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VIA EMAIL ONLY – [redacted]

April 16, 2015

Ms. Shannon M. Lemke
Federal Investigator
EEOC – Milwaukee Area Office
310 W. Wisconsin Ave., Suite 500
Milwaukee, WI 53203

RE: ***Robert Eschliman v. B.F. Shaw Printing Co., Inc.***
EEOC Charge No. 443-2014-1242C

Ms. Lemke:

We write in response to your letter of April 10, 2015, inviting our client, Bob Eschliman ("Bob"), to submit further arguments, explanation and evidence in support of his charge of religious discrimination against Shaw Media d/b/a Newton Daily News (the "Media Company").

Our client remains available for an interview in this matter. His testimony counters many of the factual assertions in the Equal Employment Opportunity Commission's ("EEOC") preliminary determination. Specifically, the Media Company informed Bob that he was terminated for the **beliefs** he expressed, rather than for any specific word choice. The Media Company first mentioned Bob's word choice only *after* the instant complaint was filed. What the Media Company says today is not as credible as what it said to Bob and, indeed, to the public in the article it drafted detailing the reasons it fired Bob.

Media Company Admits it Fired Bob for His "Opinion"

On May 6, 2014, John Rung, the Media Company's president, publicly and clearly explained the precise reason for Bob's termination through the paper's main, prominently featured editorial column on the paper's editorial page – in addition to its reporting on Bob's termination on page 2A of the same day's newspaper:

> Last week, he [Bob] expressed an **opinion** on his personal blog that in no way reflects the **opinion** of the Newton Daily News or Shaw Media. While he is entitled to his **opinion**, his public airing of **it** compromised the reputation of this newspaper and his ability to lead it.

See Exhibit 1 (emphasis added).

Mr. Rung explained that Bob's termination was not for mere words – "inflammatory language" – but for the expression of Bob's religious opinion. Mr. Rung had a chance to qualify the reason for Bob's termination. He did not:

> As previously stated, he has a right to voice his **opinion**. And we have a right to select an editor who we believe best represents our company and best serves the interests of our readers.

Id. (emphasis added).

Prior to the instigation of this charge, Bob was never informed that language had anything to do with his termination. Regardless of the words used or what anyone thinks about them, the President of the Media Company said in his original public statement that it terminated Bob based upon his actual religious **opinion**. The Media Company gave that explanation, and only that explanation, first privately to Bob and then publicly in their own newspaper (twice) – until Bob filed this complaint. Either Bob's version of the facts is true and he prevails, or at a minimum, there is a significant dispute of facts that a trier of fact must adjudicate. In any event, the EEOC should not simply side with the Media Company's post-charge excuse that Bob was terminated for "inflammatory language" when the Media Company's own, published words betray its attempt to mischaracterize its original, publicly professed basis for terminating Bob: the expression of his religious opinion.

The EEOC's preliminary determination acknowledges that Bob expressed more than generic opinions on his blog (". . . it is true that the essence of your client's blog was regarding his sincerely held religious beliefs . . ."). That significant finding is sufficient to serve the basis of a Title VII violation. Bob's expressed a religious viewpoint – a viewpoint expressly protected from discrimination in employment by Title VII – was his opinion and he was discharged for it. *See* 42 U.S.C. § 2000e-2(a)(1) ("It shall be an unlawful employment practice for an employer to . . . discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's . . . religion . . .").

"Mixed-Motives" in Termination are Illegal

The Media Company violated Title VII, regardless of whether the company considered Bob's choice of words. The Media Company stated unambiguously that Bob's religious "opinion" motivated its termination of Bob, demonstrating that Bob's religion was *at least* a motivating factor for his termination. That is unlawful. Congress amended Title VII in 1991 to prohibit this very practice:

> [A]n unlawful employment practice is established when the complaining party demonstrates that race, color, **religion**, sex, or national origin was **a motivating factor for any employment practice, even though other factors also motivated the practice**.

42 U.S.C. § 2000e-2(m) (emphases added); *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99-101 (2003) (concluding same regarding Title VII's language).

Bob demonstrated that his religion was "a motivating factor" for his termination by the Media Company. The company published that it was Bob's religious **opinion** that led to his termination *twice* on the same day, in the same newspaper, featuring it as the newspaper's primary, above-the-fold editorial column. In response to every media inquiry, the Media Company released Rung's statement that it was Bob's religious **opinion** that was the basis for his termination, not his language.

