

[Cite as *Cowan v. Ohio State Univ.*, 2015-Ohio-5658.]

RODNEY COWAN

Plaintiff

v.

OHIO STATE UNIVERSITY

Defendant

Case No. 2014-00503

Judge Patrick M. McGrath
Magistrate Holly True Shaver

ENTRY GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

{¶1} On March 30, 2015, defendant filed a motion for summary judgment pursuant to Civ.R. 56(B). On April 9, 2015, plaintiff filed a response. On April 16, 2015, defendant filed a motion for leave to file a reply memorandum in support, which is GRANTED, instanter. The motion is now before the court for a non-oral hearing.

{¶2} Civ.R. 56(C) states, in part, as follows:

{¶3} “Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, 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. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party’s favor.” See also *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317 (1977).

{¶4} Plaintiff began his employment with defendant in December 1998 in the housekeeping department. On his initial employment application, which he filled out by

hand, he answered “no” to the question whether he had ever been convicted of a criminal offense. (Defendant’s Exhibit B.) However, in the lines on the application to explain his answer, the words, “92 Drug Trafficking” appear. (*Id.*) In his deposition, plaintiff testified that after he was initially hired, a supervisor named Mark Cherry asked him about his application. Plaintiff testified that at that time, he informed Cherry that he had not disclosed all of his convictions. As a result, plaintiff completed an “Employment Addendum C Form” in his own handwriting wherein he listed his convictions in 1992 for drug trafficking, a conviction in 1984 for promotion of prostitution, and a conviction in 1982 for receiving stolen property. (Defendant’s Exhibit C.) Plaintiff testified that after he completed the addendum, Cherry told him to go back to work.

{¶5} In 2003, plaintiff asked to transfer into a position as a Sterile Supply Technician 2 in defendant’s Central Sterile Supply Department. According to plaintiff, he did not fill out an employment application for that position, rather, he filled out a “card” with his badge number and some other information and gave it to a supervisor named Karen Ramey. Plaintiff was selected for the Sterile Supply Technician 2 position. Plaintiff’s performance met expectations as noted in his employment evaluation in 2004. (Plaintiff’s Exhibit 13.)

{¶6} Plaintiff testified that in 2010, he was placed on administrative leave as a result of a positive urine screen for marijuana. Shortly after he returned to work, plaintiff began to experience severe back pain. Plaintiff went on medical leave from April 26, 2010 to August 31, 2010. On September 8, 2010, plaintiff entered into an agreement to attend regular intensive outpatient program meetings at Talbot Hall for treatment for substance abuse. (Defendant’s Exhibit E.) By March 1, 2011, plaintiff had exhausted the maximum allowable medical leave of absence under his civil service contract, and consequently, he was placed on an involuntary disability separation effective March 15, 2011. (Plaintiff’s Exhibit 3.)

{¶7} On December 4, 2012, plaintiff submitted a written request for reinstatement, along with a statement from his physician stating that he had recovered from his disability. (Plaintiff's Exhibit 5.) On January 30, 2013, plaintiff received a letter offering him the position of Sterile Supply Technician 2, effective February 11, 2013, contingent upon the "successful completion of the pre-employment process, including but not limited to references, physical, blood work, drug screen and a background check in accordance with Policy 02-47 - Self-Disclosure of Criminal Convictions and Background Check." (Plaintiff's Exhibit 6.)

{¶8} In April 2013, plaintiff was informed that his criminal background check did not match with his 2003 application for the Sterile Supply Technician 2, which reflected that he had no criminal convictions. In May 2013, a hearing was held and plaintiff was represented by a member of his union. As a result of the hearing, plaintiff's employment was terminated on the basis of dishonesty; specifically, that as a result of his 2013 BCI background check, defendant discovered that plaintiff failed to disclose his past criminal convictions and that he answered "no" to the prior convictions question at the time he submitted his 2003 application. As a result of his termination, plaintiff is not eligible for rehire at defendant's university.

{¶9} Plaintiff asserts a claim of defamation. Plaintiff contends that although he transferred positions in 2003, he did not complete the computerized employment application that states that he had no prior convictions. Plaintiff asserts that he simply filled out a card with his badge number on it, and that he was transferred to the Sterile Supply Technician 2 position. Plaintiff asserts that defendant manufactured the electronic employment application from its own internal human resources records, and that the 2003 electronic application that states that he reported no prior convictions is a false document. Plaintiff additionally asserts that inasmuch as he did not complete the 2003 electronic application, defendant erroneously concluded that he was dishonest in failing to disclose his convictions in that he disclosed them in 1998 on his addendum to

his application. Plaintiff also argues that any future employer who would contact defendant to inquire about his prior employment would be informed of the false basis of his termination. Plaintiff asserts that both the 2003 electronic employment application and his termination on the basis of dishonesty are defamatory.

{¶10} “Defamation is the unprivileged publication of a false and defamatory matter about another.” *McCartney v. Oblates of St. Francis deSales*, 80 Ohio App.3d 345, 353 (6th Dist.1992). “A defamatory statement is one which tends to cause injury to a person’s reputation or exposes him to public hatred, contempt, ridicule, shame or disgrace or affects him adversely in his trade or business.” *Id.*, citing *Matalka v. Lagemann*, 21 Ohio App.3d 134, 136 (10th Dist.1985). “Slander” refers to spoken defamatory words, while “libel” refers to written or printed defamatory words. *Matikas v. Univ. of Dayton*, 152 Ohio App.3d 514, 2003-Ohio-1852 (2nd Dist.).

