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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002072-MR

AMOS N. JONES — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 02-CI-01054

LEXINGTON H-L SERVICES, INC.,
D/B/A KNIGHT RIDDER PRODUCTIONS,
F/K/A LEXINGTON HERALD-LEADER CO.;
LEXHL, LIMITED PARTNERSHIP,
D/B/A LEXINGTON HERALD-LEADER; AND
PETER MATHEWS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON, SCHRODER, AND TACKETT, JUDGES.

SCHRODER, JUDGE: This is an appeal from a summary judgment entered in favor of appellant's employer and supervisor on his claims of religious harassment, defamation, intentional

infliction of emotional distress, and invasion of privacy stemming from remarks about appellant posted on an intra-office electronic bulletin board. Upon review of the various assignments of error, we adjudge that the trial court properly entered summary judgment in favor of appellees on all claims. Hence, we affirm.

In April of 2001, Amos Jones, an African-American of Baptist faith, was hired by appellee, the Lexington Herald-Leader newspaper (the "Herald-Leader") as a copy desk editor. Amos was hired for this position out of college, but had worked at the Herald-Leader previously as an intern.

On November 24, 2001, Amos's immediate supervisor, Peter Mathews, Amos, and two other colleagues, Jared Peck and Susan Waggoner, were chatting in the copy editors area and engaging in casual office banter. Everyone in the group was Caucasian except Amos. Referencing forms of punishment, Amos stated, "Susan Waggoner and I are big believers in caning," to which Mathews responded, "Amos, what you and Susan do in your spare time is none of our business." All those involved in this discussion, including Amos, have admitted that Amos's comment and Mathews's response were meant as a joke.

A week later, the same group, plus another employee, William Scott, were discussing the collapse of Internet provider Excite.com. Amos, who used this provider, stated to the group

that he had not lost his service. Mathews then replied, “Amos will continue to be able to visit his bondage and domination chat rooms.” Peck then added, “You can’t spell Amos without S & M.” Again, all those present, including Amos, considered those remarks, when made, to be jokes.

The copy editor department at the Herald-Leader had, since the late 1990’s, maintained an intra-office electronic bulletin board called “Night Quotes.” This site was essentially limited to the copy desk section of the Herald-Leader, though it was potentially accessible to other employees if they knew of its existence and were aware of where and how to access the site. On December 1, 2001, Mathews placed the following on the “Night Quotes” site:

> “Susan Waggoner and I are big believers in caning”
>
> **Amos Jones, Nov. 24, 2001**
>
> “Amos, what you and Susan do in your spare time is none of our business”
>
> **Pete Mathews, Nov. 24, 2001**
>
> **Saturday, Dec. 1:** Amos says he has not lost internet Service despite the troubles of his named ISP, Excite@Home. Mathews says Amos will continue to be able to visit bondage-and-domination chat rooms. Then:
>
> “You can’t spell Amos without S & M.”
>
> **Jared Peck, Dec. 1, 2001.**

Amos made no complaint about the posting of the above remarks to anyone until January 16, 2002, when he emailed a co-worker, Jill Nevels-Haun, the following: “Remind me to tell you

about being sexually harassed by white male managers while on the night desk." Nevels-Haun encouraged Amos to report Mathews's conduct, but Amos refused. On January 17, 2002, Nevels-Haun, on her own initiative, reported the posting of the comments about Amos to the managing editor, Tom Eblen. Eblen asked Kim Parson, Mathews's direct supervisor, to handle the matter. Parson addressed the issue that day. She verbally reprimanded Mathews and instructed Mathews to delete the Night Quotes file, which Mathews did immediately. On January 18, Parson met with Amos and told him she had reprimanded Mathews and Peck and had instructed Mathews to delete the file. It is undisputed that after that time, no other incident of alleged harassment of Amos occurred at the Herald-Leader.

