IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

JAMES C. EATON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**C.A. No. S08C-07-033 RFS**
	)	
RAVEN TRANSPORT, INC.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Upon Defendant's Motion for Summary Judgment.
Granted in Part. Denied in Part.

Submitted: October 15, 2010
Decided: November 15, 2010

James C. Eaton, Pro Se Plaintiff.

Craig A. Karsnitz, Esquire, Barry M. Willoughby, Esquire, Lauren Hudecki, Esquire, Young, Conaway, Stargatt & Taylor, LLP, Georgetown, Delaware.

STOKES, J.

This is my decision on the parties' cross motions for summary judgment on the issue of defamation. James C. Eaton ("Eaton") is the Plaintiff. Raven Transport Holding, Inc. ("Raven") is the Defendant. As explained below, summary judgment is granted in part and denied in part.

Facts

Eaton was hired by Raven in late January 2007 as a long-haul truck driver transporting beer from one destination to another. During his 90-day probationary period, Eaton made three trips between February 3, 2007 and March 9, 2007, departing from the Miller Brewery in Eden, North Carolina, and arriving in Rockville, Maryland; Elizabeth, New Jersey; and Baltimore, Maryland. It is uncontested that some of the cargo on each of these trips was spilled, shifted or otherwise damaged upon arrival. Eaton made other runs that did not result in spillage. Raven learned of the damage when Miller Brewery requested repayment for having restacked the cases of beer on one of the runs. Eaton did not report the incidents to Raven, as required by company policy.

On March 22, 2007, Eaton met with William A. Wiese ("Wiese"), Raven's VP of Fleet Services and was discharged from his employment. The parties differ in their explanations for the termination, as discussed, *infra*. Eaton alleges that the spills occurred because of Raven's inadequate loading practices and that Raven blamed Eaton in order to keep its account with Miller Brewery.

Eaton filed an employment discrimination claim with the Equal Employment Opportunity Commission ("EEOC"), which was denied. He prevailed on his claim for unemployment benefits with the Delaware Department of Labor. In both cases, Raven was asked to provide written documentation regarding Eaton's termination. Raven complied with the requests, stating that Eaton was discharged for poor performance in his 90-day probation period.

On July 17, 2008, Eaton filed a Complaint against Raven, alleging "character assassination, deformation [sic] of character, time loss, liable [sic] and distortion for an otherwise perfect record.."[1] Defamation on the part of Raven is the sole remaining claim. The Complaint asserted that Raven defamed Eaton to the EEOC and the Delaware Department of Labor ("DOL"). Eaton withdrew those claims in his December 5, 2008, response to Raven's first Motion to Dismiss, and on January 26, 2010, this Court formally dismissed the claims pertaining the EEOC and the DOL.

On summary judgment, Eaton argues that Raven defamed him in oral statements to prospective employers and in oral and written statements to USIS, the entity which maintains a federally mandated database for motor carriers known as the DAC Report.[2]

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[1]The Complaint also included a claim against Fleetmaster and Miller Brewery. These claims were dismissed. Eaton's claims of wrongful termination and Recklessness against Raven were also dismissed.

[2]Raven is required by law to exchange information about its truck drivers with other motor carriers. 49 CFR § 391.21 and § 391.23. This information is compiled in the Drive-A-Check Report ("DAC Report"). The entity maintaining the DAC Report when Eaton filed his Complaint was USIS, which in March 2009 merged into an entity known as HireRight. The

Raven moves for summary judgment on the same issues.

Standard of Review

On summary judgment, this Court's role is to examine the record to ascertain whether genuine issues of material fact exist and to determine whether the moving party is entitled to judgment as a matter of law. If the Court finds that material facts are is dispute or that judgment as a matter of law is not appropriate, summary judgment will be denied. In this case, each party asserts that there are no genuine issues of material fact in dispute, but their legal arguments rest on vastly differing fact patterns. This posture has been addressed as follows:

> [T]he existence of cross motions for summary judgment does not act *per se* as a concession that there is an absence of factual issues. Rather, a party moving for summary judgment concedes the absence of a factual issue and the truth of the nonmoving party's allegations only for the purposes of its own motion, and does not waive its right to assert that there are disputed facts that preclude summary judgment in favor of the other party. Thus, the mere filing of a cross motion for summary judgment does not serve as a waiver of the movant's right to assert the existence of a factual dispute as to the other party's motion.[3]

In such a case, the standard of review is not altered simply because of cross motions for summary judgment;[4] that is, the provisions of Super.Ct.Civ.R. 56(h) do not apply.

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names of both entities are used herein, as appropriate.

