[Cite as *Jahahn v. Wolf*, 2013-Ohio-2660.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Leigh Jahahn,	:	
Plaintiff-Appellant,	:	
		No. 12AP-624
v.	:	(C.P.C. No. 11 CVC05-6687)
Allison Wolf et al.,	:	(ACCELERATED CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on June 25, 2013

Rosenberg & Ball Co., LPA, and *David T. Ball*, for appellant.

Vorys, Sater, Seymour and Pease LLP, Jonathan R. Vaughn, and *Samantha A. Stilp*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} This is an appeal by plaintiff-appellant, Leigh Jahahn, from an entry of the Franklin County Court of Common Pleas granting summary judgment in favor of defendants-appellees, Allison Wolf and Nationwide Children's Hospital ("NCH").

{¶2} On August 4, 2008, NCH hired appellant as an accountant/data analyst, a position she held until her termination on May 13, 2009. Pursuant to NCH policy, new employees are required to complete a 90-day introductory period, during which absences are not permitted. During the first 90 days of her employment, appellant was absent a total of four days; as a result of these absences, appellant was counseled by her supervisor, appellee Wolf (individually "Wolf"), and appellant's introductory period was extended an additional 30 days.

{¶3} NCH timesheets indicated that appellant also had absences from work on February 6 and 20, 2009, March 9 and 10, 2009, and that during this time appellant made requests to leave work early for doctor appointments. Appellant was also absent from work commencing April 15, 2009 and continuing until May 13, 2009 (the date of her termination). According to appellant's affidavit, she was diagnosed in May 2009 with mononucleosis. On May 6, 2009, appellant requested leave of absence from April 6 to June 7, 2009. Wolf approved leave for appellant from April 16 to May 13, 2009, but Wolf informed appellant that she would be terminated if she did not return to work on May 13, 2009. When appellant failed to report to work on that date, NCH terminated her employment.

{¶4} On May 31, 2011, appellant filed a complaint against appellees alleging causes of action for defamation per se against both Wolf and NCH. The complaint alleged that, when prospective employers contacted Wolf as a reference for appellant, Wolf "falsely told those prospective employers that Plaintiff was terminated for excessive absenteeism and that Plaintiff caused problems in the workplace." (Complaint, ¶ 52.)

{¶5} On March 6, 2012, appellees filed a motion for summary judgment against appellant. Attached to the motion were various exhibits, including the deposition testimony of appellant. On March 23, 2012, appellant filed a memorandum in opposition to the motion for summary judgment, which included the affidavit of Kellie Guajardo. Appellees filed a reply memorandum April 2, 2012. By entry filed June 12, 2012, the trial court granted summary judgment in favor of appellees.

{¶6} On appeal, appellant sets forth the following assignment of error for this court's review:

> The trial court erred in granting the motion for summary judgment of Defendants-Appellees Allison Wolf and Nationwide Children's Hospital.

{¶7} Under her single assignment of error, appellant challenges the trial court's grant of summary judgment, arguing that the trial court failed to construe the facts most strongly in favor of the non-moving party. Appellant further argues that the court erred in its determination that the statements at issue were qualifiedly privileged.

{¶8} Pursuant to Civ.R. 56(C), summary judgment shall be granted if the filings in the action, including the pleadings and affidavits, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." This court's review of a trial court's decision granting summary judgment is de novo. *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314, 2002-Ohio-2220, ¶ 24.

{¶9} Appellant argues that genuine issues of material fact exist as to whether her former supervisor, Wolf, made defamatory statements to two prospective employers after appellant's termination. In her deposition testimony, appellant stated she had posted her resume on an Internet job site, and that she was contacted by Jen Savage of Tailored Management, a third-party staffing agency. Appellant testified that Savage, after speaking with Wolf in August 2009, contacted appellant and told her that Wolf "was saying negative information about me, she was talking about my leave of absence from work, when I'd been off." (Appellant's Depo., 213.) According to appellant, Wolf had mentioned "attendance issues." (Appellant's Depo., 214.) The record indicates that Savage refused to sign an affidavit statement prepared by appellant's counsel with respect to the matter.

