better make more pieces, because the company needs more production to keep your jobs, and if you don’t cut down on your breaks and increase production, you will start getting some reprimands!”

3) He is the guy who accepted an all expense paid vacation to Portugal to accompany Euclid plant management. Some said they took Danny along as a boot [sic] licker

because he fit the role so well, but I'm sure that was just a rumor. At the time, management was considering places to transfer the work from Euclid, and visited some "slave" shops to learn how to squeeze the blood out of people until then, to pay for it. They needed Danny's assistance to succeed!

4) He is the ex-official who reopened the Local contract about 3-4 months before its natural expiration in 1990, and when I asked him why, he whimpered like a little mouse: "Well, the company wanted it, they needed some concessions."

5) He is the ex-shop chairman who led both negotiations for all the concessions during the two Local contract talks in 1990, and I was told by some members of his former negotiating team who were in the know, that he had secret meetings with management in and out of the plant by himself and behind their back. (sic) Some of the results of his negotiating abilities:

A. Brought into the plant a Non-Union leather company to set up a crib and to eliminate the job of material handlers. Gave away the 23 min. breaktime and reduced it to 12 min.

B. Agreed to prohibit anyone bringing any personal items onto the shop floor, and as a consequence a man got a D.L.O. for reading his Bible by his machine during his lunchtime!

6) He is the ex-Union official I heard at the school auditorium during ratification meeting threaten the membership with the plant closing down if they don't vote for the concessions he negotiated. These concessions paid the company's expenses of moving jobs from Euclid to Mexico and Canada. (but Smith was too stupid to see that even when it was explained to him in detail!)

7) He is the ex-shop chairman who appointed his wife as a committeeman (or woman) when a vacancy occurred, but wouldn't you know it, she turned out to have more balls than he did!

8) He is the ex-official whose actions and/or inactions got the working conditions so outrageously awful, that he couldn't even stand it any longer it seems, so he disappeared from the Euclid plant on a Friday, and by the wave of the company's magic wand, he reappeared in this plant on a Monday. Slick, huh?

9) He is the guy whose qualification as a Union official was best described to me by one of his former constituents who always tells it like it is, when he said: "Danny Smith wouldn't make a pimple on a Union man's ass, but he makes the best company man any management could hope to have in the Union." Amen!!

10) He is also the candidate for Alternate in our Dist. #2, who recently made statements to the effect, that winning this election would assure him first shift, and lot of overtime. What a piss-poor reason to run for Union office!!!

11) And finally, he is the ex-shop chairman I was warned not to criticize openly or write anything about (I listen so well!), (because he can't stand criticism and he likes to file lawsuits so much, he even filed one against his own Union at Euclid!) Of course, he didn't get anywhere with it, but that's not the point. It seems he's never been informed, that any idiot can file a lawsuit for anything under the sun. It only takes about \$30, but winning it is a different ballgame. It's also obvious, that he never heard of the Taft-Hartley Act, or the N.L.R.B. Even a half-baked Union official is familiar with their laws and rules on Union affairs, elections, campaigns, et. And how about Truman's advice: "If you can't stand the heat, keep your ass the hell out of the kitchen!" (sic)

12) To be sure, and to be fair, there are many former U.A.W. officers in this plant from other Locals who served their constituents with competence and distinction. Danny Smith is just most definitely NOT one of them!!

So, it is your responsibility to yourself to find out about the candidates before the election, and if you need verification of the above, feel free to call the Euclid Local (what's left of it) or ask any former Euclid member.