[3] *JJID, Inc. v. Delaware River Industrial Park, LLC*, 2007 WL 2193735, at *3 (Del. Super.)(citing *United Vanguard Fund, Inc. v. Takecare, Inc.* 693 A.2d 1076. 1079 (Del. 1997)).

[4] *Hass v. Indian River Vol. Fire Co.*, 2000 WL 1336730, at *3 (Del. Ch. 2000).

Discussion

Federal regulations. Eaton argues that Raven willfully violated the provisions of the Federal Motor Carrier Safety Administration ("FMCSA") regulating to the loading procedures of cargo in motor carriers. On July 17, 2009, this Court granted Raven's Motion for Protective Order, excluding evidence of Raven's loading practices because such information was not relevant to the defamation claim. Alleged violations of FMCSA regulations fall within the scope of the Protective Order and are not properly before the Court. Summary judgment on this issue is granted as to Raven and denied as to Eaton.

Whistleblowing. Eaton asserts that he informed Raven that its inadequate loading practices were the cause of the damaged loads. As a result, he alleges that Raven justified its termination of a whistleblower by defaming him. Eaton did not make this claim in his Complaint or file a motion to amend the Complaint. This allegation can only be seen as an untimely effort to amend the Complaint. Super.Ct.Civ.R. 15(a). Summary judgment is granted as to Raven and denied as to Eaton.

Defamation. The tort of defamation is composed of two torts: libel, which is written defamation, and slander, which is oral defamation.[5] Generally, the elements of defamation are: (1) a defamatory communication; (2) publication; (3) the communication refers to the plaintiff; (4) a third party's understanding of the communication's defamatory

[5] *Spence v. Funk*, 396 A.2d 967, 970 (Del. 1978).

character; and (5) injury.[6] Although oral defamation claims generally require proof of special damages, Delaware courts recognize four categories of slander that require no such proof and are considered slander *per se*.[7] These categories are maligning a person is his or her trade or business, imputing a crime of moral turpitude, implying a person suffers from a loathesome disease and imputing unchastity to a woman.[8] In this case, Eaton's claims are that Raven maligned him in his job performance, a claim of slander *per se*. Thus, he need not show special damages. Once a plaintiff establishes a *prima facie* case, the defendant may plead the truth of the alleged defamatory statements as a defense.[9]

Eaton alleges two instances of Raven's slander to prospective employers, and one instance of Raven's slander and two of libel to USIS in regard to the DAC Report. Raven argues that all the allegations of slander are inadmissible hearsay, pursuant to DRE 801 c and 802. Raven also argues that its written statements to USIS were true.[10]

EPES. Eaton contends that he telephoned Gary Huff, a recruiter for EPES Transport Systems, Inc. ("EPES"), about a job and that he told Huff he had been fired

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[6]*Delaware Express Shuttle, Inc. v. Older*, 2002 WL 31458243, at 21 (Del. Ch. 2002).

[7]*Spence,* at 970.

[8]*Delaware Express Shuttle, Inc.*, at 21.

[9]*Id.*

[10]Eaton previously raised a claim of libel pertaining to information provided by Raven in response to a written request from D. Krutiak Trucking, a potential employer. (Raven Ex. P.) Eaton has conceded that this claim has no merit. (Eaton's Motion for Protective Order (April 8, 2010) at ¶ 2.).

from Raven for spilling beer.[11] Eaton sent Huff photographs of the spilled cargo. In their next phone conversation, Huff allegedly told Eaton that EPES could not hire him because Cecil Simmons, a Raven recruiter, told Huff that Eaton was responsible for the spilled beer. Eaton offers no evidentiary support for this allegation. When asked at his deposition if he had any evidence that anyone at Raven told either EPES or Cowan (another prospective employer) about the spilled beer, Eaton said "No, other than their words, that's all." (Raven Ex. L at 39.) Eaton offers no affidavits in support of his allegation regarding the call to Gary Huff.[12]

Under DRE 801(c), "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Huff's alleged statement is offered for the truth of the fact that Simmons slandered Eaton, not for the truth of Simmons's alleged statement that Eaton was responsible for the spillage.[13] Although Eaton has no evidentiary support for his contention, he argues that it is admissible as a "present sense of impression." Under DRE

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[11]In some cases, it has been held that if the plaintiff communicates or by his actions causes the communication of a defamatory matter to a third person, there is no publication for which the defendant can be liable. *See* 62 A.L.R.4th 616.

[12]As a *pro se* party, Eaton is accorded a measure of judicial lenience. *Johnson v. State*, 442 A.2d 1362, 1364 (Del. 1982). However, Eaton has shown his familiarity with the requirement of supporting affidavits by submitting his own affidavits supporting certain other assertions he has made in this motion.