No case exists where a company prominently and publicly declared its termination for discriminatory reasons ("expressed an opinion") yet was vindicated by Title VII because the employer crafted another post-complaint reason for termination to the EEOC ("inflammatory language"). As the United States Court of Appeals for the Ninth Circuit, explained:

> We think this text [42 U.S.C. § 2000e-2(m)] is crystal clear: an employee makes out a Title VII violation by showing discrimination "because of" race, sex, or another protected factor [religion]. Such discrimination is characterized by the statute as "an unlawful employment practice." More specifically, "an unlawful employment practice" **encompasses any situation in which a protected characteristic was a "motivating factor"** in an employment action, **even if there were other motives**.
>
> More specifically, "an unlawful employment practice" encompasses **any** situation in which a protected characteristic was "a motivating factor" in an employment action, **even if there were other motives**. In such a case – sometimes labeled with the "mixed-motive" moniker – **if the employee succeeds in proving only that a protected characteristic was one of several factors motivating the employment action, an employer cannot avoid liability altogether**, but instead may assert an affirmative defense **to bar certain types of relief** by showing the absence of "but for" causation.

Costa v. Desert Palace, 299 F.3d 838, 847-48 (9th Cir. 2002) (emphasis added), affirmed by *Desert Palace v. Costa*, 539 U.S. 90 (2003).

At the very least, Bob's sincerely held religious opinion was, by the Media Company's own admission, "one of several factors motivating" Bob's termination. Regardless of the alleged presence of "other motives," the presence of Bob's religious opinion as at least **a** motivating factor. In fact, it was the **only** motivating factor advanced by the Media Company to explain Bob's termination. As such, under *Costa*, as affirmed by the Supreme Court of the United States, the Media Company violated Title VII:

> [T]he Civil Rights Act of 1991 . . . expressly overruled the basic premise that an employer could avoid all liability under Title VII by establishing the absence of "but for" causation."
>
> Now, under Title VII, the use of a prohibited characteristic (race, color, **religion**, sex, or national origin) as simply "a motivating factor" in an employment action **is unlawful**.

Id. at 850 (emphasis added).

Or, as the Supreme Court of the United States stated, when the employee proves a violation of 42 U.S.C. § 2000e-2(m), any defenses the employer may have "does not absolve it of liability." *Desert Palace v. Costa*, 539 U.S. 90, 95 (2003).

"Inflammatory Language" Excuse Not Supported by the Facts

The Media Company's "inflammatory language" excuse is pretext. At no time did the Media Company explain to Bob that the reason he was placed on indefinite suspension and, ultimately, terminated was because of his "language" – inflammatory or otherwise. There was plenty of discussion about the religious opinion reflected in the blog post. At no point did the Media Company discuss with Bob that one, two, three, or more individual words were the basis for his termination. Only after Bob filed his charge of discrimination did the Media Company invent the misleading narrative that Bob's word choice was the problem, instead of his religious opinions. The EEOC should not accept the Media Company's after-created excuse when its unequivocal, public admission makes clear: Bob was terminated for the expression of his religious opinion.

Further, the Media Company's own statement of editorial principles fails to prohibit the use of "inflammatory language." The Media Company does not have clear guidelines or procedures regarding the allegation that Bob used "inflammatory language." Thus neither Bob nor any other employee was on notice regarding this allegation. That is especially true of private blogs and personal writings. Newspapers are not to be treated differently under the law than any other company. They are not immune to Title VII liability, especially, as here, where the vague "inflammatory language" excuse is raised for the first time in response to legal process and is directly at odds with earlier admissions by the Media Company. *See AP v. NLRB*, 301 U.S. 103, 132-33 (1937) ("The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others."); *McDermott ex rel. NLRB v. Ampersand Publ'g*, LLC, 593 F.3d 950, 959 (9th Cir. 2009) ("Newspapers are not entitled to blanket immunity from general regulations . . ."); *Passaic Daily News v. NLRB*, 736 F.2d 1543, 1556 (D.C. Cir. 1984) ("[I]n this case, the Company characterizes its decision as an editorial one and contends that the First Amendment prevents the Board from challenging its decision or inquiring into its motives. We disagree."); *Hausch v. Donrey, Inc.*, 833 F. Supp. 822, 832 (D. Nev. 1993) (Holding that Title VII applies to a newspaper company's unlawful employment practice against its editor "on the basis of sex, race, or any of the other characteristics prohibited by Title VII.").

