STATE OF MICHIGAN

COURT OF APPEALS

GARY MCMILLIN and JANICE MCMILLIN, Plaintiffs-Appellants, v DIANE FUMICH, Defendant-Appellee.	UNPUBLISHED December 13, 2002 No. 232067 Wayne Circuit Court LC No. 98-838110-NO
GARY MCMILLIN and JANICE MCMILLIN, Plaintiffs-Appellants, v BARBARA MARSIGLIO, WILLIAM LAY, and GENERAL MOTORS CORPORATION, Defendants-Appellees.	No. 232068 Wayne Circuit Court LC No. 99-919138-NO

Before: Jansen, P.J., and Holbrook, Jr., and Cooper, JJ.

PER CURIAM.

In these consolidated cases, plaintiffs appeal as of right the order granting defendants' motions for summary disposition regarding plaintiff Gary McMillin's claims of defamation, false light invasion of privacy, and intentional infliction of emotional distress against all four individual defendants, and an additional claim against defendant General Motors Corporation (GM) for breach of executive compensation agreements. Coplaintiff Janice McMillin's derivative claims for loss of consortium were likewise dismissed. We affirm.

Plaintiff[1] was an executive with GM with thirty-eight years of service. He was discharged after he was investigated by GM's Human Resources Department for alleged sexual

[1] For ease of reference, we will use "plaintiff" to refer only to Gary McMillin.

harassment. Plaintiff appealed his dismissal through GM's "Open Door" process. After an investigation, plaintiff's discharge was upheld.

Plaintiff filed a complaint against defendant Fumich for defamation, false light invasion of privacy, and intentional infliction of emotional distress regarding her allegedly false accusations of sexual harassment against him. Several months later, plaintiff filed an identical complaint against defendants Marsiglio and Lay and included GM as a defendant under a respondeat superior theory. Plaintiff was later permitted to amend his complaint to add an additional claim against GM for breach of executive compensation agreements.

Defendants filed motions for summary disposition, which the trial court granted on all plaintiff's claims. The trial court ruled that the defamatory statements made by the individual defendants while GM was investigating the allegations against plaintiff were protected by a qualified privilege and that plaintiff had failed to overcome the privilege by proving actual malice. The court further found that plaintiff had not established that he had experienced "severe emotional distress" required for the intentional infliction of emotional distress claim. The court also stated that, since the individual defendants were simply pursuing a legal right and had a qualified privilege to do so, the individual defendants' conduct was not "extreme and outrageous." The court found that there had not been sufficient publication by defendants of plaintiff's termination from GM and the reasons for it for plaintiff's claim of false light invasion of privacy to survive summary disposition.

In addition, the court dismissed any liability attributable to GM on a respondeat superior theory because GM had an obligation to investigate allegations of harassment. Furthermore, if the individual defendants had been untruthful about the harassment allegations, such conduct was not done in furtherance of any objective of GM or under GM's control. Finally, the court dismissed the breach of executive compensation agreement claim because the court gave deference to GM's determination that plaintiff had been dismissed for cause,[2] or, alternatively, had not satisfied the condition precedent in the agreement not to act in any way inimical to the best interests of GM. Plaintiff appealed the trial court's dismissal of all his claims to this Court.

Plaintiff first claims that the trial court erred in granting defendants' motions for summary disposition on the defamation claims. We disagree. In evaluating a motion for summary disposition pursuant to MCR 2.116(C)(10), the trial court considers affidavits, pleadings, depositions, admissions, and other evidence that the parties submit, in the light most favorable to the opposing party. The moving party is entitled to judgment as a matter of law if the proffered evidence fails to establish a genuine issue of material fact. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999); MCR 2.116(G)(5). Furthermore, "where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). In deciding a motion for summary disposition, the

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[2] The parties do not dispute that plaintiff was an at-will employee. However, the stock option agreement that plaintiff claims GM breached included a clause that permitted GM to terminate plaintiff's eligibility under the plan for "cause."

trial court may not make findings of fact or weigh credibility. *Nesbitt v American Community Mutual Ins Co*, 236 Mich App 215, 225; 600 NW2d 427 (1999).

