UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-8093
Summary Calendar

JAMES HANDLIN,

Plaintiff-Appellant,

VERSUS

NORTHWESTERN RESOURCES CO.,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(W 92 CV 194)

August 5, 1993

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Following his discharge, James Handlin sued his former employer, Northwestern Resources Co. ("Northwestern"), for defamation and intentional infliction of emotional distress. The case was removed to federal court, and the district judge granted the Appellee's motion for summary judgment. We affirm.

I.

Northwestern operates a coal mine in central Texas where the Appellant was employed as Supervisor of Electricians. At the

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

time of his discharge, Handlin had been employed by Northwestern for seven years. It is undisputed that Handlin was an at will employee, and could have been discharged with or without cause at any time.

In early 1992, Northwestern received a complaint from one of its supply vendors that Handlin was requesting favors from suppliers. Appellee's "Code of Business Conduct," which Appellant admits to receiving, prohibits such employee activity when it would create an actual or apparent conflict of interest. See R. vol. I, at 111-112. Acting on this information, Tom Miller, Manager of Administration, and Harry Clark, Director of Materials Control, began an investigation of Appellant's dealings with Northwestern's vendors. Clark and Miller either spoke directly with various suppliers or contacted them by telephone. When their investigation was complete, the two reported their findings to Randy Sandrik, Manager of Mine Operations, and Floyd Walters, Manager of Employee Relations. It was concluded that Handlin had engaged in activities which, at the minimum, created an appearance of conflict of interest. The decision was made to discharge Appellant for violating Northwestern's Code of Business Conduct.

On March 6, 1992, Appellant was discharged. On the same day, Sandrik called a meeting of Northwestern supervisory personnel and explained that Handlin had been discharged for violating policy in his dealings with vendors. The statements allegedly made in this meeting form the gist of Appellant's

defamation claim. Handlin maintains that Sandrik stated that he (Handlin) pressured vendors into providing free work on his personal property, and received a free trip to Las Vegas from a vendor to whom he steered a contract.

Appellant alleged that the statements, listed above, slandered his professional reputation. Additionally, Handlin sought damages for the intentional infliction of emotional distress. Appellee moved for summary judgment which the district court granted. The court held that any statements made by Sandrik at the March 6, 1992 meeting were protected by a conditional privilege. R. vol. III, at 608. Because Northwestern had also shown it evinced no malicious intent in making these statements, summary judgment was proper. Id. at 607. Likewise, the court held that Handlin could not maintain his claim for emotional distress because he failed to show that Northwestern's conduct was extreme and outrageous. Id. at 606.

II.

Summary judgment is appropriate if the record discloses "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In reviewing the summary judgment, we apply the same standard of review as did the district court. Waltman v. International Paper Co., 875 F.2d 468, 474 (5th Cir. 1989); Moore v. Mississippi Valley State Univ., 871 F.2d 545, 548 (5th Cir. 1989). The pleadings, depositions, admissions, and answers to interrogatories, together with affidavits, must demonstrate that no

genuine issue of material fact remains. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). To that end we must "review the facts drawing all inferences most favorable to the party opposing the motion." Reid v. State Farm Mut. Auto. Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986). If the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); see Boeing Co. v. Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc).

III.

Conditional Privilege

A slanderous statement is one that is orally communicated or published to a third person without legal excuse. Crum v. American Airlines, Inc., 946 F.2d 423, 429 (5th Cir. 1991) (applying Texas law); Kelly v. Diocese of Corpus Christi, 832 S.W.2d 88, 91 (Tex. Civ. App. -- Corpus Christi 1992, writ dism'd w.o.j.). Texas law provides that communications made by an employer during an investigation into employee wrongdoing are protected by the legal excuse of qualified privilege. Southwestern Bell Tel. Co. v. Dixon, 575 S.W.2d 596, 599 (Tex. Civ. App. -- San Antonio 1978, writ dism'd w.o.j.). Whether or not such privilege exists is a question of law. Id.

The only challenge that Appellant launches against the existence of a qualified privilege is without merit.[2] Therefore,

[2] Handlin argues that Northwestern should be precluded from claiming a qualified privilege because the corporation has never admitted that the alleged statements were made. No authority is

we turn to the Appellant's contention that there is a genuine issue of material fact whether the qualified privilege is trumped by malice on Appellee's part.

