

1 THE COURT: If you were to quantify all of the
2 articles, all of the publicity about this, it would seem just
3 from my reading that the vast majority is by attribution to the
4 miners who were making the complaints in the first place. If
5 it is from that source that Mr. Brown received his opinion
6 about the Kingstons and their treatment of these miners, then
7 it certainly wouldn't be attributable to one sentence in the
8 Deseret Morning News --

9 MR. HUNT: That is exactly my point.

10 THE COURT: -- article.

11 MR. HUNT: There are no facts --

12 THE COURT: I am telling you that that is an issue of
13 fact, I suppose.

14 MR. HUNT: I suppose, but he needs to come forward at
15 the pleading stage with facts that establish that.

16 THE COURT: That it came from an alleged defamatory
17 statement.

18 MR. HUNT: Exactly. None of these statements show
19 that. They are just statements that have been made by other
20 participants in this contentious labor dispute about the
21 Kingstons. None of them show that people got that opinion on
22 the basis of reading a sentence in a Deseret News editorial or
23 a Tom Wharton column published in the Tribune.

24 THE COURT: What would really help me, and I take it
25 that it does not exist, is a case that when the Supreme Court

1 in Linn and the other cases, and I am not thinking of them
2 right off the top of my head, has recognized that in these
3 contentious labor disputes there is almost an immunity for what
4 you say during the heat of the battle. That would include
5 statements, as I read the cases, that would include statements
6 that are made to reporters in the context of the labor
7 relations dispute.

8 Is there a case that spills that over into the media?

9 MR. HUNT: We could not find a case directly that
10 close, Your Honor. Linn is instructive in that regard. I
11 think that the policy reasons underlying the rationale in Linn
12 that you give the participants in the debate the breathing room
13 to make those kinds of vituperations, caustic statements would
14 apply equally to the media that is reporting on those
15 statements so that the public can be informed about the debate.

16 But, no, I do not believe we found a case on all
17 fours applying that directly to the media. We can certainly
18 look harder at that.

19 The last point, Your Honor, I would make is that Your
20 Honor does not have to disregard his life experience and
21 judgment as a person living in Utah when reading these articles
22 and deciding whether they are capable of sustaining defamatory
23 meaning and whether they would cause injury to the plaintiffs.
24 You clearly are entitled and should consider your life
25 experience and take judicial notice of the fact that what is

1 pleaded here does not meet that standard.

2 We would ask the Court to dismiss them on that
3 ground.

4 THE COURT: Thank you, Mr. Hunt.

5 Do you want to say anything in response to that?

6 MR. HANSEN: Just very briefly.

7 I think Mr. Hunt was really touching toward the end
8 there on the neutral reporting privilege, and it was the
9 neutral reporting privilege I think that led us to re-draft the
10 complaint the way it is to make sure that the statements
11 against his clients, the Salt Lake Tribune and the Deseret
12 Morning News, to the extent that they are arguing neutral
13 reporting on an ongoing labor dispute and not defamatory, you
14 have to make an effort to excise from the complaint any
15 inference that the Salt Lake Tribune or the Deseret Morning
16 News should be liable simply for making neutral reporting.

17 But beyond that, when we start getting into the
18 neutral reporting privilege and we are going beyond the scope
19 of the complaint, and if the complaint makes specific
20 allegations that the matter is defamatory, then you can't look
21 at the allegations of the complaint to determine whether the
22 reporting was in fact neutral reporting.

23 This Linn case, the U.S. Supreme Court case, I don't
24 think really even applies to newspapers at all. It applies
25 only to the parties to the labor dispute itself. We'll get

1 into that, I suppose, when we get to that point. I could point
2 out that the language of that, but it clearly does not immunize
3 every statement that is made in the context of a labor dispute.

4 THE COURT: Let me ask you one last question.

5 MR. HANSEN: Sure.

6 THE COURT: Do you have any evidence that anyone from
7 reading something in the Salt Lake Tribune or the Deseret
8 Morning News, has taken from that reading, and materially from
9 that reading, an opinion of one of your clients that has
10 defamed your client?

11 MR. HANSEN: I don't have any direct evidence at this
12 time that somebody reading the Tribune article specifically
13 said those are bad people. What we have is evidence of people
14 reading and hearing information similar to that and coming to
15 those conclusions. I don't know that we are going to be able
16 to do that without engaging in some discovery.

17 THE COURT: I am just wondering, genuinely,
18 Mr. Hansen, I am just wondering what would motivate your client
19 to file such a strong lawsuit against long standing newspapers
20 in this community without having that factual basis? It would
21 seem that you're reading the articles and if you found any
22 sentence that you can argue is false, that you're then entitled
23 to make a jump sufficient to file a piece of serious litigation
24 against them that, oh, someone must have read that sentence and
25 taken a defamatory meaning against my clients because of it.

1 You do that in the context of a widely publicized
2 labor dispute in which most, if not 99 percent of the articles,
3 attribute comments to one side, that being the miners who have
4 lots of complaints against your clients, and the other side,
5 your clients who either refuse to comment or when they do they
6 defend themselves. That is the context.

7 In addition, you have conferences and seminars and
8 rallies and things being said that have exposed that there is a
9 dispute going on down there between the managers of the mine
10 and the people who work for them. Yet we, this is you and your
11 clients, are huddled together saying we are going to sue the
12 Salt Lake Tribune and the Deseret Morning News because we can
13 find among these dozens if not hundreds of articles a sentence
14 or two that is false, that we claim is false, such as this
15 statement about whether someone was fired because of union
16 organizing activity in an editorial.

17 Because of that we're going to sue them. They are
18 going to have to hire expensive attorneys, and we're going to
19 then come into court and say, well, this is just at the
20 pleading stage, Your Honor. This is just the complaint. You
21 have to take it as true. Now we get to have discovery to
22 decide whether we have a claim or not. I have told him what I
23 was worried about from his side, and that is what I am worried
24 about on your side. Is that a proper use of the courts?

25 You're causing us all to spend an awful lot of time,

1 and that is our job, but I'm asking you, do you have a proper
2 Rule 11 justified basis for bringing this lawsuit at all
3 against these two entities?

4 MR. HANSEN: I think it is clear that the evidence
5 will show that the plaintiffs' reputations have been injured.
6 I think it is clear that the evidence will show that there has
7 been a considerable amount of publicity, and that the injuries
8 resulted because of all of that publicity. The evidence is
9 also going to show that the publicity pretty much was
10 one-sided. You don't see people out there making the comment,
11 oh, that poor mine has been abused by the workers and by all
12 their false statements. The outcome of all of that has not
13 resulted in injury to the reputations of the workers, it has
14 resulted in injury to the reputations of the plaintiffs in this
15 case.