On December 28, 2001, Amos applied for a voluntary buyout of his position at the Herald-Leader. Thereafter on January 30, 2002, Amos requested a meeting with Amanda Bennett, the Editor of the Herald-Leader, and asked for an apology from Mathews and questioned when the Night Quotes file was actually deleted. Bennett directed Eblen to have apology letters by Mathews and Peck drafted for her review and to get Human Resources involved. However, before the letters could be sent out, Jim Green, Vice-President for Human Resources at the paper, received a letter from Amos demanding that his buyout offer be increased from $7,800 to $48,603. The demand was based on his

claim that he received a negative reference from the Herald-Leader in seeking employment with another paper in retaliation for reporting the incident of sexual harassment, which prevented him from getting the job at the other paper. Hence, he sought the additional funds to pay his tuition to continue his journalism education.

Upon getting the letter, Green and his assistant began an investigation of the matter. As a result of the investigation, Green determined that the Detroit Free Press, the paper where Amos had sought a job, did not decline to hire Amos because of any negative reference, but because he stated that he only intended to stay at the job for 18 months and they wanted a more long-term commitment. As for the reference given to the Detroit Free Press, the evidence revealed that Eblen gave Amos a generally positive reference. Eblen made no mention of the Night Quotes incident, but did state that Amos had some issues with his supervisor. Apparently, Eblen did not specify what those issues were and placed no blame on Amos.

As for the Night Quotes incident, Green concluded that while Mathews's conduct did not violate any specific harassment policy at the paper, the behavior was nevertheless inappropriate for a supervisor, warranting a written reprimand. Both Mathews and Peck received written reprimands in their files.

On March 12, 2002, Amos filed an action against the Herald-Leader and Mathews alleging: religious discrimination and/or harassment; race discrimination and/or harassment; retaliation (which count was voluntarily withdrawn by Amos); defamation; intentional infliction of emotional distress; negligent supervision; and invasion of privacy. On July 30, 2003, the trial court sustained the defendants' motion for summary judgment as to all the claims. This appeal by Amos followed.

Summary judgment is only proper where the trial court, drawing all factual inferences in favor of the nonmoving party, can conclude that there are no issues as to any material fact and that the moving party is entitled to judgment as a matter of law. Fischer v. Jeffries, Ky. App., 697 S.W.2d 159 (1985). Summary judgment "should only be used 'to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.'" Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 483 (1991) (quoting Paintsville Hospital v. Rose, Ky., 683 S.W.2d 255, 256 (1985)).

Amos's first argument is that the trial court erred in finding that the remarks at issue about Amos were made in the course of "casual office banter." Amos claims that the trial

court failed to view the evidence on this issue in the light most favorable to him. Amos maintains that there was evidence that he was not a participant in the discussion when the comments about him were made and that he did not view the remarks as a joke.

The following is an excerpt from Amos's deposition:

Q. Amos Jones, November 24, 2001, says Susan Wagner and I are big believers in caning. You said those words, didn't you?

A. Correct.

Q. And you were making a joke, correct?

A. I was referring to the punishment meted out in Singapore for people who abused public property through graffiti.

Q. Were you making a joke or were you serious?

A. No, we were serious, we support this for people who damage public property, the concept of caning in Singapore. Tongue in cheek, I would say it was tongue in cheek.

Q. A joke or serious?

A. I would say –

Q. You're laughing now.

A. Well, yeah, when I said it, then I reiterated it to Peter as a joke. I mean, it was wholly a joke when

I told Peter that, you know, Susan and I are big believers in caning.

. . .

Q. And then Pete apparently – when you said this as a joke to Pete, right, he came back and says, Amos, what you and Susan do in your spare time is none of our business. He said that, right?

A. Right.

Q. Was he being serious about your joke or was he just following up on your joke?

A. He was following up and turning the joke to a sexual – into a sexual kind of context.

Q. Was he serious about that or was it just a misplaced joke, in your mind?

Q. I think it had elements of being serious, and the reason was this implication that Susan and I are together in this whole black man, women kind of issue at work, especially in the context of visiting pornographic websites, which I don't do, you know.

