[Cite as *Washington v. Dept. of Rehab. & Corr.*, 2017-Ohio-4462.]

TRACY WASHINGTON Plaintiff v. DEPARTMENT OF REHABILITATION AND CORRECTION Defendant	Case No. 2015-00902 Magistrate Robert Van Schoyck DECISION OF THE MAGISTRATE

{¶1} Plaintiff, who at all times relevant was an inmate in the custody and control of defendant, brings this action claiming that employees of defendant at the Warren Correctional Institution (WCI) defamed him. Specifically, plaintiff alleges that Assistant Healthcare Administrator Jennifer Otto told third parties that plaintiff was a thief, and that employees Rhonda Stegemoller and "Sky" "gave third parties the impression that Plaintiff is a sexual pervert by telling them that Plaintiff 'gives [them] the creeps' and that they do not feel safe around him." The case proceeded to trial before the undersigned magistrate.

{¶2} At trial, plaintiff testified that he had a work assignment as a porter in the infirmary at WCI, which involved cleaning and housekeeping duties. At first the job went well and he received no complaints about his work, plaintiff stated. According to plaintiff, problems started to develop when Otto, his supervisor, changed his normal work hours from the second shift to the first shift. Plaintiff explained that this came about because the first shift porter, an inmate Jeffrey Kibler, quit and walked off the job one day, but Otto followed up with Kibler and worked out a solution under which Kibler would move to the second shift and plaintiff would move to the first shift.

{¶3} Plaintiff stated that he did not like to work the first shift because he did not get along well with the corrections officer who worked in the infirmary during those

hours, and because there was more work to do on the first shift. Plaintiff stated that he told Otto that he did not want to move to the first shift, but that she told him he could quit if he did not like it. Plaintiff testified that Kibler was treated more favorably and that it was not fair to him, and that he complained to Otto about her accommodating Kibler's wishes but not his own. Plaintiff stated that he felt Otto or others were putting him in a bad situation intentionally, and that after he complained about it the staff treated him poorly. Plaintiff testified that the staff talked about him behind his back and disrespected him.

{¶4} It was plaintiff's testimony that even after moving to the first shift, he got his work done and did not have a bad attitude, but he also stated that the staff could not have expected him to talk to them much when they treated him so poorly. Plaintiff also stated that at times there were not adequate cleaning supplies for him to use, and that it was challenging for him to perform the job because he suffered a broken left hand, being his dominant hand, around the same time that he moved to the first shift.

{¶5} Plaintiff testified that he was eventually warned by a corrections officer that prison officials were going to "come after him." About one week later, plaintiff stated, his unit manager informed him that he had been given a poor performance evaluation, a copy of which was presented to him for his signature. Plaintiff related that the unit manager also asked him some questions at that time about a bag of syringes or needles that had apparently gone missing from the infirmary. According to plaintiff, he knew nothing about the needles and never had access to them, and any accusation that he had stolen the needles would have been false.

{¶6} Plaintiff testified that when he went to work later that same day, he asked Otto why he was being accused of stealing needles but Otto denied that anyone had accused him of doing that. Plaintiff also acknowledged that he was never brought up on any formal charges before the Rules Infraction Board pertaining to any theft accusation.

Plaintiff related, though, that he believes word spread around WCI that he had stolen the needles.

{¶7} According to plaintiff, he tried to get a job somewhere else in the prison but no one would hire him, and he felt that it was because he had been given a bad name. To that end, plaintiff testified that in addition to the matter about the needles, he was informed by a corrections officer in the infirmary that an employee there named Rhonda had said plaintiff "was creeping her out." Plaintiff testified that there was no basis for a comment like that because he was respectful to the staff and left them alone, other than to say hello when he reported for work.

{¶8} Plaintiff stated that he was ultimately fired from his job, but that defendant later transferred him to the Madison Correctional Institution, where he obtained a comparable job as a porter in the infirmary at that institution.

{¶9} Jennifer Otto testified that she is employed by defendant as the Assistant Healthcare Administrator at WCI, and that in this role she is responsible for hiring and supervising the inmate porters assigned to the infirmary. According to Otto, plaintiff's job performance started out satisfactorily but worsened over time, and the decline began long before plaintiff injured his hand.

{¶10} Otto testified that on September 3, 2015, she completed an Inmate Evaluation Report in which she assessed, on a scale of 1 (poor) to 10 (excellent), several aspects of plaintiff's job performance as follows: Attitude (2); Initiative (1); Quality/Quantity (2); Attendance (5); Dependability (5); Safety/Housekeeping (2); Increasing Knowledge/Skills (2). Otto testified that she also wrote the following comments: "Inmate Washington lacks motivation, initiative, and has a poor attitude when given instructions. The quality of his work is poor. Washington's shift and days off have changed to weekend relief porter—Saturday and Sunday, 1st and 2nd shift. Even after this change in schedule the Nurses report to me that he does not do any work unless instructed exactly what to do." (Defendant's Exhibit B.) Otto stated that

she subsequently fired plaintiff from his job as a porter in the infirmary because of his poor initiative.

{¶11} According to Otto, she never told anyone that plaintiff had stolen anything or engaged in any kind of inappropriate sexual conduct. Otto explained that if she had suspected an inmate of taking needles from the infirmary, the process to be followed was to notify the shift supervisor, and then the inmate would be strip-searched and the inmate's cell would be searched.

