[Cite as *Reece v. Miami Univ.*, 2003-Ohio-2393.]

IN THE COURT OF CLAIMS OF OHIO

DONALD REECE :

Plaintiff : CASE NO. 2000-12611

v. : DECISION

MIAMI UNIVERSITY : Judge Everett Burton

Defendant :

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{¶1} Plaintiff brought this action against defendant alleging claims of defamation and tortious interference with a business relationship. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶2} In January 1996, plaintiff began employment with defendant as a construction project manager. In March 1997, he became project manager for the construction of Hughes Hall. Defendant's Director of Architecture, Robert Keller, was plaintiff's initial supervisor on the Hughes Hall project. The Associate Architect for the Hughes Hall project was URS Greiner (URS), a company with offices in Cincinnati and Columbus, Ohio.

{¶3} At some point during the course of the Hughes Hall project, Tom Pruckno became plaintiff's immediate supervisor. Keller became Pruckno's immediate supervisor but he also indirectly supervised plaintiff. Throughout the course of the project, the relationship between plaintiff and Keller became strained due to conflicts on the job. One conflict occurred on February 26, 1999, when plaintiff and Keller had an argument during a project meeting,

after which they continued to argue. Plaintiff's relationship with Pruckno also became strained. In March 2000, defendant accepted plaintiff's letter of resignation with a termination date effective June 30, 2000.

{¶4} In May or June 2000, before plaintiff left defendant's employment, plaintiff became aware of a vacancy at URS for a position as local construction representative for Hughes Hall. The local construction representative was to act as a liaison between URS and defendant. Plaintiff contacted Randy Kirschner, URS's project manager for the Hughes Hall project, and expressed interest in the vacancy at URS. Kirschner testified that although plaintiff would have been his first choice because of his extensive knowledge of the project, plaintiff's problematic relationship with Keller was a significant drawback to his candidacy. Kirschner told plaintiff that he would have to "patch up" his relationship with Keller before Kirschner could consider hiring him. Kirschner also told plaintiff that he would have to seek Keller's approval of plaintiff's employment with URS as it related to the Hughes Hall project. Kirschner discussed the possibility of hiring plaintiff with his own supervisor, Tom Rice. Rice questioned the propriety of hiring a construction representative who did not get along with a client of URS.

{¶5} Plaintiff subsequently informed Pruckno and Keller of his interest in the position at URS. Some time thereafter, Keller called Kirschner to discuss business. At the end of the conversation, Keller and Kirschner discussed the possibility of hiring plaintiff. Keller told Kirschner that he did not mind if URS hired plaintiff for the Cincinnati office, but that he did not think that plaintiff would be a "good fit" with the Hughes Hall project. Keller cited two reasons for this assessment: 1) his "weaker people skills"; and 2) his confrontational relationship

with Tom Pruckno. Keller suggested two other individuals to fill the position, namely, Ron Gunter and Dwight Coleman. Ron Gunter was eventually chosen for the position.

{¶6} In September 2000, construction of Phillips Hall had begun on defendant's campus with Burgess and Niple (B&N) as the Associate Architect. At that time, a field representative position was vacant at B&N. John Kornbluh, a consultant from B&N, called Mel Schidler, a project manager at defendant, and requested possible candidates for the position. Schidler suggested plaintiff, Scott Webb, and Ron Gunter. Schidler then spoke to Pruckno, who advised him to talk to Keller about it. Keller responded negatively to Schidler's suggestion to hire plaintiff. Schidler later advised Kornbluh that it would not be in B&N's best interest to hire plaintiff for the position at Phillips Hall. Ron Gunter was eventually hired for that position also.

{¶7} Plaintiff alleges that defendant, through Robert Keller, defamed him and tortiously interfered with a business relationship on two occasions.[1] At the close of plaintiff's case, defendant made a motion to dismiss the case pursuant to Civ.R. 41(B)(2). The court took that motion under advisement.

I. Defamation

{¶8} Defamation is a false publication that injures a person's reputation, exposes him to public hatred, contempt, ridicule, shame or disgrace, or affects him adversely in his trade or business. *Matalka v. Lagemann* (1985), 21 Ohio App.3d 134, 136. Defamation may be in the form of either slander or libel. Slander generally refers to spoken defamatory words, while libel refers to written or

[1]Plaintiff alleges in both his pretrial statement and post-trial brief that Keller stated that plaintiff had "burned his bridges at Miami" when Keller talked to Kirschner about the URS job; however, testimony about these exact words was not presented at trial.

printed defamatory words. *Lawson v. AK Steel Corp.* (1997), 121 Ohio App.3d 251, 256.

{¶9} The essential elements of a defamation action are: "(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third-party; (c) fault amounting to at least negligence on the part of the publisher; and, (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." Id.

{¶10} "The degree of 'fault' required on the part of the publisher varies depending on whether the injured party is a private individual or a 'public figure.'" *Huntington Trust Co., N.A. v. Chubet* (Nov. 10, 1998), Franklin App. No. 97APF12-1591. It is undisputed that plaintiff was a private figure and, as such, he must prove both that the statement was false and that defendant was at least negligent in reporting or publishing it. *Dale v. Ohio Civil Serv. Employees Assn.* (1991), 57 Ohio St.3d 112, 114.