The elements of a cause of action for defamation are: (1) a false and defamatory statement concerning the plaintiff; (2) an unprivileged communication to a third party; (3) fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm, or the existence of special harm caused by publication. *Linebaugh v Sheraton Michigan Corp*, 198 Mich App 335, 338; 497 NW2d 585 (1993). These elements must be specifically pleaded, including the allegations with respect to the defamatory words, the connection between the plaintiff and the defamatory words, and the publication of the alleged defamatory words. *Gonyea v Motor Parts Federal Credit Union*, 192 Mich App 74, 77; 480 NW2d 297 (1991).

Defendants maintain that plaintiff cannot proceed on his defamation claim because the allegedly defamatory statements made by the individual defendants were made under a qualified privilege.[3] Therefore, element (2) of his claim, an unprivileged communication to a third party, has not been met. This Court addressed the issue of a qualified privilege in *Prysak v R L Polk Co*, 193 Mich App 1, 14-15; 483 NW2d 629 (1992), stating:

> The determination whether a privilege exists is one of law for the court. The elements of a qualified privilege are (1) good faith, (2) an interest to be upheld, (3) a statement limited in its scope to this purpose, (4) a proper occasion, and (5) publication in a proper manner and to proper parties only. A plaintiff may overcome a qualified privilege only by showing that the statement was made with actual malice, i.e., with knowledge of its falsity or reckless disregard for its truth. General allegations of malice are insufficient to establish a genuine issue of material fact. [Citations omitted.]

Likewise, an employer has a qualified privilege to defame an employee by making statements to other employees whose duties interest them in the subject matter. *Patillo v Equitable Life*, 199 Mich App 450, 454; 502 NW2d 696 (1992). A plaintiff may overcome this qualified privilege only by showing that the statement was made with actual malice, *Gonyea, supra*, 192 Mich App 79, or through excessive publication of a false defamatory statement. *Fulghum v United Parcel Service, Inc*, 424 Mich 89, 106-107; 378 NW2d 472 (1985).

Here, the parties agree that a qualified privilege applies to the statements made by the individual defendants and GM employees during the course of GM's investigation into the sexual harassment allegations against plaintiff. However, plaintiff maintains that the privilege has been overcome by defendants' "reckless disregard for the truth" and publication to individuals outside the "need to know group."

However, "[g]eneral allegations that privileged statements were false and malicious are insufficient to create genuine issue of fact regarding whether a person published a statement with actual malice." *Kefgen v Davidson*, 241 Mich App 611, 624; 617 NW2d 351 (2000), citing *Reed*

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[3] Defendants also assert that the statements made about plaintiff are *not* false.

v Michigan Metro Girl Scout Council, 201 Mich App 10, 13-14; 506 NW2d 231 (1993). This Court stated in *Ireland v Edwards*, 230 Mich App 607, 622; 584 NW2d 632 (1998):

> Actual malice is defined as knowledge that the published statement was false or as reckless disregard as to whether the statement was false or not. Reckless disregard for the truth is not established merely by showing that the statements were made with preconceived objectives or insufficient investigation. Furthermore, ill will, spite or even hatred, standing alone, do not amount to actual malice. "Reckless disregard" is not measured by whether a reasonably prudent man would have published or would have investigated before publishing, but by whether the publisher in fact entertained serious doubts concerning the truth of the statements published. [Quoting *Grebner v Runyon*, 132 Mich App 327, 332-333; 347 NW2d 741 (1984) (citations omitted).]

The issue of actual malice is a question for the jury, for which supporting facts must be given. *Gonyea*, *supra*, 192 Mich App 79. However,

> [w]hether the evidence in a defamation case is sufficient to support a finding of actual malice is a question of law. In considering a motion for summary disposition, a court must consider whether the evidence is sufficient to allow a rational finder of fact to find actual malice by clear and convincing evidence. [*Ireland*, *supra*, 230 Mich App 622 (citations omitted).]

Clear and convincing evidence is defined as evidence that:

> produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. . . . Evidence may be uncontroverted, and yet not be "clear and convincing." . . . Conversely, evidence may be "clear and convincing" despite the fact that it has been contradicted. [*Kefgen*, *supra*, 241 Mich App 625 (citations omitted).]