16 I think their reputations have been injured as a
17 result of all of the publicity taken as a whole, and I think it
18 would probably be very difficult to just parse out a single
19 statement at a single time by a single person and identify this
20 particular statement was the result of this particular part of
21 the injury to their reputation.

22 THE COURT: Well, if your case is based on the
23 statement that you just made that their reputations have been
24 hurt because of the publicity taken as a whole, then that is
25 hardly a defamation claim.

1 MR. HANSEN: It is because of the false and
2 defamatory statements in that publicity. I think if all of the
3 people sued had only made truthful statements we would not be
4 before the court.

5 THE COURT: Well, conversely, Mr. Hansen, if everyone
6 who has ever had a false statement made against them in a
7 newspaper were to sue for defamation, we wouldn't have enough
8 courtrooms or enough judges or juries to handle it all.

9 MR. HANSEN: Well, again, you do have to show more
10 than that the statement is false. You do have to show that the
11 statement tends to injure one's reputation.

12 THE COURT: You have an amorphous group of people,
13 and I have heard one name today, and I guess you can defame an
14 entity, but entities are only comprised of people, but entities
15 have their own reputations, so I'm just going to have to try to
16 sort this out as to whether to let your case go forward against
17 these two newspapers.

18 MR. HANSEN: For example, in Jones versus the
19 National Enquirer case, it involved a lawsuit by the actress
20 Shirley Jones arising out of an article that the National
21 Enquirer published, and somewhere in the article they had said
22 that she had some kind of a drinking problem or that she had
23 been seen drinking alcohol, which wasn't true. Well, whether a
24 statement like that is injurious to a person's reputation
25 depends on the person. She didn't have to show that her

1 reputation was injured in this small group, this small
2 community, and it was a fairly widely published article, and
3 all that she had to show was that it tended to injure her
4 reputation in the eyes of the readers wherever they may be
5 found. That is what we are up against here.

6 THE COURT: If you had that kind of a case it would
7 be a lot easier. I am not sure that that strikes me as a
8 similar situation at all. If this were like the General
9 Westmoreland case arising out of Vietnam, those are cases that
10 I submit are quite easy to wrap one's arms around. This one
11 has its different unique situation.

12 MR. HANSEN: Which I think is precisely why it is not
13 subject to dismissal at this stage of the proceedings.

14 THE COURT: You have made that point very well.
15 Thank you.

16 Let's take a ten minute break.

17 Mr. O'Brien, did I skip you all together?

18 MR. O'BRIEN: Well --

19 THE COURT: On this point, do you want to talk now
20 and then we'll take a break.

21 MR. O'BRIEN: Your Honor, I am going to be a lot more
22 brief than I was going to be and I was going to be fairly brief
23 to begin with. One of my personal heroes in life and that I
24 like to listen to a lot is Groucho Marx. As I was listening to
25 this whole discussion I was reminded of a quote he had which

1 was something like this. Outside of a dog, a man's best friend
2 is a good book. Inside of a dog it is too dark to read.
3 Sometimes that really sort of simple thinking about things
4 brings some clarity to it, and maybe the clarity that we can
5 apply to this whole case really is in the neutral reporting
6 privilege. That is the first reaction I had to this case when
7 I heard about it.

8 What we have here is a big huge dispute, a bunch of
9 people not involving either of our clients, the newspapers, and
10 they are very public disputes, very important disputes, and it
11 is reported on. As you pointed out a moment ago, 95 or
12 whatever percent of these articles directly attribute the
13 quotes, in reading them altogether to the participants. It
14 seems to me that if you apply that kind of simple thinking of
15 Groucho Marx to this that really the neutral reporting
16 privilege answers those questions.

17 Why shouldn't the press have the ability to neutrally
18 report on what happened here? The problem with a neutral
19 reporting privilege is that it is evolving and it is new. It
20 has been recognized in Utah and we gave you that case. It
21 really gives you all the features you need, I think, to resolve
22 this case. You have got people in a very public dispute and
23 you have got the newspapers reporting on it, and they are
24 reporting on it in an accurate way. I think you can just look
25 at their pleading in terms of what they allege, and this isn't

1 a case where the miners are saying something else and the
2 Tribune and the Deseret News reported it the wrong way.

3 So, yes, I was going to take you through each
4 paragraph and tell you how they missed a lot of things that
5 have been attributed, but I hear that you have already read
6 those and seen that. So I guess I would just urge you to take
7 a real look at that as a way of getting rid of this case. If
8 there is not a right to talk about what happened in this
9 dispute, then I think there is an important part of what is
10 going on with the public that is not being told to the public.
11 That is really what the First Amendment was designed to do, is
12 to make sure that the public was informed about things going on
13 in their lives. The neutral reporting privilege is a First
14 Amendment privilege. It is a constitutional privilege. It is
15 something that you probably can more comfortably rule on with a
16 12(b)(6) motion than some of these other issues, and which I
17 think would also be sustained on appeal.

18 Again, instead of taking you through each of these
19 paragraphs, I can submit a separate document that would show
20 you how they say something is not attributed in a Tribune
21 article when in fact it really is, and they have a lot of
22 attributed statements that they have missed in their complaint.
23 Maybe that is the answer here. Maybe this really is the
24 perfect case for the neutral reporting privilege. If the
25 miners and the union have the privilege under federal law,

1 somebody should have the right to talk about what is going on
2 between the miners and the union. The neutral reporting
3 privilege provides that.

4 THE COURT: Well, of course, the neutral reporting
5 privilege does not empower a newspaper to take a position on an
6 issue, and in taking that position report an untruth.

7 MR. O'BRIEN: No, it does not.

8 What you do is you say that the neutral reporting
9 privilege does not apply to the one or two editorials that have
10 been asserted here, but, as you know, the editorial arms and
11 the reporting arms of a newspaper is two completely separate
12 things. At the very least you pare down this case
13 substantially if you just focus on what are editorials, and
14 maybe that provides an opportunity for limited discovery, but I
15 still think that you can rule as a matter of law that those are
16 opinions for all the reasons Mr. Hunt has made.

17 At best we have two or three opinion columns and two
18 or three editorials and the rest of it is just reporting,
19 reporting what was said, reporting the counter charges and
20 giving their side of the story as well as their side of the
21 story. So I think that is a real, at least for me, and
22 obviously I am biased because I am an advocate for my client,
23 but that is a real appealing way to get rid of the case, that
24 really for all the reasons you have just discussed with Mr.
25 Hansen shouldn't be here.

1 THE COURT: Would you agree that the newspaper is
2 entitled to report, and even if a sentence sneaks in there
3 without attribution, if it is in context and it appears obvious
4 it is a report on what is happening, and that there are two
5 sides to the dispute, that that is not actionable for libel?

6 MR. O'BRIEN: That is our position.

7 THE COURT: Now, the next step is if the newspaper
8 moves into the opinion writing side of things, either by an
9 opinion column or an editorial, that is also not actionable
10 because it is clearly the opinion of the newspaper?

