Lambda Legal
making the case for equality

January 28, 2010

Phaedra Parks
The Parks Law Firm
3575 Piedmont Road NE
15 Piedmont Center, Suite 1560
Atlanta, GA 30305

Re: Your Cease and Desist Letters on Behalf of Ovie Mughelli

Ms. Parks:

Lambda Legal[1] is aware of your "cease and desist" letters to various internet websites alleging that they have defamed your client, professional athlete Ovie Mughelli, by publishing allegations that he had a former romantic and/or sexual relationship with a man. You claim that Mr. Mughelli was defamed by sites that relayed or referred to reports that, in your words, Mr. Mughelli "is a homosexual and is or was involved in a homosexual relationship."[2]

Although as of the writing of this letter we do not represent any of those to whom you have written, we write to explain to you – and to the internet sites to which you have written – that, under the law of Georgia (and the law of other states) it is not defamatory to describe a person as gay, lesbian or bisexual – nor is it defamatory to claim that someone has had a consensual, intimate, adult relationship with someone of the same sex. Moreover, your claim that someone falsely described as gay is entitled to collect money damages demeans those who are gay, lesbian and bisexual.

For the statements of which you complain to be defamatory under Georgia law (as in other states), the question is not whether anti-gay bias has been completely eradicated, but whether someone identified as gay would be exposed to "public hatred, contempt or ridicule." O.C.G.A. § 51-5-1. The Georgia Supreme Court has *never* held that describing someone as gay, lesbian or bisexual is defamatory (let alone defamatory per se) and it is inconceivable that it would do so for the first time in 2010.

In *Lawrence v. Texas*, the United States Supreme Court explained that gay men and lesbians are "entitled to respect for their private lives" and that "[t]he State cannot demean their existence . . . by making their private sexual conduct a crime." 539 U.S. 558, 578 (2003). The Court held that

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[1] Lambda Legal Defense and Education Fund (Lambda Legal) is the nation's oldest legal organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender (LGBT) people and those living with HIV.

[2] As an athlete and public figure, Mr. Mughelli would have to prove four elements to establish a viable defamation claim in Georgia: 1) a false and defamatory statement about the plaintiff; 2) communication of the statement to a third party in the absence of a special privilege to do so; 3) actual malice; and 4) special damages, unless the statement amounts to defamation per se. *See Mathis v. Cannon*, 276 Ga. 16, 21 (2002). Our foremost concern in this letter is the potentially harmful impact of your allegations on those who *are* lesbian, gay or bisexual; however, based on the correspondence and reports that we have seen, several of the other necessary elements are also likely absent.

criminalizing consensual sodomy violates the Federal Due Process Clause, and overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), noting that continuing *Bowers* as precedent would "demean[] the lives of homosexual persons." 539 U.S. at 575. The Court explained that even though sodomy prohibitions were rarely enforced, their mere presence as law impermissibly stigmatized gay people. *Id.*

Years before *Lawrence* was decided, the Georgia Supreme Court held that criminalizing consensual sodomy was unconstitutional and recognized the fundamental right of all adults to engage in sexual intimacy. *See Powell v. State*, 270 Ga. 327 (1998). More recently, the Georgia Supreme Court demonstrated that it does not view lesbians and gay men to be held in low regard when, in *Mongerson v. Mongerson*, the Court vacated a "blanket prohibition against exposure of [a father's] children to members of the gay and lesbian community with whom [the father] is acquainted." 285 Ga. 554, 556 (2009). It would be incongruous for that court now to hold that gay men and lesbians are such objects of public hatred, ridicule and contempt that it is defamatory per se to identify a person as gay.

It is inconceivable that the Georgia Supreme Court would hold that being described as gay is defamatory per se for the first time in 2010 when so many other jurisdictions – before and after *Lawrence* – have rejected that claim under other states' laws.[3]

While gay men and lesbians have yet to attain full equality, one cannot presume as a matter of law that identifying an individual as gay or bisexual would trigger the public hatred, contempt or ridicule necessary to support a claim of defamation per se. Your letter threatens claims based on outdated prejudices about lesbian, gay and bisexual people and invokes a government-opposed stigma that the Supreme Court has held should not be perpetuated in our law. *Lawrence*, 539 U.S. at 575. *See also Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

Because of (but not limited to) the foregoing reasons,[4] a court would likely find the potential defamation action you describe in your letter as lacking substantial justification, allowing it to award any defendant(s) the costs of reasonable and necessary attorney's fees and expenses of litigation. *See* O.C.G.A. § 9-15-14. Please govern yourself accordingly.

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[3] *See, e.g., Stern v. Cosby*, 645 F.Supp.2d 258 (S.D.N.Y. 2009) (applying New York law, not defamatory per se to describe a man as gay); *Greenly v. Sara Lee Corp.*, No. CIV S-06-1775, 2008 WL 1925230 (E.D. Cal. Apr. 30, 2008) (same, applying California law); *Albright v. Morton*, 321 F. Supp. 2d 130 (D. Mass. 2004) (same, applying Massachusetts law); *Regehr v. Sonopress, Inc.*, No. 2:99CV690K, 2000 WL 33710902 (D. Utah Apr. 14, 2000); *Hayes v. Smith*, 832 P.2d 1022 (Colo. App. 1991); *Boehm v. Am. Bankers Ins. Group, Inc.*, 557 So.2d 91 (Fla. Dist. Ct. App. 1990); *Moricoli v. Schwartz*, 46 Ill. App. 3d 481 (1977); *Donovan v. Fiumara*, 114 N.C. App. 524 (1994).

[4] For example, the reports and correspondence we have seen suggest that Mr. Mughelli will likely be unable to prove that the statements were published with actual malice (that is, knowledge that, or reckless disregard for whether, they are false). *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (First Amendment mandates that a public figure plaintiff prove actual malice by clear and convincing evidence) Also, Mr. Mughelli would be required to prove that he sustained special damages (that is, a monetary loss) because of the statements, since they do not appear to fall within any category of slander per se. *See* O.C.G.A. § 51-5-4. *See also Lucas v. Cranshaw*, 289 Ga. App. 510 (2008) (under Georgia law, the definition of slander in has been incorporated into the definition of libel). The reports and correspondence we have seen fail to identify any such damages.

Respectfully yours,

Beth Littrell

cc: Outsports.com via Cynthia Counts, Esq.
MediaOutrage.com
Queerty.com
MissJia.com