Absence of Malice

The district court, after finding that Northwestern's internal communications were shielded by a qualified privilege, held that the statements made by Sandrik were made without malice. Appellant urges that summary judgment on this point was improper because: (1) a reasonable person could find that the statements were made with the knowledge they were false, or made with a reckless disregard for their veracity; (2) the remarks stemmed from ill will that Sandrik held against Handlin; and (3) malice involves a finding of intent, which is not summary judgment fodder.

The qualified privilege can be lost if the alleged defamatory statements were made with malice or in bad faith. See Ramos v. Henry C. Beck Co., 711 S.W.2d 331, 335 (Tex. Civ. App. -- Dallas 1986, no writ); Bolling v. Baker, 671 S.W.2d 559, 564 (Tex. Civ. App. -- San Antonio 1984, writ dism'd w.o.j.); Mayfield v. Gleichert, 484 S.W.2d 619, 625-26 (Tex. Civ. App. -- Tyler 1972, no writ). But see Seidenstein v. National Medical Enters., Inc., 769 F.2d 1100, 104 (5th Cir. 1985) (applying "actual malice"

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cited for this proposition, and it appears to be at odds with Federal Rule of Civil Procedure 8(e)(2): "A party may set forth two or more statements of a claim or defense alternately or hypothetically.... A party may also state as many separate claims or defenses as the party has regardless of consistency[.]" Fed. R. Civ. P. 8(e)(2).

standard).[3] When a defendant in a defamation case moves for summary judgment, he has the burden to prove absence of malice and good faith. Jackson v. Cheatwood, 445 S.W.2d 513, 514 (Tex. 1969); Ramos, 711 S.W.2d at 335.

Malice can be shown if the statements were made with the knowledge that they were false; a high degree of awareness that the statements were false; or, a disregard for the truth or falsity of the statements. See Seidenstein, 769 F.2d at 1104; Bolling, 671 S.W.2d at 564. Additionally, an inference of malicious intent can be derived from a showing that the speaker harbored "ill will" towards the slandered individual. Id. at 570.

Northwestern introduced affidavit testimony from those involved with the investigation of Handlin. It is clear that all inquiries were discreetly made; no names were mentioned when suppliers were initially asked if they were aware of any improper practices. Furthermore, Northwestern submitted affidavits from various suppliers stating that Handlin used his position with the

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[3] Texas jurisprudence on which malice standard applies to a defamation/slander action between a private individual and a non-media defendant is less than clear. See Bolling v. Baker, 671 S.W.2d 559, 564 (Tex. Civ. App. -- San Antonio 1984, writ dism'd w.o.j.) (discussing case law); Southwestern Bell Tel. Co. v. Dixon, 575 S.W.2d 596, 599 (Tex. Civ. App. -- San Antonio 1978, writ dism'd w.o.j.) (same).

This quandary is no obstacle to the disposition of the present case. The district court applied the more lenient "malice or bad faith" standard, not the "actual malice" standard. R. vol. III, at 606-07. Even under this less demanding threshold, the court held that Appellant failed to advance any support for his claim. We will likewise employ this standard in reviewing the record, mindful that we are to "review the facts drawing all inferences most favorable to the party opposing the motion." Reid v. State Farm Mut. Auto. Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986).

company to secure favors from them.

Appellant counters with his own affidavit testimony that Sandrik harbored ill will towards him. Appellant also maintains that there is sufficient evidence from which a jury could infer that Sandrik knew that the allegedly slanderous statements (free trip from vendor, pressure on vendors to perform work), were false, probably false, or made with reckless disregard for their veracity. Handlin bases this latter argument on the fact that Clark's investigatory notes indicated that the vendor denied providing Handlin and his wife with a free trip to Las Vegas. Sandrik was briefed by Clark and Miller on their investigations, and Appellant argues that it is reasonable to assume that Sandrik was told that no such free trip was provided.

Our review of the record shows that Clark's notes do not clearly indicate that Handlin was not provided with a trip to Las Vegas. The president of Flanders Electric, the vendor that allegedly gave Appellant the trip, indicated that "Flanders's funds were not used for any side trips he was aware of." R. vol. I, at 76. Clark also noted that Flanders's President remarked that it was possible that Mr. and Mrs. Handlin may have accompanied Flanders's Sales Manager on his trip to Las Vegas that weekend. Id. During his deposition, Clark stated that his investigation of this matter was "inconclusive." R. vol. III, at 392.

