[Cite as *Highsmith v. Ohio Dept. of Pub. Safety*, 2024-Ohio-1483.]

IN THE COURT OF CLAIMS OF OHIO

JASON E. HIGHSMITH Plaintiff v. OHIO DEPARTMENT OF PUBLIC SAFETY Defendant	Case No. 2022-00494JD Judge Lisa L. Sadler Magistrate Gary Peterson DECISION

{¶1} On January 12, 2024, Defendant, Ohio Department of Public Safety (DPS), filed a Motion for Summary Judgment pursuant to Civ.R. 56(C). Plaintiff, Jason Highsmith, did not file a response. Defendant's Motion for Summary Judgment is now before the Court for a non-oral hearing pursuant to L.C.C.R. 4(D). For the reasons stated below, Defendant's Motion is GRANTED.

{¶2} On January 12, 2024, Defendant, Ohio Department of Public Safety (DPS), filed a Motion for Summary Judgment pursuant to Civ.R. 56(C). Plaintiff, Jason Highsmith, did not file a response. Defendant's Motion for Summary Judgment is now before the Court for a non-oral hearing pursuant to L.C.C.R. 4(D). For the reasons stated below, Defendant's Motion is GRANTED.

Standard of Review

{¶3} Motions for summary judgment are reviewed under the standard set forth in Civ.R. 56(C). Civ.R. 56(C) states, in part, as follows:

> 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, 821 N.E.2d 564, ¶ 6, citing *Temple v. Wean United, Inc.,* 50 Ohio St.2d 317, 364 N.E.2d 267 (1977).

{¶4} "The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact." *Starner v. Onda*, 10th Dist. Franklin No. 22AP-599, 2023-Ohio-1955, ¶ 20, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). "The moving party does not discharge this initial burden under Civ.R. 56 by simply making conclusory allegations." *Id.* "Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Id.*

{¶5} If the moving party meets its burden, the nonmoving party bears a reciprocal burden. "Once the moving party discharges its initial burden, summary judgment is appropriate if the non-moving party does not respond, by affidavit or as otherwise provided in Civ.R. 56, with specific facts showing that a genuine issue exists for trial." *Hinton v. Ohio Dept. of Youth Servs.*, 2022-Ohio-4783, 204 N.E.3d 1174, ¶ 17 (10th Dist.), citing *Dresher* at 293; *Vahila v. Hall*, 77 Ohio St.3d 421, 430, 674 N.E.2d 1164 (1997); Civ.R. 56(E). The Court must resolve all doubts and construe the evidence in favor of the nonmoving party. *Pilz v. Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 04AP-240, 2004-Ohio-4040, ¶ 8.

Background

{¶6} According to the complaint, Plaintiff is a sergeant in the Ohio State Highway Patrol. In his one count of defamation, Plaintiff alleges that Defendant engaged in

defamatory conduct arising out of an internal investigation regarding Plaintiff's testosterone use.[1]

{¶7} In its Motion for Summary Judgment, Defendant argues that Ohio Department of Public Safety employees are entitled to qualified privilege which precludes liability. Additionally, Defendant argues that Plaintiff cannot state a prima facie case of defamation. Plaintiff did not file a response to Defendant's Motion for Summary Judgment.

Facts

{¶8} Defendant submitted various affidavits, exhibits, and Plaintiff's deposition in support of its Motion for Summary Judgment. The evidence submitted, viewed in a light most favorable to the Plaintiff, shows the following:

{¶9} Plaintiff, at the time of his deposition, had been a state trooper with the Ohio State Highway Patrol for 24 years. (Highsmith Dep. 10:3-5.) In approximately February 2019, Plaintiff began taking testosterone replacement therapy (TRT) while he was employed as a state trooper. (Highsmith Dep. 19:12-20:5; 22:14-16.)[2]

{¶10} Due to allegations that Plaintiff was dealing steroids to Trooper Jared White, an Administrative Investigation commenced to examine the allegations. (Highsmith Dep. 30:22-31:11.) During the investigation, on November 8, 2019, Plaintiff submitted a urine sample to be analyzed for the presence of steroids. (Highsmith Dep. 37:16-20.) The results of the urine test showed that Plaintiff tested positive for steroids which, in Plaintiff's own words, was a "reference to testosterone" he was receiving. (Highsmith Dep. 37:16-23.) At that point, on November 8, 2019, Plaintiff had not provided any written documentation, interoffice communication, or memorandum to the patrol that he was taking a prescribed controlled substance (i.e., TRT). (Highsmith Dep. 37:24-39:14.) Only

