

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

NABIL SAMAAN,

Case No. 2:07-CV-00960 JAM GGH

Plaintiff,

ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT ON
DEFENDANT'S COUNTERCLAIM

V.

KURT SAUER and DOES 1-10,

Defendants.

Plaintiff Nabil Samaan ("Samaan") brought an action against defendant Kurt Sauer ("Sauer") alleging discrimination on the basis of race in violation of various federal and state laws. Sauer filed a counterclaim alleging defamation. Samaan now moves for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure on Sauer's counterclaim. Sauer opposes

1 the motion. For the reasons set forth below, Samaan's motion is
2 DENIED.¹

3 I. FACTUAL AND PROCEDURAL BACKGROUND

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5 Samaan is an attorney of Egyptian descent with a home and
6 business in Sacramento. Sauer is a juvenile probation officer
7 for Shasta County. He currently resides in Redding. In or
8 around March 2006, Samaan became romantically involved with
9 Sauer's ex-wife, Shannon Wilde ("Wilde"). On or about March 7,
10 2007, Samaan alleges that Sauer made or received phone calls
11 wherein he used the word "nigger" in reference to Samaan.
12 According to Samaan, Sauer allegedly stated that he did not want
13 the "nigger" (Samaan) around his ex-wife, and that his ex-wife
14 "got herself a nigger." From March 8 to April 3, 2007, Sauer
15 allegedly called or e-mailed threats about Samaan. On April 19,
16 2007, Sauer allegedly made threats against Samaan in the
17 presence of a fellow probation officer, including commenting
18 that he would "like to kick that nigger's ass."

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20 On May 22, 2007, Samaan filed the instant action against
21 Sauer alleging discrimination on the basis of race in violation
22 of various federal and state laws. Specifically, Samaan's
23 complaint alleges two federal claims, including violations of 18

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27 ¹ Because oral argument will not be of material assistance,
28 the Court orders this matter submitted on the briefs. E.D. Cal.
L.R. 78-230(h).

1 U.S.C. §§ 241, 245 and 42 U.S.C. § 1981. The complaint also
2 alleges two state law claims, including violations of the Unruh
3 Civil Rights Act, Cal. Civ.Code § 51, the Ralph Act, Cal.
4 Civ.Code § 51.7, and the Bane Act, Cal. Civ.Code § 52.1.
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6 On July 21, 2007, Samaan sent an e-mail to Brian Richart
7 ("Richart"), Sauer's supervisor at the Shasta County Probation
8 Department, and to Don Yost ("Yost"), the Vice President of
9 Shasta County Citizens Against Racism ("SCCAR"). In these e-
10 mails, Samaan identified himself as an attorney of Egyptian
11 descent from Sacramento. He claimed that he had "filed a
12 Federal case against a Juvenile probation officer in Redding"
13 predicated on racist comments made by this individual. Samaan
14 further claimed that he had hired a private investigator that
15 allegedly followed this probation officer for several days
16 documenting his use of the "N" word.² The e-mail also stated
17 that another probation officer was present at the time some of
18 the racist comments were made. The e-mails, however, did not
19 specifically identify the probation officer by name. At the
20 time the e-mails were sent, Samaan had only commenced one
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26 ² Specifically, the e-mail states, "Not only do I have an e-
27 mail that confirms [the probation officer's] racist comments,
28 but I also have a declaration under oath by this person that
states, he has no idea that calling someone a 'greasy foreigner'
is bad. In addition, I hired a p.i. to follow this person for
several days that has documented his use of the 'N' word."

1 federal lawsuit against a Shasta County juvenile probation
2 officer.

3 Following his receipt of the e-mail, Richart discussed the
4 matter with the Assistant Chief Probation Officer, Sherri Leitem
5 ("Leitem"). Yost, for his part, contacted Tom O'Mara, in public
6 relations at SCCAR, and Francine Brady, President of SCCAR, to
7 relay the information in the message. On July 23, 2007, Leitem
8 initiated an e-mail exchange with Samaan in response to his
9 complaint. In this exchange, Samaan claimed that he would be
10 forwarding additional information to the Shasta County Probation
11 Department, including, a copy of the federal complaint, a
12 declaration by the juvenile probation officer filed in another
13 matter wherein he used the word "greasy foreigner," and the
14 names of the two juvenile probation officers referenced in his
15 July 21, 2007 e-mail. Samaan claimed that this information
16 would provide "a basis to initiate an inquiry into the matter."
17 Although she was unable to recall whether she received any
18 materials from Samaan, Leitem obtained a copy of the underlying
19 complaint.