Turning to the other alleged slanderous statement -- pressure from Handlin on vendors -- we again find that there is ample evidence from which Sandrik could conclude that this was true.

There are affidavits from vendors stating that Handlin did pressure them for favors. See R. vol I, at 103-04 (Gilliam affidavit); Id. at 99 (Womble affidavit); Id. at 95-96 (Watson affidavit). Based upon the evidence gathered in the investigation, Sandrik and Walters concluded that Handlin violated Northwestern's Code of Business.

Sandrik was entitled to rely on the information provided by Miller and Clark. See Mayfield v. Gleichert, 484 S.W.2d 619 (Tex. Civ. App. -- Tyler 1972, no writ):

> "Failure to investigate the truth or falsity of a statement before it is published has been held insufficient to show actual malice. Negligence or failure to act as a reasonably prudent man is likewise insufficient."

Id. at 627 (quoting El Paso Times, Inc. v. Trexler, 447 S.W.2d 403 (Tex. 1969)).

"The essential issue in making a determination as the presence of malice on the part of the defendant is the issue of whether the defendant believes the truth of the conditionally privileged communication." Mayfield, 484 S.W.2d at 627. Sandrik, relying on the information provided him, believed that the statements he made in the March 1992 meeting were true. R. vol. I, at 49 (Sandrik affidavit).

We are unpersuaded that the Appellant presented sufficient evidence of malicious intent to preclude summary judgment. Handlin testified in his deposition that his disagreements with Sandrik may have contributed to the investigation, R. vol. I, at 228-29, but there has been no showing of malice or bad faith connected to the

speaking of the allegedly defamatory statements. The decision to discharge Appellant was made after an investigation in which Sandrik did not participate. Moreover, the termination decision was made by Carrol Embry, a Northwestern Vice-President. We agree with the conclusion of the district court that Handlin's belated recollection[4] of Sandrik's ill-will is insufficient to create a genuine issue of material fact regarding the existence of malice.

IV.

The district court held that Handlin could not state a claim for intentional infliction of emotional distress because there was no evidence that Appellee's conduct was "outrageous." See Ramirez v. Allright Parking El Paso, Inc., 970 F.2d 1372, 1375 (5th Cir. 1992) (to prevail on such a claim, defendant's conduct must be "extreme and outrageous"). We agree. The cases cited by Appellant are illustrative of the type of conduct that is actionable as being extreme or outrageous. See, e.g., Dean v. Ford Motor Credit Co., 885 F.2d 300 (5th Cir. 1989) (supervisor planted checks on employee in attempt to implicate her in theft); Mitre v. Brooks Fashion Stores, Inc., 840 S.W.2d 612 (Tex. Civ. App. -- Corpus Christi 1992, no writ) (mall security distributed fliers with plaintiffs' pictures, incorrectly identifying them as counterfeiters).

Alternatively, we conclude that Appellant advanced no evidence that he suffered "severe" distress, an additional element in an intentional infliction claim. Ramirez, 970 F.2d at 1375; Tidelands

[4] Appellant raised the three "confrontations" with Sandrik only in response to Appellee's motion for summary judgment.

Auto. Club v. Walters, 699 S.W.2d 939, 942 (Tex. Civ. App. -- Beaumont 1985, writ ref'd n.r.e.). Appellant admits that the alleged defamatory statements were never repeated to any of his prospective employers. R. vol. II, at 405 (Handlin deposition). He was employed by another mining entity less than two weeks after his discharge from Northwestern. Id. at 406. As far as damage to his reputation in the mining community, Handlin can point to nothing more than "rumors" he heard from "some people." Id. at 405-06. He complained that his stomach hurt, but no physical or psychological treatment was sought for this malady. Id. at 403. There is no evidence that Appellant suffered "severe" distress, a necessary element in an intentional infliction of emotional distress claim.

V.

After a thorough review, we conclude that the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party. Consequently, there is no genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); see Boeing Co. v. Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc). The judgment of the district court is AFFIRMED.