In this case, plaintiff maintained throughout the GM investigations into the alleged harassment and during discovery that he did not do the acts of which he was accused. He introduced evidence that such actions on his part are out of character and that none of his witnesses have seen him act in a sexually harassing manner toward women. He also established that William Lay, a fellow executive who corroborated the "lap patting" incident, disliked him. However, he has not presented evidence to directly attack Fumich's and Marsiglio's veracity. Although he has called them "wanna-be executives" who were dissatisfied with the course their careers have taken, and has taken exception to minor inconsistencies in their testimony, he has not demonstrated the falsehood of any of the allegations against him, nor has he demonstrated any motive for them to lie about him. The witnesses upon whose deposition testimony plaintiff relied to establish that he did not act inappropriately also stated during the "Open Door" investigation that they had no reason to doubt the veracity of the individual defendants.

Plaintiff claims that, because this Court must view the evidence in the light most favorable to him, his denials of any wrongdoing must be taken as true and that it, therefore,

follows that defendants' statements are false. *Maiden*, *supra*, 461 Mich 120. Plaintiff further argues that since defendants' statements must be false, they must be knowingly false; therefore, according to plaintiff, he has proven actual malice. However, plaintiff fails to recognize that in Michigan both falsity and actual malice must be proved.[4]

While plaintiff may have presented sufficient evidence to establish a question of fact regarding whether the individual defendants' statements were true, plaintiff has failed to establish that the individual defendants acted with actual malice to override the qualified privilege attached to their responses to an internal GM investigation. Defendants' interpretations of actions plaintiff may have believed to be innocuous, even if plaintiff denies having taken the actions, does not indicate actual malice by clear and convincing evidence. Therefore, even viewing the evidence in a light most favorable to him, plaintiff's general allegations, supported primarily with his own self-interested statements, do not create an inference that defendants made their statements with knowledge that they were false or with reckless disregard for their truth. See *Prysak*, *supra*, 193 Mich App 14-15.

Regarding the publication of the defamatory statements, the limited publication of the statements by defendants after plaintiff's discharge is insignificant compared to the dissemination of the information by plaintiff and his wife. To the extent that plaintiff relies on *Grist v Upjohn Co*, 16 Mich App 452; 168 NW2d 389 (1969) for the proposition that "compelled self-defamation" is actionable, plaintiff was not compelled by defendants to release details of his discharge and voluntarily chose to release these details to certain people, while simply telling other people that he had "retired."

Likewise, qualifiedly privileged communications made in good faith do not lose their status if the content of the communication is indeed proved false. *Merritt v Detroit Memorial Hosp*, 81 Mich App 279, 287; 265 NW2d 124 (1978). Plaintiff claims that the GM employees investigating the claims against him did not act in good faith because they were aware of false accusations made by Marsiglio against another executive. However, this is a mischaracterization of the evidence presented. The investigator's notes indicate that the other executive was questioned about the reported incidents and acknowledged that they had occurred, although he did not remember the "tummy pat." The executive acknowledged that he needed to be more sensitive and that he was not an eloquent speaker. The executive is from the United Kingdom, and the investigating team recognized cultural differences in appropriate behavior. It appears that the executive's bonus was affected by the complaints, and he was required to undergo additional sensitivity training. Although plaintiff's attorney attempted to elicit a response from the investigator during her deposition that Marsiglio had made a false accusation against this executive, a close reading of the deposition transcript does not support that conclusion. Instead, the investigator looked at the context of the executive's conduct and concluded that it was not intended as sexual harassment. In addition, the "tummy pat" incident was verified by two other witnesses.

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[4] The first element of a defamation claim is a *false* and defamatory statement. The second element is an *unprivileged* communication to a third party. See *Linebaugh*, *supra*, 198 Mich App 338; *Harrison v Arrow Metal Products Corp*, 20 Mich App 590, 174 NW2d 875 (1969).

Therefore, even when viewed in a light most favorable to plaintiff, we cannot conclude that the GM investigators published defamatory statements about plaintiff with knowledge that they were false or with reckless disregard to their truth. *Ireland*, *supra*, 230 Mich App 622. In addition, Fumich and Marsiglio's complaints accusing plaintiff of sexual harassment do not amount to defamation *by GM* because, even if they were intentionally false, Fumich and Marsiglio were not acting in the discharge of their employment duties. See *Linebaugh*, *supra*, 198 Mich App 341. Therefore, the court did not err in granting summary disposition to defendants on plaintiff's defamation claims.