[13]Because Simmons' alleged statement is not offered for the truth of the matter asserted, Eaton's claim is not hearsay within hearsay under DRE 805. Nor do the remaining claims of slander raise this issue.

803(1), a present sense impression is a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Huff's alleged statements were not made under these circumstances and the exception does not apply. Therefore, Eaton's allegation regarding his call to Huff is inadmissible hearsay.

In its Opening Brief, Raven submits the affidavit of Michael Hamilton, Vice President of Human Resources at EPES. (Raven Ex. X.) Mr. Hamilton states that Eaton submitted one application for a job with EPES in October 2006 but was not hired. He states that EPES records do not give a reason for the decision not to hire Eaton. Mr. Hamilton asserts that Eaton was never declined a position based on his employment history from January 2007 to March 2007 (when Eaton worked for Raven) because he applied to EPES in October 2006. Eaton asserts that he did not apply for a job with EPES in October 2006, but that he applied on June 13, 2007 and sent a follow-up letter to Gary Huff on June 26, 2007. (Pl.'s Ex. L.) The exhibit contains a copy of Eaton's letter to Hamilton written after Eaton received a copy of his affidavit. Although the letter refers to the alleged 2007 submissions to EPES, they are not included in the exhibit. Thus, Mr. Hamilton's affidavit stands.

Eaton cannot make a *prima facie* case of slander because he offers only inadmissible hearsay to support his allegation. Nor can he defeat the Hamilton affidavit.[14]

[14]*Higgins v. Walls*, 901 A.2d 122, 140 n. 83 (citing *Monsanto Co. v. Aetna Casualty & Surety Co.*, 1993 WL 563246, at *1 (Del. Super.)).

Summary judgment is granted as to Raven on the claim that Gary Huff told Eaton that Simmons orally defamed him by stating that Eaton was at fault for the spilled beer.

USIS. Eaton contends that on April 13, 2009, Natasha Neal at USIS told Eaton on the phone that Mary O'Brien from Raven told Neal that Eaton was "fired for spilling the beer." Raven argues that the alleged statements are inadmissible hearsay. Eaton argues that the statement is admissible as a "present sense of impression." The alleged statement was not a present impression made while Neal was perceiving the event or immediately thereafter. DRE 803(1). Nor has Eaton submitted a supporting affidavit. Therefore, Eaton's allegation about his conversation with Natasha Neal is inadmissible hearsay.

In its Opening Brief, Raven submits the affidavit of William A. Wiese, Vice President of Fleet Services for Raven. (Raven Ex. I.) Mr. Wiese avers that all information provided to USIS for Eaton's DAC Report was in writing. Raven also submits the affidavit of Mary O'Brien, Raven's Safety Manager, stating that she acted in accordance with Raven's policy and gave no information over the phone to USIS about Eaton. (Raven Ex. O). Eaton's unsupported allegation regarding Natasha Neal's statement about Mary O'Brien's defamatory statement is inadmissible hearsay that cannot defeat Raven's argument and affidavits on summary judgment.[15]

Cowan. Eaton asserts that in June 2007 Debra Shoop at Cowan Systems, LLC ("Cowan"), a prospective employer, told him on the phone that she had spoken to Lee

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[15] *Id.*

Hogle at Raven and that Cowan could not hire him because of his "problems" at Raven. Eaton does not identify those problems as being damaged cargo. Eaton acknowledges that when he first contacted Shoop he told her that Raven fired him for spilling beer loads. Eaton offers no evidence or documentation to support his alleged conversation with Shoop. In his deposition, Eaton conceded that his evidence was "their words, that's all." (Raven Ex. L at 39.) Thus, Shoop's alleged statement is inadmissible hearsay, and Eaton therefore cannot make a case that Hogle verbally defamed him.

In its Opening Brief, Raven submits the affidavit of Herman Funk, General Counsel and Vice President for Risk Management at Cowan. (Raven Ex. V.) The affidavit has no bearing on Ms. Shoop's alleged statement but raises a relevant issue as to the DAC Report. Mr. Funk states that Eaton applied for a position with Cowan in June 2007. Cowan did not seek or receive any employment references from Eaton's past employers, including Raven. Instead, Cowan obtained Eaton's DAC Report, which stated that Raven discharged Eaton and that his work record included a "Company Policy Violation." Mr. Funk states that this information "played no part in the decision not to hire Mr. Eaton." Mr. Funk does not explain why Eaton was not hired.