{¶10} Appellant also testified in her deposition that she applied for a position with Arkidan Global Web Conference ("Arkidan") in July or August 2010. Appellant related that Guajardo, an Arkidan employee, spoke with Wolf in August 2010. Appellant testified that Wolf had told Guajardo about "the attendance issues, and * * * job performance issues." (Appellant's Depo., 242.) Guajardo "would not elaborate on exactly what was said." (Appellant's Depo., 230.) According to appellant, Guajardo "would not talk about it at the time. I had to pry the information from her." (Appellant's Depo., 230.) Guajardo subsequently signed an affidavit stating that she "no longer recall[s] the precise nature of [the] negative comments," but that "they related to [appellant's] job performance, her attendance or her behavior."

{¶11} Appellant argues that the trial court erred by construing the evidence of Wolf's "attendance issues" statement in a light most favorable to appellees. Appellant maintains that Wolf's statement is capable of being construed as a statement that the attendance issues were appellant's fault (as opposed to missing work for legitimate reasons beyond her control). According to appellant, if the "attendance issues" statement

is construed as implying she was at fault in missing work, such statement, while superficially true, is defamatory due to its implications.

{¶12} In response, appellees argue that appellant's testimony as to what Savage allegedly told her regarding Wolf's statements constitutes inadmissible hearsay. Appellees further argue that the alleged statements were true, susceptible to an innocent construction, and that they were qualifiedly privileged.

{¶13} Defamation is defined as "a false publication that injures a person's reputation." *Gosden v. Louis*, 116 Ohio App.3d 195, 206 (9th Dist.1996). A cause of action for defamation consists of the following elements: "(1) a false and defamatory statement, (2) about plaintiff, (3) published without privilege to a third party, (4) with fault of at least negligence on the part of the defendant, and (5) that was either defamatory *per se* or caused special harm to the plaintiff." (Emphasis sic.) *Id*. Under Ohio law, "[t]here are two kinds of defamation. Defamation *per se* occurs when material is defamatory on its face; defamation per quod occurs when material is defamatory through interpretation or innuendo." (Emphasis sic.) *Id*.

{¶14} Further, "truth is a complete defense to a claim for defamation." *Ed Schory & Sons v. Soc. Natl. Bank*, 75 Ohio St.3d 433, 445 (1996), citing R.C. 2739.02. Ohio law also follows the innocent construction rule with respect to defamatory statements, which provides that "if an utterance is reasonably susceptible to both a defamatory and an innocent meaning, as a matter of law, the innocent meaning is to be adopted." *Sweitzer v. Outlet Communications, Inc.*, 133 Ohio App.3d 102, 112 (10th Dist.1999), citing *Yeager v. Local Union 20*, 6 Ohio St.3d 369, 372 (1983). Thus, "[i]f a statement has more than one interpretation, it cannot be defamatory per se." *Murray v. Knight-Ridder, Inc.*, 7th Dist. No. 02 BE 45, 2004-Ohio-821, ¶ 31.

{¶15} The trial court, in granting summary judgment in favor of appellees, held that "even if Plaintiff has sufficiently identified a statement or statements that could potentially be defamatory, based on the record and the evidence * * * reasonable minds could conclude only that those statements were true, affording Defendants a complete defense to Plaintiff's claims." Further, the court determined "that the statements were qualifiedly privileged, and * * * that the record is devoid of any evidence from which

reasonable minds could conclude that the statements were made with malice or with reckless disregard."

