

Chicago Daily Law Bulletin®

VOLUME 168

LAW BULLETIN MEDIA.

Libel suit against 'The Mix' tossed

PATRICIA MANSON

pmanson@lawbulletinmedia.com

The radio station known as "The Mix" did not defame former morning co-host Melissa McGurren in an executive's email saying it did not agree with her "characterization" of the events that led her to accuse the station of tolerating sexual harassment, a federal judge held.

In a written opinion, U.S. District Judge Ronald A. Guzman of the Northern District of Illinois dismissed the defamation lawsuit that McGurren brought against Hubbard Radio Chicago LLC, the owner of WTMX 101.9-FM.

Guzman rejected the argument that the internal email sent to employees at the station concerning a discrimination charge McGurren filed with the Equal Employment Opportunity Commission was defamatory per se.

In the charge, McGurren alleged morning co-host Eric Ferguson sexually harassed her and created a hostile workplace environment by harassing, belittling and ridiculing female employees.

Hubbard executives ignored or downplayed repeated complaints from women about Ferguson's conduct because they did not want to lose the popular on-air personality, McGurren alleged.

She maintained she was forced to quit in December 2020 after 22 years on the job because she could no longer endure Ferguson's behavior.

McGurren now is a co-host on the morning show at WUSN-FM 99.5, a country music radio station known as "US99." It is owned by Audacy Inc.

McGurren's sexual harassment claims are to go to arbitration.

Ferguson himself announced in October 2021 that he was leaving The Mix. He departed in the face of multiple allegations — and at least three suits — pursued by co-workers who maintained he engaged in sexual misconduct and abused his power.

In a statement at the time, Ferguson said he looked forward to defending himself against various claims.

"I am confident that at the end of the day the courts will rule and the right outcome will prevail," he said.

Following Ferguson's announcement, Jeff England, Hubbard's vice-president and market manager, sent an email to employees saying the station expected "another round of media stories" about Ferguson's "situation." The coverage likely would include stories about McGurren's EEOC charge, England wrote.

"This is not a new development, and we've thoroughly investigated this matter previously," he continued. "Suffice it to say that we do not agree with Melissa's characterization of events, but we are committed to following the appropriate process and not litigating this matter in the public or the press."

McGurren maintains the email was defamatory per se because it accused her of lacking integrity in the performance of her job duties and prejudiced her in her profession as a radio personality.

She filed her libel suit against Hubbard in Cook County Circuit Court. The radio station removed the suit to federal

court in November 2021 under diversity jurisdiction and filed its motion to dismiss the following month.

In his opinion Tuesday, Guzman acknowledged that statements suggesting someone lacks integrity or that he or she lacks ability can be defamatory per se under Illinois law.

But statements found by the Illinois courts to be defamatory per se "have always been related to job performance," Guzman wrote, quoting *Cody v. Harris*, 409 F.3d 853 (7th Cir. 2005).

He wrote England's comments in the email do not fall under that category.

"Defendant's statement that it has investigated the matter and does not agree with Plaintiff's characterization of events is not related to Plaintiff's job performance; it comments neither on her ability as a radio personality nor indicates that she did 'something bad' in the course of carrying out her job," Guzman wrote.

Even if McGurren is correct that England was calling her a liar, he continued, the statement "is properly construed as a statement regarding Plaintiff's personal, not professional, integrity, which does not satisfy the requirements for defamation per se."

He would have dismissed McGurren's suit anyway because England's statement "is capable of innocent construction," Guzman wrote.

"[W]hile Plaintiff interprets the statement as indicating that she is a liar," he wrote, "the statement is reasonably and appropriately understood as Defendant's position on the legal matter at hand."

Guzman noted McGurren stated in her response brief that

she will ask for leave to amend her suit to allege Hubbard violated an Illinois statute that states it is slander "to charge any person with swearing falsely, or with having sworn falsely."

He gave McGurren 14 days to respond to Hubbard's contention that the amendment would be futile and Hubbard 14 days to reply to McGurren's response.

The case is *Melissa McGurren v. Hubbard Radio Chicago LLC*, No. 21 C 6287.

McGurren is represented by Carmen D. Caruso and William B. Whitner, both of the Carmen D. Caruso Law Firm.

"We are disappointed by the Court's ruling on the defamation claim and are reviewing the path forward," Caruso said in a statement. "And we are confident of our client's underlying claims against Hubbard and look forward to our hearing in arbitration."

The lead attorneys for Hubbard are Michael P. Roche of Winston & Strawn LLP's Chicago office and Steven P. Mandell of Mandell Menkes LLC. They declined to comment.

The same attorneys represent the opposing parties in other litigation against Hubbard.

Former associate producer Cynthia DeNicolò alleges Ferguson coerced her to perform sexual acts and then blocked her progress at the radio station when she started resisting his coercion.

She filed a libel suit that is pending before U.S. District Judge Franklin U. Valderrama of the Northern District of Illinois. That case is *Cynthia DeNicolò v. Hubbard Radio Chicago LLC*, No. 21 C 6292.