/s/ Ted Papp

Ted Papp, Dept. # 43

The Ohio Court of Appeals found the defendant's reliance on the federal Labor Management Reporting and Disclosure Act misplaced since the Act applied to a union's reprisal against its members for their speech, not to a dispute between two members.³⁵⁸

Without analyzing the holdings of *Milkovich* and *Letter Carriers*, the court examined whether the flier was protectable opinion under the Ohio Constitution using a four-part "totality of the circumstances" test, which considered "the specific language at issue, whether the statement [was] verifiable, the general context of the statement, and the broader context in which the statement appeared."³⁵⁹

Affirming a jury verdict for the plaintiff, the court concluded it was "inconceivable that any reasonable reader would construe the general context of the information" as anything other than fact.³⁶⁰ The author of the flier apparently claimed firsthand knowledge of several statements, and implied firsthand knowledge of others.³⁶¹ The general tenor and overall nature of the flier was of factual reporting, not subjective opinion.³⁶² Thus, the Ohio appellate court found the communication was not protected opinion.³⁶³

3. *Milkovich Applied in the Context of a Labor Dispute*

One court, under a convoluted fact pattern, found *Linn* did not apply to a particular union dispute, applied a straightforward *Milkovich* analysis to the controversy, and found a series of statements fell outside of any protection. In *Batson v. Shiflett*,³⁶⁴ a bitter dispute arose between a national union and its local regarding the terms of a new collective bargaining agreement negotiated at a shipyard. During the course of the dispute, the national union repudiated the contract and both the local and the employer filed unfair labor practice charges.³⁶⁵ When the National Labor Relations Board (NLRB) ruled in favor of the national union and voided the contract, the presidents

Formerly of Euclid

P.S. Wonder why this is printed on yellow? When it comes to standing up for your best interest, it's the closest match for the streak on Danny Smith's back!!!

Id.

358. *Id.* at 391. See Labor Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(2) (2000).

359. *Smith*, 683 N.E.2d at 390 (quoting *Vail v. Plain Dealer Publ'g Co.*, 649 N.E.2d 182, 186 (Ohio 1995)).

360. *Id.*

361. *Id.*

362. *Id.* at 391.

363. *Id.*

364. *Batson v. Shiflett*, 602 A.2d 1191 (Md. 1992).

365. *Id.* at 1196.

of both the national and local unions began leaf-letting campaigns.³⁶⁶ The leaflets concerning Shiflett, the local union president, accused him and his supporters of “crimes of perjury, falsification of records” and violations of the union’s rules.³⁶⁷ The facts of the case were further complicated by allegations of unrelated financial improprieties by Shiflett.³⁶⁸ Amidst accusations of being a “crook” and a “thief,” Shiflett lost the next election.³⁶⁹ He brought suit for defamation against his accusers, and recovered \$730,000 in punitive and compensatory damages.³⁷⁰

With respect to the issue of the viability of the claim of defamation, the Maryland Court of Appeals interpreted *Linn* as being a preemption case.³⁷¹ It found *Linn* did not apply to “the intentional circulation of defamatory materials,” and therefore held the case was to be decided under the *New York Times* standards.³⁷² The Court then applied *Milkovich* to the question of whether the statements were expressions of opinion, and concluded they could not be categorized as “rhetorical hyperbole.”³⁷³ It found that since the statements were “capable of a defamatory meaning,” they were actionable.³⁷⁴ While arising out of a complex fact pattern, the decision in *Shiflett* demonstrated how statements made in an intra-union dispute may avoid application of common law, statutory, and constitutional protections.

V. CRITICISM AND MODEST PROPOSALS

The law of defamation functions poorly in the workplace. It is a patchwork of antiquated and abstract concepts whose effect has only been softened by the hit or miss application of common law and constitutional defenses. The present law fails to recognize the importance of communication in the workplace and perversely rewards speakers who use the inflammatory rhetoric public policy now so strongly frowned upon. The courts’ difficulty in grappling with the distinction between fact and opinion has only highlighted the law’s weaknesses.

366. *Id.* at 1196-97.

367. *Id.* at 1196.

368. *Id.* at 1196-97.

369. *Id.* at 1197.

370. *Batson*, 602 A.2d at 1198.

371. *Id.* at 1204.

372. *Id.* at 1205.

373. *Id.* at 1211-12.

374. *Id.* at 1213.

