

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>GLADYS MONAHAN,</b>	)	
	)	
<i>Plaintiff</i>	)	
	)	
<b>v.</b>	)	<b>Docket No. 98-183-P-H</b>
	)	
<b>CHAPMAN &amp; DRAKE, et al.,</b>	)	
	)	
<i>Defendants</i>	)	

**MEMORANDUM DECISION ON PLAINTIFF’S MOTION FOR LEAVE  
TO AMEND COMPLAINT**

The plaintiff has moved for leave to amend her complaint in this action to add two counts, one asserting defamation through compelled self-publication and one seeking punitive damages. The motion was filed on January 27, 1999, the deadline for filing such motions. Scheduling Order (Docket No. 40) at 1. At that time, the deadline for completion of discovery was April 14, 1999, but that deadline has since been extended to May 1, 1999. Endorsement, Plaintiff’s Unopposed Motion for Extension of Discovery Deadline (Docket No. 49) at 1. This action is scheduled for trial in July 1999. Scheduling Order at 2. The initial complaint was filed in this court on May 18, 1998. The defendants oppose the motion on the grounds of undue delay resulting in prejudice and futility of the proposed amendment. I grant the motion.

**I. Applicable Legal Standards**

Fed. R. Civ. P. 15(a) provides in relevant part that in these procedural circumstances a party

may amend a pleading “only by leave of court . . . and leave shall be freely given when justice so requires.” Among the reasons for which a court may withhold such leave are “undue delay” on the part of the movant and “undue prejudice to the opposing party.” *Foman v. Davis*, 371 U.S. 178, 182 (1962). The matter is consigned to the trial court’s discretion. *Id.*

The First Circuit has made clear that when “considerable time has elapsed between the filing of the complaint and the motion to amend, the *movant* has the burden of showing some valid reason for [her] neglect and delay.” *Grant v. News Group Boston, Inc.*, 55 F.3d 1, 6 (1st Cir. 1995) (citation omitted; emphasis in original). “While courts may not deny an amendment solely because of delay and without consideration of the prejudice to the opposing party, . . . it is clear that ‘undue delay’ can be a basis for denial.” *Tiernan v. Blyth, Eastman, Dillon & Co.*, 719 F.2d 1, 4 (1st Cir. 1983) (citation omitted). “A party’s belated attempt to revise its pleadings requires that a court examine the totality of the circumstances and exercise sound discretion in light of the pertinent balance of equitable considerations.” *Quaker State Oil Refining Corp. v. Garrity Oil Co.*, 884 F.2d 1510, 1517 (1st Cir. 1989) (citation omitted). *See Acosta-Mestre v. Hilton Int’l of Puerto Rico, Inc.*, 156 F.3d 49, 51-52 (1st Cir. 1998) (motion to amend by adding new defendant brought one month before end of discovery period and fifteen months after initial complaint filed properly denied where allowing amendment would cause further delay in proceeding with additional costs and need for existing defendant to alter trial strategy).

The court may also deny a motion for leave to amend if the proposed amendment would be futile. *Foman*, 371 U.S. at 182. A proposed amendment is futile if, *inter alia*, the claim it asserts fails to state a claim upon which relief may be granted and would be subject to dismissal under Fed. R. Civ. P. 12(b)(6), *Hayden v. Grayson*, 134 F.3d 449, 455-56 (1st Cir. 1998), or would be time-

barred, *Demars v. General Dynamics Corp.*, 779 F.2d 95, 99 (1st Cir. 1985).

## **II. Discussion**

### **A. Delay**

The defendants first contend that the motion should be denied because the plaintiff must have been aware of the existence of the factual basis for the proposed new claims when she filed the initial complaint seven months before she filed this motion, yet offers no explanation for the delay; the passage of time has made it less likely that any prospective employers will remember what the plaintiff said to them in job interviews; and the proposed amended complaint provides no details concerning the alleged publication, making it necessary for the defendants “to expend more time and money ferreting out claims for which there is no basis.” Defendants’ Opposition to Plaintiff’s Motion for Leave to File an Amended Complaint (“Defendants’ Opp.”) (Docket No. 47) at 2. To the extent that these arguments may be construed as alleging prejudice to the defendants from the plaintiff’s delay in raising these claims, the plaintiff’s response is brief: she argues that compliance with the court’s deadline for such motions as established in the scheduling order is sufficient to immunize her motion from any claims of undue delay. Plaintiff’s Reply Brief in Support of Motion for Leave to File an Amended Complaint (“Plaintiff’s Reply”) (Docket No. 50) at 1-2.<sup>1</sup>

