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## CACI Premier Technology, Inc. v. Rhodes

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**CACI PREMIER TECHNOLOGY, INC. V. RHODES**

Beginning in April 2004, the United States military came under intense public scrutiny following the publication of shocking photographic evidence of prisoner abuse at the United States' military-controlled Abu Ghraib Prison (now Baghdad Central Prison) in Iraq.<sup>1</sup> The controversy surrounding the abuses at Abu Ghraib intensified a larger national debate about the conduct of the war in Iraq.<sup>2</sup> A point of particular contention was the growing role of private contractors in ongoing military operations.<sup>3</sup>

In August 2008, the United States Court of Appeals for the Fourth Circuit held that Randi Rhodes, a talk show host on Air America Radio, could not be held liable for defamation for comments she made criticizing CACI Premier Technology, Inc. (CACI), one of the private military contractors that supplied civilian interrogators to the Abu Ghraib Prison.<sup>4</sup> Basing its decision primarily on the "actual malice" standard first announced in *New York Times Co. v. Sullivan*,<sup>5</sup> the Fourth Circuit affirmed the district court's order granting Rhodes's motion for summary judgment.<sup>6</sup>

Rhodes, admittedly a "shrill, screeching, . . . hectoring, [and] cocksure" host,<sup>7</sup> used her program on Air America as a platform to accuse various private

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1. See, e.g., Editorial, *Abuses at Abu Ghraib*, N.Y. TIMES, May 1, 2004, at A14 ("To imagine the outrage the incident has provoked, Americans need only imagine how they would feel if they saw pictures of American soldiers being treated in a similar way."); Sewell Chan & Jackie Spinner, *Allegations of Abuse Lead to Shakeup at Iraqi Prison*, WASH. POST, Apr. 30, 2004, at A24 ("The documents add to growing accusations of improper prisoner treatment at Abu Ghraib, which was Iraq's largest and most notorious prison during the rule of ousted president Saddam Hussein."); Editorial, *The Nightmare at Abu Ghraib*, N.Y. TIMES, May 3, 2004, at A22 ("The American military made a strange and ill-starred decision when it chose to incarcerate Iraqis in Abu Ghraib, the prison that had become a byword for torture under Saddam Hussein and a symbol of everything the invasion of Iraq was supposed to end."); Roland Watson et al., *Scandal over Humiliation of Iraqi Prisoners*, TIMES (London), Apr. 30, 2004, at 1 ("[P]hotographs that show US troops humiliating and trying to 'break' Iraqi prisoners [have] shocked America . . .").

2. See, e.g., Mark Jurkowitz, *A War of Images*, BOSTON GLOBE, May 15, 2004, at C1 ("Several analysts say that the flood of horrific pictures—whether featuring Americans, insurgents, or terrorists as the perpetrators of evil deeds—will probably increase overall anxiety and concern about the situation in Iraq."); James Risen, *Command Errors Aided Iraq Abuse, Army Has Found*, N.Y. TIMES, May 3, 2004, at A1 ("The widening prison-abuse scandal in Iraq, which has stirred anger in the Arab world just as the Marines have tried to defuse a bloody confrontation in Falluja, holds the potential to damage efforts by American officials to meet a June 30 deadline to transfer limited self-rule to the Iraqi people.").

3. See, e.g., Editorial, *A Privatized War*, BOSTON GLOBE, May 7, 2004, at A22 ("The deeper issue with civilian contractors in a situation like the Abu Ghraib prison is overall accountability—how private employees fit into the chain of command."); Paul Krugman, Op-Ed., *Battlefield of Dreams*, N.Y. TIMES, May 4, 2004, at A29 ("It's one thing to have civilians drive trucks and serve food; it's quite different to employ them as personal bodyguards to U.S. officials, as guards for U.S. government installations and—the latest revelation—as interrogators in Iraqi prisons.").

4. CACI Premier Tech., Inc. v. Rhodes, 536 F.3d 280, 284 (4th Cir. 2008).

5. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

6. CACI, 536 F.3d at 304.

7. *Id.* at 284 (internal quotation marks omitted).

contractors of committing or colluding in a multitude of heinous crimes.<sup>8</sup> CACI was one of several military contractor firms that Rhodes accused by name on her radio program.<sup>9</sup>

CACI sued Rhodes and Air America for defamation under Virginia law in a diversity action in the United States District Court for the Eastern District of Virginia.<sup>10</sup> CACI based its suit on several of Rhodes's statements that she made on air from August 10–26, 2005.<sup>11</sup> These statements accused CACI and its employees of, *inter alia*, “misrepresent[ing] their authority to soldiers,”<sup>12</sup> committing torture,<sup>13</sup> raping detainees,<sup>14</sup> and raping or torturing minors.<sup>15</sup> In addition, she characterized CACI as a group of “hired killers” and “fricken mercenaries.”<sup>16</sup>