A. *The Milkovich Analysis Has Proven to be of No Utility*

Before the Supreme Court's decision in *Milkovich*, many jurisdictions held a statement of opinion could not be defamatory, thus insulating statements of opinion from liability.³⁷⁵ Dictum in *Gertz* was cited as acknowledging a separate constitutional privilege for opinion, which led to a fact/opinion distinction.³⁷⁶ The Court in *Milkovich* declined to create what it described as an "artificial dichotomy" between opinion and fact.³⁷⁷ Instead, the Court held that statements of opinion have First Amendment protection only to the extent they have no provably false factual connotation, regardless of whether they are qualified as statements of opinion.³⁷⁸

Theoretically, *Milkovich's* mechanical analysis should have substantially modified the protection for statements of opinion. It has not. Most courts that have purported to apply *Milkovich* have employed the same tests previously used to distinguish fact from opinion.³⁷⁹ Lower courts seem unable to abandon public and social context as critical factors in the analysis, even if the Supreme Court did not consider context as part of its analysis in *Milkovich*.³⁸⁰ Similarly, many lower courts apply the *Milkovich* "provable as false" test to non-media defendants, even though the Supreme Court reserved judgment on the test's applicability to cases involving non-media defendants such as employers and labor unions.³⁸¹ The *Milkovich* analysis is of so little utility that lower courts have paid it only lip service, relying instead on tests that are themselves only slightly more helpful.

B. *The Law of Defamation Disserves Everyone in the Workplace*

Communication is essential to the workplace. Supervisors must direct, critique, and redirect employee's performance. Effective management requires the continual assessment of an employee's strengths and weaknesses and the communication of those traits to others. Few businesses could function without the communication of management's assessment of job interviews, an employee's performance in evaluations, and in connection with decisions as to compensation, pro-

375. See *supra* note 200.

376. *Gertz*, 418 U.S. at 323; see SACK, *supra* note 35, at 4-10-4-11.

377. *Milkovich*, 497 U.S. at 20.

378. *Id.*

379. See SACK *supra* note 35, at 4-18 (stating that "courts now rely on the pre-*Milkovich* opinion/fact criteria to decide post-*Milkovich*, what is protected based on whether it is or is not provably false.").

380. *Id.*

381. *Id.* at § 4.2.4.3 at 4-21.

motions, demotions, discipline, transfers, or in other judgments employers must make on a daily basis.

Employees and unions also rely on workplace communication. Employees must respond to management directives and must be free to express legitimate concerns about those that may be inappropriate. A union could not exist without the ability to communicate dissatisfaction over management's actions and criticize those of its members who wish to break ranks.

The law of defamation, developed largely with other contexts in mind, does not treat workplace communication in a realistic fashion. The legal concepts that may apply to even the most routine workplace statements would prove daunting to a trained lawyer, let alone to a front-line supervisor or middle manager. Phrases such as "opinion," "statements of fact," and "malice" have different, and oftentimes counterintuitive, definitions that would bewilder the vast majority of supervisors.

The law of defamation also functions badly in the workplace because it requires fine distinctions unappreciated by laymen. A slight difference in phraseology or context may subject an otherwise absolutely protected statement to potentially multi-million dollar liability. Jurisdictions vary widely in the tests they use and in the means by which they apply even identical tests.³⁸² There are no bright lines and no clear guidance for those who use the workplace as a forum to insure they may not be held liable for their own words. Of the tests used, the *Ollman* analysis is probably the most suitable as it considers the greatest number of factors germane to the running of a modern business. But even that test fails to take into account the myriad of other important considerations, rendering it far less predictable and of far less utility than it otherwise might have.

At the same time, the law displays little sensitivity to the fact that workplaces themselves vary greatly. The same tests apply without regard to the sophistication of the individual, from a front-line supervisor to the chief executive officer of the company. It recognizes no difference based upon the supervisor's education, background, or experience. It applies the same rules to industrial and manufacturing settings and professional or office environments. The law only crudely observes how heated a workplace dispute may be. The law, and the doctrine of opinion in particular, only dimly acknowledge the critical difference between objective and subjective observations.

