DIANE LAWLESS VS. CHERYL ESTRELLA

Docket:	19-P-1278
Dates:	June 9, 2020 - December 10, 2020
Present:	Sullivan, Blake, & Ditkoff, JJ.
County:	Bristol
Keywords:	Libel and Slander. Municipal Corporations, Officers and employees. Privileged Communication. Practice, Civil, Summary judgment.

Civil action commenced in the Superior Court Department on June 22, 2015.

The case was heard by Karen F. Green, J., on a motion for summary judgment.

Chip Muller for the plaintiff.

John M. Wilusz for the defendant.

DITKOFF, J. The plaintiff, Diane Lawless, a former municipal employee, appeals from the entry of summary judgment in favor of a former subordinate, the defendant, Cheryl Estrella, on the plaintiff's claim of defamation. We conclude that an opinion based on disclosed, nondefamatory facts is not defamatory and that many of the allegedly defamatory statements constitute such opinions. Further concluding that an employee has a conditional privilege to provide information concerning another employee upon the request of a supervisor and that the plaintiff failed to raise a genuine issue of material fact that would allow a jury to find that this privilege was abused regarding the other statements, we affirm.

1. Background. In June 2013, the board of selectmen of the town of Freetown (board) hired the plaintiff as the town's "Treasurer/Tax Collector" (treasurer). The plaintiff served in this position for two years, until June 2015, at which time she was terminated for cause.[1] The defendant worked as the senior clerk in the treasurer's office under the plaintiff's supervision beginning in August 2013 until December 2014, when she transferred to the town clerk's office.

On March 24, 2015, several months after the defendant's transfer, the plaintiff was involved in an altercation with the new senior clerk (the defendant's replacement), that caused the new senior clerk to become upset, and to seek the assistance of the town administrator. The matter was brought to the attention of the board, and the plaintiff was subsequently placed on paid administrative leave pending the outcome of a review of this and other past incidents.

Shortly thereafter, a selectman who was chair of the board's personnel committee called the town's employees together and requested that they provide written statements regarding their experiences working with the plaintiff. The selectman solicited the feedback of the employees to

get a "feel for exactly what was going on in the workplace." She specifically asked them for an honest account of how they were treated by the plaintiff, "good, bad or indifferent." The defendant, the new senior clerk, and the assistant tax collector complied with the request.

The new senior clerk described the plaintiff as having an "uncontrollable temper," and treating her in an unprofessional, hostile, and intimidating manner. The assistant tax collector similarly described an unpleasant work environment that was extremely stressful and anxiety provoking.

The defendant drafted a detailed, six-page e-mail, and sent it to the selectman, the town administrator, and the board's administrative assistant, on April 3, 2015 (e-mail). In deposition testimony, the defendant stated that she submitted her written statement specifically in response to the selectman's request.

In the e-mail, the defendant shared her observations of the plaintiff's job performance, stating that the plaintiff spent significant time "socializing on the phone . . . and shopping online," and would frequently disparage the town, its residents, and colleagues. She described the plaintiff as "creating an uncomfortable, abusive and hostile work environment," and as being "belligerent, threatening, overbearing and [engaging in] psychological harassment." She further portrayed the plaintiff as someone who acted abrasively and rudely, and suggested the plaintiff may have engaged in dereliction of her duties, if not unlawful conduct.

The plaintiff, on the other hand, paints a substantially different picture of her job performance. She states that, as the town's treasurer, she inherited an ineffective staff, had to assume her position without adequate training, and hired and trained the defendant as a senior clerk shortly after her own arrival. With respect specifically to the defendant, the plaintiff states that the defendant disliked being directed to work, and soon began feeding negative information about the plaintiff to the board, information which the plaintiff maintains was biased and self-serving.

After the board solicited the employees' feedback, and held a three-day hearing that included testimony from witnesses and other evidence (including the defendant's e-mail), the plaintiff was terminated.[2] The board found that the plaintiff was impolite to employees and vendors, failed to turn over passwords after being placed on leave, misled the board, admitted to downloading employee and taxpayer information after being placed on leave, went into the office after being placed on leave, and neglected to provide pension information to the town's insurance agency.

The plaintiff filed this action on the same day as her termination, containing one count of libel per se against the defendant based on the e-mail.[3] The defendant subsequently filed a motion for summary judgment. A judge of the Superior Court granted the defendant summary judgment and dismissed the complaint. This appeal followed.

2. Standard of review. Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. See Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). "We review a grant of summary judgment de novo." Blake v. Hometown Am. Communities, Inc., 486 Mass. 268, 272 (2020), quoting DeWolfe v. Hingham Centre, Ltd., 464 Mass. 795, 799 (2013).

3. Defamation. a. Generally. To prevail on a claim for defamation, a plaintiff must establish that (1) the defendant published a defamatory statement of and concerning the plaintiff; (2) the statement was a false statement of fact (as opposed to opinion); (3) the defendant was at fault for making the statement, and any privilege that may have attached to the statement was abused; and (4) the plaintiff suffered damages as a result, or the statement was of the type that is actionable without proof of economic loss. Downey v. Chutehall Constr. Co., 86 Mass. App. Ct. 660, 663 (2014). We view the evidence here in the light most favorable to the plaintiff as the nonmoving party. Id. at 662-663.

"A statement that is claimed to be defamatory must reasonably be understood either as a statement of actual fact, or one that implies defamatory facts. . . . Statements that are merely 'rhetorical hyperbole,' or which express a 'subjective view,' are not statements of actual fact" (citations and footnote omitted). Kelleher v. Lowell Gen. Hosp., 98 Mass. App. Ct. 49, 53 (2020). "[W]hen a statement is substantially true, a minor inaccuracy will not support a defamation claim." Reilly v. Associated Press, 59 Mass. App. Ct. 764, 770 (2003).

The defendant included in her e-mail to town officials certain statements about the plaintiff's work habits and personal qualities that reflected poorly on the plaintiff. The plaintiff identifies in her complaint the following six allegedly defamatory statements:[4]

(1) "[A]ll I could hear all day was Ms. Lawless socializing on the phone all day long, and shopping online for 'beads' for her jewelry making business."

(2) "I believe Ms[.] Lawless demonstrates paranoid behavior and has serous mood swings that could be associated as severe bipolar disorder or some other form of mental handicap."[5]

(3) The plaintiff "made mention many times on how she remodeled one of her offices at another city/town and couldn't wait to 'paint our office with dollar signs.' She also made mention that she had bullet proof glass installed when she was a collector but that we wouldn't be getting that in Freetown[, and] that's why she moved her desk around the corner so we ([the assistant town collector and] myself) would 'be the first ones in the line of fire.'"

(4) "[I]t has crossed my mind and the mind of some of my other coworkers that Ms[.] Lawless will show up at Town Hall with that gun her husband bought her."

(5) "I witnessed Ms. Lawless retrieve the Workers Compensation Binder off the top of the filing cabinet, that [the board's administrative assistant] had left with her, per her request a few

days earlier, and put it in her briefcase bag. She had often taken materials home with her but this time I felt very uneasy because I thought there might have been insurance quotes in that binder, and seeing that her husband was an insurance salesman, to me there was a conflict of interest or an ethics violation."

(6) "[I]n March 2014, Ms. Lawless had somehow been able to take pretty much the whole month off –- without putting in for sick/vacation time."

The motion judge found that none of these statements were actionable as defamation either because the defendant was protected by a conditional privilege or because the statement constituted an opinion. We agree.

b. Opinion. Statements of pure opinion are not actionable. See King v. Globe Newspaper Co., 400 Mass. 705, 708 (1987), cert. denied, 485 U.S. 940 and 485 U.S. 962 (1988). "The determination whether a statement is a factual assertion or an opinion is a question of law if the statement unambiguously constitutes either fact or opinion." Id. at 709, quoting Aldoupolis v. Globe Newspaper Co., 398 Mass. 731, 733 (1986).

The motion judge concluded that the defendant's statement -- concerning her belief that the plaintiff suffered from "paranoid behavior" and "serious mood swings" that could be indicative of "severe bipolar disorder or some other form of mental handicap" -- was unambiguously a statement of opinion, and not fact, and was therefore not actionable. We agree.

In determining whether a statement reasonably can be understood as fact or opinion, we must "examine the statement in its totality in the context in which it was uttered or published." Cole v. Westinghouse Broadcasting Co., 386 Mass. 303, 309, cert. denied, 459 U.S. 1037 (1982), quoting Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781, 784 (9th Cir. 1980). We also "must give weight to cautionary terms used by the person publishing the statement." Cole, supra, quoting Information Control Corp., supra.

The Supreme Judicial Court adopted the principles in § 566 of the Restatement (Second) of Torts (1977) setting forth when the expression of an opinion can be actionable. See National Ass'n of Gov't Employees, Inc. v. Central Broadcasting Corp., 379 Mass. 220, 227 (1979), cert. denied, 446 U.S. 935 (1980). The court stated as follows:

"The matter is put thus in Comment C, second par.: 'A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is. But an expression of opinion that is not based on disclosed or assumed facts and therefore implies that there are undisclosed facts on which the opinion is based, is treated differently.' Thus if I write, without more, that a person is an alcoholic, I may well have committed a libel prima facie; but it is otherwise if I write that I saw the person take a martini at lunch and accordingly state that he is an alcoholic." (Footnote omitted.)

Id. at 227-228, quoting Restatement (Second) of Torts § 566 comment c (1977). The rationale is that, when an opinion is accompanied by factual statements, it is understood as an opinion based on those factual statements. See Scholz v. Delp, 473 Mass. 242, 251 (2015), cert. denied, 136 S. Ct. 2411 (2016). In that situation, no matter how unreasonable the opinion, it has no defamatory impact when the recipient can judge the reasonableness of the opinion having heard the facts underlying it.

The defendant's assertion about the plaintiff's mental health comes at the end of a six-page e-mail setting forth a myriad of disclosed nondefamatory facts. The assertion can reasonably be understood only as the defendant's concluding opinion that encapsulates the plaintiff's personality as manifested in her job performance. More specifically, the assertion was bookended, first, by a cautionary phrase that preceded the assertion ("I am not a doctor nor a psychologist, but I believe . . ."). This phrase reasonably conveyed that she was, as a preliminary matter, "indulging in speculation." Scholz, 473 Mass. at 251-252, quoting King, 400 Mass at 713. The assertion was then followed by a statement that further constitutes disclosed nondefamatory facts and that more directly summarizes her underlying concerns ("She seems to thrive on creating a chaotic and hostile working environment all while bullying her employees to no end").

Given these disclosed facts both in the e-mail as a whole, and directly accompanying the statement in question, the assertion about the plaintiff's mental health could not have been understood by a reasonable reader to have been anything but an opinion. "[I]f it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, . . . the statement is not actionable." Scholz, 473 Mass. at 251, quoting Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1227 (7th Cir. 1993).

A similar logic applies to other statements in the e-mail. The defendant explained in the e-mail the basis of her fear that the plaintiff would show up at town hall with a gun. The basis was, in addition to the other volatile behavior the defendant described, the fact that the plaintiff told her that her husband had bought her a gun, something the plaintiff confirmed in her deposition. The same thing holds for the defendant's fear that the plaintiff acted unethically in taking the workers' compensation binder home. In the e-mail, the defendant explained that the basis of this concern was the fact that the plaintiff's husband was an insurance salesman, and the binder contained insurance information, again underlying facts confirmed by the plaintiff.

c. Conditional privilege. On summary judgment in a defamation action, the burden is on the defendant as the moving party to demonstrate that there is no dispute of material fact as to the existence of a conditional privilege. Cf. Downey, 86 Mass. App. Ct. at 665, citing Judd v. McCormack, 27 Mass. App. Ct. 167, 173 (1989) ("Where, as here, a defendant in a defamation action establishes the existence of a privilege, the burden rests upon the plaintiff to raise a trial-

worthy issue of an abuse of that privilege"). A person is conditionally privileged to publish a defamatory statement if the publisher and the recipient share a common interest in the subject, and the statement is reasonably calculated to further or protect that interest. Downey, supra at 666. The privilege is not limited to statements made by an employer to an employee. See Humphrey v. National Semiconductor Corp., 18 Mass. App. Ct. 132, 133 (1984) (disparaging statements made by company's employee about performance of employee of another company with which it had business relationship held privileged).

In addition, "[s]tatements made by public officials while performing their official duties are conditionally privileged." Barrows v. Wareham Fire Dist., 82 Mass. App. Ct. 623, 630-631 (2012), quoting Mulgrew v. Taunton, 410 Mass. 631, 635 (1991). The privilege is particularly important with respect to public officials because the "threat of defamation suits may deter public officials from complying with their official duties when those duties include the need to make statements on important public issues." Barrows, supra at 631, quoting Mulgrew, supra.

More generally, the privilege is similarly important in the context of workplace investigations. The privilege is necessary to ensure that employees are able to report both actual and suspected misconduct without fear of being held liable for claims of defamation. Accordingly, the conditional privilege will protect the disclosure of otherwise defamatory information "when the publication is reasonably necessary to serve the employer's legitimate interest in the fitness of an employee to perform his or her job." Sovie v. North Andover, 742 F. Supp. 2d 167, 174 (D. Mass. 2010), citing Bratt v. International Business Machs. Corp., 392 Mass. 508, 509 (1984).

The parties agree that the circumstances under which the request was made and the response was given would fall under a conditional privilege. The defendant had drafted and submitted her e-mail in response to the directive of the board's personnel committee chair. As a town employee and the former senior clerk in the treasurer's office, she and the recipients of her e-mail -- the requesting selectman and the town administrator -- shared a common interest in assessing the plaintiff's job performance as the town's treasurer, and in the effective operation of the treasurer's office.[6] The purpose of soliciting the defendant's statements was to further and protect this common interest. Moreover, the statements were made in the defendant's professional capacity and only after a public official specifically requested them. As such, the defendant's statements are precisely of the type contemplated by the privilege, and "to claim otherwise would rob the privilege of its intended purpose." Downey, 86 Mass. App. Ct. at 666.

The plaintiff contends, however, that the defendant lost her conditional privilege through abuse. See Humphrey, 18 Mass. App. Ct. at 134 (when defendant proves that conditional privilege applies, burden shifts back to plaintiff to prove that privilege was abused). A conditional privilege may be lost or abused if (1) there is "unnecessary, unreasonable or

excessive publication," and the defendant recklessly published the defamatory statements; (2) the defendant published the defamatory statements with knowledge of their falsity or with reckless disregard of the truth; or (3) the defendant acted with actual malice. Barrows, 82 Mass. App. Ct. at 631, quoting Bratt, 392 Mass. at 515.

We agree with the motion judge that there are no material facts in dispute which would permit a jury to find that the plaintiff established any theory of abuse, and that the defendant was entitled to judgment as a matter of law. First, the record establishes that the statements contained in the e-mail were published only once, and only in response to the selectman's specific request. The plaintiff contends that the privilege was abused because of how extreme or seemingly outrageous the statements sounded, or because the statements went beyond what was necessary to communicate helpful information to the board. The issue for the first theory of abuse, however, is not whether the defendant's allegations were, as the plaintiff characterizes, explosive or painted a "bombastic caricature." Rather, it is the extent, the necessity, and the reasonableness of the publication that is relevant. As such, the summary judgment record does not support a finding of any "unnecessary, unreasonable or excessive publication." Nor could a jury find that such a limited publication, in direct response to a specific request by one's employer, was reckless.

Second, although the record may pose certain questions as to the factual accuracy of the statements -- or whether the statements could be inferred by a jury to be inaccurate -- factual accuracy is not dispositive when considering whether the privilege was lost or abused. Rather, to defeat the privilege, there must be some facts in dispute which, if believed, would show that the defendant published these statements knowing they were false, or with reckless disregard as to whether they were true. To show reckless disregard as to the truth of the statement, there must be some facts in dispute sufficient to show "that the defendant in fact entertained serious doubts as to the truth of [the] publication." King, 400 Mass. at 720, quoting St. Amant v. Thompson, 390 U.S. 727, 731 (1968). On summary judgment, once the moving party has made a showing that the statements of suspected wrongdoing were made in the context of a workplace investigation, the nonmoving party must come forward with some evidence to show that the statements were knowingly false or made with reckless disregard of the truth. Here, the plaintiff has not produced such evidence. There may well be a dispute of fact as to what happened during the course of the plaintiff's employment, but that does not rise to the level of knowing falsity or reckless disregard without more.[7]