[1] Plaintiff's complaint originally alleged one count of defamation, one count of abuse of process: internal investigation, and one count of malicious prosecution: internal investigation. However, Defendant moved to dismiss the one count of abuse of process: internal investigation and the one count of malicious prosecution: internal investigation, which was granted by this Court, leaving just one count of defamation. *See* September 26, 2022 Entry.

[2] It also appears from testimony that Plaintiff also took testosterone in 2017, but Plaintiff's 2017 testosterone use is not at issue in the current case. (Highsmith Dep. 35:22-36:4.)

after the formal investigation did Plaintiff notify patrol, in writing, that he was taking a controlled substance. (Highsmith Dep. 39:5-14.) Plaintiff also alleges that he verbally informed his supervisor, Lieutenant Molly Harris, that he was on testosterone prior to November 8, 2019; however, Plaintiff cannot recall when the conversation(s) took place, where the conversation(s) took place, or whether anyone else was present at the time of the conversation(s). (Highsmith Dep. 39:18-41:2; 46:2-47:12.)

{¶11} The Administrative Investigation concluded that Plaintiff had violated Administrative Rule 4501 regarding the use of controlled substances and narcotics. (Highsmith Dep. 50:9-17.) Specifically, the investigation found that Plaintiff "failed to notify a supervisor about taking a prescribed controlled substance." (Highsmith Dep. 50:12-17.) However, he was not found to be providing steroids to other patrol officers as noted in the original report. (Highsmith Dep. 88:9-11.) Plaintiff asserts that numerous defamatory statements were written or spoken about him arising out of the investigation. (*See* Plaintiff Jason Highsmith's Supplemental Answers to Defendant's First Set of Interrogatories to Plaintiff, pgs. 3-6.)

Legal Standard for Defamation

{¶12} "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, 883 N.E.2d 1060, ¶ 9, quoting *A & B-Abell Elevator Co., Inc. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 7, 651 N.E.2d 1283 (1995). "Slander refers to spoken defamatory words, while libel refers to written or printed defamatory words." *Schmidt v. Northcoast Behavioral Healthcare*, 10th Dist. Franklin No. 10AP-565, 2011-Ohio-777, ¶ 8 (internal quotations omitted).

{¶13} "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. Truth is a complete defense in an action against libel or slander. R.C. 2739.02.

{¶14} Even if a statement was false, "'[u]pon certain privileged occasions * * * the law recognizes that false, defamatory matter may be published without civil liability.'" *M.J. DiCorpo, Inc. v. Sweeney*, 69 Ohio St.3d 497, 505, 634 N.E.2d 203 (1994), quoting *Bigelow v. Brumley*, 138 Ohio St. 574, 579, 37 N.E.2d 584 (1941). "The privileged occasions in which this principle applies are divided into two classes: (1) those that are subject to absolute privilege, and (2) those that are subject to a qualified privilege." *Mettke v. Mouser*, 10th Dist. Franklin No. 12AP-1083, 2013-Ohio-2781, ¶ 6. "'The distinction between these two classes is that the absolute privilege protects the publisher of a false, defamatory statement even though it is made with actual malice, in bad faith and with knowledge of its falsity; whereas the presence of such circumstances will defeat the assertion of a qualified privilege.'" *DiCorpo*, 69 Ohio St.3d at 505, quoting *Bigelow*, 138 Ohio St. at 579-80.

{¶15} "[A]bsolute privilege extends to '* * * legislative and judicial proceedings, and other acts of state, such as communications made in the discharge of a duty of the Governor and heads of the executive departments of a state.'" *Wrenn v. Ohio Dept. of Mental Health & Mental Retardation*, 16 Ohio App.3d 160, 162, 474 N.E.2d 1201 (10th Dist.1984), quoting *Costanzo v. Gaul*, 62 Ohio St.2d 106, 109, 403 N.E.2d 979 (1980); *see also DiCorpo* at 505. "[A] statement in a judicial or quasi-judicial proceeding is absolutely privileged and may not form the basis for a defamation action as long as the allegedly defamatory statement is reasonably related to the proceedings." *Savoy v. Univ. of Akron*, 2014-Ohio-3043, 15 N.E.3d 430, ¶ 19 (10th Dist.). "However, since an absolute privilege produces such profound results, it is quite limited in scope." *Wrenn*, 16 Ohio App.3d at 162.