{¶11} Under Ohio law, for a statement to be defamatory it must be a statement of fact and not of opinion; opinions are constitutionally protected speech. *Vail v. The Plain Dealer Publishing Co.*, 72 Ohio St.3d 279, 281, 1995-Ohio-187. Whether allegedly defamatory language is opinion or fact is a question of law for the court to decide. Id. at 280. Ohio courts use a "totality of the circumstances" test to determine whether a statement is fact or opinion. *Vail,* at syllabus. This test calls for the court to consider: "the specific language at issue, whether the statement is verifiable, the general context of the statement, and the broader context in which the statement appeared." Id. The weight to be given each of these factors varies depending upon the circumstances of the case. Id. See, also, *Condit v. Clermont Cty. Review* (1996), 110 Ohio App.3d 755, 759.

{¶12} In this case, the specific language used was that plaintiff would not be a "good fit" for the position. As to the language used, the court finds that the term "good fit" is subjective. As to whether the statement is verifiable, the court finds that one could infer that since plaintiff had worked for Keller for three years, Keller had formed an opinion about plaintiff as a worker. Indeed, Keller also testified that the reasons he stated that plaintiff would not be a good fit were his "weaker people skills" and his confrontational working relationship with Tom Pruckno. The statement was given in response to a question about whether plaintiff should be hired for a job doing business directly with defendant. Thus, both the general and broader contexts of the statement are that Kirschner was seeking Keller's opinion. The court finds that these statements reflect Keller's opinion based upon his prior business dealings with plaintiff.

{¶13} Even if Keller's statements could be construed as statements of fact, the court finds that Keller's statements should be afforded a qualified privilege.

{¶14} "A qualified or conditionally privileged communication is one made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest or duty on a privileged occasion and in a manner and under circumstances fairly warranted by the occasion and duty, right or interest." *Hahn v. Kotten* (1975), 43 Ohio St.2d 237, 244.

{¶15} "A qualified privilege attaches where the publication is made in a reasonable manner and for a proper purpose. Implicit 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 Serv. Inc.* (Nov. 30, 2001), Mahoning App. No. 00CA-79.

{¶16} Keller testified that one of his job duties as the director of architecture was to choose the project team from an architectural firm and that he usually conducted "team interviews." In this case, the URS "team" changed due to a vacancy. At the outset, Kirschner told plaintiff that he would seek Keller's approval in order to hire plaintiff as the Hughes Hall liaison for URS. When Keller told Kirschner that plaintiff would not be a "good fit," Keller made his recommendation based upon his own experience with plaintiff as an employee. The court finds that both Keller and Kirschner had an interest in the selection. The court further finds that the statement was made in a manner and under circumstances fairly warranted by the interest, and that the publication was made in good faith, in a reasonable manner and for a proper purpose.

{¶17} Once a defendant raises the qualified privilege defense, the plaintiff has the burden of showing, beyond the allegations in the complaint, that the defendant acted with actual malice. *Evely v. Carlon Co.* (1983), 4 Ohio St.3d 163, 166.

{¶18} Plaintiff has failed to prove that Keller acted with actual malice. Keller, Pruckno, Schidler, Kirschner, and even plaintiff testified that plaintiff did not have a good working relationship with either Pruckno or Keller. In addition, Keller's statement that he did not mind whether Kirschner hired plaintiff at URS for some other position tends to show that Keller did not act maliciously. Therefore, the court concludes that Keller's statements to Kirschner about plaintiff are not actionable because plaintiff has failed to prove the essential element of an unprivileged publication to a third party.

{¶19} For the above-stated reasons, the court also finds that the statements Keller made to Mel Schidler regarding plaintiff's candidacy for the job at B&N were also statements of opinion. Similarly, Schidler's communications with Kornbluh were protected by privilege.

II. Tortious Interference with Business Interest

{¶20} "The torts of interference with business relationships and contract rights generally occur when a person, without a privilege to do so, induces or otherwise purposely causes a third person not to enter into or continue a business relation with another, or not to perform a contract with another." *A&B-Abell Elevator Co. v. Columbus/Central Ohio Building & Construction Trades Council*, 73 Ohio St.3d 1, 14, 1995-Ohio-66. "In order to recover for a claim of intentional interference with a contract, one must prove 1) the existence of a contract, 2) the wrongdoer's knowledge of the contract, 3) the wrongdoer's intentional procurement of the contract's breach, 4) the lack of justification and, 5) resulting damages." *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St.3d 415, paragraph 2 of the syllabus, 1995-Ohio-61.

{¶21} For the same reason that plaintiff cannot prevail on his defamation claim, he cannot prevail on his claim for tortious interference with a business interest. The court finds that plaintiff has failed to prove by a preponderance of the evidence that Keller lacked privilege or justification for any of the statements he made about plaintiff.

{¶22} In the final analysis, plaintiff has failed to prove any of his claims by a preponderance of the evidence. Judgment is rendered in favor of defendant. In light of this decision, defendant's motion to dismiss pursuant to Civ.R. 41(B) is DENIED as moot.

{¶23} This case was tried to the court on the issue of liability. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

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EVERETT BURTON
Judge

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