Conclusion

The Media Company explained to Bob personally and to the public at large that it terminated him because, "he expressed an **opinion** on his personal blog." That opinion, as the EEOC has rightly concluded, was in regards to his "sincerely held religious beliefs." Congress declared in Title VII that the use of religion, even as just one of several "a motivating factors," to make an adverse employment decision is unlawful. The Media Company used Bob's religion as at least one motivating factor to unlawfully terminate his employment. Under the Civil Rights Act of 1964, as amended in 1991, the Media Company discriminated against Bob Eschliman.

As you continue your investigation, please let me know if you would like to set up a time to interview Mr. Eschliman or require any additional information.

Sincerely,
WHITAKER HAGENOW & GUSTOFF, LLP

Matthew G. Whitaker
Counsel for Bob Eschliman

CC: Hiram Sasser, Liberty Institute
Jeremy Dys, Liberty Institute
Cleve Doty, Liberty Institute

EXHIBIT 1

Earning public trust our priority

Published: Tuesday, May 6, 2014 11:22 a.m. CDT • Updated: Tuesday, May 6, 2014 12:54 p.m. CDT

The First Amendment prohibits the making of any law that impedes the free exercise of religion, abridges freedom of speech, infringes on the freedom of the press, interferes with the right to peaceably assemble, or prohibits the petitioning of government for redress of grievances.

The First Amendment *does not* eliminate responsibility and accountability for one's words and actions.

As reported on page 2 of today's newspaper, Bob Eschliman is no longer the editor of the Newton Daily News.

Last week, he expressed an opinion on his personal blog that in no way reflects the opinion of the Newton Daily News or Shaw Media. While he is entitled to his opinion, his public airing of it compromised the reputation of this newspaper and his ability to lead it.

Shaw Media's "Statement of editorial principles," which can be read in full by clicking on the link at the bottom of NewtonDailyNews.com, starts with this:

"Because journalists subject people and institutions to intense and constant scrutiny, we must maintain the highest principles in our conduct. Our integrity is our most valuable asset. Without it, we lose the public trust invested in us by the First Amendment of the U.S. Constitution."

In the past week, we have lost some of that public trust that is so vital to our existence. Today, we hope to begin earning it back.

There will be some who will criticize our action, and mistakenly cite Mr. Eschliman's First Amendment rights as a reason he should continue on as editor of the Newton Daily News.

As previously stated, he has a right to voice his opinion. And we have a right to select an editor who we believe best represents our company and best serves the interests of our readers.

We take our responsibility as a media company seriously. Our Promise is to provide relevant information, marketing solutions for our business partners, and to advocate for the communities we serve. To be effective advocates, we must be able to represent the entire community fairly.

We appreciate the feedback from readers that we've received in the past week. This is your newspaper, and once again you've shown how deeply you care about it.

We thank everyone for their concern, and we look forward to continuing to serve you into the future.

John Rung is president of Shaw Media, owner of the Newton Daily News.

More News

Skilled Iowa designation shows commitment to workforce, now and in the future

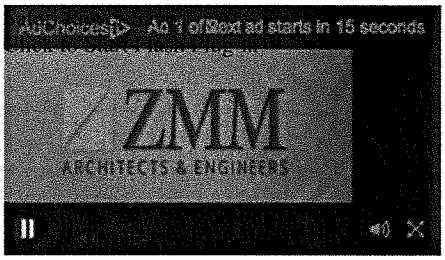
Feb. 19, 2015 - 11:23 am

Local Community Calendar (http://www.newtondailynews.com/evei

FRI 13	**The Chieftains**	Stephens Auditoriu... | Ames, IA (http://www.newtondailynews.com/evei CHIEFTAINS/973344/2015-03-13T19)
FRI 13	**Knights of Columbus Annual Lento...**	McCann Center | Newton, IA (http://www.newtondailynews.com/evei OF-COLUMBUS-ANNUAL-LENTON-FISH-FRY/1271790/2015-03-13T17)
SAT 14	**Alcoholics Anonymous**	St. Stephen's Epis... | Newton, IA (http://www.newtondailynews.com/evei ANONYMOUS/1259591/2015-03-14T10)

National video

Massive 14Ft Stingray is Largest Freshwater Fish Ever Caught with Rod and Reel
Inform News



Local Business Guide

Featured Businesses

Work Systems Rehab & Fitness
J H Travel
Park Center A Wesleylife Community
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Search for a business

Reader Poll

Should body cameras be standard equipment utilized by all police officers?

- Yes
- No
- Unsure

Vote! Show results