{¶16} Upon review of the record on summary judgment, we agree with the trial court that reasonable minds could only conclude that the alleged statements by Wolf regarding "attendance issues" were truthful. This is confirmed by appellant's own deposition testimony in which she acknowledged being "told that I had attendance issues in the beginning of my employment, and those factored into my termination." (Tr. 131.) Appellant stated that she was counseled by Wolf regarding her absences during the 90-day introductory period. Further, in March 2009, Wolf informed appellant that she "needed to get on a more set schedule." (Tr. 120.) Wolf told appellant that if she "continued to leave work early, we would have to have a discussion." (Tr. 125.) Appellant felt it was "implied" she would be disciplined if she missed more work. (Tr. 125.) Appellant was subsequently absent from work from April 15, 2009 until the date of her termination on May 13, 2009. Wolf told appellant that "I needed to return on May 12th and * * * they couldn't wait the two weeks for me to return [because] there was a business need for someone to be in that position, that someone had to be in that position." (Tr. 262.) According to appellant, at the time of her termination she received a personal action form from her employer indicating that "[t]he only thing that was dissatisfactory was my attendance." (Tr. 213-14.) Thus, assuming Wolf provided statements to prospective employers that appellant had attendance issues, the record fails to show that such statements were not true.

{¶17} We further agree with the trial court that, even assuming the statements at issue could be found to be defamatory, the statements are subject to a qualified privilege. Such a privilege exists "where the publication is made in a reasonable manner and for a proper purpose [and] [i]mplicit in this defense is a right and a duty to speak on matters of concern to a particular interested audience and good faith in the publication." *Regional Imaging Consultants Corp. v. Computer Billing Servs., Inc.,* 7th Dist. No. 00 CA 79 (Nov. 30, 2001). Ohio law recognizes that "a qualified privilege exists as to communications of an employer concerning the discharge of a former employee to that employee's prospective employer." *Croskey v. Universal Health Servs.*, 5th Dist. No. 09 CA 37, 2009-Ohio-5951, ¶ 59. *See also Rainey v. Shaffer,* 8 Ohio App.3d 262, 264-65

(11th Dist.1983) ("[A]n employer may pass on to a prospective employer facts, opinions, or suspicions regarding a former employee and not be subject to an action for slander"). In general, "[a] qualified privilege attaches where the publication is made in a reasonable manner and for a proper purpose." *Regional Imaging*.

{¶18} A qualified privilege "can be defeated, 'only by a clear and convincing showing that the communication was made with actual malice. In a qualified privilege case, "actual malice" is defined as acting with knowledge that the statements are false or acting with reckless disregard as to their truth or falsity.' " *Regional Imaging*, quoting *Jacobs v. Frank*, 60 Ohio St.3d 111 (1991), paragraph two of the syllabus. In order to establish "reckless disregard," a plaintiff must present sufficient evidence that the defendant "had serious doubts as to the truth of his publication." *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr.*, 73 Ohio St.3d 1, 12 (1995).

{¶19} As previously discussed, the evidence on summary judgment indicates that appellant was terminated from her employment due to excessive absences, a fact acknowledged by appellant, and the alleged statements by Wolf focused upon the reason for her termination. Such statements, made in the context of information sharing between a former and prospective employer, are protected by a qualified privilege. *See Browning v. Navistar Internatl. Transp. Corp.*, 10th Dist. No. 91AP-1286 (May 19, 1992) ("there is a qualified privilege to give truthful statements regarding a discharge of a former employee in an employment reference situation").

{¶20} With respect to the issue of malice, appellant cannot show that the alleged statements were made with knowledge of their falsity or with reckless disregard of their truth or falsity. As noted, appellant's own deposition testimony reflects that she was on notice of Wolf's concerns regarding her work absences. Further, appellant's conclusory allegations, in which she speculates that Wolf made the statements because she may have been upset with appellant for certain actions taken by appellant at work, including her reporting of a sexual harassment claim against another employee, do not create a genuine issue of fact as to whether appellees acted with malice toward her. *See McKimm v. Ohio Elections Comm.*, 89 Ohio St.3d 139, 147 (2000) (actual malice may not be inferred from personal spite or ill will; rather, the focus is on the defendant's attitude toward the truth or falsity of the publication).

{¶21} Based upon this court's de novo review, the trial court did not err in granting summary judgment in favor of appellees. Accordingly, appellant's single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

SADLER and DORRIAN, JJ., concur.

_____