{¶12} Amy McIntosh testified that she is employed with defendant as the Healthcare Administrator at WCI, a role in which she oversees all the medical and dental care operations at the institution. McIntosh related that she is Otto's supervisor and has delegated to Otto the supervision and management of all inmate porters working in the infirmary. McIntosh stated that she remembers plaintiff, and that although she does not have much involvement in the hiring and firing of inmate porters, she recalls that the cleaning in the infirmary was not up to par at that time. McIntosh testified that she has no recollection of anyone accusing plaintiff of stealing anything from the infirmary, nor accusing plaintiff herself of stealing anything or engaging in inappropriate sexual conduct.

{¶13} "In Ohio, defamation occurs when a publication contains a false statement 'made with some degree of fault, reflecting injuriously on a person's reputation, or exposing a person to public hatred, contempt, ridicule, shame or disgrace, or affecting a person adversely in his or her trade, business or profession.'" *Jackson v. Columbus*, 117 Ohio St.3d 328, 2008-Ohio-1041, ¶ 9, quoting *A & B-Abell Elevator Co., Inc. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 7 (1995). "To succeed on a defamation claim, a plaintiff must establish: (1) a false statement, (2) about the plaintiff, (3) published without privilege to a third party, (4) with fault of at least negligence on the part of the defendant, and (5) the statement was either

defamatory per se or caused special harm to the plaintiff." *Watley v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 07AP-902, 2008-Ohio-3691, ¶ 26.

{¶14} Upon review of the evidence presented at trial, the magistrate finds as follows. Regarding the claim that Otto defamed plaintiff by calling him a thief, the evidence does not show that Otto ever made any statement to a third party, or anyone at all for that matter, that plaintiff was a thief or had stolen anything from the infirmary. Plaintiff never heard Otto make such a statement, and Otto credibly denied ever making such a statement. The fact that Otto never reported plaintiff to prison authorities for stealing and that Otto terminated plaintiff from his job for legitimate reasons having no connection to a theft accusation tend to substantiate that Otto never accused plaintiff of theft. It is also relevant that employees of defendant subsequently hired plaintiff into a similar infirmary porter job at a different prison, for if he had been accused of stealing needles at WCI it is unlikely that defendant would have later placed him in a similar position.

{¶15} Although another employee of defendant apparently questioned plaintiff about any knowledge he may have had into the disappearance of some needles from the infirmary, this was a conversation between plaintiff and the staff, with no third party involved, and he was only questioned about the needles, not accused of stealing. And, while plaintiff vaguely testified that he somehow later became aware of a rumor going around WCI that he was a thief, it was not shown that Otto, or any other employee of defendant, was the source of such information. It cannot be presumed that defendant was the source of any such rumor. *See Chodosh v. Franklin Univ.*, 10th Dist. Franklin No. 96APE11-1582, 1997 Ohio App. LEXIS 4349 (Sept. 23, 1997); *Thrifty Propane, Inc. v. Natl. Propane Gas Assn.*, 9th Dist. Medina No. 11CA0086-M, 2012-Ohio-6113, ¶ 8. Accordingly, the evidence fails to sustain plaintiff's claim that Otto defamed him.

{¶16} Regarding the claim that employees Rhonda Stegemoller and Sky "gave third parties the impression that Plaintiff is a sexual pervert by telling them that Plaintiff

'gives [them] the creeps' and that they do not feel safe around him," there is no evidence that anyone named Sky made any such statement. Moreover, there is an absence of credible evidence that any employee remarked that "they do not feel safe around" plaintiff. Plaintiff offered only vague evidence through his own testimony that he heard from an unidentified corrections officer that someone who worked at WCI named Rhonda had said he "was creeping her out." It was not established when such a remark was supposedly made, nor to whom it was made. Indeed, the trial was nearly devoid of any evidence on this subject. Considering its suspect evidentiary quality, little weight can be given to plaintiff's uncorroborated thirdhand account of what was supposedly said.

{¶17} Accordingly, the evidence does not substantiate by a preponderance of the evidence the claim that an employee of WCI made any statement to a third party to the effect that plaintiff "was creeping her out." And, even if an employee had made such a statement, "[u]nder Ohio law, for a statement to be defamatory, it must be a statement of fact and not of opinion." *Spingola v. Sinclair Media, II, Inc.*, 10th Dist. Franklin No. 06AP-402, 2006-Ohio-6950, ¶ 22. The statement here is ambiguous and not verifiable, nor is there evidence about the general context of the statement or the broader context in which the statement appeared which would tend to give it a factual character. Therefore, the statement cannot reasonably be interpreted as an actionable statement of fact. *See Vail v. Plain Dealer Publishing Co.*, 72 Ohio St.3d 279, syllabus (1995).

{¶18} Finally, it is noted that while much of the evidence presented at trial pertained to the termination of plaintiff's employment, plaintiff's complaint is one for defamation and the parties did not by consent try any claim predicated upon his termination. It is also noted that the complaint raises the issue of personal immunity of state employees pursuant to 9.86 and 2743.02(F), but as set forth in the order issued October 19, 2016, and considering the absence of any argument or evidence presented on this issue at trial, the request for immunity determinations was waived.

{¶19} Based on the foregoing, the magistrate finds that plaintiff failed to prove his claims by a preponderance of the evidence. Accordingly, judgment is recommended in favor of defendant.

{¶20} *A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).*

ROBERT VAN SCHOYCK
Magistrate

cc:

Tracy Washington, #A706-379
P.O. Box 740
London, Ohio 43140

Christopher P. Conomy
Assistant Attorney General
150 East Gay Street, 18th Floor
Columbus, Ohio 43215-3130

Filed May 12, 2017
Sent to S.C. Reporter 6/23/17