. . .

Q. Go back to what happened on November 24, what Pete said back to you, Amos, what you and Susan do in your spare time is none of our business.

A. Uh-huh

. . .

Q. So at that point it’s just a joke?

A. Right.

. . .

Q. And then Saturday, December 1, you come in and you say despite these reports of it going down, that you, Amos, had not lost your service, right?

A. Right.

. . .

Q. And then you say Pete made the statement that you would be able to continue to visit bondage and domination chat rooms, right?

A. Right.

. . .

Q. At that point you know it’s a joke?

A. Right, because –

Q. And he’s opening it up for you to be the butt of more jokes according to you, right?

A. Right.

Q. Because he’s a supervisor and he gives people the indication it’s all right to joke about Amos, then he sets the tone, is that the deal?

A. Yes.

Q. But he’s not trying to say in effect that you’re onto bondage and domination chat rooms, is he?

A. Individually, no, it was – yeah –

Q. It was a joke, right?

A. I was the butt of this –

Q. Right. But it was a joke. You were the butt of the joke?

A. At that moment, yes.

Q. And then Jared Peck comes back – Pete didn’t say any more, did he?

A. Right.

Q. And then Jared Peck comes back and says you can’t spell Amos without S and M, right?

A. That’s right.

Q. And was Jared making the allegation that you were into bondage and domination or into sadomasochism, S and M?

A. Yes.

Q. That was not a joke, he was serious?

A. No, I think it was a joke and I think he was making the allegation.

The record also contains affidavits of three of those present on the two occasions when the comments at issue were

made – William Scott, Susan Waggoner, and Jared Peck – and they all indicated that the comments about Amos were made in the course of casual office conversation and were intended only as jokes. Likewise, Mathews testified in his deposition that the remarks and their subsequent posting were meant only as a joke. As can be seen from the above deposition testimony of Amos, Amos himself admitted the comments were made as jokes, although he attempted to simultaneously and contradictorily characterize them as factual allegations. In viewing the record, we could find no evidence that the remarks made about Amos were intended as anything more than jokes made in the course of casual office conversation. Hence, in viewing the evidence in the light most favorable to Amos, the trial court did not err in reaching the same conclusion.

Amos next argues that the trial court erred in limiting his negligent supervision claim to just Mathews. Regarding the negligent supervision claim, the court found:

> [T]here is no evidence in the record to support a finding that the named employees were unfit for the job for which they were employed. Furthermore, there is absolutely no evidence that the Herald-Leader knew or should have known that retaining these employees would create a foreseeable risk of harm to Mr. Jones or any other employee.

The court also noted that the Herald-Leader had an employment harassment policy in place, of which Jones failed to avail

himself, and that Amos failed to establish a prima facie case of hostile work environment.

Amos specifically alleged in his complaint that the Herald-Leader should have known that Mathews, Eblen, Parson, and Bennett were unfit for the positions of supervising employees without any training, supervision or instructions on the Herald-Leader's employment harassment policy. To sustain a claim for negligent supervision, the claimant must show that 1) the employer knew or should have known that the employees were unfit for the job, and 2) the employer's alleged failure to properly supervise the employees created an unreasonable risk of harm to the claimant. Oakley v. Flor-Shin, Inc., Ky. App., 964 S.W.2d 438 (1998).

It was undisputed that the Herald-Leader had an employment harassment policy in place at the time of the alleged harassment of Amos in this case. The Herald-Leader's harassment policy manual, which was filed in the record, contained sections on the prohibited conduct, complaint procedures, and investigations. The section on investigations states in pertinent part:

> The company will conduct a prompt and thorough investigation into every reported incident of conduct inconsistent with this policy. Any individual found to have engaged in inappropriate behavior will be subject to disciplinary action, up to and including immediate termination.