{¶16} Qualified privilege, on the other hand, extends to a communication "'"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."'" (Emphasis deleted.) *McIntyre v. Ohio Bur. of Workers' Comp.*, 10th Dist. Franklin No. 12AP-1062, 2013-Ohio-2338, ¶ 6,

quoting *Hahn v. Kotten*, 43 Ohio St.2d 237, 244, 331 N.E.2d 713 (1975), quoting 50 American Jurisprudence 2d, Libel and Slander, Section 195, at 698.

Statements at Issue and Analysis

> Statement 1: claims that the document "falsely states that Plaintiff failed to notify his supervisor that he was taking a controlled substance and [that] he 'played a role in getting other Patrol employee(s) involved with controlled substance.'"

(Plaintiff's Supplemental Answers to Defendant's First Set of Interrogatories to Plaintiff, pgs. 3-6.)

{¶17} This statement was made in the context of the Administrative Investigation into Plaintiff's alleged conduct; the document at issue containing the alleged false statement is an internal investigation pre-interview form from DPS and is used for the purpose of conducting an official Administrative Investigation by DPS. (Highsmith Dep. 57:17-59:10.) Additionally, Sgt. Jacob Fletcher, a sergeant in the Administrative Investigation Unit (AIU), confirmed in his affidavit that the pre-interview form was filled out by him and used for the purposes of his investigation into Highsmith. Fletcher Affidavit, ¶ 8. Therefore, and as discussed further below, the statement is subject to a qualified privilege.

> Statement 2: "Jacob Fletcher, in email of 11/1/19, 7:56 AM, to Ricardo Alonso, reported the false claim of Christa Browing that Plaintiff 'was a patrol employee who got White started in using [controlled substance.]'"
>
> Statement 3: "Jacob Fletcher in email of 11/1/19, 8:42 AM, to Ricardo Alonso, stated again that Plaintiff 'got them started' and that '[s]he was not real clear if [Plaintiff] was legal or not.'"
>
> Statement 4: "Jacob Fletcher, in email of 11/1/19, 8:50 AM, to Ricardo Alonso, stated once again that '[Plaintiff] got them started in using enhancement drugs for lifting,' adding 'from the conversation I assume White told her.'"

(Plaintiff's Supplemental Answers to Defendant's First Set of Interrogatories to Plaintiff, pgs. 3-6.)

{¶18} These emails were between Sgt. Fletcher and Lt. Alonso who both work in the AIU. (Highsmith Dep. 64:10-14.) Plaintiff also confirmed that these emails were sent from Sgt. Fletcher's and Lt. Alonso's respective work email, and they were discussing what Sgt. Fletcher learned during his interview with Christa Browning during the Administrative Investigation of Trooper White. (Highsmith Dep. 64:15-24.) Through his affidavit, Sgt. Fletcher confirmed that these emails were written "based on [his] memory and notes of [his] interview with Browning, which occurred the day before" and were written as part of his job duties and responsibilities. Fletcher Affidavit, ¶ 9. Furthermore, Plaintiff confirms through his deposition testimony that none of the emails at issue were "disseminated out." (Highsmith Dep. 72:13-21.) Therefore, and as discussed further below, the statements are subject to a qualified privilege.

> Statement 5: "Administrative Investigation #2019-10440: '[Browning] named Jason Highsmith as a patrol employee who got White started on using [the controlled substance].'"

(Plaintiff's Supplemental Answers to Defendant's First Set of Interrogatories to Plaintiff, pgs. 3-6.)