20 On August 2, 2007, Leitem assigned Tyler Wilson ("Wilson")
21 to conduct an internal affairs investigation into Samaan's
22 complaint. When the assignment was made, Leitem informed Wilson
23 that the complaint was made against Sauer. On December 4, 2007,
24 the internal affairs investigation issued a report concluding

1 that Sauer did not use the word "nigger" in reference to Samaan,
2 nor did he make any similar statements or threaten him in any
3 way. The report stated that both Creighton Darling (the other
4 probation officer referenced by Samaan in his e-mails) and Sauer
5 denied ever being a part of a conversation where Sauer made
6 threats or racially derogatory comments about Samaan. The
7 investigation further concluded that Sauer used the term "greasy
8 foreigner" in reference to Samaan during a conversation with his
9 ex-wife Wilde. The investigation also concluded that there was
10 no evidence that Sauer made comments or took action intended to
11 coerce, intimidate or harass Samaan for the purpose of
12 preventing him from moving to or visiting Redding. Finally, the
13 investigation concluded that while Samaan had requested in his
14 federal complaint that Sauer's probation files be reviewed to
15 ensure he had not harmed those under his control, there was no
16 basis for doing so given that there was no evidence supporting
17 Samaan's allegations.³

21 On August 7, 2007, Sauer filed a counterclaim against
22 Samaan alleging that he made false and defamatory statements
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26 ³ The evidence before the Court indicates that Samaan
27 refused to cooperate with the internal affairs investigation
28 insofar as he refused to be interviewed, submit a Citizen
Complaint form, or turn over various documents related to his
complaint against Sauer.

about Sauer to the "Anti-Racial League of the City of Redding"⁴ and the County of Shasta. Specifically, Sauer alleges that Samaan sent correspondence to his employer falsely accusing him of being a racist and discriminatory to minorities. Sauer contends that this correspondence is libelous on its face because it exposed him to hatred, contempt, ridicule and obloquy as well as casting doubt on his impartiality as a juvenile probation officer by attributing to him negative characteristics and traits which are generally looked down upon by society. On July 1, 2008, Samaan filed a motion for summary judgment. On July 18, 2008, Sauer filed an opposition.

TT. OPTINTON

A. Legal Standard

Summary judgment is appropriate if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

An issue of fact is "genuine" if it constitutes evidence with

⁴ The Court notes that Samaan did not have any communications with the "Anti-Racial League of the City of Redding." Rather, the evidence in the record reveals that he communicated with the Shasta County Probation Office and SCCAR.