11 MR. O'BRIEN: It is an opinion and it can also be a
12 form of neutral reporting.

13 THE COURT: Well, either way it is not actionable,
14 fair?

15 MR. O'BRIEN: Fair.

16 THE COURT: Now, it is the next little category that
17 I suppose that might cause a newspaper to spill over into the
18 area of possible liability, and that is where, in expressing
19 that opinion, a statement of fact is asserted as a statement of
20 fact. It would be one thing for a newspaper, and taking the
21 Shirley Jones example, for the newspaper to go into an opinion
22 writing mode and in that opinion saying something, for example,
23 everyone knows Shirley Jones has a drinking problem. That is a
24 statement of fact. That might hold the newspaper up to some
25 problems legally.

1 MR. O'BRIEN: Opinion and fact are two different
2 things.

3 THE COURT: If, on the other hand, if in this same
4 opinion statement they had said, we believe that the better
5 case has it that those persons asserting -- I'm making this up,
6 and I am not even sure who Shirley Jones is.

7 MR. O'BRIEN: The Partridge Family mother.

8 THE COURT: I am defaming her here and --

9 MR. O'BRIEN: David Cassidy's mom on the Partridge
10 Family.

11 THE COURT: Really.

12 MR. HANSEN: She was also in Oklahoma. She was the
13 actress --

14 THE COURT: So if the side that urges or that argues
15 that she has a drinking problem has the better case, that they
16 would be entitled to say. Going back to this very specific
17 example in this case, if when the Deseret Morning News says the
18 National Labor Relations Board issued -- I'm on the wrong line.

19 They said, the National Labor Relations Board has
20 said the mine owners fired the miners illegally, and it is one
21 thing if that is true, but if it happens to be a falsehood,
22 that is I guess where I am wondering, and assuming they can
23 meet the other elements of a defamation claim that someone
24 actually has been defamed because of that statement, at least
25 it would be a beginning. Do you agree with me on that? Do you

1 agree with that legal proposition that newspapers can't lie
2 with impunity?

3 MR. O'BRIEN: No, it can't make factual statements
4 under the guise of an opinion and then assert the opinion
5 privilege. What it can do is give its opinion on certain
6 circumstances, and this is not my part of the argument, but
7 certainly the Deseret News could argue based on the
8 circumstances that we have seen where a charge is filed, and
9 knowing that the N.L.R.B. usually indicates to people that we
10 are going to pursue this, and we think there is fire and smoke
11 here unless you settle it, and then it gets settled and there
12 are circumstances, then that is the N.L.R.B. concluding that
13 this was an illegal termination.

14 The union's counsel can speak to this far more
15 accurately than me, but that is my understanding of how the
16 N.L.R.B. proceeds. Then they say later on in the same opinion
17 piece that it is a settlement.

18 I mean, another good example is the Tribune
19 editorial, T-9.

20 THE COURT: It could be a settlement and still in
21 reaching that settlement the N.L.R.B. could have said something
22 like that.

23 MR. O'BRIEN: Yes.

24 THE COURT: Just because something settles does not
25 mean that the N.L.R.B. does not make what they believe to be

1 factual assertions, whether they were legally or illegally
2 fired.

3 MR. O'BRIEN: What I read is that that is the Deseret
4 News' opinion interpreting what occurred. Because the N.L.R.B.
5 acted the way they did, that this is what they said. It is
6 like a governmental agency has said --

7 THE COURT: If they had said --

8 MR. O'BRIEN: They could say it without speaking out
9 of their mouth. They could say it by their actions.

10 THE COURT: I see.

11 MR. O'BRIEN: That is there I think it is an opinion.

12 Like I said, another good example is the Tribune in
13 T-9. This shows how they have tried to carefully depict this
14 as a dispute, but in the Tribune editorial, T-9, which the
15 plaintiffs also claim is actionable, is the following quote.
16 When they talked about forming a union last September they say,
17 referring to the miners, their leader was fired and the rest of
18 them were locked out. Then the editorial goes on and notes
19 that the company claims that it was a walk out, not a lock out.
20 Then the editorial ends with reference to the N.L.R.B.
21 brokering a settlement. It states, if the miners' claims about
22 various matters are as they appear, and if you look at the vast
23 amount of this reporting in all of these articles that have
24 been written about this, it has very clearly indicated that the
25 Tribune and Morning News are reporting about people who are

1 fighting with each other and they are not participants in the
2 fight. They are making observations about things that happened
3 in the fight, but they are not participants in the fight.

4 The basic core of the neutral reporting privilege is
5 that people like newspapers who are reporting about a very
6 public fight, they really shouldn't have to bear the liability
7 for the charges that are filed under the First Amendment when
8 it is a very public controversy played out in front of all of
9 us.

10 That is, you know, looking at it from my very simple
11 Groucho Marx type approach, and that is very appealing to me as
12 a way to resolve this case.

13 THE COURT: I'll just quote Groucho Marx and the
14 whole thing is over with.

15 MR. O'BRIEN: I don't think the Tenth Circuit can
16 overrule you if you quote Groucho Marx.

17 Thank you.

18 I know we are short on time, but do you want me to
19 talk about the --

20 THE COURT: I think that is good. You don't need to
21 worry about the time.

22 Mr. Hansen, do you want to say anything in response
23 to Mr. O'Brien? Then we'll take a short break.

24 MR. HANSEN: Whatever we might say about the Salt
25 Lake Tribune and the Deseret Morning News, The Militant I don't

1 think can claim a neutral reporting privilege here. The
2 Militant makes no pretense of being a neutral reporter. They
3 admit and openly admit that they are partisan or one-sided on
4 their reporting. All you have to do is take a look at the
5 articles that The Militant has submitted to determine that that
6 is in fact the case. They have not engaged in neutral
7 reporting.

8 THE COURT: We probably ought to hear from Mr. Dryer
9 before you take him on. It is his motion, not yours.

10 MR. HANSEN: Right.

11 THE COURT: I think we have been so far just letting
12 you respond to the movants who have addressed their --

13 MR. HANSEN: I thought that is what I was doing.

14 THE COURT: I don't think anyone has --

15 MR. HANSEN: Okay. I think we have covered neutral
16 reporting adequately as far as it addresses the Tribune and the
17 Deseret Morning News.

18 I would cite the Court to the articles we included in
19 our memorandum on even arguing privileges and other defenses on
20 12(b)(6) motions. I can't even pronounce this. I am not very
21 good at these names. It is the Zoumadakis case. It is a 2004
22 Utah Appellate Court case. It says that privileges are
23 affirmatory defenses and they are not properly raised on
24 12(b)(6) motions. I think that is where we are here. You can't
25 look at the complaint or even the articles and make a factual

1 determination at this stage of the proceedings and say that
2 those articles are subject to neutral reporting or any
3 particular privilege. We are going beyond, well beyond the
4 bounds of a 12(b)(6) motion when you are arguing those
5 affirmative defenses.