{¶19} This statement was made in an administrative document summarizing the Administrative Investigation of Trooper White. (Highsmith Dep. 73:12-16.) Plaintiff also confirmed that the document containing the statement is part of the official business of the Ohio State Highway Patrol. (Highsmith Dep. 74:19-22.) Furthermore, Sgt. Fletcher, through his affidavit, also confirmed that the document containing the above statement was an "Inter-Office Communication regarding the [A]dministrative [I]nvestigation of Trooper White" and it was part of his job duties and responsibilities to summarize the investigation of Trooper White. Fletcher Affidavit, ¶ 10. Therefore, and as discussed further below, the statement is subject to a qualified privilege.

> Statement 6: claims that the document "falsely states on behalf of Defendant that 'Trooper Highsmith failed to notify supervision of taking a prescribed controlled substance.'"

(Plaintiff's Supplemental Answers to Defendant's First Set of Interrogatories to Plaintiff, pgs. 3-6.)

{¶20} This statement was made in a document, known as a deportment record, summarizing Highsmith's written reprimand, effective date December 17, 2019. (Highsmith Dep. 77:11-20.) Plaintiff also confirmed that this specific form is used for the purposes of summarizing discipline. (Highsmith Dep. 77:21-23.) Sgt. Fletcher also confirmed in his affidavit that the document containing the statement at issue is a true and accurate copy of Plaintiff's deportment record which lists his written reprimand that Plaintiff received as a result of the Administrative Investigation. Fletcher Affidavit, ¶ 11. Sgt. Fletcher additionally confirmed that the document at issue is an official business record of the Ohio State Highway Patrol. *Id.* Therefore, and as discussed further below, the statement is subject to a qualified privilege.

> Statement 7: "The Complaint identifies Cassandra Brewster in ¶ 33 as delivering false information that Plaintiff was "dealing steroids to Jared White" to Plaintiff's supervisor Capt. Springs on November 8, 2019."

(Plaintiff's Supplemental Answers to Defendant's First Set of Interrogatories to Plaintiff, pgs. 3-6.)

{¶21} This phone call occurred between Cassandra Brewster, the head of the AIU, and Captain Springs, Plaintiff's district captain. (Highsmith Dep. 81:6-17.) Cassandra Brewster confirmed through her affidavit that she contacted Captain Springs, "the Captain directly in Highsmith's chain of command, to tell [him] of the allegations and to have him ensure that White and Highsmith were drug tested immediately." Brewster Affidavit, ¶ 4. Cassandra Brewster also stated that she had "no way of knowing if the allegations were true or false until it was investigated." *Id.* at ¶ 5. Therefore, and as discussed further below, the statement is subject to a qualified privilege.

{¶22} The undisputed evidence establishes that the above statements are subject to a qualified privilege. "[T]he existence of a qualified privilege has been recognized in cases involving allegedly defamatory statements made during the course of criminal or governmental investigations." *Black v. Cleveland Police Dept*., 96 Ohio App.3d 84, 89, 644 N.E.2d 682 (8th Dist.1994). Here, the statements were made in emails, documents,

and discussions surrounding the Administrative Investigation into Plaintiff's alleged conduct. The statements were only made to necessary patrol staff and Plaintiff, or the statements were contained in documents that were relevant to the investigation into Plaintiff. Though Plaintiff notes that some patrol members did find out about the reason for the investigation, he was unable to discern how the individuals found out or what was actually discussed amongst the individuals. Nevertheless, even if other employees in the department knew about the investigation and spoke about it, "communications between an employer and an employee, or between two employees, concerning the conduct of a third employee or former employee, are qualifiedly privileged, and thus, even though such a communication contain matter defamatory to such other or former employee, he cannot recover in the absence of sufficient proof of actual malice to overcome the privilege of the occasion." *Louscher v. Univ. of Akron*, Ct. of Cl. No. 2015-00212, 2017-Ohio-4316, ¶13, quoting *McKenna v. Mansfield Leland Hotel Co.*, 55 Ohio App. 163, 167, 24 Ohio Law Abs. 53, 9 N.E.2d 166 (5th Dist.1936); *see also Hanly v. Riverside Methodist Hosp*., 78 Ohio App.3d 73, 603 N.E.2d 1126 (10th Dist.1991) (finding that statements, even if false, made by supervisors to subordinates regarding an employee's suspension are subject to a qualified privilege).