Although there was evidence that Eblen, Parson, and Bennett had no training on this harassment policy, there likewise was no evidence that they failed to follow the policy or were negligent in handling the matter once it was brought to their attention. The evidence established that when Eblen was informed of the matter, he immediately told Parson to handle it. Parson thereupon verbally reprimanded Mathews that same day and instructed Mathews to delete the Night Quotes file, which Mathews did immediately. When Amos thereafter met with Bennett and complained of the harassment, Bennett immediately directed that apology letters be issued and contacted Human Resources. Subsequently, Green and his assistant began an investigation of the matter which resulted in written reprimands being placed in Mathews's and Peck's employment files. There simply was no evidence that Eblen, Parson or Bennett were unfit or handled the matter negligently. The complaint was investigated as soon as they had notice of the alleged harassment, Mathews and Peck were reprimanded for their inappropriate conduct, and, most importantly, there was no further incident of alleged harassment after that time. There was also no evidence that Mathews had a proclivity for harassment or had ever harassed another employee such that his supervisors would have been aware that he created an unreasonable risk of harm to another employee. Accordingly,

summary judgment on the claim of negligent supervision was proper.

Next, Amos argues that the trial court erred in dismissing his defamation claim. Relative to the defamation claim, the court found that the evidence established that the Night Quotes comments were "clearly intended to be humorous" and were not intended to state actual facts about Jones. Hence, the defamation claim could not be maintained.

The four elements necessary to establish an action in defamation are: 1) defamatory language; 2) about the plaintiff; 3) which is published; and 4) which causes injury to reputation. Columbia Sussex Corp., Inc. v. Hay, Ky. App., 627 S.W.2d 270 (1981). Language that cannot be taken literally and could not reasonably be considered a statement of fact cannot support a claim for defamation. Pring v. Penthouse Internationl, Ltd., 695 F.2d 438 (10th Cir. 1982), cert. denied, 462 U.S. 1132, 103 S. Ct. 3112, 77 L. Ed. 2d 1367 (1983). "A parody or spoof that no reasonable person would read as a factual statement, or as anything other than a joke – albeit a bad joke - cannot be actionable as defamation." Walko v. Kean College of New Jersey, 235 N.J.Super. 139, 561 A.2d 680, 683 (1988).

In Walko, the plaintiff, a college administrator, brought suit for defamation after the school newspaper produced a spoof edition featuring the plaintiff in a phony advertisement

for sex alongside a collection of other phony advertisements. The Court looked at the content of the ad and the context in which it was presented and concluded that no person could reasonably believe that the plaintiff was actually advertising to perform sexual acts. In the present case, in looking at the content and context of the Night Quotes comments, we do not see how they could be construed as anything other than a bad joke. From the context, it was clear that the comments at issue were intended as humorous responses to Amos's statements that he and Susan Waggoner were big believers in caning and that he had not lost Internet service despite the troubles with his provider.

Amos makes much of the fact that Mathews's superiors (Eblen, Parson, Bennett, and Green) perceived the Night Quotes comments to be troubling and as creating a bad situation for the paper. However, none of those persons testified that they took the comments seriously as statements of fact about Amos. Clearly, those persons were concerned because they felt the comments, even as jokes, were inappropriate for the workplace and could potentially expose the paper to legal action.

Amos also argues that the trial court erred in adjudging that there was no evidence of religious or racial discrimination, i.e. hostile work environment. Relative to this claim under the Kentucky Civil Rights Act, KRS Chapter 344, the court found that the record was "devoid of evidence of

discrimination that [was] severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive." The court pointed to the fact that the Night Quotes incident was an isolated incident. The court also concluded that Amos failed to demonstrate that the remarks were based on either race or religion.