6 Thank you.

7 THE COURT: Yes, Mr. O'Brien.

8 MR. O'BRIEN: One last thought on that, Your Honor.
9 We have addressed this in the briefs, but this is a federal
10 constitutional privilege and you have already noted the Time v.
11 Barry case and that addressed neutral reporting on a motion to
12 dismiss. I don't think that that line of cases applies.

13 THE COURT: Which court?

14 MR. O'BRIEN: Time v. Barry. It is the District
15 Court case, the basketball coach case.

16 THE COURT: That brings me back to the same thing I
17 was talking to Mr. Hunt about. If the neutral reporting
18 privilege is an affirmative defense, and if it is not proper to
19 be decided, and someone might argue and be correct on the view
20 of some court of appeals that it is not a proper matter to take
21 up during a 12(b)(6) argument, but it could be taken up
22 immediately after recognizing the pleadings are technically
23 sufficient, and why not do it that way? It wouldn't seem to me
24 that the neutral reporter privilege assessment would
25 necessitate any discovery at all.

1 MR. O'BRIEN: If you would rather treat it that way I
2 think you can do it that way under the rules, but right now it
3 is based on the pleadings that have been filed. You can deem
4 our motion to dismiss as a denial and go right to the
5 pleadings, and the articles, by the way, all 25 articles that
6 are published are referred to in the pleadings and that is a
7 part of the whole package that is in front of you, and I think
8 you can do it that way.

9 THE COURT: That is what I am wondering about,
10 obviously. That is a procedural question not a substantive
11 one.

12 MR. O'BRIEN: I am not Wright & Miller and I didn't
13 write books on procedure but, you know, it seems to me --

14 THE COURT: You spent too much time watching T.V.

15 MR. O'BRIEN: Watching Groucho Marx and Shirley
16 Jones.

17 THE COURT: Next you'll be quoting the Three Stooges.

18 MR. O'BRIEN: I took that out of my argument.

19 THE COURT: Thank you.

20 Let's take a ten minute recess. Let's come back in
21 at five minutes after the hour, and I guess I'm going to be
22 hearing from you, Mr. Dryer, when we come back in.

23 MR. DRYER: Thank you.

24 THE COURT: Court is in recess.

25 (Recess)

1 THE COURT: Mr. Dryer, are you up next?

2 MR. DRYER: Yes, Your Honor.

3 THE COURT: You may proceed.

4 MR. DRYER: May it please the Court, I would like to
5 focus my argument principally on a separate and additional
6 reason why The Militant should be dismissed from this lawsuit,
7 but before I do that let me just note that the same arguments
8 that Mr. Hunt and Mr. O'Brien made apply with equal force to
9 The Militant. That is not just because the same common law and
10 statutory and constitutional protections apply, the same legal
11 principles apply, which they do, but it is also because
12 factually the statements that the plaintiffs are complaining
13 about that were published by The Militant fall into the same
14 categories as the statements that they were complaining about
15 published by the Tribune and the Deseret Morning News.

16 In other words, they complain against all the papers
17 about the fact that the miners were not fired. They complain
18 about statements that all three newspapers said about the
19 current union being a sham and that it does not adequately
20 represent the miners' interests. All the papers complain about
21 statements that the miners are being exploited and are being
22 forced to work in unsafe conditions.

23 The reason all of these statements are the same is
24 because they all come from the same source. They come from
25 miners, they come from the U.N.W.A. representatives who have

1 made statements, and from other participants in this dispute.
2 So really there is no legal or factual difference between the
3 statements published by The Militant and the statements
4 published by the Tribune or the Deseret Morning News.

5 Let me suggest to the Court that there is an
6 additional reason why the complaint should be dismissed as
7 against The Militant, and that is simply because the plaintiffs
8 have failed to comply with this Court's previous order. To put
9 that in context, let me quote from some statements that Your
10 Honor made at our last hearing on June 14th after you ordered
11 the plaintiffs to replead their case.

12 I quote, if the plaintiffs want to keep this lawsuit
13 alive they must file a second amended complaint which needs to
14 clearly allege who is being sued for what and by whom. The
15 plaintiffs are going to have to sort out precisely which
16 defendant is being accused of which defamatory statement so
17 they know what they are being charged with. The plaintiffs
18 must also give the defendants a better understanding of what is
19 claimed to be defamatory. They need to know what part you
20 think is untrue and why if it, therefore, forms the basis for a
21 defamation claim. We need to sort out in this lawsuit as we
22 continue what is merely reporting who said what in a dispute
23 and what is opinion. You can't just lift a sentence out and
24 say, oh, that is wrong, therefore, it is defamatory. That is
25 not the full definition of defamation and of a defamation

1 lawsuit and the law behind defamation. Just because something
2 is wrong may not mean that it is defamatory. In its present
3 form the amended complaint is sufficiently vague and
4 insufficiently precise to stand as a complaint upon which
5 relief can be granted and from which, in this court, litigation
6 may proceed.

7 Then you ordered the plaintiffs to do two things.
8 First you ordered them to eliminate any statements that are
9 attributed to others, and then you also ordered them to replead
10 and set forth with specificity who was being sued and by whom
11 and for what, and set out the exact statement that you claim is
12 false, and set out the exact statement that you claim is
13 defamatory and explain why it is defamatory.

14 At least with respect to The Militant the plaintiffs
15 have failed to do either of those things. The miners, the
16 U.N.W. representatives and others involved in the dispute, they
17 made the statements that were published in The Militant and
18 they are still included in the complaint. What has happened is
19 that the plaintiffs have just selectively edited out those
20 attributions, and let me just give you one example.

21 In paragraph 81-Q of the first amended complaint, and
22 that is the one that Your Honor has already deemed to be
23 insufficient, there is this allegation. The mine, owned by the
24 Kingston family, has suspended U.N.W.A. supporter William
25 Estrada for refusing to file a disciplinary warning the week

1 before. At the time it was the company's third attempt to fix
2 the mine's workers, according to the co-op miners. They have
3 taken that exact same allegation, and it now appears in
4 paragraph 135-C of the second amended complaint, but they have
5 dropped off according to the co-op miners. I can cite numerous
6 other examples of where that has happened. So they have
7 apparently gone to the trouble of deleting the attributed
8 statements as they appeared in the Deseret News and the Salt
9 Lake Tribune, but they have not done that for The Militant.

10 They also did not comply with the second prong of the
11 Court's order, which was to identify which plaintiffs, which of
12 these 26 plaintiffs were defamed by which of these 84
13 defendants. Which of these 26 plaintiffs were defamed by the
14 literally thousands of statements that they attribute to The
15 Militant?

