

SIDEBAR

‘A Bit of Divine Justice’: Trump Vowed to Change Libel Law. But Not Like This.

By Adam Liptak

April 2, 2018

WASHINGTON — When Donald J. Trump was running for president, he promised to “open up our libel laws.” No one quite knew what he meant.

Last month, Mr. Trump started to make good on his campaign pledge. But he did so inadvertently — as a libel defendant on the losing side of a decision that will help victims of sexual misconduct sue when they are called liars.

“The irony is glaring,” said Roy Gutterman, who teaches communications law and journalism at Syracuse University.

Before the #MeToo movement, libel lawsuits from people accused of lying were in decline. Indeed, a 2016 law review article chronicled what it called “the slow, quiet and troubled demise of liar libel.”

These days, a remarkable number of libel suits, including ones against Bill Cosby, Bill O’Reilly, Roy S. Moore and Mr. Trump, have been filed by women who say they were defamed by men who denied their accusations of sexual misconduct.

Courts have struggled with such suits. Calling someone a liar can be an insult, an opinion or hyperbole, all of which are protected by the First Amendment. But an assertion of fact soberly presented from someone in a position to know the truth can amount to libel. A lot depends on context, and courts have had a hard time drawing a line.

**You have 3 free articles remaining.
Subscribe to The Times**

Two recent decisions in libel suits against Mr. Trump have helped clarify matters.

In December, a New York appeals court affirmed the dismissal of a lawsuit against him from a political consultant he had mocked on Twitter. Mr. Trump had called the consultant, Cheryl Jacobus, “a real dummy” and a “major loser.”

Those “vague and simplistic insults” were opinions, Justice Barbara Jaffe, the trial judge in the case, wrote last year.

She cited a 1985 decision that threw out a libel claim from a real estate developer who had sued an architecture critic for saying that a planned building would be “an atrocious, ugly monstrosity.” That was an opinion, the court ruled.

The unsuccessful plaintiff was Mr. Trump. He had asked for \$500 million.

In the second recent decision, Justice Jennifer Schecter ruled against Mr. Trump on March 20 in a case brought against him by Summer Zervos, a former contestant on “The Apprentice.” Mr. Trump’s repeated and specific denials that he had mistreated Ms. Zervos were, the judge said, assertions of fact.

Ms. Zervos came forward in October 2016, after the release of a recording in which Mr. Trump boasted about sexually assaulting women. She said Mr. Trump had kissed and groped her in his office in New York and at a Los Angeles hotel a decade before.

Mr. Trump immediately denied Ms. Zervos’s account. “To be clear, I never met her at a hotel or greeted her inappropriately,” he said.

In the following days, at campaign rallies, on Twitter and at a presidential debate, Mr. Trump issued other denials, some directed at Ms. Zervos and some calling all sexual-misconduct accusations against him “total lies” and “totally phony stories.”

“All of these liars will be sued when the election is over,” Mr. Trump said.

Those suits never arrived, but one from Ms. Zervos did. “His brutalizing of her a second time — this time falsely condemning her to the world as a liar for having the temerity to reveal his earlier unwanted sexual groping of her body — directly caused serious injury,” Ms. Zervos’s lawyers wrote.

Mr. Trump's lawyers asked the judge to throw out the case, saying he had merely offered his opinions. "Political statements in political contexts," they wrote, "are nonactionable political opinion."

Justice Schechter disagreed. Mr. Trump's statements "cannot be characterized simply as opinion, heated rhetoric or hyperbole," she wrote in a decision allowing the case to move forward. "That defendant's statements about plaintiff's veracity were made while he was campaigning to become president of the United States does not make them any less actionable."

Over the weekend, Mr. Trump's lawyers filed an appeal in Ms. Zervos's case. They said his statements were "opinions made in quintessentially political forums during a political campaign."

Len Niehoff, who wrote the 2016 article on "liar libel" with Ashley Messenger, said last month's decision made an important distinction.

"Not all liar libel cases are created equal," said Mr. Niehoff, who teaches at the University of Michigan School of Law. "The plaintiff has a stronger case where the defendant has personal knowledge of the matter. If the president himself denies having an affair, this is a statement of fact. After all, he knows whether he did or didn't."

Mr. Trump's unusual silence in the face of accusations from the adult film star known as Stormy Daniels may be an effort to avoid yet another libel suit, Mr. Niehoff said. Should he deny the encounter, Mr. Niehoff said, "it will be the newest count in the amended complaint filed against him."

Mr. Trump himself has been an enthusiastic but almost entirely unsuccessful libel plaintiff. A 2016 article from the American Bar Association called him a "libel bully" and a "libel loser."

Mr. Gutterman, who has written about libel suits based on accusations of lying, said Mr. Trump's recent loss was in a way fitting. "The libel bully," Mr. Gutterman said, "is now facing libel liability himself."

Susan E. Seager, the author of the bar association article, said Mr. Trump was receiving "a bit of divine justice."

“The libel bully,” she said, “is getting his comeuppance.”

Follow Adam Liptak on Twitter at [@adamliptak](https://twitter.com/adamliptak)

A version of this article appears in print on April 3, 2018, on Page A9 of the New York edition with the headline: Trump Vowed to Change Libel Laws. He Might Not Have Had This in Mind.