

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000021-MR

LARRY SABO

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE GARLAND HOWARD, JUDGE
ACTION NO. 99-CI-00829

RON PAYNE; ALMA RANDOLPH; JIM TONY
FULKERSON; and CITY OF OWENSBORO

APPELLEES

OPINION
REVERSING AND REMANDING
** **

BEFORE: COMBS, EMBERTON, and TACKETT, Judges.

COMBS, JUDGE: Larry Sabo appeals the Daviess Circuit Court order dismissing his claims of defamation, tortious interference with a business relationship, and civil conspiracy. We have concluded that the appellant's complaint sufficiently states viable causes of action; therefore, we reverse and remand the dismissal ordered on the pleadings as premature.

In December 1996, Sabo accepted a position as Director of Finance and Administration for the City of Owensboro. In March 1998, Ron Payne, City Manager and Sabo's direct supervisor, recommended Sabo's permanent appointment to the position. Weeks

later, however, the Owensboro City Commission extended the probationary period of Sabo's employment until October 1998.

In an effort to evaluate Sabo's job performance, Payne distributed "Supervisor Assessment Surveys" to a number of city employees.¹ On September 17, 1998, following a closed door meeting, the Owensboro City Commission terminated Sabo from his position as Director of Finance and Administration.

In July 1999, Sabo filed a complaint against Ron Payne; Alma Randolph, the City's Human Resources/Community Relations Specialist; and the City of Owensboro.² Sabo alleged that on September 17, 1998, Payne made slanderous and false statements regarding Sabo's management skills and job performance. He alleged that Payne falsely represented the results of staff surveys and comments. Moreover, Sabo alleged that Payne's statements had been made with malice and with the intent that he be deprived of employment with the City. With respect to Randolph, Sabo alleged that she had made malicious, false, and slanderous statements about him "beginning in at least March and April 1998." Complaint at 5. In addition, Sabo alleged that Randolph had tortiously interfered with his employment and with his expectation of becoming a permanent employee of the City of Owensboro.

¹Sabo alleges that Payne knowingly violated City policy and procedure, which limits the completion of such evaluations to a supervisor's immediate subordinates.

²Allegations were also made against unknown defendants. The unknown defendants have not been included in the notice of appeal, however, and are not a part of these proceedings. Sabo filed a separate action against the City for wrongful termination.

Before answering, the defendants filed a motion to dismiss the complaint for failure to state a claim. CR 12.02. The defendants argued that Sabo's claims against Randolph were barred by the one-year statute of limitations and by the doctrine of qualified privilege. They argued that the claims asserted against Payne were barred by the doctrine of absolute and/or qualified privilege. They contended that claims against the City should be similarly dismissed.

In late August of 1999, Sabo filed his first amended complaint. He alleged that Randolph had continued to make slanderous comments about him after August 1998 and that Payne had further defamed him outside the City's closed-door meeting of September 17, 1999. The defendants' second motion to dismiss soon followed.

In mid-September 1999, Sabo filed his second amended complaint. This amended complaint included allegations against Jim Tony Fulkerson, former Deputy Director of Finance, and a claim for civil conspiracy against Fulkerson and Payne. Sabo alleged that Fulkerson had maliciously defamed him and tortiously interfered with his employment and his expectations of becoming a permanent employee of the City. Furthermore, Sabo alleged that Fulkerson, Payne, and others had "conspired to remove [Sabo] from his position with the City of Owensboro by defaming him and encouraging other employees to defame him" Second Amended Complaint at 11. The defendants' third motion to dismiss followed.

Although Sabo vigorously contested each successive motion to dismiss, the trial court dismissed this action on December 20, 1999. In granting the motion, the trial court concluded that Payne was entitled to claim an absolute privilege to defame Sabo; that Fulkerson and Randolph were protected by a qualified privilege; and that all of the defendants were insulated from liability by the "intracorporate conspiracy doctrine." This appeal followed.

In considering the motion to dismiss, the trial court was bound to construe liberally the pleadings in the light most favorable to the plaintiff and to take as true all allegations contained in his complaint. Gall v. Scroggy, Ky. App., 725 S.W.2d 867 (1987). While we sympathize with the trial court's diligent efforts to unravel the numerous, interconnected allegations asserted in this case, our review compels us to reverse the court's order dismissing the action.

We begin our discussion with an analysis of Sabo's defamation claims. In its order, the trial court concluded that Fulkerson and Randolph were entitled to a qualified privilege to defame Sabo. Our review of the complaint, however, indicates that Sabo has alleged that the false and defamatory statements made against him by these defendants were made with malice – a fact that would remove the behavior complained of beyond the protective scope of the privilege.³ Contrary to the position

³Sabo alleges that the defamatory statements were made with ill will and improper motives.

taken by the appellees, that mere allegation couched in terms of malice is sufficient to avoid dismissal of the claim.

At common law, defamation suits were disfavored and subjected to a number of pleading technicalities. However, the modern rules of civil procedure have expanded the opportunity to state a cause of action through more liberal "notice-pleading." Friedenthal, Kane, and Miller, Civil Procedure, §5.16 (1985). CR 9.02 expressly provides that the presence of malice may be averred "generally." Although Sabo will bear the heavier burden of proving this allegation with "convincing clarity" rather than by a mere preponderance in order to overcome a motion for directed verdict when this action proceeds to trial, the mere allegation that the statements were undertaken with malice suffices to meet his threshold at this juncture.⁴ See Warford v. Lexington Herald-Leader Co., Ky., 789 S.W.2d 758 (1990).