16 Well, what did the plaintiffs do? Well, they merely
17 reorganized the 13 pages of allegations that are against The
18 Militant. They reorganized them. The first amended complaint
19 listed all of the allegations by article and by date. The
20 second amended complaint takes those exact same allegations
21 and, in fact, adds eight new articles, and instead of listing
22 them by article, they just reorganize them and organize them by
23 author. They have not done a thing to comply with the Court's
24 order. They are the same conclusory, sweeping, scatter gun
25 approach, and that was the term that Your Honor used at the

1 last hearing, that you thought this was a scatter gun approach,
2 and they have just taken this scatter gun approach, at least as
3 with respect to The Militant and repackaged it. Virtually
4 every article that has been published by The Militant about
5 this Co-op Mine dispute since October of 2003 is implicated.

6 Now, the plaintiffs do give an explanation in their
7 papers for why the plaintiffs didn't do what the Court required
8 them to do. They say in their papers, well, if we were to do
9 that it would triple the size of our complaint. We would have
10 to add 100 pages to our complaint. Then to just sort of
11 emphasize that point they do that exercise with one paragraph.
12 It is attached as an addendum to the plaintiff's memorandum in
13 opposition to our motion.

14 I would encourage the Court, if not now, to at least
15 at some point look at that addendum, because it demonstrates
16 that if they really wanted to they could comply with the
17 Court's order, because they have attempted to do so with one
18 paragraph of the allegations. So what they have done, and
19 paragraph 143-G is the paragraph that they have attempted to
20 comply with the Court's order on, and --

21 THE COURT: Addendum one?

22 MR. DRYER: Yes.

23 THE COURT: I have that.

24 MR. DRYER: If you look at addendum one, and they
25 don't identify it and they say it is from the complaint, but I

1 will represent to the Court that that is paragraph 143-G. That
2 is the allegation that is in their second amended complaint.

3 Now, if you read through that, and it is about maybe
4 six inches of single space type, there are actually nine
5 separate sentences that they are complaining about. Then on
6 the right hand side of addendum one they take each of these
7 nine and they attempt to, as they say, parse and explain and
8 they attempt to comply with the Court's order by setting forth
9 what the claimed defamatory statement is and why it is
10 defamatory.

11 Let me direct your attention to the second example
12 that they give. It is in the middle of the first page. It
13 says, the author's article said, quote, that the miners were
14 being paid between \$5.15 and \$7 an hour with no benefits. They
15 claim that is defamatory. Then they go on to explain that this
16 was false because it is not true, that the miners were being
17 paid between \$5.15 and \$7 an hour with no benefits, and that it
18 is defamatory because it implies that the workers are being
19 unfairly underpaid for the work they do. It is defamatory, per
20 se, because it imputes to C.W.M. and its managers conduct which
21 is incongruous with the exercise of a lawful business.

22 My point is that they at least have made an effort to
23 comply with the Court's order in one example, in a one
24 paragraph allegation, but they refuse to do so on the rest.
25 Even their explanation and their attempt is not really what the

1 Court asked them to do fully, because you wanted them to say
2 who is defamed by this. You have said that again today in
3 questions to Mr. Hansen.

4 He gave you his best example, which was that
5 editorial that said that miners were illegally fired. You
6 asked him, who did that defame? Which of these 26 plaintiffs'
7 reputation was injured by that? He really had no answer.
8 Well, who is defamed by this statement that the miners were
9 being paid between \$5.15 and \$7 an hour with no benefits?
10 Which of those 26 plaintiffs are defamed by that article or
11 that statement, assuming that it is false? I don't know
12 whether it is false or not. I would say it is not defamatory.
13 There is no injury that could be attributed to that.

14 I think in the overall context of this you'll see
15 that that statement, that the miners are being paid between
16 \$5.15 and \$7 an hour, comes from the miners and from the United
17 Mine Workers. It is not something that The Militant made up or
18 that the Tribune or the Deseret Morning News made up. So the
19 plaintiffs demonstrate that they can attempt to do, at least
20 attempt, albeit not successfully, but, nonetheless, they didn't
21 do it.

22 That is in sharp contrast to what they did with the
23 Tribune and the Deseret Morning News. The Tribune statements,
24 and there were originally 60 statements they were complaining
25 about and they reduced them down to 11. The Deseret Morning

1 News had 45 statements in the first amended complaint and they
2 were reduced down to eight statements.

3 So the plaintiffs have just failed to comply with
4 this Court's order despite their third opportunity to do so.
5 On that basis alone I think the Court can dismiss this case and
6 dismiss it against The Militant, with prejudice, and because of
7 the First Amendment issues that are implicated here, the First
8 Amendment rights that are being implicated, as Mr. Hunt has
9 previously said, the law encourages the judicial process to
10 resolve these issues at an early state, analogous to Your
11 Honor's observations about the qualified privilege.

12 That is why it is appropriate for Your Honor to
13 resolve this case, whether it is a 12(b)(6) or whether it is
14 converted to a 12(c) or a 56 motion, the law encourages the
15 early disposition. I would refer the Court to Cox V. Hatch,
16 involving a defamation case against Senator Hatch. The trial
17 court dismissed that. And I don't have the case in front of
18 me, and I am going from memory, but I think it was 12(b)(6),
19 but if not it was converted to Rule 56, and the Utah Supreme
20 Court in upholding that trial court dismissal noted that in
21 cases that involve free speech where litigation can be used to
22 chill that free speech, that it is appropriate for the court to
23 dispose of the case early on the merits without going through
24 the expensive discovery.

25 I don't think my clients really care whether it is

1 12(b) (6) or 12(c) or 56(f), but if converting it to 56(f) means
2 that there is discovery, and the plaintiffs are going to want
3 to take depositions of all 84 defendants, that is where the
4 chilled speech comes into play.

5 You asked Mr. Hansen, well, what has motivated his
6 clients to file this massive lawsuit against the Tribune and
7 Deseret Morning News? I would say he didn't have a good
8 answer. I think the same question can be asked about why would
9 he sue The Militant, a publication who sends about 150 papers
10 into the State of Utah. With all due respect to my client,
11 there are not a lot of socialist readers in Utah. 150 papers
12 get delivered into Utah each week. Well, now why would the
13 Kingstons care about what is being reported by The Militant to
14 such a small, narrow, little audience?

15 Well, I think it is, at least inferentially, the
16 answer is they are attempting to chill any further reporting by
17 The Militant. And I suppose that could be the reason for their
18 suit against the Tribune and the Deseret Morning News. With
19 respect to The Militant I think that there is that additional
20 ground upon which the Court could dismiss the complaint against
21 The Militant.