Funk's affidavit by inference leaves an unanswered question. If the DAC Report was the only information Cowan had about Eaton, what information did Cowan use to decide not to hire Eaton? This question is relevant only if Raven's input on the DAC Report was defamatory. As discussed below, there are questions of material fact as to

whether Raven's written communications with USIS were defamatory. It follows that Cowan's possible use of the DAC Report is also a question of material fact for the jury. Summary judgment is granted to Raven as to Shoop's alleged phone conversation because it is inadmissible hearsay that cannot support a showing of slander on the part of Hogle. Summary judgment is denied as to Cowan's possible use of the USIS statement in the DAC Report.

DAC Report. Eaton asserted in the Complaint that Raven's written communications with USIS for the DAC Report were defamatory, and he has not abandoned this claim although he focuses on slander in his briefing. Raven argues that the information it provided to USIS was true and that truth is an absolute defense to a defamation claim, which is correct.[16] Raven further argues that it provided input to USIS on only two occasions, and that both statements were in writing. The record shows this assertion to be true. What is not clear is the meaning of those two communications. If the meaning is not discernible on the current record, then truth cannot be determined on summary judgment.

The record shows the following. Eaton's DAC Report contains information received from Raven on March 22, 2007, the day Eaton was discharged. The DAC Report states that Raven "discharged" Eaton in March 2007. It also states, without explanation, that his work record included a "Company Policy Violation." (Raven Ex.

[16] *DeBonaventura v. Nationwide Mut. Ins. Co.*, 428 A.2d 1151, 1155 (Del. 1981).

Q.) These statements are the first instance of alleged defamation. In June 2007, Eaton filed a dispute with USIS stating: "I was not discharged nor was I ever told of any company policy violation." *Id*. USIS sent an inquiry to Raven. (Raven Ex. R.) Raven responded by e-mail, dated June 11, 2007, stating simply that "Mr. James C. Eaton. . . was discharged for unsatisfactory 90 days on 3/22/2007." (Raven Ex. S.) This is the second instance of alleged defamation and Wiese appears to have provided all of the information for the DAC Report.

Thus, the three allegedly defamatory statements are: "discharged," "company policy violation," and "discharged for unsatisfactory 90 days." Plainly, the statements malign Eaton in his trade.[17] Therefore, the question is whether the record can show what these statements mean in order to determine whether they are true. It is important to note here that the only definite reason Raven has given for the discharge was in a letter to the EEOC two years prior to its concession that Eaton was not responsible for any of the three spills, discussed below.

A chronological review of Raven's references to the discharge reveals a wavering attitude on Raven's part. There is no written record of the termination meeting held on March 22, 2007. Eaton has consistently maintained that he believed he was discharged because of the beer spillage. Raven has not been similarly clear or consistent. In his

[17]As previously noted, Eaton stated in his deposition that nothing defamatory appeared in the wording of the DAC Report. However, this reference was made in context with the spillage of the beer. The quality of his "admission" would be a jury question.

affidavit, Wiese states the following:

> At the [termination] meeting, I reviewed with Eaton the Miller loads, along with the physical requirements of the job. Eaton said he was physically incapable of performing the physical requirements of the job. This was the first time Eaton mentioned anything to me about alleged physical limitations. Having never seen a doctor's note regarding plaintiff's alleged limitations I asked Eaton if he was willing to submit to an independent medical evaluation to assess whether Eaton was capable of performing the duties of the job. Eaton refused. I terminated Eaton's employment. (Raven Ex. I, ¶ 15.)

Wiese does not identify a specific reason for the discharge or refer to a particular company policy. The affidavit also states that "It is generally the driver's responsibility to re-stack freight that shifts during transport." (Raven Ex. I, ¶ 8). However, he does not say that this was the reason for Eaton's discharge.

Raven's Personnel Action Notice, dated March 22, 2007, states that Eaton was terminated on March 22, 2007 because of "Unsatisfactory 90 days." (Pl.'s Ex. R., not paginated.)

Raven expressed a different position on the termination in its letter of August 14, 2007 to the EEOC.[18] In response to Eaton's allegations of employment discrimination, Wiese described the termination meeting with an emphasis on Eaton's failure to report incidents:

> I reviewed the three disrupted beer loads with Mr. Eaton and asked him if he remembered that he was required to report any accident or incident to his immediate supervisor immediately upon its occurrence. He answered that

[18]Although Eaton's claim against the EEOC was dismissed, the evidence pertaining to it remains part of the record and is properly before the Court.

> he had. I then asked him why he did not report the last beer load incident to Mr. Hogle and he started rambling on about how he had a pacemaker and that he could not pick up cases of beer. I asked him if he had a doctor's note stating such a restriction and he answered by stating that he did not need a doctor's note and that everyone knows a person with a pacemaker cannot lift anything. He never did answer the question of why he did not report the incident. (Pl.'s Ex. G, at 2.).