Plaintiff next alleges that the trial court erred in granting the individual defendants summary disposition on plaintiff's intentional infliction of emotional distress claims.[5] We disagree. The elements of a claim of intentional infliction of emotional distress are: (1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress. *Duran v Detroit News, Inc*, 200 Mich App 622, 629-630; 504 NW2d 715 (1993). Liability for such a claim has been found only where the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. *Johnson v Wayne Co*, 213 Mich App 143, 161; 540 NW2d 66 (1995); *Linebaugh*, *supra*, 198 Mich App 342. Whether conduct is so extreme as to permit an action for intentional infliction of emotional distress is initially a determination for the court, but when reasonable people can differ, the issue is one for the jury. *Doe v Mills*, 212 Mich App 73, 92; 536 NW2d 824 (1995).

Liability "does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 603; 374 NW2d 905 (1985), quoting Restatement Torts, 2d, § 46, comment d, pp 72-73; *Linebaugh*, *supra*, 198 Mich App 342. Furthermore,

> [t]he conduct, although it would otherwise be extreme and outrageous, may be privileged under the circumstances. The actor is never liable, for example, where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress. [*Roberts*, *supra*, 442 Mich 603 (emphasis in original), quoting Restatement Torts, 2d, § 46, comment g, p 76.]

In this case, plaintiff contends that defendants' conduct "was so extreme and outrageous in a civilized society as to constitute the intentional infliction of emotional distress" and that he suffered "humiliation, anxiety, [and] hurt feelings" as a consequence.

> Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. *It is only where it is extreme that the liability arises*. Complete emotional tranquillity [sic] is seldom attainable

[5] We note that the Michigan Supreme Court has not yet formally recognized intentional infliction of emotional distress as a viable tort claim. *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 603; 374 NW2d 905 (1985).

> in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. *The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it*. [*Roberts, supra*, 422 Mich 608-609, quoting Restatement Torts, 2d, § 46, comment j, p 77.]

Plaintiff presented his treating physician's letter indicating the physical symptoms caused by plaintiff's increased stress levels directly related to his termination. The physician also indicated that plaintiff was receiving anti-depressant drugs. Plaintiff also further described in his deposition the emotional and physical toll the allegations and termination had taken on him. This undisputed evidence established a question of fact regarding whether plaintiff suffered severe emotional distress. See *Haverbush v Powelson*, 217 Mich App 228, 235-236; 551 NW2d 206 (1996). Therefore, the trial court erred in concluding as a matter of law that plaintiff did not suffer severe emotional distress as a result of his termination from GM in response to the individual defendants' allegations of sexual harassment.

However, while plaintiff maintains that false allegations of sexual harassment are the type of extreme and outrageous behavior contemplated to prove a case of intentional infliction of emotional distress, plaintiff has failed to demonstrate that the allegations were false. Even viewing the facts in the light most favorable to plaintiff, the statements made by the complainants, witnesses, and investigators in an investigation into alleged sexual harassment are protected by a qualified privilege, which, as previously discussed, plaintiff has failed to overcome by proving actual malice. The individual defendants were insisting upon their legal rights in a permissible way, which cannot constitute extreme and outrageous conduct. *Roberts, supra*, 442 Mich 603. Therefore, the trial court did not err by granting summary disposition to the individual defendants on plaintiff's intentional infliction of emotional distress claims.

Plaintiff next argues that the trial court erred in granting the individual defendants summary disposition on plaintiff's false light invasion of privacy claims. We disagree. The elements of an action for false light invasion of privacy are that the defendant broadcast to the public in general, or to a large number of people, information that would be highly objectionable to a reasonable person by attributing to the plaintiff characteristics, conduct, or beliefs that were false and placed the plaintiff in a false position. *Porter v Royal Oak*, 214 Mich App 478, 486-487; 542 NW2d 905 (1995). In addition, the defendant must have known of or acted in reckless disregard to the falsity of the publicized matter and the false light in which the plaintiff would be placed. *Detroit Free Press v Oakland Co Sheriff*, 164 Mich App 656, 666; 418 NW2d 124 (1987).