22 Let me just make one comment on this issue that
23 Mr. Hansen raised about the Zoumadakis case, saying that that
24 is a very recent case by the Utah Court of Appeals. Zoumadakis
25 dealt with a common law privilege that protects communications.

1 between an employer and an employee. The contours of that,
2 because it is a common law privilege are a bit undefined, and
3 as Mr. O'Brien pointed out, the neutral privilege at least is a
4 constitutionally based privilege, but the other privileges
5 apply to all three newspapers, and those are statutory
6 privileges and they are not ill defined. And the reason that
7 the Court of Appeals reached that result in Zoumadakis is
8 because it would have been unfair to require the plaintiffs to
9 sort of divine that they were going to assert this as an
10 affirmative defense. That is not the case here.

11 Maybe they could make that argument if this was round
12 one with their original complaint, but they have had two
13 additional opportunities to plead, and we raised these same
14 privilege arguments in our first round of motions, so they are
15 on notice that we are raising these affirmative defenses. It
16 is not like they have been surprised. It is not like they have
17 not had proper notice to adequately plead in response to those
18 affirmative defenses. I think to not consider the affirmative
19 defenses at this stage really would be form over substance.

20 Let me make one final comment on the substantive
21 merits, and that is with respect to defamatory meaning. The
22 plaintiffs, I think, erroneously equate injury with defamatory
23 meaning, and they also erroneously equate falsity with
24 defamatory meaning. Neither of those are accurate
25 understandings of the law. They seem to argue that, hey, if

1 I'm injured and my status or my reputation has been harmed then
2 it, therefore, must be defamatory. That is not the case. As
3 Your Honor has noted, not everything that is false is
4 necessarily defamatory.

5 Opinions are the clearest example. Opinions can be
6 very, very injurious. They can damage people significantly.
7 People lose their jobs. People lose contracts. They can be
8 significantly injured. If it is an opinion as a matter of law,
9 it is not actionable. Defamatory meaning is viewed in
10 isolation, and I really don't want to get into this quagmire of
11 is it a factual or a legal question, and defamatory meaning is
12 a legal question and I do think it necessarily does involve
13 Your Honor's assessment of facts. The facts that you have to
14 assess are the facts that are alleged in the complaint.

15 It is not simply enough to say in a bare conclusory
16 fashion, these words are defamatory, these words were false,
17 these words were made with reckless disregard of the truth.
18 Notice pleading requires more. It requires underlying facts.
19 What has happened in this complaint is they have taken this
20 shotgun approach at least to The Militant, and now reorganized
21 and instead of by article by author, and then at the end of
22 their 84 page complaint or 75 page complaint, they say all of
23 the above statements were false and defamatory. They were made
24 by all of the defendants and they all conspired together to
25 make them.

1 Clearly, as Your Honor has observed, this was a high
2 profile labor dispute. You certainly can take judicial notice
3 of the fact that mining and mine safety is something that is in
4 the news of late, and since we have had our last hearing 16
5 miners have died. Two in separate incidents in West Virginia
6 and one here in Utah and one in Kentucky. Thankfully none of
7 those deaths involved any of the mines owned by the Kingstons.
8 Two weeks ago the Bear Canyon mine, which is owned by the
9 Kingstons, that mine was closed, portions of it were closed and
10 miners were evacuated because of safety issues.

11 The statements that The Militant published are the
12 exact same statements that were published in the Tribune and
13 the Deseret Morning News, and all of them are based on the same
14 sources of information, the representatives from the United
15 Mine Workers and others who were participants. So while it may
16 be true that the neutral reporting privilege does not apply
17 equally to the Tribune or the Deseret Morning News, the same
18 fundamental concept of the other privileges and the
19 constitutional protections apply equally to The Militant just
20 as they would to the New York Times or the John Birch Society
21 publications.

22 I would urge the Court to dismiss, and clearly a Rule
23 56 conversion, which I believe the Court has the authority to
24 do, would be appropriate and would be more sustainable on
25 appeal.

1 THE COURT: Doesn't that open up the possibility of a
2 request for some limited discovery?

3 MR. DRYER: It does open that up, although I think
4 the Court has the authority, given the fact that you have given
5 them three opportunities to plead their case with specificity,
6 and that they failed to do that, and what this is all about is
7 trying to get past the motion stage so that they can subject
8 these newspaper defendants to the huge expense of discovery.
9 That is what our law, because of the importance of the First
10 Amendment in our country, that is what the law is designed to
11 prevent.

12 You made the statement that converting it to Rule
13 56(f) wouldn't necessarily open it up to full blown discovery,
14 and I think that is correct, and I also think it does not
15 necessarily have to entail any discovery in the context of this
16 where they still have not done what Your Honor has ordered them
17 to do.

18 Thank you.

19 THE COURT: Let me hear from Mr. Hansen and then I
20 will maybe ask you if you want to respond to him.

21 Mr. Hansen.

22 MR. HANSEN: Thank you.

23 I just want to set one fact straight. We were not
24 given three opportunities to make corrections to the complaint.
25 There was an initial complaint and it was filed just a couple

1 of days before the statute of limitations deadline and was
2 filed to meet the deadline. The plaintiffs knew that it would
3 require an amendment and that it was filed in order to meet the
4 statute of limitations deadline. We had made significant
5 changes to it before we ever started serving it, and so the
6 original complaint was never even served.

7 The amended complaint was served and it was the
8 subject of the prior motion to dismiss, and the Court made only
9 that one ruling, so we are only dealing with one ruling from
10 the Court dealing with amended pleadings, not three. I just
11 wanted to get that out of the way.

12 THE COURT: I'm aware of that history. Thank you.

13 MR. HANSEN: Mr. Dryer argued that The Militant's
14 statements fall within the same categories as the Salt Lake
15 Tribune's statements and the Deseret Morning News' statements
16 as far as fact versus opinion and whether they are capable of
17 defamatory meaning and so on. We have already covered in
18 general the law dealing with those issues, and I just want to
19 point out that The Militant's publications were much broader
20 and more specific and they are more numerous than the Tribune
21 and the Deseret Morning News. There are many more statements
22 made by the Tribune reporters and editors that are clearly not
23 attributable to other people, and that they were clearly
24 statements being made by the articles themselves. I would just
25 refer the Court to those articles to show that.

1 I think the Court is perfectly capable to look at the
2 second amended complaint and determine whether it sufficiently
3 complies with the Court's prior order. The issue there before
4 the Court was really the amended complaint, and was that
5 pleading adequately framed so as to give the defendants
6 sufficient notice of what was being alleged against them to
7 frame their responsive answers? That is all that Rule 8
8 requires. I would submit that the second amended complaint
9 does satisfy that.