{¶11} The elements of the common-law action of defamation, which includes both libel and slander, are: “(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to 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.” *Akron-Canton Waste Oil, Inc. v. Safety-Kleen Oil Servs., Inc.*, 81 Ohio App.3d 591, 601 (9th Dist.1992).

{¶12} Plaintiff testified in his deposition that he never filled out any employment application on a computer, and that all of his employment applications were filled out in his own handwriting. Plaintiff also testified that when he transferred from housekeeping to the Sterile Technician 2 position, he filled out a card and gave it to his supervisor. The statement “prior convictions: No” is false based upon plaintiff’s disclosure of his criminal record in his 1998 addendum. However, even assuming that defendant created the 2003 application, stating that someone does not have a history of criminal convictions is not defamatory. In fact, the opposite is true. “A writing that accuses a person of committing a crime is libelous per se.” *Akron-Canton Waste Oil, Inc., supra*,

at 601. Therefore, construing the evidence most strongly in plaintiff's favor, the statement in the 2003 electronic application that he does not have prior criminal convictions, while false, is not defamatory as a matter of law.

{¶13} Turning to the statement that plaintiff was terminated for dishonesty, and assuming for purposes of argument that defendant, not plaintiff, created the 2003 electronic document, a reasonable fact-finder could find that the statement that plaintiff was terminated for dishonesty is false. The statement that plaintiff was fired for dishonesty when he was, in fact, not dishonest, could injure plaintiff in his trade or profession if that statement were published to a third-party when trying to secure other employment.

{¶14} However, assuming *arguendo* the statement were published to a third-party, defendant would enjoy a qualified privilege to make such statement. Qualified privilege does not change the actionable quality of the words published, but merely rebuts the inference of malice that is imputed in the absence of privilege, and makes a showing of falsity and actual malice essential to the right of recovery. *Hahn v. Kotten*, 43 Ohio St.2d 237, 244 (1975), citing 50 Am Jur. 2d 698, Libel and Slander, Section 195. "The purpose of a qualified privilege is to protect speakers in circumstances where there is a need for full and unrestricted communication concerning a matter in which the parties have an interest or duty." *Id.* at 246. To uphold a qualified privilege, defendant must show the following: (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&B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Contr. Trades Council*, 73 Ohio St. 3d 1, 15-16, 1995-Ohio-66, citing *Hahn*, *supra*, at 245-6.

{¶15} The statement in Plaintiff's Exhibit 22, that plaintiff was charged with dishonesty for failing to disclose his prior criminal convictions when he submitted his 2003 application based upon the results from his 2013 BCI background check, were

made in the context of a disciplinary hearing. The disciplinary hearing occurred as a result of processing plaintiff's paperwork to reinstate him after he had been on an involuntary disability separation. The offer of employment in 2013 notified plaintiff that he must pass a background check in accordance with defendant's employment policy. Johnette Malone, plaintiff's supervisor, testified in her deposition that it was brought to her attention that plaintiff's 2003 application and his 2013 background check did not match. Based upon the evidence presented, the only reasonable conclusion is that defendant was subject to a qualified privilege. The evidence shows that defendant's employees acted in good faith after following defendant's policies of requiring a background check prior to plaintiff's reinstatement. The interest to be upheld was defendant's policy of disclosure of prior criminal convictions on employment applications. The statement was limited in its scope of the disciplinary hearing. The disciplinary hearing was a proper occasion; and the publication was made in the context of the hearing and to proper parties only, including human resources employees and plaintiff's union representative. The burden then shifts to plaintiff to show by clear and convincing evidence that defendant acted with actual malice.

{¶16} "When a defendant possesses a qualified privilege regarding statements contained in a published communication, that 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 for their truth or falsity." *Jacobs v. Frank*, 60 Ohio St.3d 111, 116 (1991).

{¶17} With regard to plaintiff's allegations of actual malice, he states in his answers to interrogatories that Johnette Malone, David Simpson, and Keith Calloway, and other of defendant's employees acted with actual malice by maintaining custody of a falsified employment application and relying on it as a basis to terminate plaintiff's employment on the basis of dishonesty. (Answer to interrogatories, 3a.) However,

other than his own assertions in his deposition that Malone treated him more harshly than she treated other employees who had substance abuse issues, plaintiff has not brought forth any evidence that defendant's employees acted with actual malice. The only reasonable conclusion is that defendant did not act with actual malice. Therefore, defendant is entitled to summary judgment as a matter of law with respect to plaintiff's defamation claim.

{¶18} Accordingly, defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of defendant. All previously scheduled events are VACATED. 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.

PATRICK M. MCGRATH
Judge

cc:

Merl H. Wayman
425 Metro Place North, Suite 420
Dublin, Ohio 43017

Randall W. Knutti
Stacy L. Hannan
Assistant Attorneys General
150 East Gay Street, 18th Floor
Columbus, Ohio 43215-3130

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