Rhodes and Air America moved for summary judgment, and the district court granted their motion, “concluding that Rhodes’s statements were protected by the First Amendment, either because they were not made with actual malice or because they did not state actual facts about CACI.”<sup>17</sup> Subsequently, CACI appealed the summary judgment order to the Fourth Circuit.<sup>18</sup> Several major news outlets, including the *New York Times*, the *Washington Post*, and the *Associated Press*, filed a joint amici curiae brief supporting Rhodes.<sup>19</sup>

Writing for the court, Judge Michael, joined in the opinion by Judge Gregory, affirmed the district court’s decision because CACI could not prove that Rhodes made any of her statements with actual malice.<sup>20</sup> Moreover, the court agreed with the district court’s finding that some of Rhodes’s allegedly defamatory statements were protected as “hyperbole” under the First Amendment.<sup>21</sup> Concurring in the judgment, Judge Duncan stressed that the court based its decision not on “the defensibility of Rhodes’s comments” but on the high burdens put on public figures as plaintiffs and the high First Amendment protections given to defendants in defamation cases.<sup>22</sup>

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8. *See id.* at 288–92.

9. *Id.*

10. *Id.* at 292.

11. *Id.* at 288–92.

12. *Id.* at 295.

13. *Id.* at 296.

14. *Id.* at 298.

15. *Id.* at 299.

16. *Id.* at 301 (internal quotation marks omitted).

17. *Id.* at 284.

18. *Id.* at 292.

19. Brief for Alm Media, Inc. et al. as Amici Curiae Supporting Appellees, *CACI*, 536 F.3d 280 (No. 06-2140), 2007 WL 1834262.

20. *CACI*, 536 F.3d at 304.

21. *Id.*

22. *Id.* at 304–05 (Duncan, J., concurring).

While Virginia law lists several conditions under which a statement is *per se* defamatory,<sup>23</sup> “[t]he ‘application of the state law of defamation’ is limited . . . by the First Amendment to the Constitution of the United States.”<sup>24</sup> The Fourth Circuit held that the First Amendment protected all of Rhodes’s statements at issue in the case.<sup>25</sup> In its analysis, the court separated Rhodes’s statements into three categories.

First, the court analyzed most of Rhodes’s statements about CACI using the actual malice standard.<sup>26</sup> The watershed case of *New York Times Co. v. Sullivan* first established this standard, which is now accepted as the standard interpretation of First Amendment law in defamation cases involving public figures.<sup>27</sup> The court held that CACI constituted a public figure and assumed the risk of “potentially exposing itself to the inhospitable climate of media criticism” because of its role as a military contractor and its involvement with matters of national security.<sup>28</sup> Moreover, CACI did not “contest its status as a public figure.”<sup>29</sup>

Under the actual malice standard, plaintiffs who are public figures cannot recover for defamation unless they can show that the defendant made the statement “with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>30</sup> The question of whether a comment is reckless “‘is not measured by whether a reasonably prudent [person] would have published [or spoken], or would have investigated before publishing [or speaking].’”<sup>31</sup> Rather, a plaintiff must show that “the defamatory statement was ‘made with [a] high degree of awareness of [its] probable falsity.’”<sup>32</sup>

Regarding Rhodes’s statements that CACI tortured detainees, raped detainees, and raped or tortured children, the court examined several documents on which Rhodes relied in making the remarks. These materials included a *60 Minutes II* report<sup>33</sup> and an investigate journalist’s article depicting the abuses

23. *Id.* at 292–93 (majority opinion) (“In Virginia a statement is defamatory *per se* if it, among other circumstances, (1) ‘impute[s] to a person the commission of some criminal offense involving moral turpitude;’ (2) ‘impute[s] to a person unfitness to perform the duties of an office or employment of profit, or want of integrity in the discharge of the duties of such an office or employment;’ or (3) ‘prejudice[s] a person in his or her profession or trade.’” (alterations in original) (quoting *Carwile v. Richmond Newspapers, Inc.*, 82 S.E.2d 588, 591 (Va. 1954))).

24. *Id.* at 293 (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 14 (1990)).

25. *Id.* at 304.

26. *Id.* at 294.

27. *See id.* at 293 (“[A] public official or public figure cannot recover[] damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’ . . . .” (second alteration in original) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964)) (internal quotation marks omitted)).

28. *Id.* at 295.

29. *Id.*

30. *Sullivan*, 376 U.S. at 279–80.

31. *CACI*, 536 F.3d at 300 (alterations in original) (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)).

32. *Id.* (alterations in original) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)).