382. See *supra* notes 217-374 and accompanying text.

Ironically, the current law of opinion and rhetorical hyperbole serves to punish employers that use objective, even-tempered language while rewarding those that use inflammatory and divisive rhetoric. Although many courts have stated that a goal of federal labor policy is to encourage the peaceful resolution of workplace results,³⁸³ the current law concerning opinion insulates the speaker from liability if a sufficient amount of invective and rhetoric is used. If an employer, under today's law, were to state that an employee is a thief, it may well be subjected to liability.³⁸⁴ If, however, the employer surrounds that accusation with name-calling, profanity, and spurious insults, it may not be liable.³⁸⁵ The shallow, biting rebuke is favored over the in-depth, reasoned critique. The courts' current interpretation of the doctrine of opinion encourages the very type of conduct, which is most corrosive in the workplace environment.

The courts' most recent interpretations of the protection for opinion also run counter to public policy in other areas. Through sexual harassment lawsuits and similar legislative and court-related causes of action, employers have been encouraged to require more civility in the workplace.³⁸⁶ Certain types of language, particularly those that insult, or degrade specific groups of people, have been recognized as being contrary to public policy.³⁸⁷ The current law of defamation, by contrast, encourages employers to use exaggerated and contemptuous language in virtually every context.³⁸⁸ Between the law of defamation and the law of sexual, or other workplace harassment, employers are now in the curious position of being better off using caustic, insulting language, including very personal insults, so long as they do not insult the employee based upon the employer's gender, race, or other protected trait.³⁸⁹

The tests applied by the courts have done little to ameliorate the shortfalls of the law of defamation. The vast majority of the tests ultimately prove hollow, leading the courts to adopt a result-oriented jurisprudence and tests that provide no certainty. If an employer, for example, states it does not "like" an employee, that assessment should

383. See, e.g., *United Steelworkers of Am. v. Warrior & Golf Navigation Co.*, 363 U.S. 574, 578 (1960). This policy is also embodied in Section 1 of the NLRA, 29 U.S.C. § 151 (2002).

384. In fact, such an accusation would constitute slander *per se*. See *RESTATEMENT*, *supra* note 7, at § 571.

385. See *supra* notes 296-374 and accompanying text.

386. See, e.g., *Faragher v. Boca Raton*, 118 S. Ct. 2275 (1998).

387. See, e.g., *Aguilar v. Avis Rent A Car Sys.*, 980 P.2d 846 (Cal. Ct. App. 1999), *cert. denied*, 529 U.S. 1138 (2000).

388. See *supra* note 385 and accompanying text.

389. Cf. *Rambo v. Cohen*, 587 N.E.2d 140, 145 (Ind. Ct. App. 1992) (finding "horse's butt" merely obnoxious, but "anti-semitic" actionable).

not lead to any liability. Yet, potentially colorable arguments can be made that the statement is actionable under virtually any court standard. For example, one court may find the statement “implies” the existence of defamatory facts and if the employer did not like the employee, there must be a reason for it.³⁹⁰ Thus, that court may hold the statement to be one of “mixed” opinion. Another court may reach the more sensible conclusion that an employer is free to like or dislike an employee, and its statement of opinion should not be actionable, either as “pure opinion,” or under the *Ollman* four-part test.³⁹¹

The doctrine of rhetorical hyperbole creates the paradox that while false statements may be actionable, extreme vituperative language is not. It is unclear from the courts’ analysis whether rhetorical hyperbole is not actionable because it is not provable as false, cannot be reasonably assumed as fact, or because there is some constitutional protection. Constitutional protection could have far-reaching ramifications.³⁹²

Even putting aside the inadequacy of the tests applied by the various courts, they are simply too unwieldy to provide any real guidance in the workplace. A typical employer may make dozens, hundreds, or even thousands of communications regarding its employees on a typical business day. To subject each of these statements to scrutiny under one or more multi-part tests is to stifle that language and to discourage the employer from evaluating its employees and running its operations in the most efficient manner. Given the importance of evaluating employees, improving their performance, and coordinating business operations, communications about employees should not be discouraged through cumbersome, unpredictable tests.