The plaintiff makes no attempt to explain why the new claims were not included in her initial

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<sup>1</sup> The plaintiff also argues that the defendants “should have been aware of the potential for this claim” because it was foreseeable that the plaintiff would be forced to republish their defamatory statements in the course of seeking new employment. Plaintiff’s Reply at 2. This argument assumes that the statement or statements at issue were defamatory, a factual issue very much in dispute, and that the defendants knew that the statements were defamatory, a claim that the defendants would obviously deny. For the purposes of a motion for leave to amend, such an argument is worth little.

complaint, and the delay in raising them does cause concern, particularly in this court where cases like this one are placed on relatively short schedules for discovery and trial. The delay in this case is seven months, less than the amount of time usually found in the reported cases to justify imposing the burden on the movant to show a valid reason for the delay, but significant in light of the fact that the scheduling order in this case only allowed seven months from the date of its entry to the anticipated time of trial. Under these circumstances, counsel should not make the cavalier assumption that they may raise two entirely new claims on the last date upon which amendment is possible without any need to explain why the claims were not asserted earlier. *See Grant*, 55 F.3d at 6.

The proposed defamation claim clearly will require further discovery on the part of the defendants. This is another factor ignored by the plaintiff. However, the fact that several weeks remain in the discovery period eases this burden. On balance, I conclude that the motion should not be denied on the basis of undue delay. *See generally Allendale Mut. Ins. Co. v. Rutherford*, 178 F.R.D. 1, 3-4 (D. Me. 1998).

### **B. Futility**

The plaintiff relies on *Carey v. Mt. Desert Island Hosp.*, 910 F. Supp. 7 (D. Me. 1995), to support her proposed defamation claim. In that case, this court discussed the doctrine of compelled self-publication as follows:

Maine has not explicitly addressed the issue of defamation by compelled self-publication. The task thus falls upon this Court to predict how Maine's highest court would resolve this issue. . . .

A growing number of jurisdictions recognize the theory of compelled self-publication. These cases generally arise in employment disputes where the originator of the defamatory statement has reason to believe that the defamed person will be under strong compulsion to disclose

the contents of the defamatory statement to a third person. These courts ground compelled self-publication in the notion of foreseeability. Specifically courts inquire as to whether the employer-defendant knew or could have foreseen that the plaintiff would be compelled to repeat the defamatory statement.

\* \* \*

Maine courts recognize the theory of negligent publication in defamation actions[,] an analysis similarly grounded in foreseeability.

\* \* \*

Maine's treatment of negligent publication mirrors the foreseeability analysis used by sister states recognizing defamation based on compelled self-publication. In both cases the essential question revolves around the foreseeability that the actionable statements will be published, whether by the defamed parties themselves, or by another party. Compelled self-publication, is thus, a derivative of negligent publication.

This Court concludes, based on Maine's position of [sic] negligent publication, coupled with the authority of the *Restatement*, that the Maine Supreme Judicial Court would recognize defamation under the compelled self-publication theory. The Court declines Plaintiff's invitation to recognize a new and distinct cause of action for compelled self-publication, but notes that in particular circumstances compelled self-publication folds neatly within the publication prong of defamation.

910 F.Supp. at 11-13 (citations and footnotes omitted).

In order to be defamatory under Maine law, a statement must, *inter alia*, be false and tend to injure the plaintiff. *Lester v. Powers*, 596 A.2d 65, 69 (Me. 1991). The defendants correctly point out that the only statement that the proposed amended complaint specifically alleges that the plaintiff made to prospective employers about the reason for the termination of her employment at Chapman & Drake was in fact true, from the plaintiff's perspective:

Since her discharge from C&D, Plaintiff has sought regular employment commensurate with the position she held at C&D, but for a time was unable to secure the same. In the process of seeking employment, Plaintiff was forced to explain the reasons for her termination from Chapman & Drake and in so doing, she was compelled to repeat the reasons for her termination, i.e., her unwillingness to cooperate with Chapman & Drake in ignoring, tolerating, accepting and fostering impermissible sexual harassment in the work environment.

[Proposed Second] Amended Complaint, Exh. A to Motion for Leave to File Amended Complaint (Docket No. 45), ¶ 35. The words in this paragraph following “i.e.” cannot be defamatory,<sup>2</sup> nor can the proposed amended complaint be construed to allege that the defendants ever uttered them.