10 The defendants can look at the second amended
11 complaint and clearly see what is being alleged against them
12 specifically, and they clearly would be able to look at the
13 specific allegations and either admit them or deny them or
14 state that they lack evidence or information sufficient to form
15 a belief as to the truth of the falsity. That's all that is
16 required at the pleading state. I think the second amended
17 complaint clearly satisfies that. It does give adequate notice
18 to satisfy due process, which is all that is required.

19 Again, there is the suggestion that we are just
20 looking at isolated statements. I know that the Court required
21 us in the second amended complaint to pull the statements out
22 and identify them specifically in the pleadings. That is
23 really kind of an artificial constraint, an artificial
24 construct, because in looking at the defamation claims you
25 really have to look at those statements in the context of the

1 entire article.

2 THE COURT: How many statements do you claim are
3 defamatory with respect to The Militant?

4 MR. HANSEN: Oh, my goodness. Much more so than the
5 Deseret News and the Tribune.

6 THE COURT: Do you know a number?

7 MR. DRYER: Literally thousands, Your Honor.

8 MR. HANSEN: Well, not thousands. Literally dozens.

9 MR. DRYER: There are nine just in --

10 THE COURT: You both said literally and you both
11 can't be correct.

12 You say thousands?

13 MR. DRYER: Hundreds. Clearly hundreds.

14 MR. HANSEN: I have never counted them. There
15 probably is more than 100. I don't know if there are more than
16 200. I would agree with dozens.

17 MR. DRYER: There is nine in paragraph 143-G.

18 MR. HANSEN: Well, there is a number of them. To
19 argue about --

20 THE COURT: Well, I brought it up. I just wondered.
21 We are down to a relatively few with respect to the Tribune and
22 the Deseret News.

23 MR. HANSEN: That is correct.

24 It may be possible that the Court would dismiss out
25 the Tribune and the Deseret News but not The Militant. That is

1 obviously left up for you to decide. But clearly the
2 statements that were made by The Militant and its staff are of
3 a different nature both quantitatively and qualitatively from
4 that of the other newspapers.

5 It may be possible due to the sheer bulk of those
6 articles and all of the statements that have been gone through,
7 that there were some very few statements that were actually
8 attributed to others that I didn't catch in drafting the
9 complaint, and if there are any there are very few of them.
10 Those are errors made by me and they are infrequent and
11 unintentional. The vast majority of the statements clearly are
12 not attributed to others.

13 Having said that, even the statements attributed to
14 others can be defamatory as to the person making that if it is
15 clearly in the context where they intend to adopt that
16 statement as their own. We are only dealing with a neutral
17 reporting privilege here, and the neutral reporter privilege
18 does not apply if the reporting is not neutral. Repeating
19 defamation made by others can be actionable against the person
20 that repeated those defamations in the proper circumstances.

21 THE COURT: Somewhere somebody got the idea that the
22 N.L.R.B. did rule that the miners had been fired illegally. I
23 don't know where that started.

24 You say it is false.

25 MR. HANSEN: We have --

1 THE COURT: I have not heard the other side say it is
2 true. It definitely was said. In your paragraph 138 The
3 Militant states in an article in June, and this is in quotes,
4 in June the N.L.R.B. had ruled that the miners had been fired
5 illegally.

6 MR. HANSEN: There were some charges that were filed
7 by the U.M.W.A. that the C.W. Mining Company had committed
8 unfair labor practices against certain workers. In June of
9 that year the N.L.R.B. did issue an order dealing with those
10 charges. The order dismissed those charges with no finding of
11 liability. It was the result of a settlement agreement made
12 between the parties.

13 THE COURT: I understand that.

14 MR. HANSEN: No liability was --

15 THE COURT: I understand.

16 It is always interesting how these things get
17 started. For all we know, the editorial writer in the Deseret
18 Morning News -- or was it the Tribune -- the Deseret Morning
19 News said something identical to that. Maybe they got it from
20 the Militant.

21 MR. HANSEN: Hopefully discovery will show where that
22 error crept into this whole thing. It clearly is not a true
23 statement. What actually happened before the N.L.R.B. was a
24 matter of public record.

25 THE COURT: What if The Militant got it from one of

1 the workers who also claimed that he or she was fired?

2 MR. HANSEN: It wouldn't make any difference where
3 The Militant got that statement to begin with. If they just
4 published the statement and it was false, and if it tends to
5 injure the reputation of a plaintiff, it is actionable. It
6 does not make any difference whether they made it up by
7 themselves or published it because somebody else told them to.

8 THE COURT: Really?

9 MR. HANSEN: Yes.

10 THE COURT: Do you think all newspapers every day are
11 laboring under that standard, that if they go talk to a person
12 about something and that person gives them a piece of fact, if
13 they put it in and it turns out not to be true that they may be
14 sued for libel?

15 MR. HANSEN: It depends on how they put it in. If
16 they say we interviewed so-and-so and so-and-so said this, then
17 they are merely engaging in neutral reporting. If the
18 newspaper itself steps up affirmatively and says this is what
19 happened, then they have adopted that statement as their own,
20 and if it is defamatory it is actionable against them.

21 THE COURT: Well, you seem to be saying if it is
22 false, and --

23 MR. HANSEN: All of the other elements of defamation
24 have to be there, yes.

25 THE COURT: Do you all agree with that? There must

1 be some law pertaining to newspaper reporting that addresses
2 this.

3 MR. HANSEN: I think that is one reason why in most
4 news articles reporters will almost universally attribute the
5 statements that are being made to the person who made them,
6 rather than just coming out and saying this is what happened.

7 THE COURT: That is because people like you are suing
8 them all the time.

9 MR. HANSEN: Well, not all the time.

10 THE COURT: No. I stand corrected.

11 MR. HANSEN: Hopefully there won't be any more by my
12 clients either.

13 Mr. Dryer argued that the plaintiffs confuse
14 defamatory meaning with injury. We have not confused it.
15 There is a very strong link. If a statement is capable of
16 defamatory meaning, that is another way of saying it is capable
17 of causing injury to reputation. If it is capable of
18 defamatory meaning it is capable of causing injury. That is a
19 separate question as to --

20 THE COURT: I am intrigued --

21 MR. HANSEN: I understand that distinction.

22 THE COURT: Not intrigued. Intrigued is too strong.
23 I find it interesting that in this little discussion that we
24 were just having, isn't there something to the fact that if
25 you're reading a newspaper or listening to a news report on the

1 television or the radio, and we all assume that it is reporting
2 the news based on an investigation of what happened, and if I
3 were to hear today, which I probably could if I just turn on
4 the television, that Dick Chaney fired a shotgun and hit his
5 hunting companion in the face, and it had no attribution, not
6 that witnesses at the scene said, wouldn't it be logical that I
7 would assume that this news person was not actually there?
8 They are reporting on what they heard from somebody.