While the law of opinion poorly serves employers in the workplace, it also poorly serves employees and their representatives. The same uncertainty that afflicts employers also burdens employees.³⁹³ Em-

390. See *supra* notes 249-255 and accompanying text.

391. Even then, a determined plaintiff might attempt to argue that the statement was provable as false (perhaps by showing he is likable, or that the supervisor really did like him, but acted out of some ulterior motive) or to attack the defense based upon the specific or broader social context. See *Ollman*, 750 F.2d at 979-83. A whole different set of arguments might be made if the statement were made during a labor dispute. See *supra* notes 299-374 and accompanying text.

392. If rhetorical hyperbole is indeed constitutionally protected, that defense could also become available in the most egregious harassment cases involving verbal misconduct. This result, however, would be a natural product of the *Milkovich* Court’s analysis, finding First Amendment protection for statements with no provably false factual connotations.

393. The authors of this article agree with Justice Black’s dissent in *Linn v. United Plant Guard Workers*, 383 U.S. 53, 67 (1966), where he argued that the threat of defamation actions and punitive damages arising out of labor disputes “tosses a monkey wrench into the collective bargaining machinery Congress set up to try to settle labor disputes.” *Id.*

ployees who prefer not to take sides in labor disputes have become ready targets for insults and inflammatory rhetoric from those who may disagree with them, and who can voice the most pointed, false, and insulting comments with impunity. Employees who are subjected to the worst and most insulting language from their employers are left without a remedy, yet those who receive relatively mild criticism may find the doors of the courthouse open for recovery.³⁹⁴

Similarly, a union serves a variety of functions, ranging from routine contract administration (the least contentious), to grievance resolution (of moderate friction), to organizing drives and strike activity (where emotions run higher). A very different standard may apply depending upon the tenor of the relationship with the employer and the precise function being performed by the union. It is unclear what standard would apply to a purely intra-union dispute, such as an internal election, over a matter concerning the union's approach to management. Defamation claims between unions and their own members threaten the cohesiveness on which their strength relies.

The continued growth of electronic communications and the Internet will provide every employee, employer, and labor organization with a far-reaching, and sometimes public, forum to discuss work-related issues and to vent their feelings.³⁹⁵ This heightened ability to communicate will further highlight the law's inadequacies. A website may be a cost-effective means for an employee, or group of employees, to express dissatisfaction over workplace issues.³⁹⁶ For many em-

394. See *supra* notes 214-374 and accompanying text.

395. Employees are using electronic communications for their own amusement and to provide negative information or statements regarding their employers. See *California Judge Orders Former Intel Worker to Stop Mass E-Mailings Critical of Company*, INDIVIDUAL EMP. RTS. REP. (BNA) Jan. 12, 1999, at 1; *Focus on Internet Sites*, INDIVIDUAL EMP. RTS. REP. (BNA) June 29, 1999, at 12; Guernsey, *The Web: New Ticket to a Pink Slip*, N.Y. TIMES, Dec. 16, 1999, at D1; Cohen, *Click Here For a Hot Rumor About Your Boss*, TIME, Sept. 11, 2000, at 48; Schwartz, *Corporate Case in Ohio Raises Questions on Internet Anonymity*, N.Y. TIMES, Oct. 17, 2000, at C1; *Enron Fired Workers for Complaining Online*, N.Y. TIMES, Jan. 21, 2002, at C1. See also *Smyth v. Pillsbury Co.*, 914 F. Supp. 97 (E.D. Pa. 1996) (stating employee was discharged for sending E-mails containing threats to "kill the back-stabbing bastards" in sales management and for referring to the company's Christmas party as the "Jim Jones Kool-Aid affair"); *You've Got Inappropriate Mail*, N.Y. TIMES, Apr. 5, 2000, at C1.