The proposed amended complaint does allege that the manager of the Chapman & Drake office where the plaintiff was working told her that she had “betrayed confidentiality” and that she was discharged effective immediately. *Id.* ¶¶ 13, 33. It also alleges that Chapman & Drake “terminated [the plaintiff] for a false . . . reason” and that the plaintiff “has been forced to explain to potential future employers . . . the reasons for her termination. The publication of these defamatory statements about [the plaintiff] are [sic] Defendant’s discriminatory conduct.” *Id.* ¶¶ 55, 57. Drawing reasonable inferences from the allegations in the proposed amended complaint, as the court would be required to do in evaluating a motion to dismiss the claim under Fed. R. Civ. P. 12(b)(6), *Pihl v. Massachusetts Dep’t of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993), I conclude that the proposed amended complaint sufficiently alleges defamation in the compelled self-publication of the statement that the plaintiff “betrayed confidentiality,” although the pleading is minimal at best in this regard.

The defendants next contend that the statement that the plaintiff “betrayed confidentiality” is true, so that no claim for defamation may be based upon it. Ordinarily, such a contention would not be appropriate for consideration in connection with a motion to dismiss or for leave to amend a complaint. Truth is a defense to a charge of defamation and requires proof beyond mere allegations in a complaint and answer. However, the defendants assert that in this case the proposed amended

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<sup>2</sup> Under Maine law, the statement that an employee has been discharged, without more, is also not defamatory. *Saunders v. VanPelt*, 497 A.2d 1121, 1126 (Me. 1985).

complaint includes allegations that establish the truth of this statement. Specifically, they point to paragraphs in which the plaintiff alleges that she spoke with the manager in his office on May 14, 1996 about a rumored affair between two married employees, Proposed Amended Complaint ¶¶ 23-24; that she told him during this conversation that she had been informed of the affair by Ms. Foye, another employee, *id.* ¶ 25; that the manager told her that “the matter was to be kept confidential,” *id.* ¶ 27; that later that evening she spoke by telephone with two fellow employees and told them that she had told the manager that Ms. Foye was the source of her information, *id.* ¶¶ 30-31; and that, when the manager told her the next day that she had “betrayed confidentiality,” the plaintiff told him that she “had not discussed any specifics with” the two other employees, *id.* ¶ 33.

Contrary to the defendants’ position, these allegations do not establish that the plaintiff in fact “betrayed confidentiality.” While the defendants urge this court to draw this conclusion at this time because “[w]hether a statement is defamatory is a question of law,” Defendants’ Opp. at 4, that is not the only conclusion that may be drawn from the allegations. In addition, the defendants’ position is not a correct statement of Maine law. The authority they cite in support of their position actually provides only that the questions whether the statement at issue is in the form of an expression of opinion rather than a statement of fact and whether the statement at issue is “capable of a defamatory meaning” are questions for the court. *Haworth v. Feigon*, 623 A.2d 150, 156 (Me. 1993); *Picard v. Brennan*, 307 A.2d 833, 835 (Me. 1973) (jury determines whether allegedly defamatory statement was false). The proposed defamation claim would not be subject to dismissal for this reason; accordingly, the amendment adding the claim would not be futile for this reason.<sup>3</sup>

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<sup>3</sup> The defendants also argue, without citation to authority on the point, that the defamation claim must fail because the proposed amended complaint does not specify the prospective employers (continued...)

The defendants' final argument<sup>4</sup> is that the proposed defamation claim would be subject to dismissal because a cause of action for defamation consisting of compelled self-publication is fundamentally inconsistent with 26 M.R.S.A. § 598 and the doctrine of employment at will. Both the statute and the doctrine were in existence when this court decided *Carey*. While neither is discussed in the opinion, *Carey* is not fundamentally at odds with either.

The statute provides:

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<sup>3</sup>(...continued)

to whom the compelled self-production was made. Defendants' Opp. at 6-7. The plaintiff responds that this court was satisfied with "a less descriptive pleading in *Carey*," referring to a paragraph in the complaint in that case without providing the court with a copy. Plaintiff's Reply at 5. In any event, there is no indication in the *Carey* opinion that this issue was before the court in that proceeding. At least three states apparently require that a complaint identify the person to whom publication of the defamation was made. *Decker v. Vermont Educ. Television, Inc.*, 13 F.Supp.2d 569, 573-74 (D. Vt. 1998) (applying New York law to Vermont defamation claim, without discussion); *Larson v. Albany Med. Ctr.*, 662 N.Y.S.2d 224, 227 (Sup. Ct. 1997); *Jaindl v. Mohr*, 637 A.2d 1353, 1358 (Pa. Super. 1994). The elements of a common-law claim of defamation set forth in those opinions do not differ significantly from those to which the Maine Law Court subscribes. Under the circumstances, I conclude that the Law Court would be likely to impose such a pleading requirement. I also conclude that denial of the motion for leave to amend on this ground would be an unduly harsh sanction for a failure to plead specific information not yet clearly required by Maine law. Accordingly, I will condition the granting of the motion on the plaintiff's submission of a revised second amended complaint that identifies the prospective employers to whom she contends she made the compelled self-production of the defendant's statement that the plaintiff was discharged because she "betrayed confidentiality."