In the next paragraph, Mr. Wiese describes the failure to report an incident as a "direct violation of company policy." *Id.* This is Raven's only identification of a company policy violated by Eaton.

In his closing paragraph, Wiese states that "Mr. Eaton failed to meet the basic job requirements of delivering freight safely and without damage and this was the reason for his termination; not because of his age or alleged disability but because of his poor performance and total disregard of company policy." *Id.* at 3.

On July 17, 2009, during a hearing on Raven's Motion for a Protective Order, Raven argued that its methods of loading trailers was not relevant to the defamation claim. In so arguing, Raven stipulated to the fact that "the spillage, itself, was not the Plaintiff's fault." (Plaintiff's Ex. N, at 4.)

Counsel for Raven wrote a letter to Eaton on March 17, 2010. The letter is not defamatory because it was sent only to Eaton. However, it shows that Raven shifted its emphasis again, this time to Eaton's refusal to handle freight. Counsel stated in part as follows:

> Raven's subjective belief is that your performance during your orientation period was unsatisfactory primarily because you refused to fulfill one of the

duties of your job; namely, handling freight. (Pl.'s Ex. O.)

Based on the record evidence, it is not possible to determine the meaning of Raven's statements that Eaton violated a company policy or that he showed poor performance during his 90-day probationary period. It is therefore impossible to gauge the truthfulness of the statements and to rule on the defamation claim as a matter of law. On summary judgment, if there is a reasonable indication that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts to clarify the application of the law, summary judgment will not be granted.[19] Such is the case here as to the meaning and truthfulness of Raven's written statements to USIS. Summary judgment is denied as to both parties on this issue.

Questions about Eaton's physical capabilities vis-a-vis the job requirements must also be resolved, including when he first informed Raven of any physical limitations. In his affidavit, Wiese states that he never saw doctors' notes about a physical condition. In his Opening Brief, Eaton makes an unsupported assertion that along with his application to Raven, he included two doctor notes restricting him from loading and unloading trucks. (Pl.'s Op. Br. at 2.) Eaton's cover letter to his Raven application refers to certain documents he attached but makes no reference to doctors' notes. (Raven Ex. D.) In the same paragraph of his Opening Brief, Eaton states that he was "physically capable of performing the full range of duty of an over the road truck driver." *Id.* Eaton received

[19]*Ebersole v. Lowengrub*, 180 A.2d 467 (Del. 1962), *rev'd in part on other grounds*, 208 A.2d 495 (Del. 1965).

and signed Raven's job description for over-the-road drivers, which states in part that drivers load and unload freight and must also frequently lift, pull, and carry freight. (Raven Ex. J.). Both Wiese and Ironmonger aver that Eaton was never told that he would not be required to handle freight. (Raven Ex. I and Ex. H, respectively.) Thus, it is clear that Eaton was informed of the physical requirements of the job and that he indicated that he was capable of performing them. It is not clear when he first asserted any physical limitations, or if had the limitations he now asserts.

Also of relevance is the reason that Eaton refused to restack the fallen cargo. Eaton now argues that he was not hired to handle freight and that he was physically unable to do so. However, at his deposition, he stated that he would not pick up even a single can of beer; that if the shifting of cargo was not his fault he should not have to fix it; and that if he handled beer, he might be suspected of drinking on the job. (Raven Ex. L at 93, 95, 96.) These contradictions must be resolved by the jury.

In order to determine whether Raven's written communications with USIS are defamatory, the meaning of Raven's written communications with USIS must be determined at trial. Only after this finding is made can it be decided whether the statements are true and whether the statements are defamatory. If the statements are defamatory, it must also be determined whether EPES relied on the DAC Report in deciding not to hire Eaton.

For these reasons, Raven's motion for summary judgment is **GRANTED** as to

Raven and **DENIED** as to Eaton on the issues of compliance with FMCSA requirements and whistleblowing. Summary judgment is **GRANTED** as to Raven and **DENIED** as to Eaton on the issue of Raven's alleged slanderous statements made in telephone calls to EPES, USIS and Cowan. Raven's and Eaton's motions for summary judgment as to the defamatory nature of Raven's two written communications to USIS for the DAC Report are **DENIED.** Summary judgment as to Cowan's reliance on the DAC Report is **DENIED,** pending the jury's decision on whether Raven's statements in the DAC Report are defamatory.

IT IS SO ORDERED.

Richard F. Stokes

Original to Prothonotary