396. For an interesting example of employees using electronic communications to express their views, see *Blakey v. Cont'l Airlines*, 751 A.2d 538 (N.J. 2000). In that case, a group of individual Continental pilots created a forum on a computer bulletin board that was critical of a female Continental pilot who had recovered \$250,000.00 from the airline in a sexual harassment lawsuit over pornography left in the airplane cockpits. The Supreme Court of New Jersey reversed and remanded, holding that while employers are not required to monitor their employees' private communications, employers do have a duty to stop co-employee harassment the employer knows or has reason to know is taking place in the workplace and "in settings that are related to the workplace." *Id.* at 552. See also *Intel Corp. v. Hamidi*, 43 P.3d 537 (Cal. App. Ct.

ployers, e-mail is now an essential component of communication on workplace issues. The imposition of antiquated legal concepts to this new technology threatens its tremendous capability to give each speaker a strong voice and to speed the pace and efficiency of communication.³⁹⁷

Certainly, no one would advocate the complete abolition of the law of defamation, or the imposition of an absolute privilege for any statements that might take place at work. Similarly, statements should not be protected simply because they might be labeled as opinions by the speaker. Employees do have a legitimate interest in protecting their reputations, and protection should exist in those instances in which an employer manufactures derogatory facts about an employee. As set forth above, and reflected in the cases decided by the courts, the current law of opinion and defamation as a whole does a poor job of balancing those interests.

C. Steps To Reform the Law of Opinion in the Workplace

1. Changes to the Law of Defamation Generally

To resolve this quandary, or at least to lessen the impact of the shortcomings, courts should reformulate the protection for opinion on a common law, rather than a constitutional, basis. First, there should be no liability for an employer's subjective opinion of an employee's performance. An employer should be free to state that an employee is a good employee or a bad employee or whether, in the employer's judgment, the employee is doing a good or bad job. At a bare minimum, the qualified privilege should apply to any subjective evaluation of the employee's performance.

Second, to the extent they have not already done so, courts should adopt the definition of malice found in *New York Times Co. v. Sulli-*

2002) (granting summary judgment for employer in case alleging that disgruntled employee "spammed" the company with over 180,000 E-mail messages); Cleary, Gottlieb, Steen & Hamilton v. Legal Serv. Staff Ass'n, 837 F. Supp. 582 (S.D.N.Y. 1993) (court enjoined campaign by union to send faxes to law firm containing shaded cartoons that slowed and blurred its fax machines); Timekeeping Sys., Inc. v. Leinweber, 323 N.L.R.B. 244 (1997) (employee who was terminated for sending e-mail to other employees critical of company vacation policy engaged in protected concerted activity under NLRA); McCarthy, *Your Manager's Policy on Employee's E-Mail May Have a Weak Spot*, THE WALL ST. J., Apr. 25, 2000, at 1. Obviously, some measures are necessary to regulate the place, manner and content of communications to prevent the disruption of business and other legitimate activities by inappropriate use of electronic communications. See, e.g., Wash. Adventist Hosp., 291 N.L.R.B. 95 (1988) (holding that disruptive use of e-mail system not protected activity under NLRA).

397. See generally, Gregory V. Mersol, *Employer/Employee Rights On The Information Highway — Is There A Right Of Privacy?*, CYBERSPACE LAW., June 1999.

van to defeat a qualified privilege.³⁹⁸ In most cases in which an employer has discharged an employee, such as for theft, vandalism, insubordination, or other serious employee misconduct, it is likely feelings will run high, and the traditional definition of malice³⁹⁹ will prove of limited utility. The *New York Times* standard, which looks at the basis for the statement, makes much more sense in this context since it emphasizes the employer's state of mind and not simply whether some ill-will may exist between the parties.

Finally, courts should abolish presumed damages. If an employer has made an unprotected statement damaging an employee's reputation, the employee should be required to prove what damages occurred. Over the past fifty years, the courts have recognized new causes of action based on an employee's ability, through expert testimony and otherwise, to prove damages with at least some specificity.⁴⁰⁰ While new claims and damages have been recognized, presumed damages, which rely upon the alleged difficulty in proving damages, have been left untouched. Courts should abolish the concept of libel *per se* or slander *per se*, and the resulting presumed damages.

2. *Modifications Relating to Protection for Opinions*

Courts should also consider reorienting the opinion defense to better suit the unique needs of the workplace. First, rather than starting with a "pure" or "mixed" opinion-analysis, courts should take into account whether the statement is primarily subjective or objective. If the statement is primarily subjective, it should not be actionable, or at a very minimum, a qualified privilege should apply.