Here, as we already noted, plaintiff's claims must fail because he failed to demonstrate that the statements made about him were false or that the individual defendants disseminated false information in reckless disregard to the falsity of the publicized matter and the false light in which plaintiff would be placed. *Id.* Furthermore, plaintiff has failed to show the requisite excessive publication by defendants. The record below indicates that plaintiff and his wife, not defendants, published the information about plaintiff's termination from GM. Therefore, the trial court did not err in granting defendants summary disposition on plaintiff's false light invasion of privacy claims.

Plaintiff also argues that the trial court erred in granting GM summary disposition on plaintiff's claim that GM is liable for its employees' acts under a respondeat superior theory. We disagree. Since summary disposition was properly granted to the individual defendants regarding plaintiff's claims, there is no liability for GM. Therefore, the trial court did not err in granting GM summary disposition on plaintiff's claims under a respondeat superior theory.

Finally, plaintiff argues that the trial court erred in granting GM summary disposition on plaintiff's claim for breach of the stock option incentive agreement. We disagree. Plaintiff claimed that GM breached its stock incentive agreement with him when it terminated his rights under the Stock Incentive Plan. Plaintiff argues that GM breached the GM 1997 Stock Incentive Plan because the stock incentive plan had a "for cause" provision for termination of rights under the plan.

The trial court appropriately noted that, since plaintiff was an at-will employee, this case is not a wrongful termination case. However, the court also stated that, even if plaintiff was not terminated for just cause, GM could still terminate his rights under the stock option plan because he had acted in a manner inimical to GM's best interests under § 5(c)(iii)(C).

A close reading of § § 1 and 5(c)(iii) of the contract unambiguously establishes that the GM Executive Compensation Committee reserved sole discretion to determine whether plaintiff was eligible for the stock option plan and whether his eligibility ceased when his employment was terminated. As such, plaintiff's sole focus on whether he was discharged for cause is misplaced.

In *Hainline v General Motors Corp*, 444 F2d 1250 (CA 6, 1971),[6] a case with facts similar to this one, the plaintiff was involuntarily terminated and stripped of his rights to undistributed proceeds from GM's Bonus Plan. The plaintiff argued that he was entitled to the bonus payments because he had not been dismissed for cause. *Hainline, supra*, 444 F2d 1251. The Sixth Circuit Court of Appeals held:

> In general, the power to exercise discretion is not the power to act arbitrarily; discretion may not be abused by those to whom it is entrusted, and this fact holds true no less in the private than in the public sector. While courts should be wary of interfering with the judgment of corporate executives, it has been held that such judgment cannot stand if fraud or bad faith was shown. [*Hainline, supra*, 444 F2d 1255 (citing *Siegel v First Pennsylvania Banking & Trust Co*, 201 F Supp 664, 669 (ED Pa, 1961).]

The Sixth Circuit further concluded that "when an executive committee is vested with the authority to terminate rights in a bonus, pension, or other similar plan, upon a factual determination such as voluntariness, it is bound to exercise its authority honestly and in good faith." *Hainline, supra*, 444 F2d 1257. Michigan case law likewise mandates that "such discretion be exercised honestly and in good faith." *Burkhardt v City Nat'l Bank*, 57 Mich App 649, 652; 226 NW2d 678 (1975).

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[6] While not binding on this Court, the Sixth Circuit's decision in *Hainline* is instructive.

Here, despite plaintiff's allegations to the contrary, there is no indication that GM's Executive Compensation Committee did not act in good faith in terminating plaintiff's stock options. Plaintiff was found to have violated GM's policy against sexual harassment and his employment was terminated. An "Open Door" investigation, conducted by a different investigator, confirmed the termination decision. Plaintiff's blanket denials of the alleged acts of harassment do not alter the determination that the individual defendants were pursuing a legal right in a proper manner and that GM responded appropriately.

Finally, plaintiff contends that his employment was not terminated for cause because another executive, who was likewise accused of harassment, was not fired. As noted above, the other executive admitted to most of the alleged actions and was reprimanded by a reduction in his bonus and additional sensitivity training. Since the other executive's situation was different than plaintiff's, there is no indication that GM acted in bad faith by treating the two different situations differently. Furthermore, whether GM had actual cause to terminate plaintiff is not critical to the analysis of this issue. Therefore, the trial court did not err in granting GM's motion for summary disposition on plaintiff's breach of the stock option plan claim.

Affirmed.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Jessica R. Cooper