1 which "a reasonable jury could return a verdict for the
2 nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S.
3 242, 248 (1986). If the moving party meets its burden, the
4 burden then shifts to the nonmoving party to go beyond the
5 pleadings and by his or her own affidavits, or by the
6 depositions, answers to interrogatories, and admissions on file,
7 designate specific facts showing that there is a genuine issue
8 for trial. See Celotex, 477 U.S. at 324 (quotation marks
9 omitted) (citing Fed.R.Civ.P. 56(e)). "If the nonmoving party
10 fails to produce enough evidence to create a genuine issue of
11 material fact, the moving party wins the motion for summary
12 judgment." Nissan Fire & Marine Ins. Co. v. Fritz Companies,
13 Inc., 210 F.3d 1099, 1102 (9th Cir. 2000). "But if the
14 nonmoving party produces enough evidence to create a genuine
15 issue of material fact, the nonmoving party defeats the motion."
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17 Id. Summary judgment is appropriate if, viewing the evidence
18 and the inferences therefrom in the light most favorable to the
19 nonmoving party, there are no genuine issues of material fact in
20 dispute and the moving party is entitled to judgment as a matter
21 of law. Valandingham v. Bojorquez, 866 F.2d 1135, 1137 (9th
22 Cir. 1989).
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24 B. Counterclaim: Defamation
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26 Samaan argues that summary judgment is appropriate with
27 respect to Sauer's libel claim because his e-mails were not
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1 defamatory insofar as they did not refer to Sauer by name.
2 Additionally, Samaan argues that summary judgment is appropriate
3 with respect to Sauer's slander claim because there is no
4 evidence that he orally communicated a charge of racial
5 discrimination against Sauer to a third person. The Court
6 disagrees.
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8 Defamation is an invasion of the interest in reputation;
9 the injury may occur by means of libel or slander. Shively v.
10 Bozanich, 31 Cal.4th 1230, 1242 (2003) (citing Cal. Civ.Code §
11 44). Generally, libel is a written communication that is false,
12 not protected by privilege, and exposes a person to ridicule or
13 other reputational injury. Cal. Civ.Code § 45. A statement is
14 libelous per se if it defames a party on its face, that is,
15 without the need of extrinsic evidence to explain the
16 statement's defamatory nature. Cal. Civ.Code § 45a; see also
17 Downing v. Abercrombie & Fitch, 265 F.3d 994, 1010 (9th Cir.,
18 2001) ("A publication is libelous on its face only if there is
19 no need to have explanatory matter introduced"). The charge of
20 racial discrimination constitutes libel per se. See 5 Witkin,
21 Summary of Cal. Law (10th Ed. 2005) Torts, § 543 at 796 (charges
22 of racial prejudice constitute libel per se). A false and
23 unprivileged oral communication attributing to a person specific
24 misdeeds or certain unfavorable characteristics or qualities, or
25 uttering certain other derogatory statements regarding a person,
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1 constitutes slander. Cal. Civ.Code § 46. Statements that
2 implicate a person's "office, profession, trade or business" may
3 be slanderous. Id. Both libel and slander require that the
4 defamatory statements be communicated to the third person who
5 understands the defamatory meaning of the statement and its
6 application to the person to whom the reference is made. Smith
7 v. Maldonado, 72 Cal.App.4th 637, 645 (1999). The statements
8 need not be communicated to the "public" at large; communication
9 to a single individual is sufficient. Id.