We shall next consider the defamation claim asserted against Payne. After considering the arguments, the trial court concluded that Payne was entitled to an absolute privilege to defame Sabo by virtue of his position as city manager as well as the provisions of KRS 83A.150(7)(b), which authorize him to report to the city commission regarding personnel matters. As a result, the trial court dismissed this cause of action.

⁴The appellees contend that Sabo's complaint lacks sufficient specificity with respect to Randolph's allegedly defamatory remarks. A motion for more definite statement pursuant to CR 12.05 would have been the proper means of curing any concerns relative to the appellees' statute of limitations defense in lieu of outright dismissal.

It has long been settled in Kentucky that absolute immunity from defamation actions is available to certain governmental officials with respect to matters upon which the law requires them to act.⁵ Compton v. Romans, Ky., 869 S.W.2d 24 (1993), citing McAlister & Co. v. Jenkins, 214 Ky. 802, 284 S.W.88 (1926). However, because of the extreme breadth and nature of this "absolute privilege," the communications to which it is said to apply are necessarily restricted to few in number. Id.

In Compton, the Kentucky Supreme Court warned that it is necessary to examine closely the authority entrusted to the governmental official and the action taken which gave rise to the defamation claim in order to determine whether the grace of absolute immunity is justified. Examining the authority granted to the city manager in this case and the actions allegedly taken, we are not persuaded that his communications regarding Sabo are absolutely privileged.

Absolute immunity is generally limited to legislative and judicial proceedings, matters of military affairs, and to the acts of high ranking executive branch officials in discharging the duties imposed on them by law. Administrative bodies exercising quasi-judicial powers may also enjoy absolute immunity. Compton, supra. Examining the scope of duties bestowed upon the city manager by the provisions of KRS 83A.150

⁵The privilege exists as a matter of public policy, of balancing public necessity against individual injury -- "a policy which regards the ends to be gained by permitting such statements as outweighing the harm which may be done to the reputation of others." See 50 Am.Jur 2d Libel and Slander §275 (1995).

(as further defined by the Owensboro Personnel Policy Manual) in light of the nature of the allegedly defamatory comments, we cannot conclude at this preliminary stage of the proceedings that Payne is entitled to assert an absolute immunity from liability in this case. Nor can we conclude the contrary. However, Sabo's complaint adequately states an arguable cause of action: that Payne's allegedly defamatory comments may have fallen outside the scope of his statutory duty and that they were inappropriate to the exercise of his office. Consequently, the cause of action could not be dismissed on this basis at this juncture.⁶

Next, we consider Sabo's allegations of civil conspiracy against Payne and Fulkerson. The trial court concluded that the defendants were "insulated from any liability herein based on the intracorporate conspiracy doctrine." This doctrine provides that employees of the same entity cannot conspire together because they are to be regarded as one person.⁷ See Johnson v. Hills & Dales General Hosp., 40 F.3d 837 (6th Cir. 1994). The application of this doctrine of presumed corporate indivisibility is limited by a well-established exception, however. If the employees of the corporate entity who are alleged to be conspiring are acting outside the scope of their employment, or if they have an independent personal stake or

⁶Sabo's allegations of tortious interference with a business relationship are governed by the same rules of privilege. Gray v. Central Bank & Trust Co., Ky. App., 562 S.W.2d 656 (1978). Because neither the trial court nor the parties included a separate discussion of this cause of action, we have limited our analysis as well.

⁷Kentucky courts have not expressly adopted this doctrine.

personal motivation in the conspiracy, the intracorporate conspiracy doctrine does not insulate them from liability for engaging in the conspiracy. Sabo has alleged that Payne and Fulkerson acted "in violation of Owensboro city policy and outside of the scope of their authority" when they participated in a civil conspiracy to defame him and to remove him from his position. Second Amended Complaint at 11. Moreover, Sabo has alleged that Fulkerson was selfishly motivated to defame Sabo in order that he (Fulkerson) would be promoted to the position of Director of Administration and Finance, giving him a personal stake in the outcome of the conspiracy. Thus, Sabo has alleged both sets of circumstances that would preclude application of the "intracorporate conspiracy doctrine" as an insulator of Payne and Fulkerson from liability. Therefore, we conclude that the trial court erred by dismissing this cause of action.

Our opinion should not be construed to indicate a belief that Sabo's claims are well-founded; nor do we express any conclusions with respect to the appellees' tactical decision to test the sufficiency of the complaint. We restrict our holding carefully to a simple determination that under the facts as recited in the pleadings, the rules of notice pleading do not allow for the elimination of this cause of action at this early stage. It may be that recourse to additional discovery will serve as a basis for later motions for summary judgment. However, it is our carefully considered opinion that the complaint in this action asserts facts sufficient to survive the motions to dismiss.

For the foregoing reasons, the order of the Daviess Circuit Court is reversed and remanded for further proceedings.

ALL CONCUR.

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