To establish a claim for hostile work environment based on race and/or religion, Amos must show that 1) he was a member of a protected class; 2) he was subjected to unwelcome harassment; 3) the harassment was based on his race or religion; 4) the harassment unreasonably interfered with his work performance or created a hostile or offensive work environment that was severe or pervasive; and 5) the paper knew or should have known of the charged sexual harassment and failed unreasonably to take prompt and corrective action. Fenton v. HiSAN, Inc., 174 F.3d 827, 829-30 (6th Cir. 1999). We agree with the trial court that the third part of the criteria could not be met in this case. There was no evidence that the comments made and Mathews's posting of those comments on the Night Quotes file were motivated by Amos's race or religion. We perceive the comments themselves as purely sexual in nature, having no racial or religious connotations or overtones. And Amos did not make a claim for sexual harassment. Amos contends that the fact that Mathews was aware he was a religious individual demonstrates

that religion was the motive for the comments and their posting. We do not agree. The mere fact that Mathews was aware that Amos was religious was not enough to prove that the comments or their posting was motivated by Amos's religion.

Amos also maintains that the trial court erred in dismissing his claim for intentional infliction of emotional distress. The trial court adjudged that under the law, Mathews's posting of the Night Quotes remarks was not sufficiently outrageous to support the claim. To establish a claim for intentional infliction of emotional distress, the plaintiff must show:

> that defendant's conduct was intentional or reckless, that the conduct was so outrageous and intolerable so as to offend generally accepted standards of morality and decency, that a causal connection exists between the conduct complained of and the distress suffered, and that the resulting emotional stress was severe.

Brewer v. Hillard, Ky. App., 15 S.W.3d 1, 6 (1999) (citing Humana of Kentucky, Inc. v. Seitz, Ky., 796 S.W.2d 1, 2-3 (1990)). In Kroger Co. v. Willgruber, Ky., 920 S.W.2d 61, 65 (1996), it was stated that petty insults, unkind words and minor indignities were not sufficient to form the basis of an outrage claim. In Wathen v. General Electric Co., 115 F.3d 400, 407 (6th Cir. 1997), an employee was subjected to sexual jokes, comments, and innuendos by upper-level management employees. The Court

held, "[t]he conduct of which Wathen complains, while crude and wholly inappropriate, does not rise to the level of the 'atrocious and utterly intolerable' as a matter of law." Id. (quoting Seitz, 796 S.W.2d at 4).

In the instant case, we agree with the trial court that the comments made by Mathews and Peck and their subsequent posting on the Night Quotes site did not rise to the level of outrageous conduct. Although the comments were sexually suggestive and thus, inappropriate for the workplace, they were clearly meant as a joke. Even considering Amos's allegation that he objected to the posting of the comments, we cannot say that the comments and their posting rose to the level of being outrageous or intolerable, especially given the fact that this was an isolated incident.

Amos's remaining argument is that the trial court erred in dismissing his invasion of privacy claim. The court rejected the claim, stating:

> In this case, there is no evidence that the Night Quotes file purported to seriously attribute qualities to any of the persons whose names appeared in the file. The quotes in the Night Quotes file amounted to jokes, albeit in bad taste.

To prevail on a claim of placing the plaintiff in a false light before the public, the plaintiff must show: "(1) the false light in which the other was placed would be highly

offensive to a reasonable person; and (2) the publisher had knowledge of, or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other was placed." McCall v. Courier-Journal and Louisville Times Co., Ky., 623 S.W.2d 882, 888 (1981), cert. denied, 456 U.S. 975, 102 S. Ct. 2239, 72 L. Ed. 2d 849 (1982). The requirement that the plaintiff be placed in a false light necessarily requires that the defendant alleged or implied facts about the plaintiff which are not true. We agree with the trial court that because the remarks posted on the Night Quotes site were clearly meant as a joke and could not be taken seriously, they could not place Amos in a false light. Hence, the false light claim was properly dismissed.

For the reasons stated above, the order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:	BRIEF AND ORAL ARGUMENT FOR APPELLEE:
Jeffrey D. Thompson Louisville, Kentucky	Robert F. Houlihan, Jr. Lexington, Kentucky