{¶23} Defendant has also put forth evidence that the statements were made in good faith and with an interest to be upheld, that is, to ensure public safety. The statements were also limited in their scope inasmuch as the statements only reported the suspected wrongdoing and were only made in the appropriate setting, specifically, the Administrative Investigation. *Black, supra*, at 89 (finding that internal police communications between law enforcement officers where the officers have a moral obligation to speak on matters involving the investigation of alleged criminal occurrences are protected by a qualified privilege); *see also McKee v. McCann*, 95 N.E.3d 1079, 2017-Ohio-7181, ¶ 37 (8th Dist.) (recognizing that statements made in internal police communications are subject to a qualified privilege); *Mullins v. Ohio Bd. of Regents*, Ct. of Cl. No. 2006-07023, 2010-Ohio-545, ¶ 13 (finding that statements made by a superior or those employees charged with conducting an investigation were subject to a qualified privilege so long as they were made in good faith and concerned matters in which the

employees had a common interest or duty). Accordingly, Defendant has established that the statements are subject to qualified privilege.

{¶24} "A qualified privilege may be defeated only by clear and convincing evidence of actual malice on the part of the defendant." *Stainbrook v. Ohio Secy. of State*, 2017-Ohio-1526, 88 N.E.3d 1257, ¶ 18 (10th Dist.) "The phrase 'reckless disregard' applies when a publisher of defamatory statements acts with a 'high degree of awareness of their probable falsity' or when the publisher 'in fact entertained serious doubts as to the truth of his publication.' (Internal citations omitted.)" *Hill v. Ohio Dept. of Rehab. & Corr*., 10th Dist. Franklin No. 20AP-88, 2021-Ohio-561, ¶ 19, quoting *Jackson v. Columbus*, 117 Ohio St.3d 328, 2008-Ohio-1041, 883 N.E.2d 1060, ¶ 10. "It is not sufficient for a libel plaintiff to show that an interpretation of facts is false; rather, he must prove with convincing clarity that defendant was aware of the high probability of falsity." *Watley v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 07AP-902, 2008-Ohio-3691, ¶ 33 (quotations omitted).

> Evidence that establishes, at best, the publisher 'should have known' of the alleged falsity of the statement is insufficient to establish actual malice. *Varanese v. Gall*, 35 Ohio St.3d 78, 82, 518 N.E.2d 1177 (1988). '[M]ere negligence is constitutionally insufficient to show actual malice.' *Id*., citing *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968); *Dupler v. Mansfield Journal Co*., 64 Ohio St.2d 116, 119, 413 N.E.2d 1187 (1980).

Hill, 10th Dist. Franklin No. 20AP-88 at ¶ 19.

{¶25} Here, Plaintiff did not put forth any evidence to contradict that put forth by Defendant and create a genuine issue of material fact. Defendant met its initial burden pursuant to Civ.R. 56 of demonstrating that the statements are subject to a qualified privilege and were not made with actual malice, and Plaintiff failed to meet his reciprocal burden pursuant to Civ.R. 56. Civ.R. 56(E) provides: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that

there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party."

{¶26} Because the evidence establishes that the statements are subject to a qualified privilege, the Court finds that there is no genuine issue of material fact and summary judgment is granted in favor of Defendant. The Court does not need to address the other arguments raised by Defendant.

Conclusion

{¶27} Based upon the foregoing, the Court concludes that there are no genuine issues of material fact, and Defendant is entitled to summary judgment. Defendant's Motion for Summary Judgment is GRANTED and judgment is rendered in favor of Defendant.

LISA L. SADLER
Judge

[Cite as *Highsmith v. Ohio Dept. of Pub. Safety*, 2024-Ohio-1483.]

JASON E. HIGHSMITH Plaintiff v. OHIO DEPARTMENT OF PUBLIC SAFETY Defendant	Case No. 2022-00494JD Judge Lisa L. Sadler Magistrate Gary Peterson JUDGMENT ENTRY

IN THE COURT OF CLAIMS OF OHIO

{¶28} A non-oral hearing was conducted in this case upon Defendant's Motion for Summary Judgment. For the reasons set forth in the decision filed concurrently herewith, Defendant's Motion for Summary Judgment is GRANTED. 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.

LISA L. SADLER
Judge

Filed March 8, 2024
Sent to S.C. Reporter 4/18/24