NWC | NATIONAL WHISTLEBLOWER CENTER

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March 8, 2018

Via email pressunit@coe.int

Mr. Gianluca Esposito
Executive Secretary | GRECO
Council of Europe
Avenue de l'Europe F-67075
Strasbourg Cedex, France

RE: Retaliation Against Whistleblower Valery Atanasov

Dear Executive Secretary Esposito:

We are writing to follow-up on our February 28, 2018 request for intervention by GRECO in the case of Mr. Valery Atanasov, a whistleblower in the Republic of Malta.

As you are aware, Mr. Atanasov has been sued for libel as a result of disclosures he made that are, or should be, protected whistleblower speech under Article 9 of the Council of Europe's Civil Law on Corruption[1] and Article 10 of the European Convention on Human Rights.[2]

The use of libel laws to retaliate against whistleblowers must be strictly prohibited under European law. The failure to strictly prohibit government agencies, corporations, and public officials from using libel laws to intimidate whistleblowers will have a massive chilling effect on the willingness of employees to disclosure fraud and corruption. No whistleblower protection law can be effective if whistleblowers fear they may be the target of a retaliatory libel lawsuit. Without the aggressive intervention of GRECO and the Council of Europe to prohibit this practice, whistleblowing in Europe will be crippled.

In the United States, limits on the right of corporations, government agencies, and public officials to file libel lawsuits against whistleblowers were the first major principle of whistleblower law established in a series of cases between 1964-68. These cases stand for the irrefutable principle that the threat of a libel suit will intimidate whistleblower disclosures, and only by crafting strong legal protections against libel suits can the promise of freedom of speech and whistleblowing be achieved.

The threat that libel lawsuits have on the general principle of freedom of speech and expression was first recognized by the U.S. Supreme Court in the case of *New York Times v. Sullivan*, 376 U.S. 254 *(1964)*. That case concerned retaliatory lawsuits in the context of the civil rights

[1] Article 9 states as follows: "*Each Party shall provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities.*"

[2] Article 10 states as follows: "*Everyone has the right to freedom of expression. This right shall include freedom . . . to receive and impart information.*"

movement, and the threat that such lawsuits posed to the movement led by Dr. Martin Luther King, Jr. The U.S. Supreme Court placed limits on the lawful use of libel suits in order to ensure that the U.S. Constitution's mandate of freedom of speech and expression was not undermined by the threat of having to defend a costly civil libel lawsuit or pay a libel judgment. The Court reasoning laid the foundation for protecting whistleblower speech four years later:

> *Thus, we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.*

Two years later the Supreme Court considered the destructive impact of libel lawsuits in the context of employee rights under federal labor laws, and applied the holding of *New York Times v. Sullivan* to prohibit the use of libel lawsuits to undermine worker-speech on labor issues. In *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966), a case concerning employee speech protected under the National Labor Relations Act,[3] the Supreme Court held:

> *[N]ot only would the threat of state libel suits dampen the ardor of labor debate and truncate the free discussion envisioned by the Act, but that such suits might be used as weapons of economic coercion. . . . We therefore limit the availability of state remedies for libel to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage. The standards enunciated in New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), are adopted. . . . [in order] to guard against abuse of libel actions and unwarranted intrusion upon free discussion envisioned by the Act.*

In *Pickering v. Board of Education*, 391 U.S. 563 (1968), the U.S. Supreme Court found that whistleblower-speech was protected under the U.S. Constitution, and that economic coercion to threaten such speech was illegal. The Court applied the holding of *New York Times v. Sullivan* and *Linn v. United Plant Guard Workers* to whistleblowers:

> *"The public interest in having free and unhindered debate on matters of public importance -- the core value of the Free Speech Clause of the First Amendment -- is so great that it has been held that a State cannot authorize the recovery of damages by a public official for defamatory statements directed at him except when such statements are shown to have been made either with knowledge of their falsity or with reckless disregard for their truth or falsity."*
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> *"While criminal sanctions and damage awards have a somewhat different impact on the exercise of the right to freedom of speech from dismissal from employment, it is apparent that the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech. . . . In sum, we hold that, in a case such as this,*

[3] These case can be found at https://www.kkc.com/handbook/first-amendment

absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.[4]"

The Council of Europe has discussed whether or not the *Sullivan* rule governing libel lawsuits should be applied in Europe in order to effectuate Article 10 of the European Convention on Human Rights.[5]

Regardless of whether or not the *Sullivan* rule should apply to libel cases as a matter of general law, the only way to effectuate whistleblower disclosure laws in Europe is to aggressively and unequivocally apply the *Sullivan* rule to whistleblower cases. This is precisely what happened in the *Linn* case when the Court understood that speech rights under U.S. labor law would be undermined if libel laws were applied without the *Sullivan* safeguards. Similarly, the holding in *Pickering* highlights this issue. In *Pickering* the Supreme Court held that speech that may otherwise be subject to a libel lawsuit was protected in the context of the right of an employee to raise matters of public concern regarding their employer.

Employees with information on fraud and corruption will be intimidated by the threat of a libel lawsuit. The case of Mr. Valery Atanasov is only the most recent example of the misuse of libel laws to punish a whistleblower and chill the speech of other potential whistleblowers.

Under *Sullivan* a whistleblower can seek the immediate dismissal of a libel lawsuit if the defendant cannot meet the high burden of proof required under that law. Only by permitting swift dismissals of such lawsuits (and potentially the imposition of severe sanctions against the defendant upon dismissal), can the chilling effect of a potential libel action be mitigated.

We hereby request that the Council of Europe/GRECO intervene in the libel lawsuit filed against Mr. Atanasov, and request that the court(s) apply the *Sullivan* rule in the context of a whistleblower case and in any case that may be covered under Article 9 of the Civil Law on Corruption.

We look forward to hearing from you within ten working days concerning whether the Council of Europe/GRECO will intervene in the libel proceeding and request that all courts of competent jurisdiction, whether in Malta or within the judicial system of the Council of Europe, apply the *Sullivan* rule in **all** whistleblower-libel lawsuits.

Please feel free to contact me directly at my personal email, sk@whistleblowers.org, should you have any questions. If you would like to contact the executive director of the European Center for Whistleblower Rights, please write to Mark Worth at mworth@whistleblower-rights.org. We stand ready to assist in this matter in order to ensure that the interests of justice are served. Thank you for your time and consideration.

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[4] New York Times Co. v. Sullivan, 376 U.S. 254 (1964) . . . Linn v. United Plant Guard Workers, 383 U.S. 53 (1966).

[5] *See,* Council of Europe, "Defamation and Freedom of Expression," Media Division, Directorate General of Human Rights," *Speech by Mr. Christos L. Rozakis, Vice-President of the European Court of Human Rights* (Strasbourg, March 2003), https://rm.coe.int/1680483b2d

Sincerely,

Stephen M. Kohn, Esq.
Executive Director
National Whistleblower Center

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