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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000007-MR

DARRELL SAMS
AND
DIANA CHEEK — APPELLANTS

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE JOHN KNOX MILLS, JUDGE
ACTION NO. 06-CI-00291

WAL-MART STORES EAST, LP;
RHONDA MESSER; KRISTOFFER
MYNHIER; AND JOHN BURTON — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE, LAMBERT, AND STUMBO, JUDGES.

MOORE, JUDGE: Darrell Sams and Diana Cheek appeal the Laurel Circuit Court's decision granting summary judgment and dismissing their claims for defamation. After careful review of the record, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Wal-Mart Stores East, LP, terminated department managers Darrell Sams and Diana Cheek (collectively "Appellants") from its London, Kentucky store for taking frequent and excessive breaks in violation of Wal-Mart's Break and Meal Period policy. Sams and Cheek filed a lawsuit claiming that Wal-Mart and their supervisors Rhonda Messer, Kristoffer Mynhier, and John Burton (collectively "Appellees") defamed them by stating both on their Exit Interviews and during their unemployment compensation hearings that they were terminated for excessive breaks resulting in "theft of company time."

As fourteen-year hourly managers, both Sams and Cheek testified in depositions that they were aware of Wal-Mart's Break and Meal Period policy and knew that they were required to follow the policy. Both Sams and Cheek acknowledged that the policy allows only two paid fifteen-minute breaks per shift and that additional and extended breaks violated Wal-Mart's policy.

Sams and Cheek both admitted during their depositions that they took more than the allowed two paid breaks per shift and took longer breaks than those allowed by the policy. Cheek testified that, in addition to her authorized breaks, she sat in the break room "just smoking, drinking coffee, and talking to people." In a written statement before her termination, Cheek also acknowledged that she was known to take several "unrealized (sic) and working breaks and extra breaks." Sams also acknowledged in a written statement that he had also taken unauthorized breaks during his employment at Wal-Mart.

Because both Appellants had admittedly taken extra breaks while on the clock in violation of policy, they were terminated on October 7, 2005. Their Exit Interview forms state that Appellants' excessive and long breaks resulted in "theft of company time," which Appellants assert constitutes defamation. Wal-Mart supervisors Messer and Burton also testified during Appellants' unemployment compensation hearings that they were terminated for excessive breaks resulting in "theft of company time," which Appellants also assert is defamatory.

Additionally, Appellants have asserted on appeal that a different terminated manager, Janet Garland, had second-hand information that Wal-Mart employees discussed Garland's own termination. However, Garland's hearsay testimony did not claim that she heard any information about Sams' or Cheek's terminations. Also, Sams testified that he speculates that Wal-Mart supervisors talked about his termination because, several weeks before he was let go, the Store Manager told him in a manager meeting that another associate had been terminated for clocking in and then going in the lounge instead of working. Neither alleged statement creates a genuine issue of material fact about whether Sams or Cheek were directly defamed. Therefore, their claims are limited to the two statements about the reasons for their terminations – one on their Exit Interviews and the other at their unemployment compensation hearings.

Following a motion for summary judgment filed by the Appellees, the trial court granted the motion and dismissed Appellants' claims for defamation. This appeal followed.

II. ANALYSIS

I. DEFAMATION CLAIMS.

The trial court correctly dismissed Appellants' claims of defamation because both Sams and Cheek admit that the statements at issue about their terminations were true. Further, testimony about their terminations during their unemployment compensation hearings is privileged as a matter of law. There also was no evidence that the Exit Interviews were privileged and constitute opinion. Finally, there was no evidence that the reputations of either Appellant were injured. Accordingly, we affirm.

Upon review of a summary judgment motion, the relevant inquiry is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Chandler v. City of Winchester*, 973 S.W.2d 78, 80 (Ky. App. 1998)(*citing Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996)). Therefore, we review the trial court's granting of summary judgment in this matter *de novo*. *Forroux v. City of Shepardsville*, 148 S.W.3d 303, 306 (Ky. App. 2004) (noting *de novo* standard of review for summary judgment).

To overcome summary judgment, Appellants must establish that: (1) Appellees made a false and defamatory statement; (2) of and concerning

Appellants; (3) the statement was an unprivileged publication to a third-party; and (4) Appellants' reputations were injured. *Columbia Sussex Corporation, Inc. v. Hay*, 627 S.W.2d 270, 273 (Ky. App. 1981). We address each of these elements in turn.

A. The Statements Were True and Not Defamatory.

Appellants claim that they were defamed when Appellees testified at their unemployment compensation hearings and wrote on their Exit Interviews that Appellants had been "terminated for theft of company time." However, both Sams and Cheek admitted in their depositions that they had taken excessive and unauthorized paid breaks, resulting in theft of company time. Because truth is an absolute defense to defamation, Appellants' claims were properly dismissed by the trial court as a matter of law. *Wolff v. Benovitz*, 301 Ky. 661, 664, 192 S.W.2d 730, 732 (1945). In fact, truth is a defense even if the speaker is motivated by malice or ill will, which was not alleged by Appellants. *Pennington v. Little*, 266 Ky. 750, 99 S.W.2d 776 (1935). Because the statements were true, as Appellants have admitted, the trial court did not err in granting summary judgment to Appellees.

B. The Unemployment Compensation Hearing Statements Were Privileged.

Even if the statements made at Appellants' unemployment compensation hearings could be considered defamatory, the statements are not actionable because they are privileged. "The question of privilege is a matter of

law for the court's determination." *Landrum v. Braun*, 978 S.W.2d 756, 758 (Ky. App. 1998).

The statements were made at Appellants' respective unemployment compensation hearings and are therefore privileged. *Schmitt v. Mann*, 291 Ky. 80, 163 S.W.2d 281 (1942). "The prevailing rule and the one recognized in [Kentucky] is that statements in . . . judicial proceedings are absolutely privileged when material, pertinent, and relevant to the subject under inquiry, though it is claimed that they are false and alleged with malice." *Id.* at 283. Further, the Kentucky Supreme Court has specifically applied the privilege to statements made in administrative proceedings. *Begley v. Louisville Times Co.*, 272 Ky. 805, 115 S.W.2d 345 (1938).

Additionally, our Court recently applied this rule expressly to statements made to the Kentucky Unemployment Insurance Commission. *Hawkins v. Miller*, 301 S.W.3d 507 (Ky. App. 2009). This Court found that the allegedly defamatory statements were privileged because they had been made in the course of an unemployment compensation proceeding. *Id.* at 509. Because the appellant failed to show that the statements were made for an improper purpose, the *Hawkins* Court affirmed the dismissal of appellant's claim.

Here, Sams and Cheek have not asserted that Appellees' statements at the unemployment compensation hearings were made for an improper purpose, nor did they present any proof of malice. Thus, the trial court did not err in finding that Appellees' statements about the bases for their terminations during

Appellants' unemployment compensation hearings were privileged and could not withstand summary judgment.

C. The Exit Interview Statements Were Not "Published."

Appellants' claims related to their Exit Interviews also fail. First, there is no evidence that Wal-Mart management "published" the Exit Interviews as defined by law. *Columbia Sussex Corp. v. Hay*, 627 S.W.2d 270, 273 (Ky. App. 1981) ("The element of publication takes an abverbial stance: Were the words either negligently or intentionally communicated as to be heard by an understanding third party?"). Appellants are required to present some evidentiary material, such as depositions or affidavits, to show that there is a genuine factual dispute. *Neal v. Welker*, 422 S.W.2d 476 (Ky. 1968); *Tarter v. Arnold*, 343 S.W.2d 377 (Ky. 1960). Here, there was no such evidentiary material and, as the trial court found, "[t]he only factual account of a publication occurred during an unemployment proceeding."

To assert that the Exit Interviews were "published," Appellants rely solely on Sams' testimony in his deposition "that exit interviews were frequently left lying on tables in the office for anyone's viewing." But, Sams also admitted he has no knowledge or information that his Exit Interview (or Cheek's for that matter) was seen by a third party. In fact, he testified that he never saw his or Cheek's Exit Interview on a table in the personnel office. He also did not testify that someone had told him that they saw his or Cheek's Exit Interview. Instead,

Sams only speculated that the Exit Interviews could have been seen by other associates, but has no evidence to support his speculation.

Such speculation is insufficient to withstand a motion for summary judgment. "Subjective speculation and conjecture" are not sufficient to create genuine issues of fact to avoid summary judgment. *Harker v. Federal Land Bank*, 679 S.W.2d 226, 231 (Ky. 1984). *See also, Boddy v. Dean*, 821 F.2d 346, 349 (6th Cir. 1987) (finding no genuine issue of material fact where "plaintiff produced nothing but speculation and hypothesis"). Simply, "[a]bsent publication, there can be no libel." *Wyant v. SCM Corp.*, 692 S.W.2d 814, 816 (Ky. App. 1985).

D. The Statements Were Privileged.

Even if Appellants had proof that their Exit Interviews had been "published," it is well-established that "discussions and communications **within a company** which are necessary to its proper function" give rise to a qualified privilege for alleged defamation against the person making the communication. *Dossett v. New York Mining and Manufacturing Co.*, 451 S.W.2d 843, 846 (Ky. 1970); *L&N RR Corp. v. Marshall*, 586 S.W.2d 274 (Ky. App. 1979).

Any information on Appellants' Exit Interviews regarding their terminations was clearly necessary to Wal-Mart's proper function. Further, "because of the common interests implicated in the employment context, Kentucky courts have recognized a qualified privilege for defamatory statements relating to the conduct of employees." *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781,

796 (Ky. 2004). The statements in this case regarding the reason for Appellants' termination were recorded on Wal-Mart's business/personnel record. Again, Appellants did not allege that these statements were made for an improper purpose.

Moreover, the Exit Interview statements are absolutely privileged as statements of opinion. *Yancy v. Hamilton*, 786 S.W.2d 854 (Ky. 1989). The Exit Interviews state that, "[a]fter an investigation [Appellants were] found to have taken too many breaks and spending extra time on breaks resulting in theft of co[mpany] time. "Pure opinion, which is absolutely privileged, occurs where the commentator states the facts on which the opinion is based . . . ." *Id.* at 857 (citing Restatement (Second) of Torts § 566 at Comment b (1977)). The statements on Appellants' Exit Interviews were privileged because they are intra-company business communications and were opinion.

Therefore, we cannot say that the trial court erred in entering summary judgment in favor of the Appellees and dismissing the defamation claims of Appellees.

Accordingly, the order of the Laurel Circuit Court is affirmed.

ALL CONCUR.

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