12 In the present case, because Samaan's e-mails claim that an
13 unnamed Redding juvenile probation officer made racist comments,
14 the e-mails constitute libel per se; Samaan does not contend
15 otherwise. Nor does Samaan contend that the e-mails were not
16 communicated to a third person. Rather, Samaan contends that
17 the e-mails are not libelous because they do not specifically
18 refer to Sauer by name. According to Samaan, absent certainty
19 as to whom the e-mails referred to, it cannot be said that they
20 were libelous as a matter of law, especially since the Shasta
21 County Probation Office contains ten to twelve juvenile
22 probation officers. In defamation actions the First Amendment
23 requires that the statement on which the claim is based must
24 specifically refer to, or be "of and concerning," the plaintiff
25 in some way. Blatty v. New York Times Co., 42 Cal.3d 1033, 1042
26 (1986) (one cannot constitutionally establish liability unless
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1 one proves that the contested statements are "of and concerning"
2 the individual, either by name, i.e. refer personally to the
3 individual, or by "clear implication"); Ferlauto v. Hamsher, 74
4 Cal.App.4th 1394, 1404 (1999). "Under California law, '[t]here
5 is no requirement that the person defamed be mentioned by name .
6 . . It is sufficient if from the evidence the jury can infer
7 that the defamatory statement applies to the plaintiff . . .
8 [or] if the publication points to the plaintiff by description
9 or circumstances tending to identify him.' " Church of
10 Scientology of California v. Flynn, 744 F.2d 694, 697 (9th Cir.
11 1984). Contrary to Samaan's contention, the fact that Sauer was
12 not mentioned by name in the e-mails is not sufficient to defeat
13 Sauer's defamation claim. While it is unclear from the evidence
14 in the record how Sauer came to be known as the target of
15 Samaan's complaint, it is undisputed that an internal affairs
16 investigation was commenced into Sauer shortly after Samaan's
17 complaint was received. As such, a reasonable trier of fact
18 could infer that the e-mails provided sufficient information for
19 officials at the Shasta County Probation Department to readily
20 ascertain the identity of Sauer. This is particularly so given
21 that one of the e-mails claimed Samaan had "filed a Federal case
22 against a Juvenile probation officer in Redding," and that
23 Samaan had only commenced one federal lawsuit against a Shasta
24 County juvenile probation officer. Because the Court at this
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1 stage must view the evidence in the light most favorable to
2 Sauer as the nonmoving party, the Court finds that there is a
3 genuine issue of material fact on the question of whether the e-
4 mails were "of and concerning" Sauer, that is, whether the e-
5 mails provided sufficient information to permit Shasta County
6 Probation Department officials to readily identify Sauer as the
7 target of Samaan's complaint. Accordingly, Samaan is not
8 entitled to summary judgment on Sauer's libel claim.
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10 As to Samaan's contention that summary judgment is
11 appropriate with respect to Sauer's slander claim because there
12 is no evidence that he orally communicated a charge of racial
13 discrimination against Sauer to a third person, the Court
14 disagrees. In general, each time a defamatory statement is
15 communicated to a third person who understands its defamatory
16 meaning as applied to the plaintiff, the statement is said to
17 have been "published," although a written dissemination, as
18 suggested by the common meaning of that term, is not required.
19 Shively, 31 Cal.4th at 1242. Each publication ordinarily gives
20 rise to a new cause of action for defamation. Id. The rule
21 that each publication of a defamatory statement gives rise to a
22 new cause of action for defamation applies when the original
23 defamer repeats or recirculates his or her original remarks to a
24 new audience. Id. at 1243. That rule also applies when a
25 person who heard, read, or saw the original defamatory remark
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1 repeats the remark to others (subject to qualifications not
2 relevant here). Id. (citing cases). In general, the repetition
3 by a new party of another person's earlier defamatory remark
4 also gives rise to a separate cause of action for defamation
5 against the *original defamer*, when the repetition was reasonably
6 foreseeable. Id. (emphasis in original). It is the foreseeable
7 subsequent *repetition* of the remark that constitutes publication
8 and an actionable wrong in this situation, even though it is the
9 original author of the remark who is being held accountable.
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11 Id. (emphasis in original).

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13 In the present case, Sauer maintains that a genuine issue
14 of fact exists on the question of whether Samaan orally
15 communicated defamatory remarks to a third person. The Court
16 agrees. As Sauer correctly points out, Samaan's Responses to
17 Interrogatories indicate that he had conversations about Sauer's
18 racist beliefs with "the probation department, friends, lawyers,
19 judges and family." Specifically, in his Responses to
20 Interrogatories, Samaan stated that "[i]t has been embarrassing
21 exposing how Kurt Sauer feels he is superior to others that are
22 not the same color or ethnicity as he is. It is a horrible
23 discussion to have with people like the probation department,
24 friends, lawyers, Judges and Family." Samaan further stated
25 that "[t]he whole subject of Kurt Sauer continually using the
26 'Nigger' word in an attempt to show his superiority is
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embarrassing. The fact that he is even someone that is in charge of children is a tragedy." Viewing the evidence in the light most favorable to Sauer as the nonmoving party, the Court finds that a genuine issue of material fact exists on the question of whether Samaan is liable for orally repeating his original defamatory remarks. Moreover, because the record reveals that Sauer's supervisor, Richart, orally discussed the content of Samaan's July 21, 2007 e-mail with Leitem, a reasonable fact finder could conclude that Samaan is liable for the repetition of his earlier defamatory remarks. A reasonable fact finder could also find that the repetition of Samaan's remarks was reasonably foreseeable. Accordingly, Samaan is not entitled to summary judgment on Sauer's slander claim.

III. ORDER

For the reasons set forth above, Samaan's motion for summary judgment is DENIED.

IT IS SO ORDERED.

Dated: September 10, 2008

John A. Mendez
JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE