IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-20468

KEITH A. DOLLAR,

Plaintiff-Appellant,

v.

GEORGIA-PACIFIC CORP.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA H 93 314 c/w 93 3404)

June 20, 1995

Before KING and JONES, Circuit Judges, and KAZEN, District Judge.[*]

PER CURIAM:[**]

Plaintiff-appellant Keith A. Dollar appeals the decision of the district court granting judgment as a matter of law following a jury trial on Dollar's claims against defendant-appellee Georgia-Pacific Corporation. Dollar, a former Georgia-Pacific employee, alleged that Georgia-Pacific slandered him in statements read by

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[*] District Judge of the Southern District of Texas, sitting by designation.

[**] 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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Georgia-Pacific at meetings of brokers in Florida and Texas following Dollar's termination. Dollar also claimed that Georgia-Pacific slandered him when it explained why he was being terminated under a theory of "compelled self-defamation." We affirm.

I. DISCUSSION

A. The Self-Defamation Claim

We address first the compelled self-defamation claim. The case law in Texas on the requisites for a compelled self-defamation claim is conflicting. Compare Chasewood Constr. Co. v. Rico, 696 S.W.2d 439 (Tex. App. 1985, writ ref'd n.r.e.) (holding that to prove a self-defamation claim, the plaintiff must demonstrate only that publication to a third party was likely) and First State Bank v. Ake, 606 S.W.2d 696 (Tex. Civ. App. 1980, writ ref'd n.r.e.) (same) with Doe v. SmithKline Beecham Corp., 855 S.W.2d 248 (Tex. App. 1993, writ granted on other grounds) (noting that to prevail on a defamation claim, a self-publishing plaintiff must show both that he was unaware of the defamatory nature of the matter and that publication to a third party was foreseeable); see also Duffy v. Leading Edge Prods., Inc., 44 F.3d 308, 312 n.5 (5th Cir. 1995) (discussing the conflict between the Texas cases). Further, the Texas Supreme Court has not spoken directly to the issue. See Duffy, 44 F.3d at 312 n.5. Fortunately, in the instant case, we need not confront this issue.

Under Texas law, in analyzing an allegedly defamatory statement, "the initial question for determination is a question of

law to be decided by the trial court: were the words used reasonably capable of a defamatory meaning." Musser v. Smith Protective Servs., 723 S.W.2d 653, 654-55 (Tex. 1987). Moreover, Texas courts have repeatedly stated that in answering that question:

> Allegedly . . . slanderous statements must be construed as a whole, in light of surrounding circumstances, based upon how a person of ordinary intelligence would perceive the entire statement. Only when the court determines the complained-of language to be ambiguous or of doubtful import should a jury be permitted to determine the statement's meaning and the effect the statement has on the ordinary listener.

Kelly v. Diocese of Corpus Christi, 832 S.W.2d 88, 91 (Tex. App. 1992, writ dism'd w.o.j.); accord Musser, 723 S.W.2d at 655.

The only statements by Georgia-Pacific that are relevant to this claim are those made by Georgia-Pacific to Dollar when he was terminated. There is no dispute about what those statements were: Georgia-Pacific told Dollar that he was terminated because of "business practices." When Dollar inquired whether his termination "related to the situation in New Orleans," Georgia-Pacific replied "yes." In subsequent interviews for employment, Dollar went beyond Georgia-Pacific's actual statements to explain what he thought were the underlying charges against him made by Georgia-Pacific. Those scenarios form the basis for Dollar's compelled self-defamation claim. Construing Georgia-Pacific's statements as a whole and in light of all of the surrounding circumstances, we find that the statements simply were not defamatory, and we do not believe that Texas courts would allow Dollar's embellishment to be attributed to Georgia-Pacific.

Moreover, even if a fact-finder might be able to conclude that the statements made by Georgia-Pacific were defamatory, they are subject to a qualified privilege. As discussed below, certain statements, even if defamatory, are subject to a qualified privilege. See infra Part B. The statements made to Dollar regarding his discharge were privileged, and there is no evidence in the record indicating that Georgia-Pacific acted with malice or want of good faith when it told Dollar why he was being terminated.

Accordingly, we find that the district court did not err in concluding that Dollar's self-defamation claim failed as a matter of law.

B. The Defamation Claim

Dollar also alleged that Georgia-Pacific defamed him through statements the company made at sales meetings. During these meetings, Georgia-Pacific officials read a prepared statement in which they noted that "discrepancies in the payment of performance funds" to a customer in the New Orleans market had resulted in the severance of the relationship with the broker serving that market and the termination of two sales representatives. The statement also described certain Georgia-Pacific policies, but it did not mention Dollar's name or title.[1] In examining the slander claim,

[1] The parties agree that the statement read in full:

> A recent investigation has revealed discrepancies in the payment of performance funds to one of the customers of the packets [sic] products group in the New Orleans market. As a result of that investigation, we have severed our relationship with the broker servicing that

the district court applied an actual malice standard and held that the evidence did not raise a jury issue on the existence of actual malice.[2] We agree.

Texas courts have recognized that defamatory statements in certain contexts are excused; that is, they are subject to qualified privilege, protecting the speaker from liability even for a defamatory statement. Such privilege inures to "communications made in good faith on any subject matter in which the author has an interest, or with reference to which he has a duty to perform to another person having a corresponding interest or duty." Mitre v. Brooks Fashion Stores, 840 S.W.2d 612, 619 (Tex. App. 1992, writ denied); accord Houston v. Grocers Supply Co., 625 S.W.2d 798, 800

> market and, in addition, have terminated two packets [sic] products group sales representatives.
>
> We adhere to those legal and ethical requirements embodied in Georgia-Pacific Corporation's code of business conduct which governs the allocation or application of credit and allowances and the payment of monetary funds to our customers. These programs are subject to scrutiny in order to confirm both their accuracy and legitimacy.
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> Any improper conduct involving the allocation or application of credits or allowances or the payment of monetary funds will subject persons involved in such improprieties to disciplinary action, including termination.

[2] In the instant case, it does not appear that the district court made an express ruling as to whether Georgia-Pacific's statements were privileged. The court, however, did apply the "actual malice" standard that only applies to conditionally privileged statements. Thus, it appears that a finding of conditional privilege is implicit in the district court's ruling. See First Nat'l Bank v. Independent Fire Ins. Co., 934 F.2d 73, 76 (5th Cir. 1991) (noting that we "may infer that the district court made a finding consistent with its general holdings as long as the inferred finding is supported by the evidence").

(Tex. Civ. App. 1981, no writ); Bergman v. Oshman's Sporting Goods, Inc., 594 S.W.2d 814, 816 (Tex. App. 1980, no writ). The privilege has been broadly construed, and it "applies to the giving of information to persons interested in the trade and commercial standing of another at the time the information is given . . . ." Mitre, 840 S.W.2d at 619. In the employment context, the privilege has been found to include "[a]ccusations against an employee by his employer or another employee, made to a person having a corresponding interest or duty in the matter to which the communication relates." Bergman, 594 S.W.2d at 816. Finally, "whether a conditional or qualified privilege exists is a question of law for the court." Mitre, 840 S.W.2d at 619; accord Grocers Supply, 625 S.W.2d at 800.

The privilege, however, is not limitless, and "a communication loses its privileged character where it is made to those outside of the interest group in question." Mitre, 840 S.W.2d at 619. Additionally, a qualified privilege is lost when the statement is made with malice or want of good faith. Bozé v. Branstetter, 912 F.2d 801, 807 (5th Cir. 1990) (per curiam); Grocers Supply, 625 S.W.2d at 801; Kelly, 832 S.W.2d at 93. Still, once the privilege is established, "the plaintiff has the burden to prove malice or want of good faith." Grocers Supply, 625 S.W.2d at 801; Kelly, 832 S.W.2d at 93. Further, the Texas Supreme Court has unequivocally stated that to prevail at trial, "[i]t is not enough for the jury to disbelieve [the] defendant's testimony. Rather, the plaintiff must offer clear and convincing affirmative proof to support a

recovery." Casso v. Brand, 776 S.W.2d 551, 558 (Tex. 1989) (emphasis added).

The statement was read to Georgia-Pacific employees at meetings involving a recitation of corporate policies and explaining certain personnel changes. Even if Georgia-Pacific's statements to Dollar could be construed as defamatory, a qualified privilege applies to the statements read at the sales meetings. We have stated that "[t]he public policy which the privilege advances recognizes the need for free communication of information to protect business and personal interests." Bozé, 912 F.2d at 806 (internal quotation omitted) (citation omitted). Moreover, in a case discussing Texas's qualified immunity and applying it to communication of a poor performance evaluation to another employee, we noted that "all employees have an interest in their employer's termination policies and grounds for termination." Id. (internal quotation omitted) (citation omitted). Thus, it is clear that Georgia-Pacific's statements were on subject matter in which Georgia-Pacific had an interest. Moreover, the statements were made to brokers having corresponding interest. Therefore, the statements were qualifiedly privileged. See, e.g., Mitre, 840 S.W.2d at 618-19 (finding that the privilege applied to flyers alleging counterfeiting that were communicated to store employees); Grocers Supply, 625 S.W.2d at 800-01 (applying the privilege to an allegation of theft that was communicated to a supervisor, a job steward, and a security guard). Further, there is no real question on this record that Georgia-Pacific acted without actual malice.

The Texas Supreme Court recently reemphasized the definition of malice in the context of defamation, noting that:

> Actual malice in the defamation context does not include ill will, spite or evil motive, but rather requires "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." Casso v. Brand, 776 S.W.2d 551, 558 (Tex. 1989). Actual malice is not ill will; it is the making of a statement with knowledge that it is false, or with reckless disregard of whether it is true. Carr v. Brasher, 776 S.W.2d 567, 571 (Tex. 1989).

Hagler v. Proctor & Gamble Mfg. Co., 884 S.W.2d 771, 771-72 (Tex. 1994).

Georgia-Pacific conducted a thorough investigation of the circumstances surrounding Dollar's termination before making any statements even arguably relating to Dollar. Simply put, there is nothing in the record to indicate that Georgia-Pacific did not believe that its statements were true. Consequently, the district court did not err in finding that there was no question of material fact regarding whether Georgia-Pacific acted with actual malice or in concluding that Dollar's defamation claim failed as a matter of law.

II. CONCLUSION

For the foregoing reasons, we AFFIRM.