9 MR. HANSEN: That really is not a very good example
10 because it brings in a public figure and --

11 THE COURT: No. I am just saying when we read in the
12 newspaper --

13 MR. HANSEN: It also happens to be true in this case,
14 from what I understand.

15 THE COURT: But I am just saying, don't we assume
16 that all news accounts when they are news accounts are based on
17 somebody telling the reporter something?

18 MR. HANSEN: Well --

19 THE COURT: I just find that interesting. You say so
20 long as you put the magic words in there, according to
21 so-and-so, then it is not actionable, but if they leave that
22 out then suddenly we assume that they have, what, made it up?

23 MR. HANSEN: That is the difference between merely
24 neutral reporting of things that other people have said and
25 adopting your statement and others' statements as your own.

1 Even if somebody else says it in the first place, and you adopt
2 someone else's statement as your own, if it is actionable
3 initially it is actionable against you. That is the law of
4 defamation.

5 THE COURT: One last question on this subject. If
6 The Militant instead of saying in June the N.L.R.B. ruled that
7 the miners had been fired illegally, and instead of saying that
8 they had said according to William Estrada in June the N.L.R.B.
9 ruled that the miners had been fired illegally, that would be
10 okay?

11 MR. HANSEN: That statement would be actionable
12 against Mr. Estrada but not against The Militant if it was
13 stated that way.

14 THE COURT: Even if the only place they got that
15 statement from was William Estrada and some reporter's notes so
16 reflect?

17 MR. HANSEN: That is correct. By adopting that
18 statement as the newspaper's own statement, the newspaper --

19 THE COURT: Well, that --

20 MR. HANSEN: -- still holds that statement out itself
21 to the public as the truth.

22 THE COURT: That is assuming that people recognize it
23 as the newspaper adopting it as its own.

24 Do you gentlemen agree with this statement of the
25 law, that if you don't attribute it the newspaper has assumed

1 legally to have adopted it as its own?

2 MR. DRYER: No.

3 THE COURT: I don't know. There must be some law on
4 this. You're all, I assume, steeped in this area of the law.

5 MR. HANSEN: If that is something that you require
6 more briefing on, we would be happy to go get the cases on it.

7 THE COURT: With all due respect, more briefing is
8 the last thing that I need. Smaller complaints and less
9 briefing is what I --

10 MR. HANSEN: Amen to that, Your Honor. I agree. I
11 am about briefed out.

12 THE COURT: You started it.

13 MR. HANSEN: Their clients started it.

14 THE COURT: I see.

15 MR. HANSEN: As far as Mr. Dryer's argument about
16 whether this second amended complaint adequately complies with
17 what the Court ordered and in giving notice, and you have got
18 that addendum that we submitted, but I submit that tripling the
19 length of that allegation really does not add anything
20 materially to the defendants' ability to respond to it.

21 What he is arguing is this, that in alleging
22 defamation we can't just allege that somebody said that the
23 light was red, and assuming that saying that the light was red
24 is defamatory, that we have to allege that so-and-so said that
25 the light was red and this is false because it was not red.

1 That argument is nonsense. The complaint as drafted adequately
2 gives notice of what is being alleged sufficient for them to
3 prepare an answer and that is all that is required.

4 I don't think I need to comment on what occurred at
5 the mine. It is not really germane here. If you are
6 interested and would like to know, there was a natural
7 occurrence and it was promptly handled and the authorities were
8 brought in and everybody was evacuated safely and there was no
9 citation issued. The problem was taken care of and it was
10 reopened. It does not have anything to do with this lawsuit.

11 Again, we have talked about this Zoumadakis case, and
12 admittedly that is a state case which is not binding on this
13 Federal Court because it is dealing with the Utah Rules of
14 Civil Procedure not the Federal Rules. I think the rationale
15 applies, and the reason for arguing similar defenses on a
16 12(b)(6) motion is, as the Court said, because the allegations
17 of the complaint -- unless the allegations of the complaint
18 themselves clearly as a matter of law show that the defense is
19 valid and is entitled to a dismissal, you have to look beyond
20 the complaint to determine whether the defense is valid, and
21 that is beyond the scope of a Rule 12(b)(6) motion.

22 For example, if the statute of limitations was at
23 issue and the allegations of the complaint clearly stated when
24 the cause of action was accrued and showed when it was filed,
25 then a dismissal under the statute of limitations might be

1 appropriate under a 12(b)(6) motion. But if you look at the
2 complaint and can't determine from the four corners of the
3 complaint when the cause of action first accrued, then
4 dismissal on a statute of limitations defense is not
5 appropriate on a 12(b)(6) motion, because you have to look at
6 something outside of the pleadings.

7 That is the case with the defenses that have been
8 raised here. The defenses are the neutral reporting privilege
9 defense, the official proceedings defense, the public interest
10 reporting defense, and all of these defenses require the Court
11 to look beyond the complaint itself. That takes the defenses
12 beyond the scope of the 12(b)(6) motion.

13 THE COURT: All right.

14 MR. HANSEN: Again, as far as treating this motion as
15 something other than a 12(b)(6) motion, 12(b) states that if
16 matters are outside of the pleadings that the Court should
17 treat the motion as one for summary judgment and give a
18 reasonable opportunity to all the parties to present additional
19 matters made pertinent to the motion. We can't do that without
20 some discovery, Your Honor.

21 So if the Court is inclined to treat this as anything
22 other than a 12(b)(6) motion we should be permitted the
23 opportunity to file a Rule 56(f) affidavit, or alternatively
24 the Court should allow us to conduct discovery in order to
25 present the matters pertinent under Rule 12(b) and Rule 56.

1 THE COURT: Thank you, Mr. Hansen.

2 MR. DRYER: May I quickly respond?

3 THE COURT: Yes, you may.

4 MR. DRYER: Three quick points. The first one
5 addresses this motion to dismiss as an appropriate procedure,
6 secondly on converting it to summary judgment, and then finally
7 I would like to comment briefly on this issue of were the
8 workers fired or locked out and what is the source of that.

9 With respect to the motion to dismiss, Mr. Hunt's
10 office since we last was up here was able to confirm that the
11 Cox v. Hatch case that I referred to was on a motion to
12 dismiss. I would encourage the Court to look at that case,
13 because it is instructive on this procedural issue that the
14 Court is wrestling with.

15 In Cox v. Hatch the plaintiff was a federal postal
16 worker. His photograph appeared in a campaign brochure of
17 Senator Hatch without his permission. He sued Senator Hatch
18 for defamation. He claimed that it was defamatory, number one,
19 because he was a well known Democrat and it would be defamatory
20 for him to be endorsing Senator Hatch.

21 Secondly, it is illegal under the Hatch Act, it
22 makes it illegal for federal workers to actively campaign for
23 candidates for public office. He said this is defamatory to
24 have my photograph appear in this campaign brochure. The trial
25 court dismissed it on a motion to dismiss, a 12(b)(6) motion.