Finally, the plaintiff has not offered evidence that would create a dispute of fact as to whether the defendant acted with actual malice. Malice, in this sense, occurs when defamatory statements are not published "pursuant to the right and duty which created the privilege," but rather "out of some base ulterior motive," which may include the intent to injure another, intent

to use the privilege as a pretense, or reckless disregard of the rights of another. Dragonas v. School Comm. of Melrose, 64 Mass. App. Ct. 429, 438 (2005), quoting Dexter's Hearthside Restaurant, Inc. v. Whitehall Co., 24 Mass. App. Ct. 217, 223 (1987). Thus, a minimum of recklessness is required. Barrows, 82 Mass. App. Ct. at 631.

The plaintiff claims that most of the defendant's allegations were either baseless, exaggerated, or speculation based on disdain or a desire for retaliation. To be sure, as both the plaintiff and the defendant agreed, the parties did not have a good working relationship. That mere fact, however, would not be enough for the plaintiff to show at trial an ulterior motive constituting malice, or the privilege would not serve its purposes in an investigation of misconduct in the employment context.[8] Nor does the record contain facts in dispute from which a factfinder could determine that malice was the primary purpose of the defendant's publication of the e-mail. "Although spite or ill will can support a finding of malice, it is not enough to show that the defendant merely disliked the plaintiff or that such animosity was part of the defendant's motivation." Dragonas, 64 Mass. App. Ct. at 439. The conditional privilege is lost only if it is shown that spite or ill will was the primary purpose of the publication. See id. Where, as here, the information was requested in the course of a workplace investigation, and provided in response to an otherwise legitimate inquiry, the plaintiff has not demonstrated a dispute of material fact that the allegedly defamatory statements were published to primarily serve a purpose beyond the purpose protected by the conditional privilege, that purpose being to provide the town officials with information relevant to the plaintiff's job performance.[9] Judgment affirmed.

footnotes

[1] The plaintiff was employed pursuant to a three-year employment agreement that, after the first six months, was terminable only for cause. She is challenging this termination through a lawsuit currently pending in Federal court.

[2] Neither the plaintiff nor the town called the defendant as a witness.

[3] The plaintiff's Federal lawsuit, in addition to challenging her termination, brings claims of libel per se against the selectmen, including the chair of the personnel committee.

[4] "To properly allege defamation, a plaintiff must specifically identify the allegedly false statement." Kelleher, 98 Mass. App. Ct. at 53 n.2, citing Flagg v. AliMed, Inc., 466 Mass. 23, 37-38 (2013) (dismissing defamation claim; although civil pleading rules are "relatively liberal," plaintiff must at least allege facts sufficient to raise right to relief above speculative level). Although the plaintiff contends that the motion judge erred by analyzing only these six statements and not all of the statements contained in the defendant's e-mail, the additional statements not identified in the complaint were not sufficiently alleged to meet the standard of a defamation claim. Accordingly, we limit our review to the statements identified by the plaintiff

in her complaint. Having said that, even were we to accept the plaintiff's generalized and conclusory assertions of underlying facts set forth in her answers to interrogatories, it would not alter our determination that the statements were not actionable for the reasons detailed herein.

[5] The complaint pointedly leaves out the beginning of this sentence: "I am not a doctor nor a psychologist, but . . . ."

[6] The board's administrative assistant, too, received the e-mail as a function of her position.

[7] We are also not persuaded that conclusory assertions or inferences about the falsity of the defendant's allegations, or that the defendant's failure to previously share these allegations, constitutes sufficient evidence that the defendant had serious doubts about them.

[8] The plaintiff's reliance on the deposition of the former town administrator, who disapproved of selectmen getting information directly from the defendant, is particularly misplaced. This witness, whom the plaintiff describes as "in a unique position to know what was really going on," testified that he did not think the defendant "wanted to get" the plaintiff. He stated that the defendant had no intent "to go out and screw" the plaintiff, but rather "wanted to be able to do [what she wanted] and be left alone." Contrary to the plaintiff's contention, the former town administrator's testimony is not helpful to the plaintiff.

[9] Given our decision here, we need not reach the additional arguments proffered by the parties.