<sup>4</sup>The defendants address Count V of the proposed amended complaint, which seeks punitive damages, only in a footnote. Defendants' Opp. at 1, n.1. They appear to argue that the addition of this count would be futile because the availability of punitive damages on the existing counts is governed by the statutes under which those counts are brought and the proposed defamation count is futile, so that there is no remaining basis for a separate count for punitive damages. I note that the proposed amended complaint does not include punitive damages among the specific damages sought in Counts I-III. Proposed Amended Complaint at 10, 12-13, 14. In any event, I have concluded that the motion for leave to amend should be granted as to the defamation count. This argument is therefore moot.

### **§ 598. Employment reference immunity**

An employer who discloses information about a former employee's job performance or work record to a prospective employer is presumed to be acting in good faith and, unless lack of good faith is shown by clear and convincing evidence, is immune from civil liability for such disclosure or its consequences. Clear and convincing evidence of lack of good faith means evidence that clearly shows the knowing disclosure, with malicious intent, of false or deliberately misleading information. This section is supplemental to and not in derogation of any claims available to the former employee that exist under state law and any protections that are already afforded employers under state law.

The plaintiff argues that the alleged defamatory statement in this case was “knowing, malicious and intentional.” Plaintiff's Reply at 6. While the proposed amended complaint does not make any such explicit allegation, it is possible to draw a reasonable inference that the allegedly defamatory statement was made with malicious intent and with knowledge of its falsity or that it was “deliberately misleading.” Nothing further is necessary at this stage of the proceeding to differentiate the allegedly defamatory statement at issue in this proceeding from the type of disclosure for which section 598 provides protection to former employers.

The defendants contend that, because this court in *Carey* found the cause of action for compelled self-publication to be “derivative of negligent publication,” 910 F.Supp. at 13, the immunity provided by section 598 for negligent disclosure of information about a former employee's job performance or work record must mean that immunity also extends to compelled self-publication. Defendants' Opp. at 8-9. However, a close reading of *Carey* will reveal that the discussion of negligent publication in defamation actions provides, by analogy, one basis for this court's conclusion that the Law Court would adopt such a cause of action. In no sense is the court's recognition of that cause of action limited to negligent publication. Indeed, the only publication that

occurs in the context of compelled self-publication is an intentional publication; the former employee is compelled to repeat what the former employee said or gave as the reason for his or her dismissal. In *Carey*, this court held that compelled self-publication is not a new and distinct cause of action but rather “folds neatly within the publication prong of defamation,” 910 F. Supp. at 13, that “prong” being one of the elements of a cause of action for common-law defamation: “fault amounting *at least* to negligence on the part of the publisher,” *id.* at 10 (emphasis added). The defendants’ attempt to limit the claim for compelled self-publication to one involving only negligent publication (equated to negligent “disclosure” in the terms used by the statute) puts a weight on *Carey* which that opinion simply will not bear.

The defendants’ contention that a cause of action for defamation by compelled self-publication is inconsistent with the common-law doctrine of employment at will deserves only brief attention. This argument was rejected in *Lewis v. Equitable Life Assurance Soc. of the U.S.*, 389 N.W.2d 876, 887-88 (Minn. 1986). The two legal doctrines clearly co-exist in other jurisdictions. *E.g.*, *Raymond v. International Bus. Mach. Corp.*, 954 F. Supp. 744, 747-48, 755-56 (D. Vt. 1997); *Booth v. Electronic Data Sys. Corp.*, 799 F. Supp. 1086, 1090 (D. Kan. 1992). The defendants offer no persuasive reason why they cannot do so in Maine as well.

#### **IV. Conclusion**

For the foregoing reasons, the plaintiff’s motion for leave to file an amended complaint is **GRANTED**, on the condition that the plaintiff file within five days from the date of this decision a revised second amended complaint identifying by name and address the prospective employers to whom the plaintiff contends she was compelled to publish the allegedly defamatory statements by

the defendants.

Dated this 19th day of March, 1999.

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David M. Cohen  
United States Magistrate Judge