Second, courts should look at the context in which the statement is made, a factor already considered to some degree in the *Ollman* analysis. Purely intra-corporate communication, such as communication through the chain of command, should not be considered actionable at all. Courts should look at the audience and its interest in the employer's assessment of the employee's performance or conduct.

Third, courts should look to cautionary and other language used by the employer. Phrases such as "in my opinion," or "I think that"

398. Some courts have already adopted the definition of malice from *New York Times*. See *Hahn v. Kotten*, 331 N.E.2d 713 (Ohio 1975).

399. See *KEETON ET AL.*, *supra* note 9, § 115, at 833-35. See also *Barker v. Kimberly-Clark Corp.*, 524 S.E.2d 821 (N.C. App. 2000) (claim of employee discharged for accessing pornographic website allowed to go to trial to resolve malice issues).

400. See, e.g., *Sinn v. Burd*, 404 A.2d 72 (Pa. 1979); *Leong v. Takasaki*, 520 P.2d 758 (Pa. 1974); *Molien v. Kaiser Found. Hosp.*, 606 P.2d 813 (Cal. 1980).

should be given weight in determining whether, in fact, a statement is one of fact or opinion.⁴⁰¹ Under the current state of the law, the speaker is rewarded by brashly making conclusions in colorful, caustic, and derogatory terms.⁴⁰² By focusing on the cautionary language, courts could more profitably look to conduct that public policy should promote. An employer that quietly posits its opinion, and labels it as such, should be given greater protection than the proverbial loose cannon.

Fourth, courts should look to the environment in which the statement is being made.⁴⁰³ Instead of looking to the use of rhetorical hyperbole, however, courts should focus upon whether, in a particular situation, there is competition for ideas. Labor disputes, for all of their impolitic language, ultimately come down to a competition for ideas. Similarly, in the context of advocacy or debate within an employment setting, words and thoughts should be given greater protection. That protection should not turn upon the strength of the language used, but rather, upon whether, in that context, one party has an opportunity to state its beliefs, even if less effectively, in an effort to persuade others.

Finally, courts should look to whether the employee has a voice in the context. An employee who is actively seeking elected union office, and has thrust himself into the fray of campaign debate, should be given less protection than one who quietly does her job. Similarly, an employee attempting to gain the support of others in dispute with an employer should not be able to claim defamation if the employer responds.

3. *Legislative Solutions*

From a legislative standpoint, another limited alternative should be to create a set means by which an employer can state the reason for the employee's discharge coupled with the employee's response. Ideally, liability for statements made in such a context should be tightly proscribed with the employer and employee largely free to state their beliefs as to the reasons for the employee's discharge. While some legislatures have attempted to adopt service letter provisions,⁴⁰⁴ those

401. While cautionary language should be given weight, its mere use by itself should not be dispositive.

402. See *supra* notes 294-374 and accompanying text.

403. This is a different facet of the third and fourth elements of the *Ollman* test, which looked at the immediate and broader social context. *Ollman*, 750 F.2d at 979-83.

404. See, e.g., MO. ANN. STAT. § 290.140 (2001); IND. CODE § 22-6-3-1 (2002); OKLA. STAT. TIT. 40. § 171 (2002) (applying only to certain employers).

statutes do not go sufficiently far; failing to insulate the employer for derogatory opinions which it believes to be true, yet providing the employee with little opportunity to formally voice his or her own position.

VI. CONCLUSION

The existing protection for opinion, and the law of defamation as a whole, function poorly in the workplace, encourage conduct contrary to public policy, and lack the predictability, which employers, employees, and unions should rightfully expect. The Supreme Court's decision in *Milkovich* has clouded the analysis, and added nothing of significance to workplace defamation law. The sheer cost of defamation suits to employers, unions, and employees and the need to improve workplace communication militate strongly toward providing greater certainty and protection in that context. Therefore, courts should modify the law of opinion to provide more predictable and more consistent results, and to reward civil discourse over wild-eyed rhetoric.