33. *Id.* at 284–85.

occurring at Abu Ghraib.<sup>34</sup> In addition, the court reviewed two official United States Army reports (the Taguba report and the Fay/Jones report) that were commissioned after the abuses came to light and that confirmed CACI's involvement in the detainee controversy.<sup>35</sup> Furthermore, the court examined Secretary of Defense Donald Rumsfeld's and Senator Lindsey Graham's comments respectively describing unpublished documents and photographs from Abu Ghraib "as show[ing] . . . blatantly sadistic, cruel and inhumane" acts against detainees and "contain[ing] scenes of rape and murder."<sup>36</sup> The court also considered "an interview with Brigadier General Janis Karpinski, who was (at the relevant time) in charge of U.S. detention facilities in Iraq," in which she stated her belief that CACI "ordered these things [the abuses] to be done."<sup>37</sup> Finally, the court reviewed a 2004 law review article about military contractors<sup>38</sup> and a *New York Times Magazine* "article about the large-scale use of military (or security) contractors in Iraq."<sup>39</sup> The court examined each of these sources and held that because Rhodes based her statements on these sources, she was not speaking with reckless disregard for the truth.<sup>40</sup>

Second, the court found that some of Rhodes's obloquies did "not assert actual facts about CACI."<sup>41</sup> The First Amendment provides "protection for 'rhetorical hyperbole, a vigorous epithet' and 'loose, figurative, or hyperbolic language.'"<sup>42</sup> These protections are "necessary to 'provide[] assurance that public debate will not suffer for lack of 'imaginative expression.'"<sup>43</sup> The Fourth Circuit agreed with the district court that many of Rhodes's statements were "'quintessential examples of non-actionable rhetorical hyperbole.'"<sup>44</sup> The district court explained that Rhodes's comments "'make[] clear to all reasonable listeners that [they] are offered . . . not as fact[s]' but as exaggerated rhetoric intended to spark the debate about the wisdom of the use of contractors in Iraq."<sup>45</sup>

34. *Id.* at 286.

35. *See id.* at 285–87.

36. *Id.* at 287–88 (first alteration in original) (internal quotation marks omitted).

37. *Id.* at 288 (alteration in original) (internal quotation marks omitted).

38. *Id.* (discussing P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521 (2004)).

39. *Id.*

40. *Id.* at 303–04. The court also found the following:

[W]hen Rhodes speaks of 'these people' or 'guys' having fought on the side of apartheid or Mobutu, she is referring to certain *individuals* currently employed by the contractors, not the contractors themselves. . . . Rhodes did not accuse CACI in its corporate capacity of fighting on behalf of apartheid or Mobutu.

*Id.* at 302.

41. *Id.* at 300.

42. *Id.* at 293 (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17 (1990)).

43. *Id.* (alteration in original) (quoting *Milkovich*, 497 U.S. at 20).

44. *Id.* at 301 (quoting *CACI Premier Tech. Inc. v. Rhodes*, 35 Media L. Rep. (BNA) 1300, 1316 (E.D. Va. 2006)).

45. *Id.* at 301–02 (alterations in original) (citation omitted) (quoting *CACI*, 35 Media L. Rep. (BNA) at 1316).

Third, the Fourth Circuit found that some of the statements were “appropriately analyzed under both the actual malice standard and the standard protecting statements that cannot reasonably be interpreted as stating actual facts about an individual or entity.”<sup>46</sup> Those statements did not target CACI specifically but military contractors in general.<sup>47</sup> As the court further explained, “[e]ven if we assumed that Rhodes in these statements was suggesting that CACI was responsible for murder at Abu Ghraib, the statements would be, as the district court concluded, protected by the actual malice standard.”<sup>48</sup>

Quoting *New York Times Co. v. Sullivan*, the court concluded, “[I]t is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public [issues], and this opportunity is to be afforded for vigorous advocacy’ that may be caustic and even exaggerated.”<sup>49</sup>

Judge Duncan, concurring in the judgment, stressed her “view that the appropriateness of summary judgment here is more reflective of the magnitude of CACI’s burden than the defensibility of Rhodes’s comments.”<sup>50</sup> While the accusations of child rape had, “at most, attenuated support,”<sup>51</sup> the law requires that a plaintiff show in the pretrial stage that a defendant acted recklessly by clear and convincing evidence.<sup>52</sup> Judge Duncan concluded that “CACI’s involvement in other abuses at Abu Ghraib and the credible sources identifying a contractor as the perpetrator of the child rape” contributed to the failure of its claim.<sup>53</sup>

The Fourth Circuit’s decision in *CACI* does little to modify the traditionally far-reaching First Amendment protections given to statements about public figures, which the Supreme Court first laid out in *New York Times Co. v. Sullivan*. Instead, the Fourth Circuit simply applied this standard to uphold the defendant’s statements on a highly controversial issue. While the role of private contractors in the United States’ military engagements continues to change, the “broad protection” that the First Amendment gives to even the most vociferous critics of “public officials or public figures responsible for war-related activities” will assuredly persist.<sup>54</sup>

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46. *Id.* at 303.

47. *Id.*

48. *Id.*

49. *Id.* at 304 (second alteration in original) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964)).

50. *Id.* at 305 (Duncan, J., concurring).

51. *Id.*

52. *Id.* at 306.

53. *Id.*

54. *Id.* at 294 (majority opinion).

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